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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS–2010–0088]

Black Stem Rust; Additions of Rust-Resistant Varieties

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: On September 8, 2010, the Animal and Plant Health Inspection Service published a direct final rule. The direct final rule notified the public of our intention to amend the black stem rust quarantine and regulations by adding four varieties to the list of rust-resistant *Berberis* species or cultivars. We did not receive any written adverse comments or written notice of intent to submit adverse comments in response to the direct final rule.

DATES: *Effective Date:* The effective date of the direct final rule published September 8, 2010, at 75 FR 54461, is confirmed as November 8, 2010.

FOR FURTHER INFORMATION CONTACT: Mr. Prakash K. Hebbar, National Program Manager, Black Stem/Barberry Rust Program, PPQ, APHIS, 4700 River Road Unit 26, Riverdale, MD 20737–1231; (301) 734–5717.

SUPPLEMENTARY INFORMATION:

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 issued under Sec. 204, Title II, Public Law 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 issued under Sec. 203, Title II, Public Law 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

Done in Washington, DC, this 12th day of January 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–982 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0354, Airspace Docket No. 10–AAL–10]

Establishment of Class E Airspace; Port Clarence, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; delay of effective date, correction.

SUMMARY: This action changes the effective date for the establishment of Class E airspace at Port Clarence Coast Guard Station (CGS) Airport, Port Clarence, AK. The charting of this airspace has been delayed; therefore the effective date of the establishment of the Class E airspace area also must be delayed. A minor correction to a geographic coordinate also will be made.

DATES: This correction is effective 0901 UTC, May 5, 2011, and the effective date of FR Doc. 2010–25479, published on October 12, 2010 (75 FR 62457) and corrected by FR Doc. 2010–32293, published on December 27, 2010 (75 FR 62457) is delayed to 0901 UTC, May 5. 2011.

The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Martha Dunn, AAL–538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *Martha.ctr.Dunn@faa.gov*. Internet address: *http://www.faa.gov/about/office_org/headquarters_offices/ato.service_units/systemops/fs/alaskan/rulemaking/.*

SUPPLEMENTARY INFORMATION:

History

Federal Register Document FAA–2010–0354, Airspace Docket No. 10–AAL–10, published on Monday, December 27, 2010 [75 FR 81110] makes a correction to the boundary description that establishes Class E airspace at Port Clarence CGS Airport, Port Clarence, AK. Subsequent to publication, the FAA's Aeronautical Products office stated that more time was needed to chart the airspace. Therefore, this action will delay the effective date of January 13, 2011, to May 5, 2011, to allow better coordination for the charting of this airspace. An error also was discovered in the regulatory text for a latitudinal coordinate. This action corrects this error.

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. Because this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart 1, section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Port Clarence CGS Airport and represents the FAA's

continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

PART 71—[AMENDED]

Delay of Effective Date

■ The effective date on Airspace Docket No. 10–AAL–10, published on October 12, 2010 (75 FR 62457) and corrected on December 27, 2010 (75 FR 62457) is hereby delayed from January 13, 2011, to May 5, 2011.

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

Correction to Final Rule

■ Accordingly, pursuant to the authority delegated to me, the Class E airspace legal description for Port Clarence CGS Airport, published in the **Federal Register**, December 27, 2010 (75 FR 81110), FR Doc. 2010–32293, page 81110, column 3, line 14, is corrected as follows:

§ 71.1 [Corrected]

* * * * *

AAL AK E5 Port Clarence, AK [Corrected]

By removing "lat. 60°00′00″ N., Long. 168°58′23″ W., and substituting "65°00′00″ N., 168°58′23″ W.

Issued in Washington, DC, on January 12, 2011.

Edith V. Parish,

Manager, Airspace, Regulations and ATC Procedures Group.

[FR Doc. 2011–944 Filed 1–13–11; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Part 12

[CBP Dec. 11–03]

RIN 1515–AD72

Extension of Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods

AGENCY: Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends Customs and Border Protection (CBP) regulations to reflect the extension of import restrictions imposed on certain archaeological material originating in Italy and representing the pre-Classical, Classical, and Imperial Roman periods of its cultural heritage, ranging in date from approximately the 9th century B.C. through approximately the 4th century A.D. The restrictions, which were originally imposed by Treasury Decision (T.D.) 01–06 and extended by CBP Decision (Dec.) 06–01, are due to expire on January 19, 2011. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has determined that factors continue to warrant the imposition of import restrictions. Accordingly, these import restrictions will remain in effect for an additional 5 years, and the CBP regulations are being amended to reflect this extension until January 19, 2016. These restrictions are being extended pursuant to determinations of the United States Department of State made under the terms of the Convention on Cultural Property Implementation Act that implemented the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. This document also contains the Designated List of archaeological material of Italy that describes the articles to which the restrictions apply. Note that the Designated List has been amended to include "Coins of Italian Types" under the category entitled "Metal."

DATES: *Effective Date:* January 19, 2011.

FOR FURTHER INFORMATION CONTACT: For legal aspects, Charles Steuart, Chief, Intellectual Property Rights and Restricted Merchandise Branch, Regulations and Rulings, Office of International Trade, (202) 325–0020; for operational aspects, Michael Craig, Chief, Interagency Requirements Branch, Trade Policy and Programs, Office of International Trade, (202) 863–6558.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to the provisions of the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention, codified into U.S. law as the Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*), the United States entered into a bilateral agreement with Italy on January 19, 2001, concerning the imposition of import restrictions on archeological material originating in Italy and representing the pre-Classical, Classical, and Imperial Roman periods. On January 23, 2001, the former United States Customs Service (now U.S. Customs and Border Protection (CBP)) published T.D. 01–06 in the **Federal Register** (66 FR 7399), which amended 19 CFR 12.104g(a) to indicate the imposition of these restrictions and included a list designating the types of archaeological material covered by the restrictions.

Import restrictions listed in 19 CFR 12.104g(a) are "effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period can be extended for additional periods not to exceed five years if it is determined that the factors which justified the initial agreement still pertain and no cause for suspension of the agreement exists" (19 CFR 12.104g(a)). On January 19, 2006, CBP published CBP Dec. 06–01 in the **Federal Register** (71 FR 3000) which amended 19 CFR 12.104g(a) to reflect the extension for an additional period of 5 years.

By diplomatic note dated December 18, 2009, the Government of Italy requested an extension of the Agreement. On October 28, 2010, after the Department of State proposed to extend the Agreement and reviewed the findings and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, determined that the cultural heritage of Italy continues to be in jeopardy from pillage of archaeological material representing the pre-Classical, Classical, and Imperial Roman periods and made the necessary determinations to extend the import restrictions for an additional five years. Diplomatic notes have been exchanged on January 11, 2011, reflecting the extension of those restrictions for an additional five-year period. In addition to all the previously protected cultural material, import restrictions are also being imposed on a new subcategory of objects (coins). Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect this extension of the import restrictions on the currently protected cultural property and the new subcategory of cultural property.

The Designated List of articles that are protected pursuant to the bilateral agreement, as extended, has been revised and set forth below. We note that, pursuant to 19 U.S.C. 2604, the category entitled "Metal" has been amended to include the subcategory

"Coins of Italian Types." This amendment comes in response to a Diplomatic Note from the Government of Italy requesting the Designated List be amended. Coins constitute an inseparable part of the archaeological record of Italy, and, like other archaeological objects, they are vulnerable to pillage and illicit export.

Designated List: Archaeological Material From Italy Representing Pre-Classical, Classical, and Imperial Roman Periods Ranging In Date Approximately From the 9th Century B.C. to the 4th Century A.D.

I. Stone

A. Sculpture

1. *Architectural Elements*—In marble, limestone, steatite, basalt, tufa and other types of stone. Types include abacus, acroterion, antefix, architrave, bacino, base, capital, caryatid, coffer, clipeus, column, crowning, fountain, frieze, pediment, drip molding, pilaster, mask, corbel, metope, mosaic and inlay, pluteus, pulvinar, puteal, jamb, tile, telamon, tympanum, trabeation, transenna, basin, wellhead. Approximate date: 7th century B.C. to 4th century A.D.

2. *Architectural and Non-architectural Relief Sculpture*—In marble and other stone. Types include carved slabs with figural, vegetative, floral, or decorative motifs, sometimes inscribed, and carved relief vases. Used for architectural decoration, funerary, votive, or commemorative monuments. Approximate date: 2nd century B.C. to 4th century A.D.

3. *Monuments*—In marble, limestone, and other types of stone. Types include altar and shrine, cippus, funerary stele, and milestones with figural reliefs or decorative moldings. Some have dedicatory inscriptions. Approximate date: 7th century B.C. to 4th century A.D.

4. *Sepulchers*—In marble, peperino, alabaster, limestone, and tufa. Types of burial containers including urns, caskets, and sarcophagi. Some have figural scenes carved in relief or decorative moldings. Approximate date: 7th century B.C. to 4th century A.D.

5. *Large Statuary*—Primarily in marble, including fragments of statues. Subject matter includes human and animal figures and groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual). Approximate date: 6th century B.C. to 4th century A.D.

II. Metal

A. Sculpture

1. *Large Statuary*—Large-scale statues or fragments of statues in bronze or other metals including animal figures, human and divine figures, and life-size metal busts or portrait heads. Approximate date: 6th century B.C. to 4th century A.D.

2. *Small Statuary*—Iron Age Sardinian (Nuragic) and Etruscan figurines in bronze and other metals. Approximate date: 8th to 3rd century B.C.

B. *Vessels*—Open and closed vessels in bronze, gold, or silver, often with incised, embossed, and molded decoration in the shape of human or animal figures. Shapes include bowls, buckets, craters, pitchers, cups, and lamps, etc. Approximate date: 8th century B.C. to 4th century A.D.

C. *Personal Ornaments*—Etruscan and Italic rings, necklaces, earrings, crowns, bracelets, buckles, belts, pins, chains of gold, silver, bronze, and iron. Approximate date: 8th to 3rd century B.C.

D. *Weapons and Armor*—Body armor, including helmets, cuirasses, shin guards, and shields, and horse armor often decorated with elaborate engraved, embossed, or perforated designs. Both launching weapons (spears and javelins) and weapons for hand to hand combat (swords, daggers, etc.). Approximate date: 8th century B.C. to 4th century A.D.

E. *Inscribed or Decorated Sheet Metal*—Engraved inscriptions often found in funerary contexts and thin metal sheets with engraved or impressed designs often used as attachments to furniture. Approximate date: 7th century B.C. to 4th century A.D.

F. *Coins of Italian Types*—A type catalogue of listed currency and coins can be found in N.K. Rutter *et al.* (eds.), *Historia Numorum: Italy* (London, 2001). Others appear in G.F. Hill *Coins of Ancient Sicily* (Westminster, 1903).

1. *Lumps of bronze* (*Aes Rude*)—Irregular lumps of bronze used as an early medium of exchange in Italy from the 9th century B.C.

2. *Bronze bars* (*Ramo Secco* and *Aes Signatum*)—Cast bronze bars (whole or cut) used as a media of exchange in central Italy and Etruria from the 5th century B.C.

3. *Cast coins* (*Aes Grave*)—Cast bronze coins of Rome, Etruscan, and Italian cities from the 4th century B.C.

4. *Struck coins*—Struck coins of the Roman Republic and Etruscan cities produced in gold, silver, and bronze from the 3rd century B.C. to c. 211 B.C., including the "Romano-Campanian" coinage.

5. *Struck colonial coinage*—Struck bronze coins of Roman republican and early imperial colonies and *municipia* in Italy, Sicily, and Sardinia from the 3rd century B.C. to c. A.D. 37.

6. *Coins of the Greek cities*—Coins of the Greek cities in the southern Italian peninsula and in Sicily (Magna Graecia), cast or struck in gold, silver, and bronze, from the late 6th century B.C. to c. 200 B.C.

III. Ceramic

A. Sculpture

1. *Architectural Elements*—Baked clay (terracotta) elements used to decorate buildings. These are most often found in Etruria, Latium, Sicily, and Magna Graecia. Elements include acroteria, antefixes, relief plaques, metopes, and revetments. Approximate date: 7th to 1st century B.C.

2. *Monuments*—Altars and urns decorated with relief scenes. Approximate date: 5th century B.C. to 4th century A.D.

3. *Large Statuary*—Large-scale human and animal figures, life-size portrait heads, and life-size votive objects, including fragments of statues. These are often found in temples and sanctuaries in Magna Graecia, Etruria, and Latium. Approximate date: 7th to 1st century B.C.

4. *Objects with Relief Decoration*—Plaques, tables, and other terracotta objects (masks) with relief decoration. Approximate date: 6th to 4th century B.C.

B. Vessels

1. Local Vessels

a. *Etruscan*—Decorated ceramic vessels produced by Etruscan culture, including Villanovan; Orientalizing pottery with imitations of Near Eastern designs painted on local hand-made vessels; archaic Etruscan painted pottery with polychrome decoration; funerary and cinerary vessels; Italo-Geometric pottery where production from local Etruscan workshops imitated Greek Geometric; bucchero made with a characteristic soft black paste and polished surface whose highly decorative shapes often imitate metal vessels; local imitations of black and red figure Attic; Etruscan imitations of Corinthian pottery; pottery with black glaze and orange stripes that imitates Ionic pottery; amphora in the Pontic style with painted figural decoration made by a single workshop of immigrant Ionic potters in Vulci, Etruria; Caeretan hydria attributed to a workshop of Greek immigrants working

near Caere, Etruria. Approximate date: 9th to 3rd century B.C.

b. *South Italian and Italic*—Decorated vessels locally produced, including hand-made Daunian pottery from northern Apulia; Italiote red figure pottery of Attic derivation produced in Apulian, Lucania, Campania, and Paestum; wheel-made pottery with elaborate applied relief and painted decoration made in Centuripe, Catania; pottery with plastic and polychrome (multicolor) decoration produced in Sicily and Magna Graecia; gilded pottery with a characteristic ochre yellow color imitating artifacts in bronze, mainly found in tombs in Apulia; Faliscan pottery in imitation of Attic red figure, often in oversize vessels; Gnathian pottery, named after Egnatia in Apulia and decorated in white and yellow with touches of red over a black background; overpainted pottery with a shiny black glaze; pottery overpainted with white, yellow, or red designs in imitation of Attic red figure; Messapian pottery, locally produced in Apulia and decorated with monochrome (one color) or bichrome painting (two color). Approximate date: 8th to 3rd century B.C.

2. Imported Vessels

a. *Attic Black Figure, Red Figure and White Ground Pottery*—These are made in a specific set of shapes (amphorae, craters, hydriae, oinochoi, kylikes) decorated with black painted figures on a clear clay ground (Black Figure), decorative elements in reserve with background fired black (Red Figure), and multi-colored figures painted on a white ground (White Ground). Attic pottery was widely exported, particularly to southern Italy, where it is commonly found in burials. Approximate date: 6th to 4th century B.C.

b. *Corinthian Pottery*—Painted pottery made in Corinth in a specific range of shapes for perfume and unguents and for drinking or pouring liquids. The very characteristic painted and incised designs depict figural scenes, rows of animals, and floral decoration. Corinthian pottery was exported throughout the Mediterranean, but particularly to Etruria and southern Italy. Approximate date: 8th to 6th century B.C.

IV. Glass

A. *Architectural Elements*—Mosaics and glass windows. Approximate date: 4th century B.C. to 4th century A.D.

B. Sculpture

1. *Intarsia*—Cut or carved glass decorative elements to inset in furniture. Approximate date: 2nd century B.C. to 4th century A.D.

2. *Small Statuary*—Glass animal statuettes as amulets or knickknacks. Approximate date: 2nd century B.C. to 4th century A.D.

V. Painting

A. Wall Painting

1. *Domestic and Public Wall Painting*—Beginning in about 200 B.C. wall painting in private and public buildings is characterized by imitation of stucco or marble design. Later developments include "architectural" style, "ornamental" style, and "fantastic" style. Triumphal painting in temples and public buildings illustrate military campaigns and conquered lands. Approximate date: 3rd century B.C. to 4th century A.D.

2. *Tomb Paintings*—Early tomb paintings are primarily found in Etruria and Southern Italy. These paintings were directly influenced by Greek painters, but illustrate local style. Scenes often illustrate funerary celebrations, rites, symbols, and daily events. Roman funerary painting is also inspired by Greek painting, but also develops from domestic and public types of wall painting. Approximate date: 6th century B.C. to 4th century A.D.

The Designated List and accompanying image database may also be found at the following Internet Web site address: *http://exchanges.state.gov/heritage/culprop/itimage.html.* The restrictions on the importation of the above-listed archaeological materials originating in Italy are to continue in effect until January 19, 2016. Importation of such material continues to be restricted unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure (5 U.S.C. 553(a)(1)). In addition, CBP has determined that such notice or public procedure would be impracticable and contrary to the public interest because the action being taken is essential to avoid interruption of the application of the existing import restrictions (5 U.S.C. 553(b)(B)). For the same reasons, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Order 12866

Because this rule involves a foreign affairs function of the United States, it is not subject to Executive Order 12866.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1).

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise.

Amendment to CBP Regulations

For the reasons set forth above, part 12 of Title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

■ 2. In § 12.104g, paragraph (a), the table is amended in the entry for Italy by removing the reference to "CBP Dec. 06—01" and adding in its place "CBP Dec. 11—03".

David V. Aguilar,

Acting Commissioner, U.S. Customs and Border Protection.

Approved: January 12, 2011.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 2011–882 Filed 1–18–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0015]

Security Zone; Protection of Military Cargo, Captain of the Port Zone Puget Sound, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Blair Waterway security zone in

Commencement Bay, WA from 12:01 a.m. on January 6, 2011, through 11:59 p.m. on January 29, 2011. This action is necessary for the security of Department of Defense assets and military cargo during loading and off-loading operations taking place within the Blair Waterway, Commencement Bay, WA. During periods of enforcement, no person or vessel operator may enter the security zone unless authorized by the Captain of the Port, Puget Sound or Designated Representative.

DATES: The security zone described in 33 CFR 165.1321 (c)(1) will be enforced from 12:01 a.m. on January 6, 2011, through 11:59 p.m. on January 29, 2011.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail LTJG Ashley M. Wanzer, Waterways Management Division, Sector Puget Sound, Coast Guard; telephone 206–217–6175, e-mail *SectorPugetSoundWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Blair Waterway security zone in Commencement Bay, WA for protection of military cargo in 33 CFR 165.1321 from 12:01 a.m. on January 6, 2011, through 11:59 p.m. on January 29, 2011. A discussion of these regulations can be found in the preamble of a final rule published December 10, 2004 (69 FR 71709).

Under the provisions of 33 CFR 165.1321, vessel operators may not enter the following security zone described in § 165.1321(c)(1): All waters enclosed by a line connecting the following points: 47°16′57″ N, 122°24′39″ W, which is approximately the beginning of Pier No. 23 (also known as the Army pier); then northwesterly to 47°17′05″ N, 122°24′52″ W, which is the end of the Pier No. 23 (Army pier); then southwesterly to 47°16′42″ N, 122°25′18″ W, which is the approximate location of a private buoy on the end of the sewage outfall; then southeasterly to 47°16′33″ N, 122°25′04″ W, which is approximately the northwestern end of Pier No. 5; then northeasterly to the northwestern end of Pier No. 1; then southeasterly along the shoreline of the Blair Waterway to the Blair Waterway turning basin; then along the shoreline around the Blair Waterway turning basin; then northwesterly along the shoreline of the Blair Waterway to the Commencement Bay Directional Light (light list number 17159); then northeasterly along the shoreline to the point of origin. [Datum: NAD 1983].

All vessel operators must obtain permission from the COTP or Designated Representative to enter, move within, or exit the security zone during periods of enforcement. To obtain permission to transit the zone vessel operators can contact the on-scene patrol craft on VHF Channel 16/13 or VST Puget Sound on VHF Channel 14. Operators of vessels 20 meters or greater in length should seek permission from the COTP or a Designated Representative at least 4 hours in advance. Operators of vessels less than 20 meters in length should seek permission at least 1 hour in advance.

Any Coast Guard commissioned, warrant or petty officer may enforce the rules of this section. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation. Vessels and persons granted permission to enter the security zone shall obey all lawful orders or directions of the Captain of the Port or Designated Representative. All vessels shall be operated at a minimum speed necessary to maintain a safe course.

This notice is issued under authority of 33 CFR 165.1321 and 5 U.S.C. 552(a).

If the COTP determines that the regulated area need not be enforced for the full duration stated in this notice, he may use a Broadcast Notice to Mariners to temporarily grant general permission to enter this zone during breaks between loading and off-loading operations.

Upon notice of temporary periods of suspension of enforcement by the Captain of the Port Puget Sound, all persons and vessels are authorized to enter, transit, and exit this security zone until the zone is reestablished and subject to enforcement.

Dated: January 5, 2011.

Scott J. Ferguson,

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

[FR Doc. 2011–1034 Filed 1–18–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 261

RIN 0596–AC93

Prohibitions in Areas Designated by Order; Closure of National Forest System Lands To Protect Privacy of Tribal Activities

AGENCY: Forest Service, USDA.

ACTION: Direct final rule.

SUMMARY: This final rule is implementing verbatim sections 8102 and 8104 of the Food, Conservation, and Energy Act of 2008 (FCEA) by adding regulations regarding special closures to provide for closure of National Forest System lands to protect the privacy of tribal activities for traditional and cultural purposes and by adding definitions for "Indian tribe" and "traditional and cultural purpose." FCEA authorizes the Secretary of Agriculture to ensure access to National Forest System lands, to the maximum extent practicable, by Indians and Indian tribes for traditional and cultural purposes, in recognition of the historic use of National Forest System lands by Indians and Indian tribes.

DATES: *Effective Date:* This rule is effective January 19, 2011.

FOR FURTHER INFORMATION CONTACT: Carolyn Holbrook, 202–205–1426, Recreation, Heritage, and Volunteer Resources staff. Individuals who use telecommunication devices for the deaf may call the Federal Information Relay Service at 800–877–8339 between 8 a.m. and 8 p.m., Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 8104 of the FCEA authorizes the Secretary of Agriculture to ensure access to National Forest System lands, to the maximum extent practicable, by Indians and Indian tribes for traditional and cultural purposes, in recognition of the historic use of National Forest System lands by Indians and Indian tribes. Section 8102 of the FCEA defines "Indian tribe" as any Indian or Alaska Native tribe, band, nation, pueblo, village, or other community that is included in a list published by the Secretary of the Interior under section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a–1). Section 8102 of the FCEA states that "traditional and cultural purposes" with respect to a definable use, area, or practice means that the use, area, or practice is identified by an Indian tribe as traditional and cultural because of its long-established significance or ceremonial nature of the use, area, or practice to the Indian tribe.

Forest Service regulations at 36 CFR part 261, subpart B, establish prohibitions relating to acts or omissions involving National Forest System lands. To implement section 8104 of the FCEA verbatim, the Forest Service is adding a paragraph to 36 CFR 261.53 regarding special closures to provide for closure of National Forest System lands to protect the privacy of tribal activities for traditional and cultural purposes. To implement section 8102 of the FCEA verbatim, the Forest Service is adding a definition for "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village, or other community that is included in a list published by the

Secretary of the Interior under section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a–1)" and a definition for "traditional and cultural purpose" that states that it means, with respect to a definable use, area, or practice, that it is identified by an Indian tribe as traditional and cultural because of its long-established significance or ceremonial nature for the Indian tribe.

Good Cause Statement

The Administrative Procedure Act (APA) exempts certain rulemaking from its public notice and comment requirements, including rulemaking involving "public property" (5 U.S.C. 553(a)(2)), such as federal lands managed by the Forest Service. Furthermore, the APA allows agencies to promulgate rules without public notice and comment when an agency for good cause finds that public notice and comment are "impracticable, unnecessary, or contrary to the public interest" (5 U.S.C. 553(b)(B)).

In 1971, Secretary of Agriculture Hardin announced a voluntary waiver of the public property exemption from public notice and comment rulemaking under the APA (July 24, 1971; 36 FR 13804). Thus, agencies in the U.S. Department of Agriculture (USDA) generally provide public notice and comment in promulgating rules. However, the Hardin policy permits USDA agencies to promulgate final rules without public notice and comment when the agencies find for good cause that notice and comment procedures would be impracticable, unnecessary, or contrary to the public interest, consistent with 5 U.S.C. 553(b)(B). The courts have recognized this good cause exception to the Hardin policy and have indicated that since the public notice and comment requirement was adopted voluntarily, the Secretary should be afforded "more latitude" in making a good cause determination. *See Alcaraz* v. *Block,* 746 F.2d 593, 612 (9th Cir. 1984).

The Department finds that good cause exists to exempt this rulemaking from public notice and comment pursuant to 5 U.S.C. 553(b)(B). Section 8104 of the FCEA allows the Secretary to "temporarily close from public access specifically identified National Forest System land to protect the privacy of tribal activities for traditional and cultural purposes." This rulemaking prohibits public access into or upon an area which is closed to protect the privacy of tribal activities for traditional and cultural purposes. Thus, the prohibition against public access to closed areas under 36 CFR 261.53 merely implements the provision for closure from public access set forth in section 8104 of the FCEA. Such a prohibition against access to closed areas is dictated by section 8104 of the FCEA; the agency has no discretion in implementing these changes. Moreover, the new provisions conform precisely to the newly enacted statute and the corresponding definitions in the statute. Accordingly, because this rulemaking involves purely minor, technical, and nondiscretionary changes, the Department finds that public notice and comment are unnecessary pursuant to 5 U.S.C. 553(b)(B).

Regulatory Certifications

Environmental Impact

This final rule makes purely minor, technical changes to the Forest Service's regulations. Forest Service regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement "rules, regulations, or policies to establish Servicewide administrative procedures, program processes, or instructions." The Department's conclusion is that this final rule falls within this category of actions and that no extraordinary circumstances exist that would require preparation of an environmental assessment or environmental impact statement.

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order (E.O.) 12866 on regulatory planning and review. It has been determined that this is not a significant rule. This final rule will not have an annual effect of $100 million or more on the economy, nor will it adversely affect productivity, competition, jobs, the environment, public health and safety, or State or local governments. This final rule will not interfere with an action taken or planned by another agency, nor will it raise new legal or policy issues. Finally, this final rule will not alter the budgetary impact of entitlement, grant, user fee, or loan programs or the rights and obligations of beneficiaries of such programs. Accordingly, this final rule is not subject to Office of Management and Budget (OMB) review under E.O. 12866.

Regulatory Flexibility Act

The Department has considered this final rule in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). The final rule makes purely minor, technical changes to the Forest Service's regulations. This final rule will not have a significant economic impact on a substantial number of small entities as defined by the act because the final rule will not impose recordkeeping requirements on them; it will not affect their competitive position in relation to large entities; and it will not affect their cash flow, liquidity, or ability to remain in the market.

No Takings Implications

The Department has analyzed this final rule in accordance with the principles and criteria contained in E.O. 12630. The Department has determined that the final rule will not pose the risk of a taking of private property.

Civil Justice Reform

The Department has reviewed this final rule under E.O. 12988 on civil justice reform. After adoption of this final rule, (1) All State and local laws and regulations that conflict with this rule or that impede its full implementation will be preempted; (2) no retroactive effect will be given to this final rule; and (3) it will not require administrative proceedings before parties may file suit in court challenging its provisions.

Federalism and Consultation and Coordination With Indian Tribal Governments

The Department has considered this final rule under the requirements of E.O. 13132 on federalism and has determined that the final rule conforms with the federalism principles set out in this E.O.; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the Department has determined that no further assessment of federalism implications is necessary.

Moreover, the Department has determined that promulgation of this final rule does not require advance consultation with Indian tribal officials as set forth in E.O. 13175, Consultation and Coordination With Indian Tribal Governments. Section 5(b) of E.O. 13175 requires that, to the extent practicable and permitted by law, agencies shall consult with tribal officials in the promulgation of "any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute." This rulemaking merely implements verbatim two existing statutory provisions, sections 8102 and 8104 of the FCEA, and involves only minor, purely technical, and nondiscretionary

regulatory changes. Moreover, these regulatory changes do not impose substantial direct compliance costs on Indian tribal governments. Accordingly, the Department has determined that advance consultation with Tribes is not required for this rulemaking. In the future if the Department publishes additional directives or guidance on how to implement this regulation in the Forest Service Manual or Forest Service Handbook, the Department will consult with Tribes prior to its publication. At this time, the Department does not intend to publish additional guidance on how to implement this regulation.

Energy Effects

The Department has reviewed this final rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Department has determined that this final rule does not constitute a significant energy action as defined in the E.O.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Department has assessed the effects of this final rule on State, local, and Tribal governments and the private sector. This final rule will not compel the expenditure of $100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

This final rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

Text of the Final Rule

List of Subjects in 36 CFR Part 261

Crime, Law enforcement, National forests.

For the reasons set forth in the preamble, part 261 of title 36 of the Code of Federal Regulations is amended as follows:

PART 261—PROHIBITIONS

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 7 U.S.C. 1011(f), 16 U.S.C. 472, 551, 620(f), 1133(c), (d)(1), 1246(i).

Subpart A—General Prohibitions

■ 2. In § 261.2, add definitions for *Indian tribe* and *traditional and cultural purpose* in alphabetical order to read as follows:

§ 261.2 Definitions.

* * * * *

Indian tribe means any Indian or Alaska Native tribe, band, nation, pueblo, village, or other community that is included on a list published by the Secretary of the Interior under section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a–1).

* * * * *

Traditional and cultural purpose means, with respect to a definable use, area, or practice, that it is identified by an Indian tribe as traditional or cultural because of its long-established significance or ceremonial nature for the Indian tribe.

* * * * *

Subpart B—Prohibitions in Areas Designated by Order

■ 3. Amend § 261.53 by adding paragraph (g) to read as follows:

§ 261.53 Special closures.

* * * * *

(g) The privacy of tribal activities for traditional and cultural purposes. Closure to protect the privacy of tribal activities for traditional and cultural purposes must be requested by an Indian tribe; is subject to approval by the Forest Service; shall be temporary; and shall affect the smallest practicable area for the minimum period necessary for activities of the requesting Indian tribe.

Dated: January 11, 2011.

Jay Jensen,

Deputy Under Secretary, NRE.

[FR Doc. 2011–937 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 74

RIN 2900–AM78

VA Veteran-Owned Small Business Verification Guidelines

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document affirms as final, with changes, a final rule with request for comments that implemented portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006. This law requires the Department of Veterans Affairs (VA) to verify ownership and control of veteran-owned small businesses, including service-disabled veteran-owned small businesses. This final rule rescinds the requirement that eligible owners work full-time in the business for which they have applied for acceptance in the Verification Program and that limits participants to a single business. It formally changes the time period for issuance of reconsideration decisions from 30 to 60 days and changes the distribution of profits for limited liability companies and employee stock ownership plans.

DATES: *Effective Date:* This final rule is effective February 18, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Gail Wegner, Deputy Director, Center for Veterans Enterprise (00VE), Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, phone (202) 303–3260 x5239.

SUPPLEMENTARY INFORMATION: In a final rule with request for comments published in the **Federal Register** on February 8, 2010, (75 FR 6098), we revised 38 CFR part 74 setting forth a mechanism for verifying ownership and control of veteran-owned small businesses (VOSBs), including service-disabled veteran-owned small businesses (SDVOSBs). We solicited comments on the following new interim final requirements: Requiring eligible owners work full-time in the business for which they have applied for acceptance in the VOSB or SDVOSB Verification Program, changing the time period for issuance of reconsideration decisions from 30 to 60 days, and changing the distribution of profits for limited liability companies and employee stock ownership plans. We provided a 30-day comment period which ended on March 10, 2010. We received more than 100 comments on the interim final requirements. The issues raised in the comments are discussed below. Based upon the rationale set forth in this document, we are rescinding the interim final provisions that require owners to work full-time in the business for which they have applied for acceptance in the Verification Program and which limit participants to a single business. We are also formally changing the time period for issuance of reconsideration decisions from 30 to 60 days and changing the distribution of profits for limited liability companies (LLC) and

employee stock ownership plans (ESOP).

Comments were solicited on the following aspects of the rule:

Section 74.3(d), Profits and Distributions

We received several comments on the additional requirement that an eligible individual's ability to share in the profits of a concern should be commensurate with the extent of his/her ownership interest in that concern and on the revised requirement for the evaluation of profits and distributions to determine ownership interest in ESOPs and LLCs. We are making a minor clarifying edit in § 74.3(d)(1) to change the word "concern" to "or participant" resulting in "applicant or participant" to be consistent with prior terminology in § 74.3.

1. Numerous commenters suggested adding text to state that the VOSB venture of any VOSB joint venture must receive 51 percent of the profits of the joint venture. We agree with this suggestion and have modified the rule accordingly. This change aligns VA's rule with the provisions of 13 CFR part 125 which governs, in part, the profit requirements of joint ventures in the government-wide SDVOSB program. The subparagraphs have been renumbered and this text, "[a]t least 51 percent of the net profits earned by a joint venture in which the applicant or participant is the lead concern," is added to § 74.3(d)(2).

2. Numerous commenters strongly recommended deleting 38 CFR 74.3(d)(4) stating that the subsection was "badly drafted" and "meaningless." We disagree and no changes will be made based on these comments. This text reads "[a]n eligible individual's ability to share in the profits of the concern should be commensurate with the extent of his/her ownership interest in that concern." VA maintains that real evidence of ownership is demonstrated where the owner has the right to receive a share of profits equivalent to his/her ownership interest in the concern; otherwise, that ownership interest lacks materiality. For example, if an owner had a 51 percent ownership interest but was only entitled to 1 percent of the profits, the owner's ownership interest is rendered meaningless. However, in the renumbered text, this language appears in § 74.3(d)(5).

3. One commenter opposed the text that "[a]n eligible individual's ability to share in the profits of the concern should be commensurate with the extent of his/her ownership interest in that concern," saying it is not envisioned by the law and the requirement that the owner be the highest compensated creates an unfair management burden in recruiting the best talent. We will not make any changes based upon this comment. The commenter's concerns are unfounded because this text deals solely with the issue of ownership of the concern and the rule already allows for exceptions to the requirement that the owner be the highest compensated employee. Currently, § 74.4(g)(3) establishes that "[t]he highest ranking officer may elect to take a lower salary than a non-veteran only upon demonstrating that it helps the applicant or participant." Therefore, if taking a lower salary is necessary for maintaining competitiveness, the owner can do so without risking verified status.

4. One commenter replied "[t]his is a welcome change for veteran-owned ESOP's. However, the language appears to exclude 100 percent veteran-owned ESOP's; *i.e.,* there must be some quantity of 'outstanding' non-ESOP stock that is owned by veterans. What if veterans owned only their portion of the ESOP stock? Could the business qualify as VOSB or SDVOSB in that event?" We will not make any changes based upon this comment because § 74.3(a) addresses this matter. If 100 percent of the stock is veteran-owned in an ESOP, then there is no issue, as the business is still owned by a veteran.

Section 74.4(c)(1), Single Business; Full-Time Control

VA received several comments concerning the single business and full-time control requirements. A few commenters opposed the requirement to have a single business participating in the program at one time, with the exception of joint-ventures. Commenters also opposed the requirement for the eligible owner to work full-time in the business. We agree and have reinstated the text of the Interim Final Rule published in the **Federal Register** on May 19, 2008 (73 FR 29024), that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business" with the addition of a requirement for an owner to submit a written statement demonstrating that outside employment activities will not have a significant impact on the owner's ability to manage and control the applicant concern. We include an exception for applications from joint-ventures from this written statement requirement because joint ventures as defined by 38 CFR 74.1 are business entities created for single, specific business ventures for joint profit and not created for conducting business on a permanent basis. Accordingly, the regulation permits a veteran to maintain its primary business operation for general business and still create a joint venture for a specific project without losing its veteran-owned small business status. Therefore, in these circumstances, VA acknowledges that the veteran owner can have its regular business operation and a joint venture without affecting its ability to manage both at the same time. To maintain the requirement that owners must work full-time in the business ignores some factors that greatly affect today's business climate and put an unnecessary burden on certain business owners who need to spread their time between several different projects or occupations. The additional requirement of a written statement demonstrating that the outside employment activities will not have a significant impact on the owner's ability to manage and control the applicant concern will allow VA to ensure that the business seeking verification is still truly under the control of the veteran owner. In addition, VA has deleted the definition of "full-time" from § 74.1.

Single Business Requirement Related Comments

1. Numerous commenters opposed the text that "an eligible owner may only have one business participating in the Verification Program at one time" because they interpreted it as limiting joint ventures. One commenter explained that such arrangements are "necessary due to the tight economy, procurement changes and lower government spending." Several commenters supported a clarification for the regulation to state that eligible owners of businesses enrolled in the Verification Program may also have additional joint venture agreements that participate in the program. We will not make any changes based upon these comments because the current rule already permits joint ventures in addition to a participant's primary business.

2. Numerous commenters opposed participation by a single business as more stringent than and inconsistent with other Federal small business programs. An additional commenter noted that the text limiting eligible owners to only one business in the Verification Program "appears to run contrary to White House policy statements in support of small business" and "would stifle job creation and economic development." We agree that

restriction of only one business participant may have the unintended effect suggested by the commenters. Accordingly, the rule has been modified to allow more than one VOSB participant so long as the veteran can demonstrate the requisite requirements of ownership and control.

3. Numerous commenters expressed that limiting eligibility to a single business is harmful to start-up businesses. We agree with the commenters. The rule has been modified to return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business." This will allow owners of start up businesses to maintain previous businesses while the new venture solidifies itself in the business world.

4. Numerous commenters noted that for tax and other considerations establishing multiple businesses is beneficial. Other commenters noted that many businesses set up separate entities to manage liability by spreading risk among other businesses. The commenters requested the rule be changed to reflect this. We agree with the commenters' suggestions, and the rule has been modified to return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business." This will allow owners to maintain multiple businesses in the database and eliminate any unnecessary burdens on these owners with regard to taxes, liability and other similar considerations.

5. Numerous commenters observed that the text limiting participants in the Verification Program to one business has no foundation in law and that there is no compelling reason to limit participation to a single concern. The rule has been modified to return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business." The original text does not include the limitation to one business participant. Our concern in proposing to limit participants to one business in the Verification Program was for the integrity of the program as it was viewed as difficult for an owner to comply with the control requirements of § 74.4 if the veteran had multiple businesses. However, we realize that this restriction would have unintended effects and may be harmful to start-up businesses where the veteran may need to control an ongoing concern while creating and growing a start-up concern.

6. Numerous commenters noted that single business participation restricts business growth and limits participation in global markets. We agree with these commenters. The rule has been modified to return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business." This eliminates the single business restriction and allows more flexibility for the owners to continue to grow their business and participate in the global marketplace.

7. Several commenters expressed that the single business restriction is discriminatory in that it is based on the belief that a veteran lacks the capability and intelligence to manage more than one business at a time. We disagree with this comment as the proposed rule was not based on this belief. Due to other comments, however, the rule has been modified to return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business." This addresses the concern of the commenter by allowing for veteran owners to maintain more than one business in the Verification Program. Our intention was not to criticize the management capabilities of veterans. In processing verification applications, we have observed that it has been difficult for an applicant to demonstrate how it can control, as addressed in § 74.4, two or more businesses at the same time. However, we find that it was unfair, not discriminatory, to preclude every applicant from attempting to demonstrate that it can control more than one business.

8. One commenter suggested that the text be revised to require that "an eligible owner have no more than two businesses in the program at one time and must work full-time in the businesses." This comment is not accepted as, based upon the majority of comments received, the rule has been revised to eliminate the single business requirement and return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."

9. One commenter expressed no opposition to the single business requirement, stating a belief that there is widespread abuse in the set-aside program. This commenter suggested that the wording is not specific to oversight agency responsibilities for enforcement. We disagree with this comment. VA has the responsibility for verifying the applicants in accordance with this rule. The rule will require that applicants submitting more than one business for verification must submit a written statement demonstrating that the outside employment activities will not have a significant impact on the owner's ability to manage and control the applicant concern. This will assist VA in ensuring that applicants fully comply with the control requirements of § 74.4 and avoid abuse and fraud in the set-aside program referenced by the commenter.

10. One commenter proposed that all veteran-owned businesses be eligible for the VOSB Verification Program. We disagree with this comment as the statute which governs the verification process is specific to the Department of Veterans Affairs and to veteran-owned small businesses, not all veteran-owned business, which would include large veteran-owned businesses not covered by the statute.

11. One commenter offered alternative language, "With the exception of joint-venture agreements, an eligible owner may have only one business participating in the Veterans First Contracting Program at one time and must work full-time in the business as defined in 38 CFR Part 74.1." We disagree with this comment, as it could be misconstrued to restrict an owner from performing work under more than one set-aside award at a single time. In addition, the single business requirement has been deleted and VA has returned to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."

12. Several commenters suggested that the rule be revised to acknowledge that owners may operate from multiple locations using electronic tools to

effectively control remote operations and other businesses. We agree with this comment. The single business and full-time requirements were overly restrictive as they failed to take into account the ability of certain veteran owners in certain situations using modern, electronic tools, to effectively run one or multiple businesses without dedicating the amount of time prescribed by the full-time requirement. The rule has been revised to eliminate the single business and full-time requirements and return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."

13. One commenter stated that certain professions require teaming, expressing the opinion that the rule prohibits such arrangements. We disagree with this comment. The current rule already permits joint ventures in addition to a participant's primary business.

14. One commenter noted that some state programs use the Verification Program and that limiting joint-ventures would be harmful to owners in those programs. We disagree with this comment, as § 74.4(c)(1) permits participants to enter into joint-venture agreements.

15. A few commenters opposed the single business requirement but suggested that additional businesses must be in different business lines (industries). We do not agree with this comment. The single business requirement has been removed and the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business" has been restored. The single business requirement placed an unfair burden on veteran owners by restricting them to just one business. VA will consider the merits of each application on an individual basis without regard for the industry in which a veteran's other business may be.

16. One commenter opposed the single business requirement but suggested that additional businesses "must be in the same or closely related industries." Another commenter suggested that multiple businesses in the same or similar industry should be considered a single entity, and cited the SBA 8(a) program as precedent. That program does not allow an owner to have more than one business in the same or similar industry. We disagree with this comment. The single business requirement placed an unfair burden on veteran owners by restricting them to just one business. Similarly, it would be an undue burden to limit these owners to just one industry. VA will consider the merits of each application, on an individual basis, without regard for the industry in which a veteran's other business is involved. The single business requirement has been removed and the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business" has been added back into § 74.4(c)(1) to allow applicants to potentially have more than a single business in the Verification Program.

17. Some commenters opposed the single business requirement saying that "[t]here is nothing illegal about owning more than one company" and "many successful owners have more than one business at a time." We agree with these commenters. The requirement put an unnecessary burden on veteran small business owners by restricting them to just one business. The rule has been modified to eliminate the single business requirement and returned to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."

18. Some commenters expressed the opinion that the single business requirement would stifle entrepreneurship at a time when we need to create jobs and the concept is "contrary to the American spirit and established precedent that owners sometimes need to start multiple businesses before one is successful." We agree with these commenters. The single business requirement was removed because it was determined that it created an unnecessary burden on veteran-owned small businesses. The rule has been modified to eliminate the single business requirement and return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."

19. One commenter noted that the restriction is contrary to mentorship of new businesses and suggested that established owners join start-ups to offer support, funding and other assistance to the new owner(s). We agree with this comment. The single business requirement placed an undue burden on veteran owners by limiting their ability to participate in other businesses for purposes such as mentoring. Therefore, the rule has been modified to eliminate the single business requirement and return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."

20. Several commenters stated that if a veteran owns a small business and then organizes a joint venture, the veteran violates the second business rule. We disagree with these comments. The regulation provides that business owners can still form joint-ventures without violating the rule. In addition, the single business requirement has been removed. Therefore, no further change is necessary to address these commenters' concerns.

21. Several commenters noted that there should be no restrictions on the number of businesses a veteran can own as the drafted regulation does nothing to ensure the viability of VOSBs or SDVOSBs or curtail fraudulent VOSBs or SDVOSBs. We agree with these comments. The single business requirement put an undue burden on veteran business owners and did not serve to eliminate potential fraud within the program. Therefore, the requirement was removed and the section of regulation was restored to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."

22. A few commenters questioned what will happen to business owners who already have 2 or more VOSBs or SDVOSBs approved. They asked whether those businesses would be grandfathered into existing ownership. The single business requirement has been removed, and therefore, the concerns expressed by these commenters have been rendered moot.

Full-Time Control Comments

23. Numerous commenters suggested returning to the original text that "[a]n

applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business." We agree with the commenters' suggestions. The full-time requirement placed an undue burden on veteran owners. We believe that a veteran owner can still maintain control and ownership of a business without meeting the full-time requirement. Therefore, the requirement has been removed and the rule has been modified to return to that original text.

24. One commenter stated that the text assigns no value to the concepts of chain of command or span of control. We agree with the commenter. The full-time requirement did not take into account the fact that some business owners are forced to delegate in order to keep up with other commitments and burdens. The rule has been modified to return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business" in order to alleviate the commenter's concerns.

25. One respondent suggested that the rule acknowledge that new owners work multiple jobs to support their families and thus should recognize that full-time requirement is restrictive. The respondent suggested replacement text to read "an eligible owner may only have one business participating in the Verification Program at one time and must devote sufficient time to the business to maintain control as defined in § 74.1." We agree with this comment, but it has been rendered moot as the rule has been revised to eliminate the full-time requirement and return to the original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."

26. One commenter noted that IRS regulations precluded limited liability company members from being employees in their firm, and therefore, VA would have no way of verifying their working hours. This problem has been alleviated because the full-time requirement has been removed and the rule has been restored to its original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."

27. One commenter stated that the full-time requirement does not take into account other work shifts performed by a veteran and recommended rewording to "[f]ull-time means working no less than 40 hours per week involved in the Day to Day management and/or Operations of the Business." Several other commenters noted that small business owners do not have normal business hours and recommended the term "normal business hours for the industry." The recommended rewording will not be necessary as the full-time requirement, as well as the stated definition of "full-time" has been removed and the rule has been restored to its original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."

28. One commenter offered that he "strongly support(s) the government's efforts to ensure: (1) That veteran-owned small businesses are actually owned by veterans, and; (2) that the veteran owner must be actively involved in day-to-day operation of the firm." By removing the full-time requirement, but adding the additional requirement of a written statement demonstrating that the outside employment activities will not have a significant impact on the owner's ability to manage and control the applicant concern, VA will be able to ensure that the business seeking verification is still truly under the control of the veteran owner.

29. Several commenters noted that the full-time requirement is discriminatory because it hinders organizations who do not operate between 9 a.m. and 5 p.m. Commenters also stated that the full-time requirement hinders a veteran's ability to attend to medical needs such as post traumatic stress disorder sessions. We agree with this comment. The full-time requirement has been removed and the rule has been restored to its original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business." This should alleviate any unnecessary burdens placed on veteran owners by the full-time requirement.

30. One commenter stated that the provision would preclude home-based businesses and prevent active duty service members from starting their business prior to leaving for active military service. We agree with this comment. The full-time requirement placed an undue burden on veteran small business owners. By removing the requirement and restoring the rule to its original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business," the concerns of the commenter have been addressed.

31. One commenter noted that VA failed to consider the impact of the full-time rule in the context of multiple business entities. The commenter pointed out that many veterans buy stock or shares as investments in other veteran-owned businesses thereby making them owners in those entities. The regulation seems to prohibit such stock ownership in more than one verified business. The commenter also noted that the full-time requirement is contrary to the intent of 38 U.S.C. 8127(l) which defines small business concern owned and controlled by veterans as "not less than 51 percent of which is owned by one or more veterans" and "the management and daily business operations of which are controlled by one or more veterans." The commenter noted that Congress' intent was that control of an eligible VOSB be shared with two or more veterans each contributing part of the time and effort necessary to manage and operate the business. We agree with these comments. The full-time requirement, coupled with the single business requirement placed an undue burden on veteran business owners who may have part ownership in several legitimate VOSBs or SDVOSBs. By removing the requirements and restoring the rule to its original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business," these concerns have been addressed.

32. One commenter suggested that the regulation be amended to state "that when full-time work is not required due to lack of government business, then the owner/manager is not required to participate in the business full-time." The full-time requirement has been removed and the rule restored to its

original text that "[a]n applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business." Therefore, the suggested amendment is unnecessary.

Section 74.13(b), Can an applicant ask CVE to reconsider its initial decision to deny an application?

VA sought comments on the merits of establishing a 60-day period for the Director, Center for Veterans Enterprise to issue a written decision on a request for reconsideration. We did not receive any comments within the scope of the request. Therefore, we have made no change to this rule.

A number of additional comments were received which were beyond the scope of the request for comments, and, therefore, we will not make any changes based on those comments.

Regulatory Flexibility Act

This final rule would generally be small business neutral as it applies only to applying for verified status in the VetBiz.gov Vendor Information Pages (VIP) database. The overall impact of the final rule will be of benefit to small businesses owned by veterans or service-disabled veterans. VA estimates the cost to an individual business to be less than $100.00 for 70–75 percent of the businesses seeking verification, and the average cost to the entire population of veterans seeking to become verified is less than $325.00 on average. A related rule describes the effect that verified businesses will have in the Department's acquisition regulation. This impact is discussed in the proposed rule modifying the VA Acquisition Regulation which was published in the **Federal Register** at 73 FR 49141 on August 20, 2008. On this basis, the Secretary hereby certifies that the adoption of this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this regulation is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this rule have been examined and it has been determined to be a significant regulatory action under the Executive Order.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains provisions that constitute collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521). OMB has approved these collections and has assigned control number 2900–0675. VA displays this control number under the applicable sections of the regulations in this final rule. OMB assigns control numbers to collections of information it approves. VA 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.

Catalog of Federal Domestic Assistance

This final rule affects the verification guidelines of veteran-owned small businesses, for which there is no Catalog of Federal Domestic Assistance program number.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on November 16, 2010, for publication.

List of Subjects in 38 CFR Part 74

Administrative practice and procedures, Privacy, Reporting and recordkeeping requirements, Small business, Veteran, Veteran-owned small business, Verification.

Dated: January 13, 2011.

Robert C. McFetridge,

Director, Regulations Policy and Management.

Accordingly, VA amends 38 CFR part 74 as follows:

PART 74—VETERANS SMALL BUSINESS REGULATIONS

■ 1. The authority citation for part 74 continues to read as follows:

Authority: 38 U.S.C. 501, 513, unless otherwise noted.

§ 74.1 [Amended]

■ 2. Amend § 74.1 by removing the definition of "Full-time".

■ 3. Amend § 74.3 by revising paragraphs (d)(1), (2), (3) and (4) and by adding paragraph (d)(5) to read as follows:

§ 74.3 Who does the Center for Veterans Enterprise (CVE) consider to own a Veteran-owned small business?

* * * * *

(d) * * *

(1) At least 51 percent of the annual distribution of profits paid to the owners of a corporate, partnership, or LLC applicant or participant;

(2) At least 51 percent of the net profits earned by a joint venture in which the applicant or participant is the lead concern;

(3) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and

(4) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock owned in the event of dissolution of the corporation, partnership, or LLC.

(5) An eligible individual's ability to share in the profits of the concern

should be commensurate with the extent of his/her ownership interest in that concern.

* * * * *

■ 4. Amend § 74.4 by revising paragraph (c)(1) to read as follows:

§ 74.4 Who does CVE consider to control a veteran-owned small business?

* * * * *

(c)(1) An applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business. An owner engaged in employment or management outside the applicant concern must submit a written statement supplemental to the application which demonstrates that such activities will not have a significant impact on the owner's ability to manage and control the applicant concern. Applications from joint-ventures are exempt from the requirement to submit a supplemental written statement.

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[FR Doc. 2011–983 Filed 1–18–11; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2008–0780; FRL–9251–8]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Amendments to Existing Regulation Provisions Concerning Case-by-Case Reasonably Available Control Technology

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia. This SIP revision consists of amendments to the Commonwealth's existing regulations in order to clarify and recodify provisions covering case-by-case reasonably available control technology (RACT), as well as to add the 1997 8-hour ozone national ambient air quality standard (NAAQS) RACT requirements to the Commonwealth's regulations. This action is being taken under the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective on February 18, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2008–0780. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, *i.e.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Gregory Becoat, (215) 814–2036, or by e-mail at *becoat.gregory@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On November 3, 2009 (74 FR 56754), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The formal SIP revision was submitted by the Commonwealth of Virginia on September 8, 2008. The NPR proposed approval of the Virginia SIP revision that clarifies and recodifies provisions covering case-by-case RACT, as well as added the 1997 8-hour ozone standard RACT requirements to the Commonwealth's regulations. EPA received no comments on the proposal to approve Virginia's SIP revision. However, regulation 9VAC5–40–7420F. and G. incorrectly cross-referenced the Commonwealth's Volatile Organic Compounds (VOC) regulations at 9VAC5–40–7390, instead of its nitrogen oxides regulation at 9VAC5–40–7410. On September 27, 2010, Virginia submitted a correction to the regulation (Article 51 of 9VAC5–40, Existing Stationary Sources) that contains the requirements for making case-by-case RACT determinations. The SIP revision corrected the two typographic errors in order to correctly cross-reference regulation 9VAC5–40–7420F. and G. to the nitrogen oxides regulation at 9VAC5–40–7410.

II. Summary of SIP Revision

The Commonwealth's SIP revision consists of the following changes:

1. Addition of 9VAC5 Chapter 40, Article 51—Emission Standards for Stationary Sources Subject to Case-by-Case RACT Determinations, in order to separate the RACT specific requirements from the general process requirements of Article 4 of 9VAC5 Chapter 40.

2. Administrative wording changes to regulations 9VAC5–40–250A. and 9VAC5–40–250B.

3. Deletion of definition of "Reasonably available control technology" in 9VAC5–40–250C. and addition of the other definitions in 9VAC5–40–250C. to 9VAC5–40–7380 in Article 51 of 9VAC5 Chapter 40.

4. Addition of the following definitions to regulation 9VAC5–40–7380C.—Terms defined: "Presumptive RACT," "Theoretical potential to emit" and "Tpy."

5. All the definitions in regulation 9VAC5–40–311B.3—Terms defined, are deleted and added to 9VAC5–40–7380C. in Article 51 of 9VAC5 Chapter 40.

6. Repealed regulations 9VAC5–40–300—Standard for volatile organic compounds, 9VAC5–40–310—Standard for nitrogen oxides, and 9VAC5–40–311—Reasonably available control technology guidelines for stationary sources of nitrogen oxides, in Article 4 of 9VAC5 Chapter 40 are replaced with 9VAC5–40–7390—Standard for volatile organic compounds (one-hour standard), 9VAC5–40–7410—Standard for nitrogen oxides (one-hour ozone standard), and 9VAC5–40–7430—Presumptive reasonably available control technology guidelines for stationary sources of nitrogen oxides, respectively, in Article 51 of 9VAC5 Chapter 40.

7. Addition of the 1997 8-hour ozone standard requirements for RACT in regulations 9VAC5–40–7400—Standard for volatile organic compounds (eight-hour ozone standard) and 9VAC5–40–7420—Standard for nitrogen oxides (eight-hour ozone standard).

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary

compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) That are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by Federal law to maintain program delegation, authorization or approval," since Virginia must "enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts * * *." The opinion concludes that "[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval."

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that "[t]o the extent consistent with requirements imposed by Federal law," any person making a voluntary disclosure of information to a State agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since "no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity."

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a State audit privilege and immunity law can affect only State enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the State plan, independently of any State enforcement effort. In addition, citizen enforcement under section 304 of the Clean Air Act is likewise unaffected by this, or any, State audit privilege or immunity law.

IV. Final Action

EPA is approving the Virginia SIP revision that clarifies and recodifies provisions covering case-by-case RACT, as well as adds the 1997 8-hour ozone standard RACT requirements to the Commonwealth's regulations.

V. Statutory and Executive Order Reviews

A. General Requirements

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.

B. 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, 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).

C. 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 March 21, 2011. 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, pertaining to the Commonwealth of Virginia's RACT provisions under the 8-hour ozone NAAQS, 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, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 17, 2010.

W.C. Early,

Acting, Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for 40 CFR part 52 continues to read as follows:

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

Subpart VV—Virginia

■ 2. In § 52.2420, the table in paragraph (c) is amended by:

■ a. Adding the heading "EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES" to the table.

■ b. Revising the heading for Article 4 and the entry for regulation 5–40–250.

■ c. Removing the entry for regulations 5–40–300, 5–40–310A.–E., and 5–40–311.

■ d. Adding a category for Article 51 after entry 5–40–7360 under Article 50 and before the existing Title entry for Article 53.

The amendments read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
*	*	*	*	*
9 VAC 5, Chapter 40.	Existing Stationary Sources [Part IV]			
*	*	*	*	*
Part II	Emission Standards			
*	*	*	*	*
Article 4	General Process Operations (Rule 4–4)			
*	*	*	*	*
5–40–250	Definitions	12/15/06	1/19/11 [Insert page number where the document begins].	Removal of "Reasonably available control technology" from 5–40–250C.
*	*	*	*	*
Article 51	Stationary Sources Subject to Case-by-Case Control Technology Determinations (Rule 4–51)			
5–40–7370	Applicability and designation of affected facility.	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7380	Definitions	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7390	Standard for volatile organic compounds (1-hour ozone standard).	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7400	Standard for volatile organic compounds (8-hour ozone standard).	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7410	Standard for nitrogen oxides (1-hour ozone standard) Subsection F.	12/15/06 6/24/09	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7420	Standard for nitrogen oxides (8-hour ozone standard).	12/15/06 6/24/09	1/19/11 [Insert page number where the document begins].	Added Regulation.

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
5–40–7430	Presumptive reasonably available control technology guidelines for stationary sources of nitrogen oxides.	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7440	Standard for visible emissions	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7450	Standard for fugitive dust/emissions	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7480	Compliance	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7490	Test methods and procedures	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7500	Monitoring	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7510	Notification	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7520	Registration	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7530	Facility and control equipment maintenance or malfunction.	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation.
5–40–7540	Permits	12/15/06	1/19/11 [Insert page number where the document begins].	Added Regulation
*	*	*	*	* * *

* * * * *

[FR Doc. 2011–484 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0032; FRL–8859–3]

Fluazinam; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of fluazinam in or on multiple commodities which are identified and discussed later in this document. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective January 19, 2011. Objections and requests for hearings must be received on or before March 21, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (*see also* Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0032. 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: Laura Nollen, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7390; e-mail address: *nollen.laura@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. How can I get electronic access to other related information?

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

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0032 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 March 21, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2009–0032, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of August 19, 2009 (74 FR 41898) (FRL–8426–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of two pesticide petitions: PP 9E7570 by Interregional Research Project Number 4 (IR–4), 500 College Rd. East, Suite 201 W, Princeton, NJ 08540; and PP 9F7571 by ISK Biosciences Corporation, 7470 Auburn Rd., Suite A, Concord, OH 44077. PP 9E7570 requested that 40 CFR 180.574 be amended by establishing tolerances for residues of the fungicide fluazinam, (3-chloro-*N*-[3-chloro-2,6-dinitro-4-(trifluoromethyl)phenyl]-5-(trifluoromethyl)-2-pyridinamine), in or on carrot, root at 0.8 parts per million (ppm). PP 9F7571 requested that 40 CFR 180.574 be amended by establishing tolerances for residues of the fungicide fluazinam and the metabolite AMGT, (3-[[4-amino-3-[[3-chloro-5-(trifloromethyl)-2-pyridinyl]amino]-2-nitro-6-(trifluoromethyl) phenyl] thio]-2-(beta-D-glucopyranosyloxy) propionic acid), in or on the raw agricultural commodity apple at 1.7 ppm and wet apple pomace at 5.0 ppm, and by establishing tolerances for the combined residues of fluazinam and its metabolites, DAPA and AMPA, in the following animal tissues and meat byproducts at 0.03 ppm: Cattle, fat; cattle, kidney; cattle, liver; cattle, meat; cattle, meat byproducts; goat, fat; goat, kidney; goat, liver; goat, meat; goat, meat byproducts; horse, fat; horse, kidney; horse, liver; horse, meat; horse, meat byproducts; milk; sheep, fat; sheep, kidney; sheep, liver; sheep, meat; and sheep, meat byproducts. PP 9E7570 referenced a summary of the petition prepared on behalf of IR–4 by ISK Biosciences, the registrant; PP 9F7571 referenced a summary of the petition prepared by the registrant, ISK Biosciences. Petition summaries are available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notices of filing.

Based upon review of the data supporting the petition, EPA has revised several proposed tolerances and has determined that several other proposed tolerances are not necessary. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

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

In the **Federal Register** of May 12, 2010 (75 FR 26662) (FRL–8824–5), EPA published a Final Rule establishing tolerances for residues of the fungicide fluazinam in or on bushberry subgroup 13–07B at 7.0 pm; lettuce, head at 0.02 ppm; lettuce, leaf at 2.0 ppm; and onion, bulb, subgroup 3–07A at 0.20 ppm,

associated with PP 8E7506. When the Agency conducted the risk assessment in support of the May 12, 2010 tolerance action, it considered the use of fluazinam in or on carrot, root (PP 9E7570), apples and wet apple pomace (PP 9F7571), and fluazinam and its metabolites AMPA and DAPA in the following animal tissues and meat byproducts: Cattle, fat; cattle, kidney; cattle, liver; cattle, meat; cattle, meat byproducts; goat, fat; goat, kidney; goat, liver; goat, meat; goat, meat byproducts; horse, fat; horse, kidney; horse, liver; horse, meat; horse, meat byproducts; milk; sheep, fat; sheep, kidney; sheep, liver; sheep, meat; and sheep, meat byproducts (PP 9F7571). However, because of data deficiencies identified during the course of review, EPA was not able to recommend in favor of the tolerances associated with PP 9E7570 and PP 9F7571. The deficiencies related to an apple processing study, a cattle feeding study, and the analytical method for the metabolites AMPA and DAPA in fat, liver, and kidney.

In response to the noted data deficiencies, the registrant provided additional data for the apple processing study and a rebuttal to the cattle feeding study; after further review, EPA has determined that these studies are now acceptable. Additionally, in response to the analytical method data deficiency, the registrant submitted a revised analytical method and independent laboratory validation, which EPA has concluded is adequate as an enforcement method for residues of fluazinam, AMPA, and DAPA and their sulfamate conjugates in kidney, liver, and fat. Detailed considerations regarding EPA's resolution of these data deficiencies are discussed in the document, "Fluazinam, Petitions for the Establishment of Tolerances and Registration of New Uses on Apples and Carrots. HED's Conclusions Regarding Registrant's Response to Data Deficiencies" which is available at *http://regulations.gov* in docket EPA–HQ–OPP–2009–0032.

Since EPA considered the additional uses proposed by PP 9E7570 and PP 9F7571 in its most recent risk assessments, establishing tolerances on these commodities will not change the estimated aggregate risks resulting from use of fluazinam, as discussed in the May 12, 2010 (75 FR 26662) (FRL–8824–5) **Federal Register**. Therefore, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to fluazinam residues. Refer to the May 12, 2010 **Federal Register** document, available at *http://www.regulations.gov,* for a detailed discussion of the aggregate risk assessments and determination of safety. EPA relies upon those risk assessments and the findings made in the **Federal Register** document in support of this action.

IV. Other Considerations

A. Analytical Enforcement Methodology

An adequate enforcement methodology, gas chromatography with electron capture detection (GC/ECD), is available to enforce the tolerance expression for plant commodities. For livestock commodities, an adequate enforcement method, liquid chromatography/mass spectrometry/mass spectrometry (LC/MS/MS), is available to enforce the tolerance expression for residues of fluazinam, AMPA, and DAPA and their sulfamate conjugates in bovine liver, fat, and milk.

The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

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

The Codex has not established MRLs for fluazinam in or on apple or carrot. However, these tolerance petitions have been evaluated as a joint review with Canada, and the United States and Canada have agreed that the appropriate tolerance levels for carrot, roots is 0.70 ppm and apple is 2.0 ppm.

C. Revisions to Petitioned-For Tolerances

Based on analysis of the data supporting the petitions, EPA has revised the proposed tolerances in or on carrot, roots from 0.8 ppm to 0.70 ppm; apples from 1.7 ppm to 2.0 ppm; and the following proposed tolerances from 0.03 ppm to 0.05 ppm: Cattle, fat; cattle, meat byproducts; goat, fat; goat, meat byproducts; horse, fat; horse, meat byproducts; sheep, fat; and sheep, meat byproducts. EPA revised these tolerance levels based on analysis of the residue data using the Agency's Tolerance Spreadsheet in accordance with the Agency's "Guidance for Setting Pesticide Tolerances Based on Field Trial Data."

Additionally, based on the results of an animal feeding study and the calculated dietary burden for dairy cattle, EPA has determined that the proposed tolerances of 0.03 ppm for the meat of cattle, goat, horse, and sheep are not necessary. The Agency has further determined that the proposed tolerances of 0.03 ppm for the liver and kidney of cattle, goat, horse, and sheep are not necessary because tolerances are being established for meat byproducts of cattle, goat, horse, and sheep; EPA previously determined that individual tolerances are not needed for liver and kidney when a tolerance is being established for meat byproducts.

V. Conclusion

Therefore, tolerances are established for residues of fluazinam, (3-chloro-*N*-[3-chloro-2,6-dinitro-4-(trifluoromethyl)phenyl]-5-(trifluoromethyl)-2-pyridinamine), in or on carrot, roots at 0.70 ppm; apple at 2.0 ppm; apple, wet pomace at 5.0 ppm; and tolerances are established for residues of fluazinam and its metabolites AMPA and DAPA in or on cattle, fat at 0.05 ppm; cattle, meat byproducts at 0.05 ppm; goat, fat at 0.05 ppm; goat, meat byproducts at 0.05 ppm; horse, fat at 0.05 ppm; horse, meat byproducts at 0.05 ppm; sheep, fat at 0.05 ppm; and sheep, meat byproducts at 0.05 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety*

Risks (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: January 7, 2011.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.574 is amended by alphabetically adding the following commodities to the table in paragraph (a)(1), and by adding paragraph (a)(3) to read as follows:

§ 180.574 Fluazinam; tolerances for residues.

(a) *General.* (1) * * *

Commodity	Parts per million
Apple	2.0
Apple, wet pomace	5.0
* * * * *	
Carrot, roots	0.70
* * * * *	

* * * * *

(3) Tolerances are established for residues of fluazinam (3-chloro-*N*-[3-chloro-2,6-dinitro-4-(trifluoromethyl)phenyl]-5-(trifluoromethyl)-2-pyridinamine), including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only fluazinam, AMPA (2-(6-amino-3-chloro-α,α,α-trifluoro-2-nitro-p-toluidino)-3-chloro-5-(trifluoromethyl) pyridine), DAPA (3-chloro-2-(2,6-diamino-3-chloro-α,α,α.-trifluoro-p-toluidino)-5-(trifluoromethyl)pyridine), and their sulfamate conjugates.

Commodity	Parts per million
Cattle, fat	0.05
Cattle, meat byproducts	0.05
Goat, fat	0.05
Goat, meat byproducts	0.05
Horse, fat	0.05
Horse, meat byproducts	0.05
Sheep, fat	0.05
Sheep, meat byproducts	0.05

* * * * *

[FR Doc. 2011–1019 Filed 1–18–11; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2008–0001; 92220–1113–0000–C6]

RIN 1018–AU67

Endangered and Threatened Wildlife and Plants; Removal of *Erigeron maguirei* (Maguire Daisy) From the Federal List of Endangered and Threatened Plants; Availability of Final Post-Delisting Monitoring Plan

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service/USFWS), are removing the plant *Erigeron maguirei* (commonly referred to as Maguire daisy) from the List of Endangered and Threatened Plants. The best scientific and commercial data available indicate that this species has recovered and no longer meets the definition of endangered or threatened under the Endangered Species Act of 1973, as amended (ESA). Our review of the status of this species shows that populations are stable, threats are addressed, and adequate regulatory mechanisms are in place so that the species is not currently, and is not likely to again become, an endangered species within the foreseeable future in all or a significant portion of its range. Finally, we announce the availability of the final post-delisting monitoring plan for Maguire daisy.

DATES: This rule becomes effective on February 18, 2011.

ADDRESSES: Copies of the final post-delisting monitoring plan are available by request from the Utah Field Office (*see* **FOR FURTHER INFORMATION CONTACT**) or online at: *http://www.fws.gov/mountain-prairie/species/plants/*

maguiredaisy/or at: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Larry Crist, Field Supervisor, U.S. Fish and Wildlife Service, Utah Field Office, 2369 West Orton Circle, West Valley City, UT 84119 (telephone 801/975–3330; facsimile 801/975–3331). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800/877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Previous Federal Action

Section 12 of the ESA (16 U.S.C. 1531 *et seq.*) directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered endangered, threatened, or extinct. On July 1, 1975, we published a notice in the **Federal Register** (40 FR 27824) accepting the Smithsonian report as a petition to list taxa named therein under section 4(c)(2) (now section 4(b)(3)) of the ESA and announced our intention to review the status of those plants. *Erigeron maguirei* was included in that report (40 FR 27824, July 1, 1975). Maguire daisy is the common name for *E. maguirei;* however, we will primarily use the scientific name of this species throughout this rule.

On June 16, 1976, we published a proposed rule in the **Federal Register** (41 FR 24524) to designate approximately 1,700 vascular plant species, including *Erigeron maguirei,* as endangered under section 4 of the ESA. The 1978 amendments to the ESA required that all proposals over 2 years old be withdrawn. On December 10, 1979, we published a notice of withdrawal (44 FR 70796) of that portion of the June 16, 1976, proposal that had not been made final, which included the endangered status determination for *E. maguirei.*

On December 15, 1980, we published in the **Federal Register** a revised notice of review for native plants that designated *Erigeron maguirei* as a candidate species (45 FR 82480). Section 4(b)(3)(B) of the ESA requires that, for any petition to revise the Federal Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information that listing the species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In addition, section 2(b)(1) of the Public Law 97–304 (the 1982 amendments to the ESA) required that all petitions pending as of October 13, 1982, be treated as if newly submitted on that date. Since the 1975 Smithsonian report was accepted as a petition, all the taxa contained in those notices, including *E. maguirei,* were treated as being newly petitioned as of October 13, 1982. On October 13, 1983, we made a 12-month finding that the petition to list *E. maguirei* var. *maguirei* was warranted but precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants. Notification of this finding was published in the **Federal Register** on November 28, 1983 (48 FR 53640).

On July 27, 1984, we published a proposed rule to designate *Erigeron maguirei* var. *maguirei* as an endangered species (49 FR 30211). The final rule designating the variety of the species as endangered was published on September 5, 1985 (50 FR 36089).

In 1983, *Erigeron maguirei* var. *harrisonii* was described as a separate variety of E. maguirei. On September 27, 1985, we published a notice of review for plants which added *E. maguirei* var. *harrisonii* as a candidate species (50 FR 39526). *E. maguirei* var. *harrisonii* remained as a candidate through the revised plant notice of review published on September 30, 1993 (58 FR 51144).

On September 7, 1994 (59 FR 46219), we proposed to accept a taxonomic revision that combined two varieties, *Erigeron maguirei* var. *maguirei* and *E. maguirei* var. *harrisonii,* into one species, *E. maguirei.* The taxonomic revision was based on new genetic information (Van Buren 1993, p. 1; Van Buren and Harper 2002, p. 1). Due in part to the taxonomic revision, we also proposed reclassifying *E. maguirei* from endangered to threatened because the population numbers and distribution range of the newly described species, *E. maguirei,* were larger than either of the two varieties. The taxonomic revision and reclassification of *E. maguirei* was finalized on June 19, 1996 (61 FR 31054).

On May 16, 2008, we published a proposed rule to remove *Erigeron maguirei* from the List of Endangered and Threatened Plants, provided notice of the availability of a draft post-delisting monitoring plan, and opened a 60-day public comment period (73 FR 28410). On May 19, 2008, we finalized a 5-year review, initiated on April 7, 2006 (71 FR 17900), which confirmed that the best scientific and commercial data available indicated that this species has recovered and no longer meets the definition of endangered or threatened under the ESA.

Species Information

A member of the sunflower family, *Erigeron maguirei* is a perennial herb with a branched woody base. Its stems are decumbent (lying on the ground with the tip ascending) to sprawling or erect. Its basal leaves are spatulate-shaped to oblanceolate (the shape of the leaf is longer than it is wide with the broadest portion of the leaf at the tip and narrower at the base). Its leaves and stems are covered with abundant stiff, coarse, white hairs. Bits of sand commonly cling to the hairs of the leaves and stems. Its flowers are dime-sized with white or pinkish-white petals. The species is further described in our June 19, 1996, final rule reclassifying the species as threatened (61 FR 31054).

The range of the species is estimated at 390 square miles (1,010 square kilometers) and extends from the San Rafael Swell south through the Waterpocket Fold of Capitol Reef National Park (see Figure 1) (Heil 1987, p. 5; 1989, p. 23; Kass 1990, p. 23; Harper and Van Buren 1998, pp. 1–2; Clark 2001, p. 2; 2002, p. 12; Clark *et al.* 2005, pp. 7–8; Clark *et al.* 2006, pp. 7–8).

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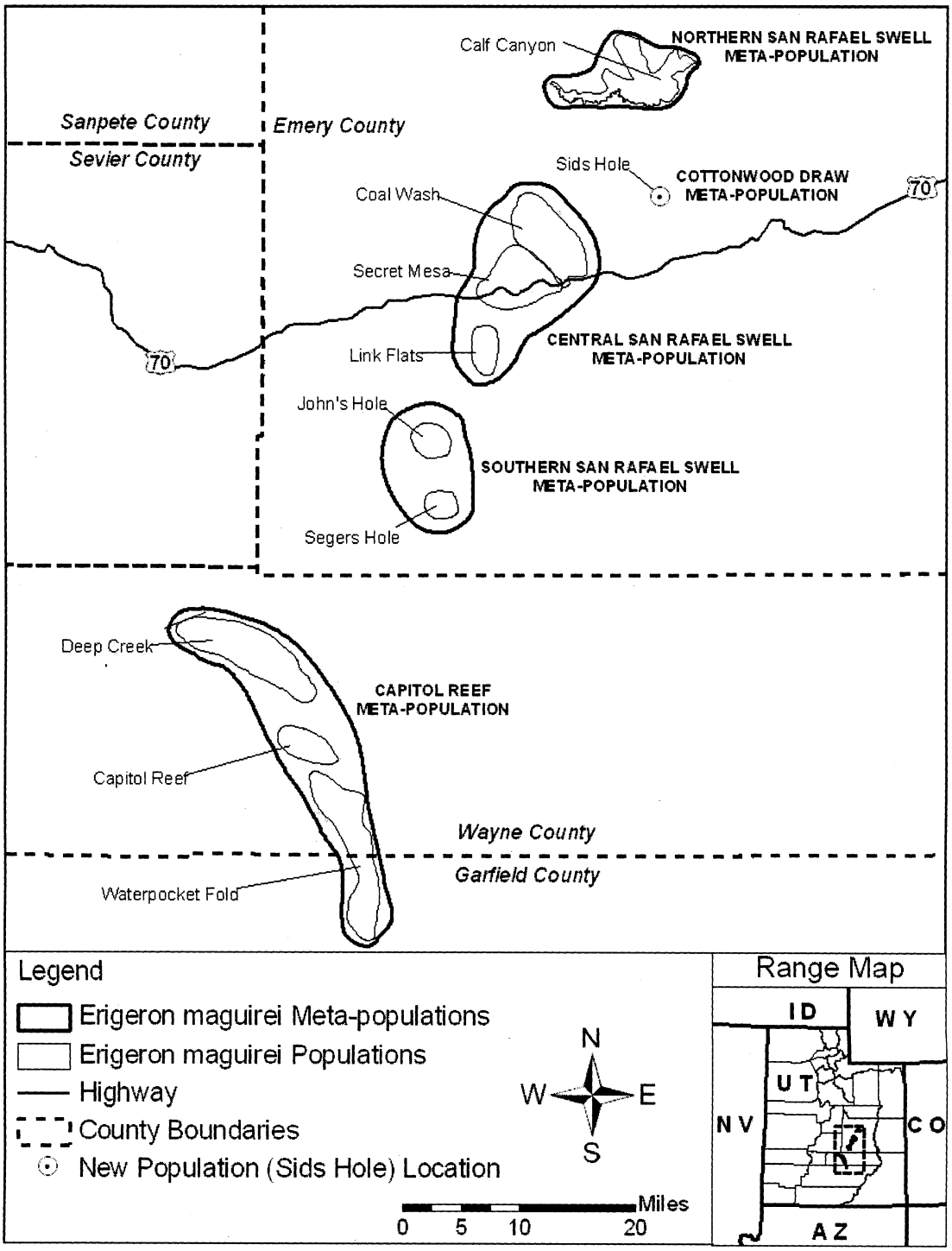

FIGURE 1. ***Erigeron maguirei*** **Range (Clark** ***et al.*** **2006).**

Erigeron maguirei occurs from 5,200 to 8,600 feet (1,585 to 2,621 meters) in elevation (Clark *et al.* 2006, pp. 9–11). The highest plant densities occur on mesa tops between 6,000 and 7,000 feet (1,829 and 2,134 meters) in elevation

(Kass 1990, p. 23; USFWS 1995, p. 2; Clark 2001, p. 3; Clark *et al.* 2006, pp. 9–11).

The distribution of *Erigeron maguirei* includes 10 populations (containing 128 sites) composing 5 meta-populations (Clark *et al.* 2006, p. 8; Ivory 2009a, p. 1; 2009b, p. 1; Clark 2010a, p. 1; Truman 2010, p. 1; Robinson 2010, entire), distributed across the species' range (see Figure 1 above). Populations are defined as groups of occurrence records (sites) located in the same geographic vicinity (Clark 2006b, p. 5; Figure 1). Sites are defined as occurrence locations recorded by one or more researchers over time within an individual population (Clark 2006b, p. 5). Every site is documented by at least one of the following: (1) A herbarium collection record; (2) field survey forms completed by researchers; or (3) a record from the Utah Natural Heritage Program. Meta-populations are comprised of a number of individual populations less than 1.5 miles (2.4 kilometers) apart, typically linked by continuous suitable habitat (Clark 2006b, p. 5; Clark 2006c). Populations within a meta-population interact at some level. For *E. maguirei,* the interaction may be from pollinators traveling between the populations or by wind carrying seeds to other populations. Table 1 provides population size estimates, number of sites, and land ownership of each population.

TABLE 1—ERIGERON MAGUIREI POPULATION INFORMATION

Meta-population	Population	Minimum population estimate (number of known sites) per land owner*					
		BLM	SITLA	USFS	NPS	Total	Percent
Northern San Rafael Swell	Calf Canyon**	500(10)	87(2)			587(12)	0.36
Cottonwood Draw	Sids Hole	60(1)				60(1)	0.04
Central San Rafael Swell	Coal Wash	100(6)	***unkown			100(6)	0.06
	Secret Mesa	9,000(9)	1,000(2)			10,000(11)	6.14
	Link Flats	200(4)	50(1)			250(5)	0.15
Southern San Rafael Swell	John's Hole	300(3)	***unkown			300(3)	0.18
	Segers Hole	100(2)	***unkown			100(2)	0.06
Capitol Reef	Deep Creek			1,500(2)	100,000(29)	101,500(31)	62.31
	Capitol Reef				30,000(15)	30,000(15)	18.42
	Waterpocket Fold				20,000(42)	20,000(42)	12.28
	Totals	10,260(35)	1,137(5)	1,500(2)	150,000(86)	162,897(128)	100.00
	Percent	6.30	0.70	0.92	92.08	100.00	

* BLM = Bureau of Land Management; SITLA = State of Utah School and Institutional Trust Lands Administration; USFS = U.S. Department of Agriculture Forest Service; NPS = National Park Service.
** The Calf Canyon population is the type locality population.
*** Although suitable habitat exists, these SITLA lands have not been surveyed.

The three largest *Erigeron maguirei* populations (Deep Creek, Capitol Reef, and Waterpocket Fold) comprise the Capitol Reef meta-population. Collectively, these three populations contain 93 percent of the known plants including ninety-two percent within Capitol Reef National Park and 1 percent on U.S. Forest Service (USFS) lands (Fishlake National Forest).

The other seven populations (Calf Canyon, Sids Hole, Coal Wash, Secret Mesa, Link Flats, John's Hole, and Segers Hole) are managed primarily by the Bureau of Land Management (BLM). Portions of three of these seven populations (Calf Canyon, Secret Mesa, and Link Flats) occur on State of Utah School and Institutional Trust Lands Administration (SITLA) lands. The Calf Canyon population is the sole population in the Northern San Rafael Swell meta-population; the Sids Hole population is the sole population in the Cottonwood Draw meta-population; Coal Wash, Secret Mesa, and Link Flats comprise the Central San Rafael Swell meta-population; and John's Hole and Seger's Hole populations comprise the Southern San Rafael Swell meta-population.

Erigeron maguirei occurs primarily on sandstone domes on mesa tops and in cracks and crevices of domes and cliffs in the Navajo Sandstone formation (Clark *et al.* 2006, p. 12). It also occurs within steep, narrow, dry, rocky, and sandy canyon or wash bottoms (Cronquist 1947, p. 165; Anderson 1982, pp. 1–2; Heil 1989, pp. 25–26; Kass 1990, p. 22; Harper and Van Buren 1998, p. 1). Populations within canyon bottoms are established from seeds dispersed by wind or overland flow from source populations on the mesa tops (Heil 1989, p. 25; Kass 1990, p. 27; USFWS 1995, p. 2). These canyon populations are generally small compared with those on the mesa tops (Heil 1989, p. 25; Kass 1990, p. 27; USFWS 1995, p. 2).

Erigeron maguirei grows primarily in the Dwarf Mountain Mahogany Slickrock plant community, a community endemic to the Colorado Plateau Region (Heil 1989, p. 23; Clark 2001, pp. 15–16; Clark *et al.* 2006, p. 15). *E. maguirei* also is associated with pinyon juniper-tall shrub, ponderosa pine-tall shrub slickrock pockets, mesic canyon bottoms, mountain shrub, and intermittent riparian communities (Kass 1990, p. 22; Harper and Van Buren 1998, p. 1; Clark 2002, pp. 15–16; Clark *et al.* 2005, p. 7; Clark *et al.* 2006, p. 15).

Flowering occurs from May to June and takes 4 to 6 weeks to go from the small green "button" bud stage to completion of anthesis, when the flower is no longer open and functional (Alston and Tepedino 2005, p. 54; Clark *et al.* 2006, p. 17). It appears that *Erigeron maguirei* lacks self-compatibility, and that pollinators are necessary for cross pollination to occur (Alston and Tepedino 2005, p. 61). Because of the open nature of the flower head, *E. maguirei* is visited by opportunistic insects searching for nectar (Alston and Tepedino 2005, p. 60). Pollinators include various flies, wasps, and bees (Alston and Tepedino 2005, p. 60).

The species is long-lived, has a low mortality rate, and has the ability to replace individuals at a rate that compensates for mortality (Van Buren and Harper 2002, pp. 2–5). Populations are stable (Van Buren and Harper 2002, p. 2).

Recovery

Recovery plans are not regulatory documents and are instead intended to provide guidance to the Service, States, and other partners on methods to minimize threats to listed species, establish goals for long-term conservation of listed species, and define criteria that may be used to determine when recovery is achieved. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more criteria may be exceeded while other criteria may not yet be accomplished. In that instance, we may determine that the threats are minimized sufficiently and the species is robust enough to reclassify from endangered to threatened or to delist. In other cases, recovery opportunities may be discovered that were not known when the recovery plan was finalized. These opportunities may be used instead of methods identified in the recovery plan. Likewise, information on the species may be learned that was not known at the time the recovery plan was finalized. The new information may change the extent that criteria need to be met for recognizing recovery of the species. Recovery of a species is a dynamic process requiring adaptive management that may, or may not, fully follow the guidance provided in a recovery plan.

We approved the Maguire Daisy (*Erigeron maguirei*) Recovery Plan (hereafter referred to as the Recovery Plan) on August 15, 1995 (USFWS 1995, entire). The Recovery Plan outlined three delisting criteria. These criteria, and the status of the species relative to these criteria, are outlined below.

Delisting Criterion One: Locate or establish additional populations. Maintain 20 populations that have been demonstrated to be above minimum viable population levels. Until minimum viable population levels are determined, it is assumed that the minimum viable population level will be about 500 individuals (USFWS 1995, p. ii). At the time the Recovery Plan was written, the species was known from 7 populations (32 sites) with a total population of 5,000 individuals (USFWS 1995, p. 2). To achieve this criterion, the Recovery Plan recommended that land managers inventory suitable habitat to determine with a reasonable degree of accuracy the species' population and distribution (USFWS 1995, pp. ii, 6, 7, 12).

In 1999, the BLM, USFS, and the National Park Service (NPS) entered into an interagency agreement to direct conservation measures for listed and sensitive plant species endemic to central Utah, including *Erigeron maguirei* (BLM *et al.* 1999, entire; Clark 2002, p. 3). The agencies committed funding to survey and monitor *E. maguirei* throughout its range (Clark 2002, p. 3). From 1999 to 2002, approximately 3,521 hectares (8,700 acres) were surveyed for *E. maguirei* on NPS, BLM, and USFS lands (Clark and Clark 1999, p. 45; Clark 2002, p. 13).

The recovery criterion of maintaining 20 viable populations was based on our earlier assumption that the species was distributed in a scattered, disconnected pattern (Clark 2006c, entire). However, the survey efforts identified broader plant distributions and larger population sizes that are evenly distributed across the landscape (Harper and Van Buren 1998, p. 2; Clark and Clark 1999, p. 47; Clark 2001, p. 3; 2002, pp. 13–14; Clark *et al.* 2005, p. 17; Clark *et al.* 2006, p. 17).

We currently know of 10 populations (128 sites) comprising 5 meta-populations, with a total population of 162,897 *Erigeron maguirei* individuals (see Figure 1 and Table 1 above) (Clark *et al.* 2006, p. 16; Ivory 2009a, p. 1; 2009b, p. 1; Clark 2010a, p. 1; Robinson 2010, entire). As previously described, the range of the species covers 390 square miles (1,010 square kilometers) and extends from the San Rafael Swell south through the Waterpocket Fold of Capitol Reef (see Figure 1 above) (Clark *et al.* 2006, p. 17; Clark 2010a, p. 1; Truman 2010, p. 1; Robinson 2010, entire). All three *E. maguirei* populations within the Capitol Reef Meta-Population are linked by contiguous suitable habitat (Clark *et al.* 2006, p. 24). A similar situation exists between populations in each of the three meta-populations within the San Rafael Swell area; suitable habitats are separated by short distances, effectively linking populations (Clark *et al.* 2006, p. 24).

In 2010, the fifth meta-population (Cottonwood Draw) was discovered east of the Central San Rafael Swell meta-population and south of the Northern San Rafael Swell population (see Figure 1 above) (Clark 2010a, p. 1; Truman 2010, p. 1). The Cottonwood Draw meta-population is currently comprised of a single population (Sids Hole). This area was discovered through recent implementation of the post-delisting monitoring protocol. The area has not been fully surveyed or evaluated and may include additional populations or sites, but is generally viewed as less ideal for the species with patchy areas of suitable habitat that currently appear isolated from other sites or populations. While not adding much to the species' overall viability, recent discoveries (since the 2008 proposed rule), such as this one, provide added support for our conclusion regarding the species' overall status.

Overall, the available information demonstrates large, sufficiently connected, and evenly distributed populations and suitable habitats that provide and will continue to provide for the desired long-term species' viability intended by the Recovery Plan. In fact, the 10 populations have more desirable biological attributes than the originally suggested 20 populations in the Recovery Plan. For example, the recovery goal of 20 populations was based on the assumption that the populations were small and widely scattered. The 10 current populations are well connected within 5 meta-populations, and these meta-populations are distributed throughout the range of the species (see Figure 1 and Table 1 above). The habitat is contiguous between populations, thereby increasing the species' robustness. Furthermore, the Recovery Plan called for 20 populations of 500 individuals. This suggests recovery at about 10,000 plants. Today, we know of 162,897 **Erigeron maguirei** individuals, far surpassing the implied numeric target in the Recovery Plan. In addition, the species' population is stable (see **Species Information**). Therefore, the available data demonstrate that the intent of this recovery criterion has been met or exceeded.

Delisting Criteria Two and Three: Establish formal land management designations for these populations that provide long-term, undisturbed habitat for Maguire daisy (USFWS 1995, p. ii). Ensure that Maguire daisy and its habitat are protected from loss of individuals and environmental degradation (USFWS 1995, p. ii). To achieve these criteria, the Recovery Plan recommended we work with our partners to document the presence of, or establish formal land management designations that provide for long-term protection for, Maguire daisy and its habitat (USFWS 1995, pp. ii, 6, 9, 12).

Approximately 85 percent of the species' range occurs on Federal lands with substantial protective measures in place (see Table 2 and Factor D below). For example, the NPS General Management Plan designated Primitive and Threshold Management Zones (Capitol Reef 1998, pp. 27–31); these land designations afford protection to the three largest *Erigeron maguirei* populations by limiting surface disturbance and construction activities. The BLM designated Wilderness Study

Areas (WSAs), Instant Study Areas (ISA), and Areas of Critical Environmental Concern (ACECs) in the approved 2008 Price Field Office Resource Management Plan (RMP) (BLM 2008c, Maps R–5, R–28, and R–29). These land designations afford protection to six *E. maguirei* populations by minimizing habitat degradation and surface disturbances from grazing, mining, mineral lease uses, and right-of-way grants (see Factor D) (BLM 2008c, pp. 41, 129, 131, and 135–137; BLM 2009, entire; Stephens 2009, p. 1). Similarly, off-highway vehicle (OHV) use also is effectively managed to minimize disturbances to plants by eliminating cross-country travel on USFS and BLM lands (USFS 2006b, pp. 123, 260–263; 2008, Tile K11; 2009, Map). OHVs are not allowed in Capitol Reef National Park, which represents the majority of the species' range (see Factor D). More information regarding the protection of *E. maguirei* through land management designations is contained in the Factor D discussion of the **Summary of Factors Affecting the Species.**

TABLE 2—PERCENT OF EACH ERIGERON MAGUIREI POPULATION WITH PROTECTIVE LAND MANAGEMENT DESIGNATIONS BASED ON GIS ANALYSIS

Population	Land ownership	% of range per landowner*	Land management designations	% of landowner range within protective designations
Calf Canyon	BLM	70	San Rafael Canyon ACEC, Mexican Mountain WSA, Sids Mountain WSA.	97
	SITLA	30	None	0
Sids Hole	BLM	**	None	0
Coal Wash	BLM	95	I–70 Scenic ACEC, Sids Mountain WSA	96
	SITLA	5	None	0
Secret Mesa	BLM	95	I–70 Scenic ACEC, Devils Canyon WSA, Sids Mountain WSA.	88
	SITLA	5	None	0
Link Flats	BLM	80	Lucky Strike ACEC, Devils Canyon WSA, Link Flats ISA	36
	SITLA	20	None	0
John's Hole	BLM	95	Muddy Creek ACEC, Muddy Creek WSA	100
	SITLA	5	None	0
Segers Hole	BLM	95	Segers Hole ACEC, Muddy Creek WSA	79
	SITLA	5	None	0
Deep Creek	NPS	95	Primitive & Threshold Management Zone	100
	USFS	5	Proposed Botanical Area	100
Capitol Reef	NPS	100	Primitive & Threshold Management Zone	100
Waterpocket Fold	NPS	100	Primitive & Threshold Management Zone	100

* Populations' ranges within BLM lands were provided by Ivory (2006 and 2007) with the exception of Calf Canyon and Sids Hole; the remaining populations' ranges were estimated based on GIS analysis.
** Unknown.

Additionally, the Interagency Rare Plant Team developed the Central Utah Navajo Sandstone Endemics Conservation Agreement and Strategy (hereafter referred to as the Conservation Strategy) (USFS *et al.* 2006, entire). Although we do not base our delisting decision on the existence of the Conservation Strategy, we believe it will provide for the continued conservation of the species. The Conservation Strategy, signed by the USFS, BLM, NPS, and the Service in September 2006, outlines the procedural provisions under which the Federal agencies will manage *Erigeron maguirei* through 2016 (USFS *et al.* 2006, pp. 24–25). In addition, the Conservation Strategy documents the conservation actions needed to mitigate any potential factors impacting the species and to promote the conservation and perpetuation of *E. maguirei* (USFS *et al.* 2006, pp. 38–47). The Conservation Strategy can be viewed in its entirety at: *http://mountain-prairie.fws.gov/species/plants/maguiredaisy/.* Copies also can be obtained from the Utah Field Office (*see* **FOR FURTHER INFORMATION CONTACT**).

In summary, Federal land management agencies have worked collaboratively to provide for the long-term protection of *Erigeron maguirei* and its habitat. Land management plans, policies, and regulations are in place that provide protection to *E. maguirei.* Based on the above, the intent of Criteria 2 and 3 have been met.

Based on the best available data, we have determined that the intent of all three recovery criteria is met.

Summary of Comments and Recommendations

In our proposed rule (73 FR 28410, May 16, 2008), we requested that all interested parties submit data, comments, new information, or suggestions concerning: (1) Biological information concerning this species; (2) Relevant data concerning any current or likely future threats (or lack thereof) to this species, including the extent and adequacy of Federal and State protection and management that would be provided to the *Erigeron maguirei* as a delisted species; (3) Additional information concerning the range, distribution, population size, and population trends of this species, including the locations of any additional populations of this species; (4) Current or planned activities in the subject area and their possible impacts on this species; and (5) Our draft post-delisting monitoring plan. We accepted comments for 60 days, ending July 15, 2008 (73 FR 28410, May 16, 2008). During the comment period, we received two comment letters representing three organizations.

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270) and the Office of Management and Budget's (OMB) December 16, 2004, Final Information Quality Bulletin for Peer Review, we solicited independent opinions from 10 knowledgeable individuals who have expertise with the species, who are within the geographic region where the species occurs, or who are familiar with the principles of conservation biology. We received

comments from four of the peer reviewers, all of whom are or were employed by Federal agencies. Although we solicited non-Federal academic peer reviewers, these parties did not respond. Peer reviewers provided new information, management guidance recommendations, editorial changes, and clarifications to the species' description.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding the proposed delisting of *Erigeron maguirei.* Substantive comments received during the comment period are addressed below and, where appropriate, incorporated directly into this final rule and the post-delisting monitoring plan.

Issue 1: One commenter expressed concern that SITLA lands are managed for minerals, grazing and recreation, and not for conservation of *Erigeron maguirei.* Isolated SITLA parcels are generally managed in conjunction with the BLM lands for grazing. These SITLA lands also are open for cross-country travel and do not fall into any designated route plan.

Response: Less than 1 percent of the species' plants occur on lands owned and managed by SITLA. Therefore, special management designations on SITLA lands, such as travel route designations, are not essential for the conservation of the species and are not necessary to support the delisting of the species.

Issue 2: One commenter expressed concern with how the post-delisting monitoring plan for the Maguire daisy characterized the status of several of the remote populations. The commenter believed that these small remote sites (less than or near 50 plants) would be seriously impacted by delisting. The commenter also stated that the Calf Canyon population of 50 plants was last visited in 1982, and it is unknown if it still exists.

Response: The draft post-delisting monitoring plan contained information regarding a number of monitoring sites within populations. We believe that the draft post-delisting monitoring plan was confusing with regard to the definitions and use of the terms "population," "site," and "element occurrence." We have now clarified our terminology and have thoroughly reviewed the document to ensure we used the terms properly and consistently throughout the final post-delisting monitoring plan.

Even though some sites contain fewer than 50 individuals, we have little reason to believe these sites are likely to be seriously impacted by delisting. Most of these sites have persisted for long periods of time without noteworthy negative changes in status. The species is long-lived, has a low mortality rate, and has the ability to replace individuals at a rate that compensates for mortality (Van Buren and Harper 2002, pp. 2–5). Populations are stable (Van Buren and Harper 2002, p. 2). Additionally, the species' preferred habitat (cliffs, rock crevices, and sandstone domes on mesa tops) is subject to few threats (*see* Summary of Factors Affecting the Species below). Collectively this suggests these sites are unlikely to be lost.

Even if some sites do suffer negative effects, many of these sites are connected to neighboring sites as part of a larger population and meta-population. For example, the Link Flats population is comprised of a number of sites totaling approximately 250 individuals and is within the San Rafael Swell area, where most suitable habitat occurrences are separated by short distances (Clark *et al.* 2006, p. 24). Meta-population dynamics indicate that although individual sites may be lost, they can be recolonized by seed dispersed from other neighboring sites.

As an added safeguard, land managers plan to carefully monitor one site within each population including some small sites (Service 2010, pp. 7–10). If impacts are observed, population trend monitoring will be expanded to include human impact monitoring (Service 2010, pp. 14–15). If a 40 percent or more decline is observed in a 2-year period at any of the monitoring plots, cooperators will evaluate possible causes of the apparent decline and determine the most appropriate response (Service 2010, p. 16). We believe this is sufficient to ensure few, if any, sites are at serious risk of extirpation.

Furthermore, even if we lost some or many of these small sites, we do not believe the species would qualify as an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered within the foreseeable future throughout all or a significant portion of its range). *Erigeron maguirei* is estimated at 162,897 individuals over a range of about 390 square miles (1,010 square kilometers) with 10 populations (containing 128 sites) composing 5 meta-populations (see Figure 1 and Table 1 above) (Clark *et al.* 2006, p. 16; Ivory 2009a, p. 1; 2009b, p. 1). In our view, these large, connected, and evenly distributed populations and suitable habitats provide for the species' long-term viability. Thus, even in the unlikely event that some or many of these small sites were lost, it would not change our determination.

Regarding the Calf Canyon population, the area was resurveyed in 2009 and again in 2010. These surveys identified 10 sites with at least 500 plants total (Ivory 2009a, p. 1; Ivory 2009b, p. 1; Robinson 2010, entire). The majority of the plants were located on a mesa top in the vicinity of the canyon bottom populations where the species was first described. As the final post-delisting monitoring plan was signed prior to the majority of these sites being known, we are making a minor amendment to the plan to reflect the latest information.

Issue 3: One commenter recommended including a specific due date for the annual post-delisting monitoring report, such as December 1 of each year. The commenter further recommended that we provide a brief and concise summary to the agencies (NPS, BLM, and the USFS) regarding the status and adequacy of the monitoring efforts each year.

Response: We have incorporated these recommendations into the final post-delisting monitoring plan.

Issue 4: One commenter noted that many of the protections provided by ACECs and WSA designations on BLM lands are for the protection and management of lands in general and not specifically for *Erigeron maguirei* populations and habitat. These management restrictions would be in place whether *E. maguirei* is listed or not.

Response: We acknowledge that many land management designations are in place for other resources; however, *Erigeron maguirei* will benefit from habitat being protected in these areas. We have incorporated language into this final rule to address this comment (see Factor D).

Issue 5: One commenter believed that the proposed rule did not fully recognize tar sands development as a threat to this species and does not disclose the number of plants in the Calf Canyon, Secret Mesa, and Link Flats areas within designated tar sands areas. The commenter expressed concern that delisting the species would open up the area for development, and that it appears that we were writing off the populations in this area.

Response: Since the proposed rule was published, the BLM has finalized the Record of Decision and Approved RMP, and the Record of Decision for Oil Shale and Tar Sands Resources to Address Land Use Allocations in Colorado, Utah, and Wyoming and Final Programmatic Environmental Impact Statement (BLM 2008a, entire; 2008c,

entire). The final rule fully discloses the percentages of each population that are susceptible to tar sands development (Calf Canyon (0 percent); Secret Mesa (about 1 percent of the population); and Link Flats (almost 37 percent of the population)). The Link Flats population contains less than 1 percent of all known individuals of the entire *E. maguirei* population. Although tar sands development will affect individuals, the effects are expected to be localized and not reach the level that would compromise the species' viability. Tar sands development is further addressed under Factor A below.

Issue 6: One commenter expressed concern with potential loss of genetic variation through potential impacts from tar sands development in the eastern and northernmost portions of the range.

Response: The potential for genetic isolation is analyzed in this final rule. Based on the close proximity of known populations, connecting habitat between most populations, and available genetic research, the species is not considered threatened by reduced genetic viability. Given the locations of potential development relative to the known distribution of *Erigeron maguirei* populations, we expect impacts to the species to be localized and minor (see Factor A discussion below).

Issue 7: One commenter was concerned that the Conservation Strategy was relied upon as justification for delisting. The commenter opined that the Conservation Strategy is not legally binding and was prepared behind closed doors with no public input whatsoever.

Response: The commenter is correct that the Conservation Strategy is not legally binding. Future implementation of conservation actions is contingent upon funding availability of each Federal entity. However, our decision to remove *Erigeron maguirei* from the List of Endangered and Threatened Plants is not dependent on future actions associated with the Conservation Strategy. Our decision to remove *E. maguirei* from the List of Endangered and Threatened Plants is based on conservation actions already completed, current population levels and their management, and our analysis of threats to the species. The commenter is correct that public input was not sought in the development of the Conservation Strategy; however, public input was not required. The Conservation Strategy is a management guidance document that was prepared and will be implemented by the involved land management agencies. Although public input was not required during developing the Conservation Strategy, implementing specific on-the-ground actions must comply with National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) regulations, which include public comment and public disclosure.

Issue 8: One commenter stated that seven of the nine populations of *Erigeron maguirei* are open to oil and gas development.

Response: Seven of the 10 populations are open to oil and gas leasing (USFS *et al.* 2006, p. 56). The three largest populations (Deep Creek, Capitol Reef, and Waterpocket Fold) on Capitol Reef National Park contain 92 percent of the individuals and occur on lands withdrawn from all mineral exploration and development activities (*see* Table 1 above and Factor D below; USFS *et al.* 2006, p. 56). Six of the remaining seven populations occur predominantly within the Navajo Sandstone formation, which has low potential for oil and gas development (USFS *et al.* 2006, pp. 37 and 56); the newest population occurs in an area that is atypical, where habitat is disjunct (Clark 2010a, p. 1). We have concluded that oil and gas development within *Erigeron maguirei* habitat is unlikely due to the low potential throughout the majority of the occupied habitats. Factor A presents additional analysis of the potential for energy development to affect the species.

Issue 9: One commenter stated that populations within Capitol Reef National Park are not necessarily protected because National Parks are not wildlife or plant sanctuaries, nor are they managed with objectives that are consistent with the protection of rare elements.

Response: More than 92 percent of the individual plants occur within Capitol Reef National Park (see Table 1 above). All *Erigeron maguirei* plants within Capitol Reef National Park are within Capitol Reef Primitive and Threshold Management Zones. These land management designations will provide protection to the species for the foreseeable future. Factor D presents our analysis of how these land management designations will specifically afford protection to the species.

Issue 10: One commenter was concerned that the delisting proposal downplays the significance of the effects of human and livestock trampling. The commenter believes that *Erigeron maguirei* should not be delisted unless cattle grazing is prohibited in the species' habitat.

Response: Eight of the 10 *Erigeron maguirei* populations occur within cattle allotments. However, the plants inhabit areas that are inaccessible to cattle due to steep terrain. Cattle have trailed through one population approximately once every 5 years for the past 100 years. Although cattle trailing can impact individual plants, the population where this activity occurs is stable (Clark *et al.* 2006, pp. 21, 25), and its viability is not affected by this level of impact. The newest population is near a reservoir used by cattle as a watering hole. Although the area experiences impacts from cattle grazing, this population is persisting without special management considerations affording it protection from grazing activities.

At the time of downlisting, we stated that livestock trampling was known to adversely impact individual plants (61 FR 31054; June 19, 1996). Livestock trampling negatively impacts individuals of *Erigeron maguirei* growing in accessible wash bottoms. However, the threat to the species is low because *E. maguirei* prefers cliffs and rock crevices that are inaccessible to livestock (Clark *et al.* 2006, p. 21). Due to habitat preferences of the species, livestock use is no longer a threat (Clark *et al.* 2006, p. 21).

The impact of grazing is analyzed in this final rule. The best available scientific data indicate that grazing does not pose a threat to the species and is unlikely to become a threat in the foreseeable future (Clark *et al.* 2006, p. 21).

Issue 11: One commenter claimed it is disingenuous to conclude that the species is recovered. If the species were to be delisted, it would be because of additional information and investigation, not because it was recovered.

Response: We recognize that this delisting is supported by new information. However, none of this information would be available had it not been due to the recovery efforts of the Interagency Rare Plant Team. The Federal partners that make up the Interagency Rare Plant Team deserve credit for implementing extensive recovery actions that allow us to remove the species from the List of Endangered and Threatened Plants. Without these actions, this species would still be listed.

Also of note, but not critical to our "delisting due to recovery" determination, only species delisted due to recovery are subject to the post-delisting monitoring requirement. We believe such a monitoring period is desirable in that it allows us to track any changes in status post-delisting and respond accordingly.

Summary of Factors Affecting the Species

In making this final determination, we have considered all scientific and commercial information available, which includes information received during our 5-year review (71 FR 17900, April 7, 2006) and the public comment period on our proposed delisting rule (73 FR 28410, May 16, 2008); additional survey data collected in 2008, 2009, and 2010 (Ivory 2008, pp. 1–2; Ivory 2009a, entire; Ivory 2009b, entire; Clark 2010a, p. 1; Truman 2010, p. 1; Robinson 2010, entire); the final BLM RMP; the Final Oil Shale and Tar Sands RMP Amendments to Address Land Use Allocations in Colorado, Utah, and Wyoming and Programmatic Environmental Impact Statement; and additional scientific information from ongoing species' surveys and studies.

Section 4 of the ESA and its implementing regulations (50 CFR 424) set forth the procedures for listing species, reclassifying species, or removing species from listed status. "Species" is defined by the ESA as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered nor threatened for the following reasons: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened (as is the case with *Erigeron maguirei*); or (3) the original scientific data used at the time the species was classified were in error.

A recovered species is one that no longer meets the ESA's definition of endangered or threatened. Determining whether a species is recovered requires consideration of the same five categories of threats specified in section 4(a)(1) of the ESA. For species that are already listed as endangered or threatened, this analysis of threats is an evaluation of both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting and the removal or reduction of the ESA's protections.

A species is "endangered" for purposes of the ESA if it is in danger of extinction throughout all or a significant portion of its range and is "threatened" if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. The "foreseeable future" is the period of time over which events or effects reasonably can or should be anticipated, or trends reasonably extrapolated.

The following analysis examines the five factors affecting, or likely to affect, *Erigeron maguirei* within the foreseeable future.

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

When the species was originally listed, the main threat was loss of habitat due to mining claims for uranium, energy exploration, and off-road vehicle (ORV) recreation (50 FR 36089, September 5, 1985). We address these threats to *Erigeron maguirei* below.

Mineral Exploration and Development Overview

Mineral exploration and development were listed as threats in the *Erigeron maguirei* listing rule, the Recovery Plan, and the downlisting rule (50 FR 36089, September 5, 1985; USFWS 1995, p. 5; 61 FR 31054, June 19, 1996). The original listing (when the population was estimated at 7 individuals) and subsequent downlisting (when the population was estimated at 3,000 individuals) noted as threats existing uranium mining claims, the potential for extraction to begin when market forces change, and mining activities and associated surface disturbances that could directly or indirectly destroy plants or render the habitat unsuitable for the species (50 FR 36089, September 5, 1985; 61 FR 31054, June 19, 1996).

Uranium

Uranium mining began in the western United States in 1871 (Ringholz 1994, p. 2). In 1952, the first noteworthy deposits of uranium ore in Utah were located (Ringholz 1994, p. 2). By the end of 1962, Utah had produced approximately nine million tons of ore (Ringholz 1994, p. 2). The Atomic Energy Commission held ample uranium ore reserves by 1970 and stopped buying uranium (Ringholz 1994, p. 3). When nuclear power plants came on-line in the mid-1970s, a brief second uranium boom was experienced (Ringholz 1994, p. 3). However, foreign competition, Federal regulations, and nuclear fears virtually put an end to domestic uranium mining (Ringholz 1994, p. 3). Substantial ore remains deep underground in Utah, and should prices rise, mining could be resurrected (Ringholz 1994, p. 3). In 2007, uranium prices increased as did mining activity (Hargreaves 2007, pp. 1–2).

Five uranium districts, areas depicting uranium resource development potential, overlap *Erigeron maguirei* populations; three of these districts have low potential, and two have moderate potential (Gloyn *et al.* 2005, Map 216; Clark *et al.* 2006, p. 9). We assume the highest potential districts will be developed first, allowing us to work proactively with other Federal agencies to minimize threats to the species and prevent relisting. A small portion of the Link Flats population (9 percent), a small portion of the Coal Wash population (16 percent), and a large portion (85 percent) of the Segers Hole population overlap uranium districts with moderate potential (Gloyn *et al.* 2005, Map 216; Clark *et al.* 2006, p. 9). Thirteen known uranium mineral locations, specific locations where mining claims exist, overlap the mapped *E. maguirei* populations (Clark *et al.* 2006, p. 16; Utah Geological Survey 2007, Map). Only the Lucky Strike Mine is active (Utah Geological Survey 2007, Map). This mine occurs along the southern edge of the mapped Link Flats population (Central San Rafael Swell Meta-Population) (Clark *et al.* 2006, p. 9; Utah Geological Survey 2007, Map). Operation of the mine will not adversely impact this population because it is located on the periphery of the population and is accessed via an existing road. Of the remaining 12 locations, 7 locations never produced uranium, and 5 locations only reached small production levels (Utah Geological Survey 2007, Map). Eleven of these locations occur on the periphery of the mapped *E. maguirei* populations (Clark *et al.* 2006, p. 16; Utah Geological Survey 2007, Map). The only location that occurs within a mapped population is within the Calf Canyon population (Clark *et al.* 2006, p. 16; Utah Geological Survey 2007, Map). Recent surveys extended the population to encapsulate the area around the mining location (Robinson 2010, p. 7); we were previously unaware of plants occurring in this area.

Uranium is restricted to geologic formations such as the Moss Back Member, Monitor Butte Member, and the Mottled Siltstone Unit of the Chinle Formation. *Erigeron maguirei* does not occur in these formations (Clark *et al.* 2006, p. 20). In addition, most of the *E. maguirei* individuals occur on lands managed by Capitol Reef National Park (92 percent) which are withdrawn from mining exploration and development activities (see Factor D) (Clark *et al.* 2006, p. 21; USFS *et al.* 2006, p. 56). In addition, historic mining activities proved there was not enough ore within Capitol Reef National Park to be worth

mining (NPS 2009, p. 2). If uranium mining were to have any impact on *E. maguirei,* impacts would likely be limited to those associated with the access routes to the desired geologic formation (Clark *et al.* 2006, p. 20; Utah Geological Survey 2007, Map). Existing roads would likely be utilized. The most substantial affects of such use would be impacts to pollinators and impacts from road dust. We believe such impacts, if they occurred at all, would likely occur along the periphery of existing populations, would impact only small portions of known populations and, overall, would not likely impacts on the viability of individual populations or the species. Based on the locations of past exploration, the geologic distribution of uranium, and the limited overlap with the habitat requirements of *E. maguirei,* we do not foresee substantial future impacts from uranium mining to *E. maguirei.*

Gypsum

We did not previously identify gypsum mining as a threat to the species. Only the Deep Creek population in Capitol Reef National Park has a known gypsum occurrence (Utah Geological Survey 2007, Map). However, lands within Capitol Reef National Park are permanently withdrawn from mining exploration and development activities (see Factor D) (Clark *et al.* 2006, p. 21; USFS *et al.* 2006, p. 56). In addition, this gypsum occurrence is located on the periphery of the mapped *Erigeron maguirei* population and within the Primitive Management Zone (Capitol Reef 1998, p. 27; Utah Geological Survey 2007, Map). Travel through this Management Zone is limited to cross-country hiking or horseback riding on unimproved trails and routes (Capitol Reef 1998, pp. 27–29). Based on the lack of gypsum mining occurring in the range of the species, coupled with the land management designations in place affording protection to the species, we do not foresee gypsum mining adversely affecting the species in the foreseeable future.

Oil Shale and Tar Sands Development

Oil shale and tar sands development is not a threat to the species (USFS *et al.* 2006, p. 37). The most geologically prospective oil shale resources do not occur within the range of *Erigeron maguirei* (Clark *et al.* 2006, p. 9; BLM 2008a, p. 11). The most geologically prospective oil shale resources occur in the Uinta Basin of Utah, a distance of approximately 60 air miles (97 kilometers) from the closest population, Calf Canyon (Clark *et al.* 2006, p. 9; BLM 2008a, p. 11). Thus, we do not consider oil shale development a threat to the species. The rest of this section will focus on tar sands resources within the range of the species.

There are 11 Special Tar Sand Areas in Utah (45 FR 76800, November 20, 1980; 46 FR 6077, January 21, 1981; BLM 2008a, p. 23). Of these, only the San Rafael Swell Special Tar Sands Area occurs within the range of *Erigeron maguirei* (Clark *et al.* 2006, p. 9; BLM 2008b, p. 2–49).

Typically, strip mining is the most efficient method of tar sands extraction, but other approaches include the injection of steam or solvents to reduce the oil's viscosity and allow the oil to be pumped out of the well. *Erigeron maguirei* could be impacted as a result of vegetation clearing, habitat fragmentation, alteration of topography, changes in drainage patterns, erosion, sedimentation from runoff, oil and contaminant spills, fugitive dust, injury or mortality of individual plants, human collection, increased human access, spread of invasive plant species, and air pollution (BLM 2008b, pp. 5–62, 5–84, 5–85, 5–98). In addition, we believe the loss and fragmentation of habitat due to the development of tar sands may negatively impact pollinator species.

Portions of the *Erigeron maguirei* mapped populations of Calf Canyon, Sids Hole, Secret Mesa, and Link Flats occur within the San Rafael Swell Special Tar Sand Area (Clark *et al.* 2006, p. 9; BLM 2008b, p. 2–49; BLM 2008d, Map R–23). However, less than 2 percent of the entire species' mapped population areas overlaps lands available for leasing for commercial tar sands development (Clark *et al.* 2006, p. 9; BLM 2008a, entire; 2008b, p. 2–49). In addition, a substantial amount of suitable habitat for the species occurs throughout the three San Rafael Swell meta-populations that has not been surveyed and may be occupied by *E. maguirei,* or may provide additional linkage habitats within these meta-populations (Clark *et al.* 2006, p. 24). Overall, we do not believe that the possible loss or degradation of the small amount of occupied (less than 2 percent) or other suitable habitat would negatively impact the viability of the species.

In summary, we do not anticipate tar sands development to be a threat to *Erigeron maguirei* in the foreseeable future. There is little overlap between leasable lands and the species' distribution. Based on the small amount of area within the species' range (less than 2 percent) that are available for leasing for commercial tar sands development, we do not anticipate that tar sands development will impact the species as a whole in the foreseeable future.

Oil and Gas Exploration and Development

Oil and gas exploration and development were identified as threats in the *Erigeron maguirei* listing rule, the Recovery Plan, and the downlisting rule (50 FR 36089, September 5, 1985; USFWS 1995, p. 5; 61 FR 31054, June 19, 1996). Oil and gas development includes exploration, drilling, production, and reclamation phases (Tribal Energy and Environmental Information Clearinghouse 2010, entire). Surface disturbance may occur throughout all phases of oil and gas development (Tribal Energy and Environmental Information Clearinghouse 2010, entire). Impacts to plant species from surface disturbance may include the direct effects of crushing and reduction in seed bank. Indirect effects to plant species include increased dust and airborne particulates (well pad and road construction), increased habitat fragmentation, changes in pollinator-plant interactions, and increased invasive species composition within and adjacent to suitable habitats.

Lands within Capitol Reef National Park are withdrawn from oil and gas exploration and development (see Factor D) (USFS *et al.* 2006, p. 56). The surrounding BLM and USFS lands are open to oil and gas leasing, but the potential for oil and gas is low in the Navajo Sandstone formation where *Erigeron maguirei* occurs (USFS *et al.* 2006, p. 34).

Oil and gas leases that were issued prior to the 2008 BLM Price Field Office RMP are managed under stipulations that were in effect when the leases were issued (BLM 2008c, pp. 24, 170). Leases issued after the RMP was signed will have the appropriate oil and gas lease stipulations and best management practices applied to prevent, minimize, or mitigate resource impacts (BLM 2008c, pp. 31, 40–42, 128, Appendix R–3, Appendix R–14, Map R–8).

On BLM-administered lands, portions of *Erigeron maguirei* populations occur within the San Rafael Canyon, Interstate 70, Muddy Creek, and Segers Hole ACECs (see Table 2 above) (Clark *et al.* 2006, pp. 9–11; BLM 2008d, Map R–29). All of these ACECs are open to leasing subject to "no surface occupancy" constraints (BLM 2008c, pp. 135–137). Leasing with "no surface occupancy" means that there will be no development or disturbance whatsoever of the land surface, including establishment of wells or well pads, and

construction of roads, pipelines, or powerlines. There are no exceptions to the "no surface occupancy" stipulation within these ACECs (BLM 2008c, Appendix R–3, pp. 1–4). The WSAs with *E. maguirei* populations, including the Sids Mountain, Devils Canyon, and Muddy Creek WSAs, are unavailable to leasing with the exception of mineral lease uses that existed before or on October 21, 1976; however, there are no active leases within these populations in these WSAs (BLM 2008c, pp. 41, 129, and 131; 2009, entire; Stephens 2009, entire).

While limited exploration has occurred, no known oil or gas fields exist within the known *Erigeron maguirei* populations, and the potential for development is low (Automated Geographic Reference Center 2001, database; Clark *et al.* 2006, p. 21; Utah Division of Oil, Gas, and Mining 2006b, Map; USFS *et al.* 2006, p. 34). The only gas field in the vicinity of *E. maguirei* is the Last Chance Gas Field located approximately 7 miles (11 kilometers) west of the Segers Hole population and 6 miles (10 kilometers) north of the Deep Creek population (Automated Geographic Reference Center 2001, database; Chidsey *et al.* 2005, Map 203DM; Clark *et al.* 2006, p. 16; Utah Division of Oil, Gas, and Mining 2006b, Map). Seven exploratory wells were sited within the mapped *E. maguirei* Secret Mesa and Coal Wash populations, but all of the wells have been plugged and abandoned (Clark *et al.* 2006, p. 9; Utah Division of Oil, Gas, and Mining 2006a, database).

Based on the lack of supporting evidence of viable oil and gas fields within the vicinity of *Erigeron maguirei* and the land management designations that afford protections to the species, oil and gas exploration and development is no longer a threat within the foreseeable future.

Recreational Use

Recreational use, including ORVs and human foot traffic, was previously identified as a threat to the species (50 FR 36089, September 5, 1985; USFWS 1995, p. 5; 61 FR 31054, June 19, 1996). At the time of listing, the species was thought to occur primarily in canyon bottoms and was estimated to have a population of seven individuals (50 FR 36089, September 5, 1985). At the time of downlisting, recreation was still a concern due to overall limited abundance (an estimated 3,000 individual plants) (61 FR 31054, June 19, 1996).

Potential impacts from recreational use include trampling and crushing of plants, soil compaction, introduction of exotic species, increased erosion, and increased dust deposition on plants. However, *Erigeron maguirei* is not prone to human recreational disturbance because it grows primarily in cliff crevices and on the sandstone domes on mesa tops (Clark 2002, p. 16). Of 60 *E. maguirei* sites in Capitol Reef evaluated for signs of human impacts (Clark 2002, pp. 12–16), only 2 showed signs of human impacts (in both cases foot traffic was observed at the site) (Clark 2002, pp. 12–16).

More than 92 percent of known *Erigeron maguirei* individuals occur in Capitol Reef National Park, which is closed to ORV use (Clark *et al.* 2006, p. 16). The Fishlake National Forest prohibits cross-country vehicle travel forest-wide (USFS 2006b, p. 263; 2009, p. 2). *E. maguirei* habitat does not occur within 0.5 mile (0.8 kilometer) of classified or potentially designated motorized routes on Fishlake National Forest lands (USFS 2006b, pp. 123, 260–263).

Only 6 percent of all known *Erigeron maguirei* plants occur on lands administered by the BLM. Of these, approximately 89 percent of the mapped population occurs within an ACEC, WSA, or ISA (Kass 1990, p. 23; Clark *et al.* 2006, p. 18; Ivory 2006; BLM 2008d, Map R–29; Robinson 2010, entire) (see Table 2 above). The ISAs are managed the same as WSAs (see discussion under Factor D below) (BLM 1995, p. 1). The ACECs, ISAs, and WSAs that contain *E. maguirei* are either closed to motorized vehicles or use is limited to designated roads and trails (Clark *et al.* 2006, p. 20; BLM 2008c, pp. 132, 135–139, Map R–17).

In summary, we do not believe that recreational use is a threat to the species. The plant's preferred habitat of cliff crevices and domes naturally separates it from most human use areas. In addition, ORV restrictions across much of the species' range reduce the potential for recreational vehicles to impact plants.

Summary of Factor A: Mineral exploration and development and recreational use were listed as threats to *Erigeron maguirei* in the species' listing rule, the Recovery Plan, and the downlisting rule (50 FR 36089, September 5, 1985; USFWS 1995, p. 5; 61 FR 31054, June 19, 1996). The species occurs predominantly within the Navajo Sandstone formation, which has low potential for oil and gas development and uranium mining (USFS *et al.* 2006, p. 37). Most mineral resources (like gypsum, tar sands, and oil shale) occur on the periphery of mapped *E. maguirei* populations and, therefore, are not likely to meaningfully impact any of the populations.

Recreational use, particularly hiking and motorized vehicle use, occurs throughout the species' range. However, land management protections are in place throughout most of the species' range, with the primary result of restricting vehicle use to designated roads and trails, thus minimizing impacts to the plants and their habitat. In addition, we now know (*see* Species Information) that *Erigeron maguirei* grows primarily in crevices and on domes, away from the majority of recreational traffic.

While potential impacts to individuals could occur when either accessing the mineral resources or during recreational use, these activities are considered unlikely to materialize in a meaningful way in the foreseeable future, would be limited to small periphery portions of populations, and therefore would not reduce the long-term viability of any of the populations. In addition, land management designations, which have been discussed briefly in this section and will be discussed later under Factor D, will continue to provide protections for *Erigeron maguirei* and its habitat in the foreseeable future.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Erigeron maguirei is not a highly collected or sought after species. We know of only one group that propagated *E. maguirei* for private use by rock garden enthusiasts (USFS *et al.* 2006, p. 35; Clark 2007, p. 1), but this group is no longer offering plants for sale (Megown 2007, p. 1). Unauthorized plant and seed collection has not been documented for this species (USFS *et al.* 2006, p. 35). We do not believe overutilization is a current or foreseeable threat to the species.

C. Disease or Predation

No diseases are known to impact *Erigeron maguirei.* Therefore, disease is not a current or foreseeable threat to the species.

At the time of listing, we believed that predation due to cattle grazing (or herbivory) had reduced the species' distribution (50 FR 36089, September 5, 1985; 61 FR 31054, June 19, 1996; Harper and Van Buren 1998, p. 2). At that time, only a few *Erigeron maguirei* were known to occur at the upper ends of canyons on sandstone ledges or among boulders. Because the species had historically been documented in canyon bottoms, the plants found on ledges and boulders were thought to be

remnants within marginal habitats. It was thought that grazing in the canyon bottoms had reduced the distribution of the plant to these marginal habitats (50 FR 36089, September 5, 1985).

However, we now know that *Erigeron maguirei* plants are much more widely distributed (see Species Information). Preferred habitat includes cliffs, rock crevices, and sandstone domes on mesa tops that are inaccessible to livestock (Kass 1990, p. 27; USFWS 1995, p. 2; Clark 2001, p. 15; Clark *et al.* 2005, pp. 12, 22, 24; Clark *et al.* 2006, pp. 21–22; USFS *et al.* 2006, p. 56).

The majority of *Erigeron maguirei* populations are thus relatively secure from predation by livestock grazing due to their known habitat preferences (Kass 1990, p. 28; USFWS 1995, p. 5; 61 FR 31054, June 19, 1996). Although 8 of the 10 *E. maguirei* populations occur within cattle allotments, 7 of these populations are inaccessible to cattle grazing due to terrain conditions (USFS *et al.* 2006, p. 56). The eighth population is the newly discovered population at Sids Hole. Cattle use a nearby reservoir as a watering hole. Although the area experiences impacts from cattle grazing, this population is persisting without special management considerations that afford it protection from grazing activities. Of the two populations that are not within an allotment, the Waterpocket Fold population in Capitol Reef, estimated at approximately 20,000 individuals on 42 sites, has a history of cattle trailing (USFS *et al.* 2006, p. 56). Cattle trailing, or moving cattle through the area, occurred at this site about once every 5 years for the past 100 years (Clark *et al.* 2006, pp. 21, 25). Cattle trailing has impacted, and is expected to continue to impact, only a few individual plants (Clark *et al.* 2006, pp. 21, 25); however, those impacts are not at a level that effects the species' viability.

In summary, grazing is no longer a threat to the species, nor is it likely to become one within the foreseeable future. The species has a much broader distribution than originally thought, and the plant prefers cliffs, crevices, and sandstone domes on mesa tops that are generally inaccessible to livestock.

D. The Inadequacy of Existing Regulatory Mechanisms

Prior to the species' 1985 listing, no Federal or State laws protected *Erigeron maguirei* (50 FR 36089, September 5, 1985), and its known distribution was limited to Calf Canyon, Utah, and its two side canyons. As previously described, implementation of specific recovery actions and surveys have resulted in and documented many more *E. maguirei* individuals, sites, and populations than were previously known. Substantial land management protections are in place across the vast majority of the species' range.

Over 99 percent of known *Erigeron maguirei* plants occur on Federal lands managed by Capitol Reef National Park (more than 92 percent), BLM Price Field Office (6 percent), and Fishlake National Forest (1 percent) (see Table 1 above) (Clark *et al.* 2006, p. 16). All three of these agencies have land management designations in place that afford the species protection. Less than 1 percent of the known population occurs on lands administered by SITLA, where no protections for *E. maguirei* exist (Clark *et al.* 2006, p. 16).

National Parks are administered under the provisions of the Organic Act of 1916 (16 U.S.C. 1, 2, 3, and 4), as amended and supplemented. The Organic Act specifies that the NPS will "promote and regulate the use of the Federal areas known as national parks, monuments, and reservations * * * which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

As discussed above under Factor A, mineral exploration and development, recreational use, and grazing were listed as threats in the *Erigeron maguirei* listing rule, the Recovery Plan, and the downlisting rule (50 FR 36089, September 5, 1985; USFWS 1995, p. 5; 61 FR 31054, June 19, 1996). Capitol Reef National Park, which contains more than 92 percent of the *Erigeron maguirei* individuals, has land management policies in place that afford protection to the species. The 1976 Mining in the Parks Act (16 U.S.C. 1901 *et seq.*), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*), and the Clean Air Act of 1977, as amended, (42 U.S.C. 7401 *et seq.*) provided tools for parks to remove and prevent mining and drilling ventures (NPS 2002, p. 14). All mining claims within Capitol Reef National Park were either declared invalid or were nullified by 1986 (NPS 2002, p. 2). By the end of the 1980s, oil and gas leases were also either eliminated or suspended (NPS 2002, p. 2). All national parks are now closed to new federal mineral leasing (NPS 2006, p. 118). Capitol Reef's 1998 Final General Management Plan Development Concept Plan designates Primitive and Threshold Management Zones within the Park (Capitol Reef 1998, pp. 27–31). All Capitol Reef *E. maguirei* sites are located within these Management Zones (Clark 2006a, entire). No off-road or off-trail recreational use is allowed within the Park within these zones. In addition, grazing is not allowed within either of these zones (Capitol Reef 1998, pp. 28–31). In order for Capitol Reef National Park lands to be made available for activities that were removed (*i.e.,* mining and grazing), Congress would have to change the laws which currently govern Capitol Reef National Park.

The Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) is the primary Federal law governing most land uses on BLM lands. Section 102(a)(8) of the Federal Land Policy and Management Act states public lands will be managed, in part, to provide protection to ecological and environmental resources. The BLM Manual 6840 directs BLM to manage habitat for sensitive species in a manner that will ensure that all actions authorized, funded, or carried out by the BLM do not contribute to the need for the species to become listed (BLM 2008c, p. 80). Typically, this means the impacts to these species are considered during project planning stages and conservation measures may be included at the discretion of agency biologists.

The BLM's RMPs are the basis for all of its actions and authorizations involving BLM-administered lands and resources. The RMPs establish allowable resource uses, general management practices, program constraints, and other parameters of project design (43 CFR 1601.0–5(n)). These plans provide a framework and programmatic guidance for site-specific activity plans. The approved RMP also incorporates resource protection measures and recommended "Best Management Practices" to maintain, protect, and enhance habitats that will support a diversity of non-listed sensitive fish, wildlife, and plant species (BLM 2008c, p. 34). These measures vary between State and field offices.

The BLM Price Field Office RMP was approved in October 2008 (BLM 2008c). *Erigeron maguirei* is provided protection from mineral exploration and development, and recreational use, through land use planning decisions in this RMP (BLM 2008c). A total of 6 percent of all *E. maguirei* populations occur on BLM lands. Of these, approximately 89 percent are within WSAs, ISAs, and/or ACECs (see Table 2 above) (Kass 1990, p. 23; Clark *et al.* 2005, pp. 16 and 19; Ivory 2006, entire; 2007, entire; BLM 2008d, Map R–28).

On BLM lands, WSAs are managed according to the Interim Management Policy for Lands under Wilderness Review (BLM 1995, entire; BLM 1976,

entire) until Congress either designates them into the National Wilderness Preservation System or releases them from wilderness study for other purposes (BLM 1976, p. 1; 2008c, p. 131). The WSAs must be managed so as not to impair their suitability for preservation as wilderness (BLM 1976, p. 2). The WSAs are unavailable to leasing with the exception of mineral lease uses that existed before or on October 21, 1976; however, as discussed under Factor A, there are no active leases within these populations in these WSAs (BLM 2008c, pp. 41, 129, and 131; 2009, entire; Stephens 2009, entire). With the exception of four routes within Sids Mountain WSA, all WSAs are closed to motorized travel (BLM 2008c, pp. 22, 132). All *E. maguirei* individuals and habitat within these areas will be afforded protection from recreational use.

Although these ACECs were not identified specifically to protect *Erigeron maguirei,* their associated land use management provides indirect protection for the plant. For example, the San Rafael Canyon, Interstate 70, and Segers Hole ACECs were designated for their scenic values (BLM 2008c, pp. 135, 137, 139); Muddy Creek ACEC was designated for cultural, historic, and scenic values (BLM 2008c, p. 136); and the Lucky Strike ACEC was designated for its historic value (BLM 2008c, p. 141). The management prescriptions for each of these ACECs are discussed below.

The ACECs are open to leasing subject to "no surface occupancy" constraints (BLM 2008c, pp. 135–137). Leasing with "no surface occupancy" means that there will be no development or disturbance whatsoever of the land surface, including establishment of wells or well pads, and construction of roads, pipelines, or powerlines. There are no exceptions to the "no surface occupancy" stipulation within these ACECs (BLM 2008c, Appendix R–3, pp. 1–4). The ACECs also are either closed to OHV use or OHV use is limited to existing routes and trails. Although these ACECs were not specifically designated for protecting *E. maguirei,* the species will be benefited by the restrictions on surface disturbances (see discussion under Factor A above).

The National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*) directs national forests to manage habitat to maintain viable populations of existing native and desired nonnative vertebrate species in habitat distributed throughout their geographic range on National Forest System lands (USFS 1976, entire). In 1983, the U.S. Department of Agriculture Departmental Regulation 9500–4 provided further direction to the USFS, expanding the protection requirements of the National Forest Management Act to include plant species (USDA 1983, p. 2).

Erigeron maguirei was not known to occur on USFS lands in 1986. Thus, the existing Fishlake Land Management Plan does not identify *E. maguirei* as occurring within the National Forest (USFS 1986). *E. maguirei* was discovered on USFS lands in 1999 (Clark 2010b, p. 1). Less than 1 percent of all known *E. maguirei* plants occur on USFS lands. Approximately 33 percent of the current mapped range of *E. maguirei* on USFS lands is designated as a Semi-Primitive Non-Motorized. The Semi-Primitive Non-Motorized designation means that recreational use is limited to non-motorized access, such as hiking or horseback riding. This designation, although not specifically designated for protecting *E. maguirei,* will benefit the species by limiting recreational use impacts (*see* discussion under Factor A above). In December 2006, the Fishlake National Forest finalized their Off-Highway Vehicle Route Designation Project, providing protections for the area in which *Erigeron maguirei* occurs (USFS 2006a). Under this plan, motorized routes on Fishlake National Forest lands cannot occur within 0.5 mile (0.8 kilometer) of the Deep Creek population (USFS 2006b, pp. 123, 260–263). The Fishlake National Forest prohibits cross-country vehicle travel forest-wide. This prohibition provides protection to *E. maguirei* from recreational use as described above under Factor A (USFS 2006b, p. 263; 2009, p. 2).

The portion of the species' range owned by SITLA does not have any special management to benefit *Erigeron maguirei.* The SITLA's mission is to administer their land to provide funding for Utah's educational system and other State beneficiaries (SITLA 2009, p. 4). They do not manage their lands for the conservation benefit of rare species. However, less than 1 percent of known *E. maguirei* plants occur on SITLA lands (*see* Table 2). Known sites on SITLA lands are in suitable habitats adjacent to populations on Federal lands and make up a small portion of known populations (see Table 2). Therefore, we do not believe that the lack of management on SITLA lands is a threat to the species.

Summary of Factor D: We find that regulatory mechanisms related specifically to land management are sufficient for avoiding or mitigating the few potential factors that could impact *Erigeron maguirei* individuals (population-level impacts are unlikely from any factor), as discussed above under Factors A and C. Federal land management agencies have worked collaboratively since the species' listing to provide for the long-term protection of *E. maguirei* and its habitat. Land management plans, policies, and regulations providing protection to *E. maguirei* include: (1) Capitol Reef Primitive and Threshold Management Zones; (2) BLM WSAs, ISAs, and ACECs; and (3) USFS Semi-Primitive Non-motorized designation. These land management designations have adequately protected *E. maguirei* individuals and habitat in the past, and are expected to continue to do so in the foreseeable future, by limiting and eliminating surface disturbing activities. While less than 1 percent of the species occurs on private land where there are no protections, the species continues to persist in those areas. The threat due to inadequacy of existing regulatory mechanisms is no longer applicable.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

The 1985 final listing rule postulated that the genetic viability of *Erigeron maguirei* was greatly reduced due to the species' small population size, geographic separation, and reproductive isolation (50 FR 36089, September 5, 1985). The June 19, 1996, final rule reclassifying *E. maguirei* to threatened identified inbreeding and loss of genetic variability as potential threats because of the species' small, reproductively isolated populations (61 FR 31054, June 19, 1996).

As discussed previously, implementation of recovery actions, specifically survey efforts, have increased our knowledge of the species' population status and distribution. We now know that *Erigeron maguirei* is widely distributed and occurs in much greater numbers than previously thought (*see* Species Information). Newly discovered sites indicate that there is substantial habitat and population connectivity across the species' range, thus reducing reproductive isolation and inbreeding threats (50 FR 36089, September 5, 1985; USFWS 1995, p. 5; 61 FR 31054, June 19, 1996; Clark *et al.* 2006, p. 24; Ivory 2009a, p. 1; 2009b, p. 1; Clark 2010a, p.1; Truman 2010, p. 1; Robinson 2010, entire). For example, populations in the Capitol Reef and San Rafael areas are separated by short distances and connected by contiguous habitat, allowing genetic interchange across the species' range (Van Buren 1993, p. 1; Van Buren and Harper 2002, p. 1; Clark *et al.* 2006, p. 24). Due to the number

of populations and individuals of *E. maguirei* found and the inter-connectivity of the habitat, the species is no longer considered threatened by a loss of genetic variability.

Pesticide use occurs within Capitol Reef National Park's Fruita Rural Historic District, a cultural area on the National Register of Historic Places (Alston and Tepedino 2005, p. 10). Management includes spraying apple and pear trees with the pesticide Phosmet to control the codling moth (*Cydia pomonella*) (Alston and Tepedino 2005, p. 10). This pesticide does not appear to affect productivity of *Erigeron maguirei* plants (Alston and Tepedino 2005, pp. 11, 61). No other routine pesticide use is known to occur within the range of *E. maguirei.* Thus, the best scientific data available indicate the current use of the pesticides is not a threat to *E. maguirei.*

When the Recovery Plan was written, the demographic stability of the various populations was not known (USFWS 1995, p. 5). Studies have since concluded that *Erigeron maguirei* is relatively long-lived with low mortality (Van Buren and Harper 2002, p. 2). Furthermore, the available science indicates that the species has the ability to replace individuals at a rate that compensates for mortality (Van Buren and Harper 2002, p. 5). Thus, the available data alleviate the concern for demographic stability.

According to the Intergovernmental Panel on Climate Change (IPCC) (IPCC 2007, p. 2), "[w]arming 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. 2).

The IPCC (2007, p. 7) predicts that changes in the global climate system during the 21st century will be larger than those observed during the 20th century. For the next 2 decades a warming of about 0.2 °C (0.4 °F) per decade is projected (IPCC 2007, p. 7). Afterward, temperature projections increasingly depend on specific emission scenarios (IPCC 2007, p. 7). 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. 8). The IPCC says it is very likely hot extremes, heat waves, and heavy precipitation will increase in frequency (IPCC 2007, p. 8). However, the confidence in predicting changes in precipitation is less than that for predicting changes in temperature (IPCC 2007, p. 600). The confidence in predicting accurate changes in precipitation levels is further reduced when applying the model to small, localized areas (IPCC 2007, pp. 601, 697). Therefore, although many semi-arid areas like the western United States will suffer a decrease in water resources due to climate change, we cannot be certain at this time how the change will occur over the range of *Erigeron maguirei* (IPCC 2007, pp. 8, 601, 697). Below we analyze possible impacts, given these uncertainties, to the extent we understand them and are able to reasonably project.

Climate change could potentially impact *Erigeron maguirei* or its pollinators, although the specific impacts of altered temperature and precipitation regimes are unknown. Rare plants in the Southwest tend to have fewer individuals during drought-related circumstances (Hughes 2009, entire). Long-term demographic monitoring produced conflicting results; some monitoring plots experienced higher mortality rates during drought years while others did not (Van Buren and Harper 2002, pp. 2–6). While we do not know the long-term response of the species to changes in climatic conditions, we believe impacts will be minimal as *E. maguirei* is a desert plant adapted to hot temperatures and little rainfall based on the life history and habitat requirements of the species. The Interagency Plant Team will continue to monitor the species and be able to identify climate change concerns in the future, if they occur. If additional trend monitoring is warranted past the initial 10-year period to address potential impacts from climate change, monitoring frequency and intensity may be reduced (USFWS 2010, pp. 13–14)).

Two of four Capitol Reef sites monitored between 1992 and 2001 experienced flash flood events (Van Buren and Harper 2002, p. 1). At one site, a flash flood event likely resulted in 48 plants being lost (Van Buren and Harper 2002, p. 2). However, the species is long-lived and shows an ability to replace individuals lost to periodic flooding (Van Buren and Harper 2002, pp. 4–5). The species occurs primarily on sandstone domes on mesa tops and in cracks and crevices of domes and cliffs (Clark *et al.* 2006, p. 12). The primary habitat of the species is not prone to flooding. Individuals that are susceptible to flooding occur in canyon bottoms, like the two sites mentioned above, which were established from seeds dispersed by wind or overland flow from source populations on the mesa tops (Heil 1989, p. 25; Kass 1990, p. 27; USFWS 1995, p. 2). Flooding may affect these individuals; however, canyon populations are small compared to those on the mesa tops (Heil 1989, p. 25; Kass 1990, p. 27; USFWS 1995, p. 2). Therefore, flood events possessing the potential to meaningfully impact *Erigeron maguirei* populations are unlikely in the foreseeable future.

Summary of Factor E: Based on the available information, reduced genetic variability, inbreeding posed by geographic separation and reproductive isolation, the use of Phosmet as an insecticide in the Capitol Reef's Fruita Rural Historic District, climate change, and flooding events do not threaten *Erigeron maguirei* in all or a significant portion of the range currently or within the foreseeable future.

Conclusion of Five-Factor Analysis

As required by the ESA, we considered the five potential threat factors to assess whether *Erigeron maguirei* is endangered or threatened throughout all or a significant portion of its range. When considering the listing status of the species, the first step in the analysis is to determine whether the species is in danger of extinction throughout all of its range. If this is the case, then the species is listed or remains listed in its entirety. For instance, if the threats to a species are acting only on a portion of its range, but they are at such a large scale that they place the entire species in danger of extinction, we would list or continue to list the entire species.

We carefully assessed the best scientific and commercial data available and determined there is no information to suggest the species is either in danger of extinction throughout all of its range or likely to become endangered in the foreseeable future throughout all its range. Recovery efforts have identified approximately 162,897 *Erigeron maguirei* individuals over an estimated range of 390 square miles (1,010 square kilometers) with 10 populations (containing 128 sites) composing 5 meta-populations (see Figure 1 and Table 1 above) (Clark *et al.* 2006, p. 16; Ivory 2009a, p. 1; 2009b, p. 1; Clark 2010a, p. 1; Truman 2010, p. 1; Robinson 2010, entire). This represents a substantial increase from the time of listing in 1985, when the species was known from 7 individuals in the Calf Canyon population (50 FR 36089, September 5, 1985), and from 1996 when the species was downlisted to threatened and had a population

estimate of approximately 3,000 plants (61 FR 31054, June 19, 1996). Today, the species occurs in large, connected, and well-distributed populations within substantial suitable habitat. Current populations appear stable, threats to the species are not likely to impact the species in a meaningful way, and land management protections are in place. We believe the species' long-term viability is assured. Thus, the species is not currently and is not likely to again become endangered or threatened in all of its range.

Having determined that *Erigeron maguirei* does not meet the definition of endangered or threatened throughout all of its range, we must next consider whether there are any significant portions of its range that are in danger of extinction or are likely to become endangered in the foreseeable future. A portion of a species' range is significant if it is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the species.

Applying the definition described above, we first address whether any portions of the range of *Erigeron maguirei* warranted further consideration. We evaluated *E. maguirei's* range in the context of whether any potential threats are concentrated in one or more areas of the range, such that if there were concentrated impacts, those populations might be threatened, and further, whether any such population might constitute a significant portion of the range. The potential threat factors we evaluated for possible geographic concentration were the most substantial factor(s) affecting the species. In this case, we evaluated mineral exploration and development and recreational use.

We noted that, as discussed above under Factor A, there are several small geographic areas where localized mineral extraction activities remain as a potential threat in the foreseeable future. However, we concluded that these areas do not warrant further consideration because such activities are unlikely to materialize in a meaningful way and if they do, would be limited to small areas on the periphery of populations. Therefore, there is no substantial information that *Erigeron maguirei* in these areas are likely to become in danger of extinction in the foreseeable future. These areas are too small to impact the viability of the individual populations, meta-populations, or the species.

As discussed above under Factor A, recreational use, particularly hiking and motorized vehicle use, occurs throughout the species' range. However, land management protections are in place throughout most of the species' range, with the primary result of restricting vehicle use to designated roads and trails, thus minimizing impacts to the plants and their habitat. We concluded that impacts from recreational use are not likely to materialize in a meaningful way in the foreseeable future, would be limited to small periphery portions of populations (*e.g.,* SITLA lands), and would not reduce the long-term viability of any of the populations. Therefore, there is no substantial information that *Erigeron maguirei* is being impacted in any area to the extent that population is in danger of extinction in the foreseeable future.

In summary, we have determined that none of the existing or potential threats, either alone or in combination with others, are likely to cause *Erigeron maguirei* to become in danger of extinction within the foreseeable future throughout all or any significant portion of its range. On the basis of this evaluation, we are removing *E. maguirei* from the List of Endangered and Threatened Plants (50 CFR 17.12).

Effect of This Rule

This rule will revise 50 CFR 17.12(h) to remove *Erigeron maguirei* from the List of Endangered and Threatened Plants. Because no critical habitat was ever designated for this species, this rule will not affect 50 CFR 17.96. Once this species is removed from the List of Endangered and Threatened Plants, ESA protection will no longer apply. Removal of *E. maguirei* from the List of Endangered and Threatened Plants will relieve Federal agencies from the need to consult with us to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of this species. Delisting *E. maguirei* is expected to have positive effects in terms of management flexibility for the State and Federal governments. Federal agencies will continue to implement management plans to conserve *E. maguirei* and its habitat.

Post-Delisting Monitoring

Section 4(g)(1) of the ESA requires us to monitor for at least 5 years species that are delisted due to recovery. Post-delisting monitoring refers to activities undertaken to verify that a species delisted due to recovery remains secure from the risk of extinction after the protections of the ESA no longer apply. The primary goal of post-delisting monitoring is to monitor the species so that its status does not deteriorate, and if a decline is detected, to take measures to halt the decline so that proposing it as endangered or threatened is not again needed. If at any time during the monitoring period, data indicate that protective status under the ESA should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing.

Section 4(g) of the ESA explicitly requires cooperation with the States in development and implementation of post-delisting monitoring programs. In early 2007, we asked the State of Utah to be a cooperator in post-delisting monitoring. In a letter dated March 6, 2007, the State suggested their participation in post-delisting monitoring was unnecessary (Harja 2007). We agree with the State's conclusion as the vast majority of the known individual plants (over 99 percent) occur on Federal land.

We have finalized a Post-Delisting Monitoring Plan (Plan) for *Erigeron maguirei* (USFWS 2010, entire). The Plan: (1) Summarizes the species' status at the time of delisting; (2) defines thresholds or triggers for potential monitoring outcomes and conclusions; (3) lays out frequency and duration of monitoring; (4) articulates monitoring methods including sampling considerations; (5) outlines data compilation and reporting procedures and responsibilities; and (6) depicts a post-delisting monitoring implementation schedule, including timing and responsible parties. The Plan was modeled after the Conservation Strategy and incorporated the Maguire Daisy Survey Protocol developed and tested by the Interagency Rare Plant Team (Clark 2006b, entire).

Although section 4(g)(1) of the ESA requires us to monitor the species for a period of only 5 years, signatories to the Plan have committed to monitor the species for a period of at least 10 years. After 10 years of monitoring following protocols stated in the Plan, all available data on this species will be reviewed to determine whether there are any data gaps that need to be addressed. If significant data gaps are found, the Interagency Rare Plant Team will recommend to USFWS management whether demographic monitoring or additional population trend monitoring would be valuable.

National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.)

We have determined that an Environmental Assessment or an Environmental Impact Statement, as

defined under the authority of the NEPA of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the ESA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

The OMB regulations at 5 CFR part 1320 implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The OMB regulations at 5 CFR 1320.3(c) define a collection of information as the obtaining of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, 10 or more persons. Furthermore, 5 CFR 1320.3(c)(4) specifies that "ten or more persons" refers to the persons to whom a collection of information is addressed by the agency within any 12-month period. For purposes of this definition, employees of the Federal government are not included. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

This rule does not contain any collections of information that require approval by OMB under the Paperwork Reduction Act. As proposed under the Post-Delisting Monitoring section above, *Erigeron maguirei* populations will be monitored by Capitol Reef, Fishlake National Forest, and the BLM Price field office in accordance with the Conservation Strategy. We do not anticipate a need to request data or other information from 10 or more persons during any 12-month period to satisfy monitoring information needs. If it becomes necessary to collect information from 10 or more non-Federal individuals, groups, or organizations per year, we will first obtain information collection approval from the OMB.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this rule is not expected to significantly affect energy supplies, distribution, or use, this action is not a significant energy action and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited in this document is available upon request from the Field Supervisor, Utah Field Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are staff members located at the Utah Field Office, U.S. Fish and Wildlife Service, West Valley City, Utah (*see* **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

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

PART 17—[AMENDED]

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

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

§ 17.12 [Amended]

■ 2. Amend § 17.12(h) by removing the entry for "*Erigeron maguirei*" under "FLOWERING PLANTS" from the List of Endangered and Threatened Plants.

Dated: January 3, 2011.

Gregory E. Siekaniec,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–1044 Filed 1–18–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910131362–0087–02]

RIN 0648–XA156

Fisheries of the Exclusive Economic Zone Off Alaska; Sculpins, Sharks, Squid, and Octopus 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 sculpins, sharks, squid, and octopus in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2011 total allowable catch (TAC) of sculpins, sharks, squid, and octopus in the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), January 13, 2011, through 2400 hrs, A.l.t., December 31, 2011.

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.

The 2011 TAC of sculpins, sharks, squid, and octopus in the GOA is 4,500 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) and (d)(1)(ii)(B), the Regional Administrator has determined that the 2011 TAC of sculpins, sharks, squid and octopus in the GOA will be taken as incidental catch in directed fishing for other species. Therefore, the Regional Administrator is establishing a directed fishing allowance for sculpins, sharks, squid and octopus of 0 mt. In accordance with 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for sculpins, sharks, squid and octopus in 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 sculpins, sharks, squid, and octopus in 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 January 12, 2011.

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: January 13, 2011.

James P. Burgess,

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

[FR Doc. 2011–1006 Filed 1–13–11; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910131362–0087–02]

RIN 0648–XA155

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Non-American Fisheries Act Crab Vessels Harvesting 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 non-American Fisheries Act (AFA) crab vessels that are subject to sideboard limits harvesting 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 A season allowance of the 2011 Pacific cod sideboard limit established for non-AFA crab vessels harvesting Pacific cod for processing by the inshore component in the Central Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), January 14, 2011, through 1200 hrs, A.l.t., September 1, 2011.

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 A season allowance of the 2011 Pacific cod sideboard limit established for non-AFA crab vessels that are subject to sideboard limits harvesting Pacific cod for processing by the inshore component in the Central Regulatory Area of the GOA is 835 metric tons (mt), as established by the final 2010 and 2011 harvest specifications for groundfish of the GOA (75 FR 11749, March 12, 2010) and inseason adjustment (76 FR 469, January 5, 2011).

In accordance with § 680.22(e)(2)(i), the Administrator, Alaska Region, NMFS (Regional Administrator) has determined that the A season allowance of the 2011 Pacific cod sideboard limit established for non-AFA crab vessels harvesting Pacific cod for processing by the inshore component in the Central Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a sideboard directed fishing allowance of 825 mt, and is setting aside the remaining 10 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 680.22(e)(3), the Regional Administrator finds that this sideboard directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by non-AFA crab vessels that are subject to sideboard limits harvesting Pacific cod for processing by the inshore component in the Central Regulatory Area 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 sideboard directed fishing closure of Pacific cod for non-AFA crab vessels that are subject to sideboard limits harvesting 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 January 12, 2011.

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 § 680.22 and is exempt from review under Executive Order 12866.

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

Dated: January 13, 2011.

James P. Burgess,

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

[FR Doc. 2011–1010 Filed 1–13–11; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 76, No. 12

Wednesday, January 19, 2011

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 185

[Document No. AMS–TM–10–0088; TM–08–07]

RIN 0581–AC83

Farmers' Market Promotion Program Regulation; Notice of Request for Approval of a New Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of proposed rule making and request for comments.

SUMMARY: This proposed rule would establish regulations for the Agricultural Marketing Service's Farmers' Market Promotion Program (FMPP). The FMPP is a competitive grant program that makes funds available to eligible entities for projects to establish, expand, and promote farmers markets, roadside stands, community-supported agriculture programs, agritourism activities, and other direct producer-to-consumer marketing opportunities. The proposed rule would establish eligibility and application requirements, the review and approval process, and grant administration procedures for the FMPP. Additionally in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Agricultural Marketing Service (AMS) announces its intention to request from the Office of Management and Budget (OMB) approval of a new information collection. Once approved, AMS will request OMB to merge this new collection into the currently approved information collection OMB 0581–0235, entitled Farmers' Market Promotion Program.

DATES: Comments received by March 21, 2011 will be considered. Pursuant to the Paperwork Reduction Act, comments on the information collection burden that would result from this action must be received by March 21, 2011.

FOR FURTHER INFORMATION CONTACT: Contact Carmen Humphrey, Branch Chief, Marketing Grants and Technical Services Branch, Marketing Services Division, Transportation and Marketing Programs, Agricultural Marketing Service (AMS), USDA; 202/694–4000.

ADDRESSES: Interested parties may comment on the proposed rule using the following procedures:

- *Mail to:* Errol Bragg, Director, Marketing Services Division, Transportation and Marketing Programs, AMS, USDA, 1800 M Street, NW., Room 3012–South Tower, Washington, DC, 20036; or
- *Internet: http://www.regulations.gov.*
- Written comments should reference docket number AMS–TM–10–0088, TM–08–07; and the section number of the regulations the comment pertains to.
- Clearly indicate whether you are in favor of or against the proposed rule and your reason for the comment. Include recommended changes, as appropriate, and any relevant documentation that supports your comments. Only relevant materials should be submitted.

All comments submitted, including name and address, if provided, will be included in the record and made available to the public via *http://www.regulations.gov.*

Pursuant to the Paperwork Reduction Act, comments regarding the accuracy of the burden estimate, ways to minimize the burden, including the use of automated collection techniques or other forms of information collection technology, or any other form of information collection, should be sent to the above address. In addition, comments concerning the information collection should also be sent to the Desk Office of Agriculture, Office of Information Technology and Regulatory Affairs, OMB, New Executive Office Building, 725 17th Street, NW., Room 725, Washington, DC 20503.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

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

Public Law 104–4

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with a base year of 1995). This proposed rule does not meet the definition of a Federal mandate because the resulting annual State expenditures would not exceed the $100 million threshold. The program is voluntary and local or tribal governments that choose to apply and qualify are eligible to receive grant funds.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule.

Executive Order 12372

This program is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (*See* 7 CFR part 3015 subpart V).

Executive Order 13132

It has been determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule would not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various levels of government.

Regulatory Flexibility Act

The AMS certifies that this rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Public Law 96–534, as amended (5 U.S.C. 601 *et. seq.*) (RFA). The RFA defines three types of small entities: small businesses, small organizations, and small governmental jurisdictions.

By nature of the FMPP grant program, this proposed rule would establish eligibility and application requirements for funding opportunities available to numerous small entities, including agricultural cooperatives, producer

networks, or producer associations; local governments; nonprofit corporations; public benefit corporations; economic development corporations; regional farmers' market authorities; and Tribal governments.

Producer networks and producer associations were added to the eligible entity list under the 2008 Farm Bill. Since 2006, however, agricultural cooperatives represented just 4.4 percent, producer networks represented 0.4 percent, and producer associations represented only 0.3 percent of all applications received under FMPP. These entities represent a total of only 5.1 percent of all FMPP applicants. Over the past 4 years the majority of all applications, or 67.9 percent, were received from nonprofit corporations. AMS anticipates this trend will continue each year through fiscal year 2012.

AMS considers for-profit agricultural cooperatives, producer networks, and producer associations as almost exclusively small agricultural firms, defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000 and that consist of a majority of small agricultural producers, defined by SBA as those having annual receipts of less than $750,000. The RFA defines a small organization as any not-for-profit enterprise that is independently owned and operated and not dominant in its field. The RFA also defines a small governmental jurisdiction as governments of cities, counties, town, townships, villages, school districts, or special districts with a population less than 50,000. AMS expects that these small organizations and governmental jurisdictions would represent or advocate on behalf of constituent groups comprised predominately of small producers.

Additionally this proposed rule would establish procedures for these entities to apply for grant funds, provide a means of submitting payment requests, and define reporting requirements for awarded organizations. In addition, there are an estimated 69 peer reviewers who would be comprised of representatives from entities that are eligible to apply for FMPP grant funds and which AMS expects to be predominately small entities.

The proposed rule would not unduly burden or impose any discriminatory requirements for these eligible small entities or erect barriers that would restrict their ability to compete for available grant funds in the market.

Catalog of Federal Domestic Assistance

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.168, Farmers' Market Promotion Program.

Authority for the Farmers' Market Promotion Program

This program would provide grant funds to establish, expand, and promote direct producer-to-consumer marketing projects. The FMPP grant program is authorized by the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. 3001–3006) and the amendment to the 1976 Act, the Farmers' Market Promotion Program (7 U.S.C. 3005).

Background

The FMPP was created through amendments to the Farmer-to-Consumer Direct Marketing Act of 1976. The grants authorized by the FMPP, originally funded in 2006 and revised under the 2008 Farm Bill (the Food, Conservation, and Energy Act of 2008, Pub. L. 110–246), are targeted to help improve and expand domestic farmers markets, roadside stands, community-supported agriculture programs, agritourism activities, and other direct producer-to-consumer marketing opportunities.

Who administers FMPP, award grants, and oversees projects?

AMS Transportation and Marketing Programs' Marketing Services Division administers and oversees the implementation of projects under FMPP.

Who Is eligible to apply for FMPP funds? ~ Eligible entities

Eligible entities under FMPP are agricultural cooperatives, producer networks or associations (added under 2008 Farm Bill); local governments; nonprofit corporations; public benefit corporations; economic development corporations; regional farmers' market authorities; and Tribal governments. All entities must be owned, operated, and located within one of the 50 U.S. States or the District of Columbia.

Are matching funds required?

No. Matching funds are allowed but not required under FMPP.

How can grant funds be used? ~ Eligible grant projects

FMPP projects should be designed "(A) to increase domestic consumption of agricultural commodities by improving and expanding, or assisting in the improvement and expansion of, domestic farmers' markets, roadside stands, community-supported agriculture programs, agri-tourism activities, and other direct producer-to-consumer market opportunities;" or "(B) to develop, or aid in the development of, new farmers' markets, roadside stands, community-supported agriculture programs, agri-tourism activities, and other direct producer-to-consumer marketing opportunities."

Are there restrictions and limitations to FMPP Funds usage? ~ Restrictions and limitations on grant funds

Yes. FMPP funds cannot be used to pay for (1) the acquisition of land or the acquisition, construction, rehabilitation, or repair of a building or facility, (2) the development of and/or participation in political or lobbying activities, (3) projects already funded by another Federal agency, or (4) any activities prohibited by FAR 31.2 or 7 CFR parts 3015, 3016, 3018, or 3019.

Is AMS subject to any special requirements, restrictions, and limitations related to electronic benefits transfer (EBT)? ~ EBT activities

Yes. Pursuant to the 2008 Farm Bill, not less than 10 percent of the grant funds awarded by AMS in fiscal years 2008–2012 shall be used to support the implementation of electronic benefits transfer (EBT) for Federal nutrition programs at farmers markets. This limitation only affects AMS' ability to award grants, and not any specific grant once awarded. Eligible EBT projects must (1) not be used for funding the ongoing cost of carrying out any EBT project; and (2) demonstrate a plan to continue to provide EBT card access at one or more farmers markets following the receipt of a grant. AMS will designate these projects as 'new EBT projects.' Existing EBT projects, therefore, are projects where a farmers market already has an EBT terminal or system in place.

Although existing EBT projects are eligible and can be funded under FMPP, to be considered under or counted toward the 10 percent legislative mandate the projects must be a new EBT project(s) at farmers markets.

What are the application requirements? ~ Completed application package

The following documentation must be submitted as an application package to AMS under FMPP:

○ Standard Form 424 "*Application for Federal Assistance*." AMS uses this information to determine the entity's eligibility for participation in the FMPP.

○ Standard Form 424A "*Budget Information—Non-Construction Programs*." AMS uses this information to assess the suitability of the budget for

the proposed project and to ensure it conforms to the program guidelines.

○ Standard Form 424B, "*Assurances—Non-Construction Programs.*" AMS uses this information to certify that grant participants are complying with applicable program regulations.

○ *Project Proposal Narrative.* The narrative must include a plan to show how the applicant will utilize FMPP grant funds. This narrative plan must also include a detailed, itemized supplemental budget summary that indicates the personnel being requested and any other items being requested for payment under FMPP. AMS provides instructions for completing the narrative and supplemental budget summary in their FMPP Guidelines annually, at the start of each new FMPP grant program year. All information about FMPP program requirements will also be made available at the FMPP Web site at *http://www.ams.usda.gov/FMPP.*

○ *Written Proof of Eligibility.* Written proof of the applicant's eligibility from a State or Federal source is also required as part of the application package.

○ *Supporting Documents.* Supporting documents, including letters of support, letters of project participation and implementation, and descriptions of the principal project manager and others involved in the project, are also strongly encouraged.

Can an organization submit multiple applications? ~ Maximum number of applications

Yes. There is no limit to the number of applications or ideas an organization can submit to AMS. However, an organization can only receive one grant in a grant-funding year.

When submitting multiple ideas, an applicant should submit similar ideas in one application package, *i.e.,* an EBT start-up project may be submitted in one application, and a multiple market distribution project in a second application.

Is there a fee for applying for FMPP funds?

No. An applicant does not have to pay any fees to submit an application for grant funds under FMPP. However there are costs that would include burden hours for the respondents to complete the FMPP application, and any additional costs to mail the application package to AMS by regular or express carrier, as needed.

How will grant applications be reviewed? ~ Review of grant applications

Applications will be approved or rejected by AMS utilizing recommendations from entities that represent 'peer' and Departmental or other Federal and State government employee reviewers.

(a) 'Peer reviewers' will be comprised of representatives from organizations that are eligible to apply for FMPP grant funds. These are: agricultural cooperative organizations, producer network organizations, and producer network associations organizations; local governments; nonprofit corporations; public benefit corporations; economic development corporations; regional farmers' market authorities; and Tribal governments. Peer reviewers will not be eligible to serve as a reviewer if they are (i) employed by, volunteer for, or serve as a board member or other type of committee/team member for the organization that submitted an application that same year under FMPP; or (ii) a proposed subcontractor or financial beneficiary in a budget from any organization submitting an application that same year under FMPP.

(b) Reviewers will utilize the evaluation criteria provisions published annually in the FMPP Guidelines and Notice of Funds Available. The criteria may change based on the priorities for annual funding. AMS may request the applicant provide additional information or clarification.

Is there a contract or grant agreement with awardees? ~ Grant agreements

Yes. AMS will enter into a grant agreement with awardees. The grant agreement is used as documentation of the agreed upon responsibilities of AMS and the awardee(s) performing the project work. AMS grant agreements will include, at a minimum, the following: the project(s) in the approved plan, the beginning date and ending date of the project work, the total amount of Federal financial assistance that will be awarded, and the terms and conditions pursuant to which AMS will fund the project(s).

Once an organization receives a grant when can they reapply? ~ Consecutive grants

An organization or entity that has received an FMPP grant may apply for future grants, but only after the current (existing) grant has been completed and AMS has accepted and approved all documentation and reports. The entity may then re-apply 12 months from this acceptance and approval date. AMS will not provide two consecutive grants to any entity. AMS has developed this system in an effort to provide grant funding opportunities to as many new awardees each year as possible in order to support the rapidly growing number of farmers markets and other direct marketing organizations. This system has also been designed to avoid repeated funding of one entity for the same or similar project activities.

Here are two examples: First, a grant awarded in fiscal year 2010 for a 12-month project begins on October 1, 2010. The project is completed by September 30, 2011. All required documentation and reports are submitted and accepted by AMS no later than 90-days after project completion, *i.e.,* December 31, 2011. The fiscal year 2010 awardee may then re-apply to FMPP after December 31, 2011, for the fiscal year 2012 funding cycle.

Second, if a 6-month grant extension is approved by AMS, the original 12-month fiscal year 2010 grant award would complete the project on March 30, 2012. All required documentation and reports are submitted and accepted by AMS no later than 90-days after project completion, *i.e.,* June 30, 2012. The fiscal year 2010 awardee may then re-apply to FMPP until after July 1, 2012, for the fiscal year 2013 funding cycle.

What are the awardee reporting requirements?

Awardees are required to provide AMS the following written project and financial reports:

• *Semi-Annual Performance and Final Performance Reports.* The Performance (progress) Report is written documentation required by awardees to notify AMS about the work activities and progress towards completing the awardees' established project workplan goals, objectives, and timelines. A performance report is required every six months after the start date of the grant agreement. A one-time final Performance Report is required to be submitted within 90 days after the ending date of the grant agreement. If the project is one year or less, then only one performance report and a final performance report are required. This information is utilized by AMS as final documentation of completion of the workplan goals, objectives, and activities.

• *Federal Financial Report and Final Financial Reports.* A Federal Financial Report must be submitted every four months, after the receipt of Federal grant funds, until the expiration of the

grant period, to provide the Agency information to monitor the financial status of the organization's grant project. A final Federal Financial Report is also required 90 days after the expiration date of the grant period. If the project is one year or less, then only two financial reports and a final Financial Report are required. The Financial Report includes the amount of Federal cash disbursements, receipts, and cash on hand; Federal expenditures and unobligated balances; and any program income earned during the reporting period. This information will be used by the Agency to determine the use of cash provided by FMPP and the organization's spending practices in correlation to the project performance reports.

Each year FMPP grant funds are available AMS intends to publish a Notice in the **Federal Register** indicating: That applications may be submitted for participation in the competitive FMPP grant review process, and the maximum FMPP funding level available that fiscal year to applicants.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the FMPP information collection is currently approved by OMB control number 0581–0235 Farmers' Market Promotion Program, which is an estimated 20,892 total annual burden hours. AMS is requesting OMB approval of a new information collection. When the final rule is approved, AMS will request OMB to consolidate this NEW collection into the currently approved collection OMB 0581–0235 Farmers' Market Promotion Program. This request would create one voluntary form and eight mandatory forms:

- Form "TM–31, FMPP Supplemental Budget Summary and Instructions—For EBT Projects"—voluntary for applicants.
- The "FMPP Guidelines"—mandatory for applicants and awardees.
- "Written Proof of Eligibility"—mandatory for applicants.
- "Registration with the Central Contractor Registry"—mandatory for applicants.
- Form "AMS–34, AMS Conflict-Of-Interest and Confidentiality Statement For Grant Reviewers"—mandatory for reviewers.
- Form "TM–32, FMPP Grant Peer Reviewer Qualifications Template"—mandatory for reviewers.
- Form "TM–33, FMPP Reviewer Declaration of Intent"—mandatory for reviewers.
- Form "AMS–33, United States Department of Agriculture, Agricultural Marketing Service, Agreement Face Sheet"—mandatory for awardees.
- Form "TM–34, FMPP Grant Program, General Terms and Conditions"—mandatory for awardees.

Title: Farmers' Market Promotion Program.

OMB Number: 0581–NEW.

Expiration Date of Approval: 3 years from approval.

Type of Request: A new information collection.

Abstract: The Farmers' Market Promotion Program (FMPP) was created through an amendment of the Farmer-to-Consumer Direct Marketing Act of 1976. The grants authorized by the FMPP, originally funded in 2006 and revised under the 2008 Farm Bill, are targeted to help improve and expand domestic farmers markets, roadside stands, community-supported agriculture programs, agritourism activities, and other direct producer-to-consumer marketing opportunities. Entities eligible to apply are agricultural cooperatives, producer networks, producer associations, local governments, nonprofit corporations, public benefit corporations, economic development corporations, regional farmers market authorities, and Tribal governments.

AMS provides voluntary forms to be used to complete the narrative and supplemental budget summary and requires that additional information be provided with the application. The forms are available via the AMS Web site at *http://www.ams.usda.gov/FMPP:*

1. "*TM–31, FMPP Supplemental Budget Summary and Instructions—For EBT Projects Only*"—AMS will create this new voluntary form for applicants developing and budget requests for new and existing EBT projects only and will include instructions for its use.

2. "*Written Proof of Eligibility*"—In addition to an explanation in the narrative of how the applicant/organization qualifies as an eligible entity, written proof from a State or Federal source must also be provided in the application package. This documentation may include, for example for a nonprofit, a copy of the organization's letter of determination from the State or Internal Revenue Service indicating the date of incorporation as a nonprofit.

In addition to the requirements above, any applicant applying for Federal funding must register with the Central Contractor Registry at *http://www.CCR.gov.*

3. *Registration with Central Contractor Registry.* The Central Contractor Registry (CCR) is the primary registrant database for the U.S. Federal Government. The CCR collects, validates, stores, and disseminates data in support of agency acquisition missions, including Federal agency contracts, grants, cooperative agreements, and other forms of Federal assistance and assistance awards. Whether applying for assistance awards, contracts, grants, or other business opportunities, all entities are considered "registrants."

CCR has its origins in the Federal Financial Assistance Management Improvement Act of 1999, also known as Public Law 106–107. Both current and potential Federal government registrants and entities applying for assistance awards from the Federal government, via either Grants.gov or hard copy submission, are required to register with CCR in order to be awarded funds by the Federal government.

The type of information requested by CCR includes, but is not limited to:

a. *General information,* including organization DUNS number, Federal Tax Identification Number (TIN), location, employee numbers, and web site address.

b. *Corporate Information,* including organization or business type and SBA-defined socioeconomic characteristics.

c. *Financial Information,* including financial institution, American Banking Association (ABA) routing number, account number, remittance address, lock box number, automated clearing house (ACH) information, and credit card information.

d. *Point of Contact Information,* including the primary and alternate points of contact and the electronic business, past performance, and government points of contact.

Registrants are required to complete the one-time CCR registration to provide information relevant to procurement and financial transactions. CCR shares the data received from registrants with the Federal government. AMS will use this information in establishing its electronic (direct deposit) payment system. Note that the CCR registration does not guarantee business with the AMS/FMPP or any other Federal government agency.

AMS will request potential grant reviewers to complete the following form:

1. "*TM–32, FMPP Grant Peer Reviewer Qualifications Template*"—AMS will utilize this mandatory form for reviewers to complete and submit their personal or work qualifications and resume. Reviewers must have a general knowledge of direct producer-to-consumer marketing that includes operational aspects of farmers markets,

farms and production/ranching, roadside stands, CSAs, agritourism, and/or electronic benefits transfers projects. Reviewers will apply their knowledge and expertise in these areas to objectively assess applications and provide both a numeric score and written comments for each application.

The form will contain a checklist for potential reviewers to identify their employment and experience. Boxes will be provided for potential reviewers to indicate (a) their area of experience or expertise, such as farmers market management; and (b) whether the person is a current or retired nonprofit, for-profit, or Federal/State government employee. As such, AMS will review and may revise the form annually. AMS may also request additional information or clarification from potential reviewers.

The reviewer qualifications will be used to determine whether a reviewer is qualified to serve as part of the grant review process.

AMS will also require anyone serving as a grant reviewer to comply with and sign the following:

1. "*AMS–34, AMS Conflict-Of-Interest and Confidentiality Statement For Grant Reviewers*"—This mandatory form for reviewers to sign indicates compliance with the conflict of interest and confidentiality requirements. Regarding confidentiality, reviewers must agree not to copy, quote, or otherwise use or disclose to anyone, any information from any application. Reviewers must also agree with the conflict of interest requirements, which include that the reviewer does not have: (1) A direct financial interest in the review outcome; or have direct and predictable financial interests in the outcome; (2) indirect interests with the organization or personnel submitting an application under FMPP; or (3) any relationship, such as a close personnel friendship, that may affect the reviewers' judgment or be seen as doing so by a reasonable person familiar with the relationship.

2. "*TM–33, FMPP Reviewer Declaration of Intent*"—AMS will utilize this mandatory form for reviewers to sign indicating they have not submitted an application under FMPP that funding year. Peer reviewers will not be eligible to serve as a reviewer if they are (i) employed by, volunteer for, or serve as a board member or other type of committee/team member for an organization that submitted an application that same year under FMPP; or (ii) a proposed subcontractor or financial beneficiary in a budget from any organization submitting an application that same year under FMPP.

Before grant funds are dispersed, applicants that are selected (awardees) must comply with the terms and conditions of the grant and sign the grant agreement. The AMS will publish the "*FMPP Guidelines*" which contain information regarding how to complete a grant application package and the Agency's post-award requirements, along with a public notice of funds being made available. The FMPP Guidelines will be revised annually and posted on the AMS Web site at *http://www.ams.usda.gov/FMPP.* While this document is not signed, applicants must read and utilize this document to prepare their application and understand the terms and conditions of the grant award. The grant agreement will include:

1. "*TM–34, FMPP Grant Program, General Terms and Conditions*"—This is a mandatory form for awardees indicating compliance with terms and conditions of the award and all Federal grant regulations and administrative requirements including 7 CFR parts 3015, 3016, 3018, 3019; and FAR 31.2. (The burden hours for this new form are already accounted for under the OMB 0851–0235, Farmers' Market Promotion Program). The document also includes awardee assurances and certifications (thereby eliminating the Agency's need for applicants to sign forms AD–1047, AD–1048, and AD–1049); changes in project contacts, leaders, managers, and staff; cost principles; actions that need prior approval; performance monitoring; reporting requirements; and payment requirements.

The FMPP Grant Program General Terms and Conditions may be updated annually to reflect mandatory additions and other changes made by regulatory or Office of Management and Budget grant requirements. The document is currently made available to applicants and awardees via the AMS website, and does not require a signature. It will also be included, by reference, the signed grant agreement face sheet.

2. "*AMS–33, United States Department of Agriculture, Agricultural Marketing Service, Agreement Face Sheet*"—This is a mandatory form for awardees to sign indicating compliance with terms and conditions of the grant award, project work approved, and receipt of grant funding. The sheet includes the grant authority; funding dollar amount; awardee and Federal contacts names, address, email addresses, and phone and fax numbers; agreement number; project title, objectives, and statement of work; project work beginning and ending dates; and awardee and AMS Associate Administrator signatures. Three (3) copies of this agreement are required with the awardee's and the AMS Associate Administrator's signatures and dated for each grant.

The 2008 Farm Bill authorizes funding for grants under FMPP, allocating mandatory funds from the Commodity Credit Corporation, from 2009 through 2012 with $5 million for each year of 2009 and 2010, and $10 million for each year of 2011 and 2012. With this increase in funding made available, and a focus of funding new EBT projects, AMS anticipates an increase in the number of applications being submitted and an increase in the burden hours. In fiscal year 2010, nearly one-half of all the project ideas submitted for funding were for new or existing EBT-related project work.

With the approval of this new collection and when the final notice is published, AMS will request that OMB consolidate these new burden hours into the currently approved information collection OMB 0581–0235.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 2.322 hours per response.

Respondents: Same respondents as for the overall collection package: Agricultural Cooperatives, Producer Networks or Producer Associations; Local Governments; Nonprofit Corporations; Public Benefit Corporations; Economic Development Corporations; Regional Farmers' Market Authorities; and Tribal Governments.

Estimated number of respondents: 1,575.

Estimated total annual responses: 4,925.

Estimated number of responses per respondent: 3.127.

Estimated total annual burden on the respondents: 11,437 hours.

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA) that requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

- Voluntary form TM–31 can be filled out electronically from the AMS Web site and printed out for submission. For Grants.gov applicants the proposal narrative and supplemental budget summary can also be filled out electronically and submitted as an attachment through Grants.gov during the FMPP application process. Additionally, Grants.gov applicants are not required to submit any additional (hard copy) paperwork to AMS.
- Form TM–34 will be made available via the FMPP website and can be printed for awardees personal records. A copy of this form is provided by AMS

to awardees with the grant agreement. There is no need to return this form to AMS.

• Form AMS–33 is completed by AMS and will be mailed to awardees for their original signature.

• Forms AMS–34, TM–32, and TM–33 will be made available via the AMS Web site and, once signed by reviewers can be scanned, e-mailed, or faxed to AMS.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the proposed regulations and USDA's oversight, including whether this information will have practical utility; (2) the accuracy of USDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments concerning the information collection requirements contained in this action should reference OMB 0581–NEW and the Farmers' Market Promotion Program. In addition, the docket number, date, and page number of this issue of the **Federal Register** also should be referenced. Comments should be sent to the same address referenced in the **ADDRESSES** section of this rule.

OMB is required to make a decision concerning the collection of information contained in this rule between 30 and 60 days after publication. Therefore, a comment to OMB is best assured of having its full affect if OMB receives it within 30 days of publication.

This proposed rule would establish the FMPP grant process, as follows:

List of Subjects in 7 CFR Part 185

Farmers' Market Promotion Program, FMPP, FMPP guidelines, FMPP application requirements, FMPP voluntary narrative and budget forms, FMPP reviewer information, reviewer confidentiality, FMPP grant agreement, and FMPP awardee grant acceptance terms and conditions.

For the reasons set forth in the preamble, it is proposed that Chapter 1 of title 7 of the Code of Federal Regulations be amended by adding subchapter I and part 185 to read as follows:

Subchapter I—Grant Programs

PART 185—FARMERS' MARKET PROMOTION PROGRAM

Sec.

185.1 Grant program scope.
185.2 Definitions.
185.3 Eligible entities for grant funds.
185.4 Eligible grant project.
185.5 Eligible grant project—EBT activities.
185.6 Restrictions and limitations on grant funds.
185.7 Project narrative.
185.8 Completed application package.
185.9 Maximum number of applications.
185.10 Review of grant applications.
185.11 Grant agreements.
185.12 Consecutive grants.
185.13 Post award requirements.
185.14 Program income.
185.15 Reporting and oversight requirements.

Authority: 7 U.S.C. 3001–3006.

§ 185.1 Grant program scope.

Pursuant to the authority conferred by the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. 3001–3006) and the amendment to the 1976 Act, the Farmers' Market Promotion Program (7 U.S.C. 3005), AMS intends to make competitive grant funds available to eligible entities for projects to establish, expand, and promote farmers markets and direct producer-to-consumer marketing, in accordance with the terms and conditions set forth herein and other applicable Federal statutes and regulations including, but not limited to, 7 CFR parts 3015, 3016, 3018, and 3019.

§ 185.2 Definitions.

(a) *Agency Fiscal Year* means the Agricultural Marketing Service's operating year which begins on October 1 and ends on September 30.

(b) *AMS* means the Agricultural Marketing Service of the United States Department of Agriculture.

(c) *Application* means a grant application package, which includes all forms, narrative, budget, and other required information as specified in 7 CFR 185.8, that is submitted to AMS under the Farmers' Market Promotion Program (FMPP) for FMPP grant funds.

(d) *Awardee* means the entity to which a grant is awarded and which is accountable for the use of the funds provided. The awardee is the entire legally eligible entity, even if only a particular component of the entity is designated in the grant agreement.

(e) *Agricultural cooperative* means a group- or member-owned entity or business that provides, offers, or sells agricultural products or services for the mutual benefit of the members thereof.

(f) *Agritourism* means the act of consumers visiting a working farm or any agricultural or agribusiness operation for the purpose of enjoyment, education, or active involvement in the activities of the farm or operation. Agritourism projects must meet the scope and eligible fund usages for the grant program prescribed in § 185.1 and 185.4.

(g) *Consumer* means a person that buys goods or services and consumes it or uses it for direct personal use or ownership, rather than for resale or use in mass production and manufacturing.

(h) *Community-supported agriculture (CSA) program* means a farm business(es) or group of farmers/producers that develop a partnership with consumers. Typically consumers pay for farm products in advance; and in turn, the farm business commits to supplying sufficient quantity, quality, and variety of products and delivering those products directly to the consumer or to a common distribution location for consumer pick-up.

(i) *Direct producer-to-consumer marketing* means agricultural marketing enterprises where farmers or vendors sell their own products directly to consumers.

(j) *Economic development corporation* means an organization whose mission is the improvement, maintenance, development and/or marketing or promotion of a specific geographic area.

(k) *Electronic benefits transfer (EBT)* means an electronic system that allows a recipient to authorize transfer of their government benefits from a Federal/State account to a retailer/business account to pay for products authorized and received under food stamps and other government benefit programs.

(l) *Equipment* means any tangible, nonexpendable, personal property, including exempt property charged directly to the grant having: A useful life of more than 1 year, and an acquisition cost of $5,000 or more per unit.

(m) *Existing EBT project* means a farmers market, facility, or other establishment that already has electronic benefits transfer (EBT) terminals and an EBT system in place at the market, facility, or establishment.

(n) *Farmers market* means a public and recurring assembly of farmers, their employees, and/or vendors that sell agricultural products that they have grown, raised, or produced, directly to consumers. The extent to which a farmer and/or vendor sells other farmer's food and/or other agricultural products to enhance the market's diversity is under the discretion of market management.

(o) *Grant agreement* means the signed documentation that designates an agreement between AMS and the

awardee entity performing the awarded project work. The agreement will include, at a minimum: The approved project plan(s), the project dates, the total amount awarded, and the terms and conditions pursuant to which AMS funds the project(s).

(p) *Grant period* means the period of time from when the grant agreement is signed until the completion of all projects submitted in the proposal narrative plan.

(q) *Indirect cost* means cost(s) incurred for common or joint objectives that can not be readily identified with a particular final project cost objective.

(r) *Local government* means any unit of local government within a State, including a county, borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

(s) *New EBT project* means a new or start-up electronic benefits transfer (EBT) initiative at a farmers market where the facility has not initiated or implemented EBT.

(t) *Nonprofit corporation* means any organization or institution, including nonprofits with State or IRS 501(c) status and accredited institutions of higher education, where no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(u) *Program income* means gross income earned by the awardee that is directly generated by a supporting activity or earned as a result of the grant award, in accordance with 7 CFR parts 3015, 3016, and 3019.

(v) *Producer association* means an organization or other business entity that assists, represents, or serves producers or a producer network.

(w) *Producer network* means a producer group- or member-owned organization or business entity that provides, offers, or sells agricultural products or services through a common distribution system for the mutual benefit of the members thereof.

(x) *Project* means all proposed activities to be funded by the FMPP.

(y) *Proposal narrative* means the written proposed project activities and planned use of funds submitted for funding in the grant application.

(z) *Public benefit corporation* means a corporation organized to construct or operate a public improvement, the profits from which inure to the benefit of a State(s) or to the people thereof.

(aa) *Regional farmers' market authority* means an entity that establishes and enforces regional, State, or county policies and jurisdiction over regional, State, or county farmers markets.

(bb) *Roadside stand* means a stand or kiosk located along the side of a road where a farmer or other agricultural vendor sells agricultural and/or other agricultural products that they have grown, raised, or produced, directly to consumers.

(cc) *States* means all 50 U.S. States and the District of Columbia.

(dd) *Supplies* means any tangible, personal property other than equipment as defined in § 185.2(l), excluding debt instruments and inventions defined in 7 CFR 3019.2(hh).

(ee) *Supplemental budget summary* means a detailed, itemized list of personnel, travel, equipment, and/or other items or costs that are being requested for payment by FMPP funds to fulfill the proposed grant project activities. The supplemental budget summary is the budget portion of the project narrative, details of which are provided in § 185.7(o), and is more specific in budget details than the required SF–424A budget.

(ff) *Tribal government* means a governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688 (43 U.S.C. 1602)) certified by the Secretary of the Interior as eligible for the special programs and services provided through the Bureau of Indian Affairs.

(gg) *United States* means any of the 50 states or the District of Columbia.

§ 185.3 Eligible entities for grant funds.

(a) Eligible grant applicants are agricultural cooperatives, or producer networks or associations; local governments; nonprofit corporations; public benefit corporations; economic development corporations; regional farmers' market authorities; and Tribal Governments.

(b) All entities must be owned, operated, and located within the United States.

(c) Entities must provide written proof of their eligibility, from State or Federal sources, to be eligible for and/or receive grant funds.

§ 185.4 Eligible grant project.

(a) To be eligible for a grant, the project(s) must establish, expand, or promote farmers markets or direct producer-to-consumer marketing activities within the United States. In general, the project(s) must increase domestic consumption of agricultural commodities by:

(1) Improving and expanding, or assisting in the improvement and expansion of, domestic farmers markets, roadside stands, community-supported agriculture programs, agritourism activities, or other direct producer-to-consumer market opportunities; or

(2) Developing, or aiding in the development of, new farmers markets, roadside stands, community-supported agriculture programs, agritourism activities, or other direct producer-to-consumer marketing opportunities.

(b) To be eligible for a grant, the project(s) must be completed within 24 calendar months after the grant agreement prescribed in § 185.11 is signed. The grant period is established by the approved project timelines submitted in the application proposal narrative and approved and documented by AMS in the grant agreement. For cause, however, an extension of the grant period not to exceed six (6) additional months may be granted by AMS on a case by case basis with a written request. Including the original 24-month grant period and any approved extensions, an FMPP grant period will not exceed 30 months (2.5 years).

§ 185.5 Eligible grant project—EBT activities.

(a) All electronic benefits transfer (EBT) projects are eligible for grant funding.

(b) Not less than 10 percent of the grant funds awarded by AMS in Agency fiscal years 2008 through 2012, however, shall be used to support the use of EBT for Federal nutrition assistance programs at farmers markets as follows:

(1) The EBT project is a new or start-up EBT initiative at a farmers market;

(2) The EBT projects must not be used for funding the ongoing cost of carrying out any EBT project; and

(3) The applicant must also demonstrate a plan to continue to provide EBT card access at one or more farmers markets following the receipt of a grant.

§ 185.6 Restrictions and limitations on grant funds.

(a) Grant funds may not be used to pay for:

(1) The purchase, construction, rehabilitation, or repair of a building or facility.

(2) The acquisition of land.

(3) The development of and/or participation in political or lobbying activities (7 CFR part 3018).

(4) Projects already funded by another Federal agency. An application that duplicates or overlaps substantially

with a project activity or application already reviewed and funded by another Federal agency will not be funded by FMPP.

(5) Other activities prohibited by 7 CFR parts 3015, 3016, 3018, or 3019.

(b) Not more than 10 percent of the total funds budgeted of any proposal may be used for indirect costs. The supplemental budget summary narrative explanation must include an explanation of how the indirect cost rate was determined and what it includes.

§ 185.7 Project narrative.

The project proposal narrative must include a plan to explain how FMPP grant funds will be used. The narrative must include:

(a) *Project Title.* Must capture the primary focus of the project, and match the title provided on Form SF–424.

(b) *Organization Information.* Provide the name of the organization applying for grant funds, contact name, mailing address, and telephone and fax number. Also provide the e-mail address for the person designated to answer questions about the organization's application, project information, and the proposed budget request.

(c) *Primary Project Manager Information.* Provide the name, mailing address, telephone and fax number, and email address for the person(s) responsible for managing and/or overseeing the project.

(d) *Requested FMPP Funding and Matching Funding.* Indicate the dollar amount requested from FMPP and the amount of matching funding (not required) that will be provided.

(e) *EBT, Equipment, Supplies, and Promotional Projects.* Questions will be asked whether the project proposal includes a new or existing EBT component, equipment, supplies, and promotional items/services; applicants must indicate by answering Yes or No.

(f) *Entity Type/Eligibility Statement.* Indicate the entity type of the applicant/organization. Provide an explanation of how the applicant/organization qualifies as an eligible entity. Although not required as part of the narrative, written proof of eligibility must also be provided from a State or Federal source in the application package. Applications that do not contain this documentation or provide sufficient information to determine the eligibility of the applicant will not be considered.

(g) *Executive Summary.* Should not exceed 200 words and must include the following: A project description, goals to be accomplished, stages of work and resources required, and expected timeframe for completing all tasks and results.

(h) *Goals of the Project.* Provide a clear statement (no more than two sentences) focusing on the ultimate goal(s) and objective(s) of the project.

(i) *Background Statement.* Provide specific information affecting the project or projects. Describe past, current, and/or future events, conditions, or actions taken that justify the need for each project. Correlate the background and purpose of the activity to support the particular project issue.

(j) *Work-plan and Resource Requirements.* Provide a statement that includes the planned scope of work, anticipated stages and timelines, and the resources required to complete the project. Identify who will do the work, whether collaborative arrangements or subcontractors will be used, the resource commitments of the collaborators, and the role(s) and responsibilities of each collaborator or project partner. Indicate in-kind and volunteer work. The anticipated stages/steps and timelines for each project activity must also be provided.

(k) *Expected Outcomes and Project Evaluation.* Describe what is to be accomplished, the expected results, and how success will be measured at the completion of the project. The quantitative and qualitative evaluation measurement of the project's impact must be identified.

(l) *Beneficiaries.* Describe which individuals, organizations, and/or entities will benefit from the project outcome and how they will benefit.

(m) *Evaluation Criteria Statements* (effective January 1, 2010). All applications will be evaluated against the criteria in the "Proposal Evaluation Criteria," which can be found in the FMPP Guidelines at *www.ams.usda.gov/FMPP.* This criteria may be changed (annually) depending on the Agency's funding priorities. Use the evaluation criteria as headings. Address and summarize how the project addresses each criterion. Provide references in the work-plan and other narrative sections, as needed, to justify the merit of each criterion.

(n) *Existing and Pending Support* (effective January 1, 2010). List all current and pending public or private support to which personnel identified in the narrative have committed portions of their time, whether or not salary support for persons involved is included in the FMPP budget request. An application that duplicates or overlaps substantially with an application already reviewed and funded by another Federal agency will not be funded under FMPP.

(o) *Supplemental Budget Summary.* Provide sufficient detail about the budget categories listed on Form SF–424A. This budget is required and supplements, but does not replace, the SF–424A. All requested budget items and activities must:

(1) Be itemized, listing separately each item, its costs, and use.

(2) Correlate to the purpose/goals of the project and demonstrate that they are reasonable and adequate for the proposed work.

(3) Not include matching funds or in-kind work and items.

(4) Be substantiated in a written budget narrative.

(p) *Primary Proposal Activity.* Each FMPP application must clearly identify the primary proposal activity. Identify only one specific activity that meets the proposal's main goal and objective.

(q) *Secondary Proposal Activity.* List all other activities (as many as are applicable) that meet the remaining goals and objectives.

§ 185.8 Completed application package.

Completed applications shall be clear and succinct and shall include the following documentation satisfactory to AMS.

(a) Standard Form–424 "Application for Federal Assistance."

(b) Standard Form–424A "Budget Information—Non-Construction Programs."

(c) Standard Form SF–424B "Assurances—Non-Construction Programs."

(d) Written proof of the applicant's eligibility (see 185.7(f)) from a State or Federal source.

(e) A Project Proposal Narrative, which includes an itemized, detailed supplemental budget summary that indicates the items being requested for payment.

(f) Any supporting documents are strongly encouraged, including:

(1) Letters and/or other evidence of commitment and participation from cooperators, contractors, or resource providers.

(2) Brief description(s) of experience or qualifications of project personnel and staff.

§ 185.9 Maximum number of applications.

An organization may submit multiple applications annually to AMS for competitive review. An organization can only receive one FMPP grant, however, in the Agency's funding or fiscal year.

§ 185.10 Review of grant applications.

All applications will undergo a competitive review and will be approved or rejected by AMS using recommendations from reviewers that represent 'peer' and departmental or

other Federal and State government employee reviewers.

(a) 'Peer reviewers' will be representatives from organizations that are eligible to apply for FMPP grant funds, as provided in § 185.3.

(b) Peer reviewers will not be eligible to serve as a reviewer if they are:

(1) Employed by, volunteer for, or serve as a board member or other type of committee/team member for the organization that submitted an application that same year under FMPP; or

(2) A proposed subcontractor or financial beneficiary in a budget from any organization submitting an application that same year under FMPP.

(c) The reviewers will use the evaluation criteria and provide AMS application scores, comments, and recommendations. AMS may request the applicant provide additional information or clarification, as needed.

§ 185.11 Grant agreements.

(a) After a competitive review and approval of grant projects and activities, AMS will enter into grant agreements with the selected applicants (awardees).

(b) AMS grant agreements will include at a minimum the following:

(1) The project(s) in the approved proposal narrative plan.

(2) The beginning and ending dates of the project work.

(3) Total amount of Federal financial assistance that will be awarded.

(4) Terms and conditions pursuant to which AMS will fund the project(s).

§ 185.12 Consecutive grants.

AMS will not award two consecutive grants to any organization or entity. Any entity that has received a grant award may apply for future grants after completion of the current grant project and 12 months after AMS has received and accepted all required documentation and reports for that current grant.

§ 185.13 Post award requirements.

Awardees are also responsible for:

(a) Diligently monitoring their performance to ensure that time schedules are being met, project work within designated time periods is being accomplished, and other performance measures are being achieved.

(b) Ensuring that grant funds are used only for the activities covered by the approved project work and budget.

(c) Ensuring that proper financial, personnel, procurement, monitoring, and recordkeeping procedures are followed.

(d) Retaining all records pertaining to the FMPP grant for 3 years after the final financial status report has been submitted to and accepted by AMS.

§ 185.14 Program income.

(a) Program income earned during the grant period shall be retained by the awardee and used to further the project objectives, unless otherwise specified in the terms and conditions of the award.

(b) Awardees must account for program income earned in all financial statements to AMS in accordance with 7 CFR parts 3015, 3016, 3018, and 3019.

§ 185.15 Reporting and oversight requirements.

(a) Performance reports will be required of all awardees every 6 months after the start date of the signed grant agreement until the expiration date of the grant period. If the project is one year or less, then only one performance report and a final performance report (*see* paragraph (b) of this section) are required. Each performance report shall include, but not be limited to, the following:

(1) Briefly summarize activities performed, targets, and/or performance goals achieved for each objective during the reporting period for each project.

(2) Note unexpected delays or impediments as well as favorable or unusual developments for each project.

(3) Outline work to be performed during the next reporting period for each project.

(4) Comment on the level of grant funds expended to date for each project.

(b) A final performance report will be required by all awardees within 90 days following the expiration date of the grant period. The final progress report shall include the following:

(1) A summary of the issue(s), problem(s), interest(s), or need(s) being examined.

(2) How the issue(s) were addressed via the project(s).

(3) Specific contributions, including time, energy, or other project assistance, of project partners.

(4) Results, accomplishments, conclusions, and lessons learned for each project.

(5) Description of who benefited from the project's accomplishments and a quantitative measure of the current or future benefits to be derived from the project.

(6) Additional information available (*e.g.* publications, Web sites).

(7) A contact person for each project with telephone number and e-mail address.

(c) "Federal Financial Reports" will be required every four months after the agreement start date until the expiration date of the grant period. If the project is one year or less, then only two financial reports and a final financial report (see paragraph (d) of this section) are required.

(d) A final "Federal Financial Report" is required within 90 days following the expiration date of the grant period. The report will include a summary of all project financial information and program income received during the grant project.

(e) AMS will monitor awardees, as it determines necessary, to assure that projects are completed in accordance with the approved project plan.

(f) AMS, after reasonable notice to an awardee, may provide a written forfeiture of grant funds should an awardee fail to request and/or use grant funds within the first 8 months following the grant agreement start date.

(g) If, after reasonable notice to an awardee and opportunity for response, AMS finds that there has been a failure by the awardee to comply substantially with any provision or requirement of the project plan, AMS may impose special conditions (7 CFR 3016.12, 3016.43, 3019.14, or 3019.62) and/or disqualify, for one or more years, the awardee from participation and/or receipt of future grants under the FMPP.

Dated: January 12, 2011.

David R. Shipman,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2011–930 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0025; Directorate Identifier 2010–NM–208–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 777 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD would require revising the maintenance program to update inspection requirements to detect fatigue cracking of principal structural elements (PSEs). This proposed AD was prompted by a new revision to the airworthiness limitations of the maintenance planning document. We

are proposing this AD to ensure that fatigue cracking of various PSEs is detected and corrected; such fatigue cracking could adversely affect the structural integrity of these airplanes.

DATES: We must receive comments on this proposed AD by March 7, 2011.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Duong Tran, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: (425) 917–6452; fax: (425) 917–6590; e-mail: *Duong.Tran@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2011–0025; Directorate Identifier 2010–NM–208–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

In accordance with airworthiness standards requiring "damage-tolerance assessments" (Part 25 of the Federal Aviation Regulations, Section 1529), all products certificated to comply with that section must have Instructions for Continued Airworthiness that include an Airworthiness Limitations Section (AWLs). The AWLs set forth:

- Mandatory replacement times for structural components,
- Structural inspection intervals, and
- Related approved structural inspection procedures necessary to show compliance with the damage-tolerance requirements.

Compliance with the terms specified in the AWLs is required by 14 CFR 43.16 (for persons maintaining products) and 14 CFR 91.403 (for operators).

As airplanes gain service experience, or as the result of post-certification testing and evaluation, it might become necessary to add additional life limits or structural inspections in order to ensure the continued structural integrity of the airplane. The manufacturer might revise the AWLs to include new or more restrictive life limits and inspections. However, in order to require compliance with those revised life limits and/or inspection intervals, the FAA must engage in rulemaking. Because loss of structural integrity would result in an unsafe condition, it is appropriate to impose these requirements through the airworthiness directive (AD) process.

Boeing recently has completed extensive analyses and testing of fatigue cracking of principal structural elements (PSE) on Model 777 airplanes, which included:

- Crack growth analysis,
- Service experience analysis,
- Crack growth testing,
- Fatigue testing, and
- Analysis of the effectiveness of applicable non-destructive inspection techniques to detect cracking and other anomalies.

The results of the testing and analyses demonstrated the need to incorporate updated inspection requirements to detect fatigue cracking of PSEs. We are proposing this AD to ensure that fatigue cracking of various PSEs is detected and corrected; such fatigue cracking could adversely affect the structural integrity of these airplanes.

Relevant Service Information

We reviewed Subsection B, Airworthiness Limitations—Structural Inspections, of Section 9, of "Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs)," D622W001–9, Revision January 2010, of the Boeing 777 Maintenance Planning Data (MPD) Document. Subsection B of Section 9 contains updated inspection requirements to detect fatigue cracking of PSEs.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD will affect 153 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revision	1 work-hour × $85 per hour = $85	$0	$85	$13,005

Authority for this Rulemaking

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

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

Regulatory Findings

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

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

(1) Is not a "significant regulatory action" under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

The Boeing Company: Docket No. FAA–2011–0025; Directorate Identifier 2010–NM–208–AD.

Comments Due Date

(a) We must receive comments by March 7, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to The Boeing Company Model 777–200, –200LR, –300, –300ER, and 777F series airplanes, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued before September 1, 2010.

Note 1: Airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or after September 1, 2010, must already be in compliance with the airworthiness limitations (AWLs) specified in this AD because those limitations were applicable as part of the airworthiness certification of those airplanes.

Note 2: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (i) of this AD. The request should include a description of changes to the required inspections that will ensure the continued damage tolerance of the affected structure. The FAA has provided guidance for this determination in Advisory Circular (AC) 25.1529–1.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Codes 27, Flight Controls; 28, Fuel; 32, Landing Gear; 52, Doors; 53, Fuselage; 54, Nacelles/Pylons; 55, Stabilizers; 57, Wings.

Unsafe Condition

(e) This AD was prompted by a new revision to the airworthiness limitations of the maintenance planning document. We are issuing this AD to ensure that fatigue cracking of various principal structural elements (PSEs) is detected and corrected; such fatigue cracking could adversely affect the structural integrity of these airplanes.

Compliance

(f) Comply with this AD within the compliance times specified, unless already done.

Revision of Maintenance Program

(g) Within 12 months after the effective date of this AD, revise the maintenance program by incorporating the information in Subsection B, Airworthiness Limitations—Structural Inspections, of Section 9, of "Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs)," D622W001–9, Revision January 2010, of the Boeing 777 Maintenance Planning Data (MPD) Document. The initial compliance time for the inspections is within the applicable times specified in Subsection B, Airworthiness Limitations—Structural Inspections, of Section 9, of "Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs)," D622W001–9, Revision January 2010, of the Boeing 777 Maintenance Planning Data (MPD) Document, or within 18 months after the effective date of this AD, whichever occurs later.

Alternative Inspections and Inspection Intervals

(h) After accomplishing the actions required by paragraph (g) of this AD, no alternative inspections or inspection intervals may be used unless the alternative inspection or interval is approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (i) of this AD.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Related Information

(j) For more information about this AD, contact Duong Tran, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: (425) 917–6452; fax: (425) 917–6590; e-mail: *Duong.Tran@faa.gov.*

(k) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com*; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on January 11, 2011.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–1017 Filed 1–18–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2009–0996]

RIN 1625–AA08

Special Local Regulation; Hydroplane Races Within the Captain of the Port Puget Sound Area of Responsibility

AGENCY: Coast Guard, DHS.

ACTION: Supplemental notice of proposed rulemaking; request for comments.

SUMMARY: The Coast Guard proposes to amend its regulation to establish permanent safety zones for hydroplane races taking place on various dates within Puget Sound, WA. This supplemental notice of proposed rulemaking changes the proposed regulation from establishing safety zones under 33 CFR part 165 to establishing a special local regulation under 33 CFR part 100, removes the duplicative Port Angeles race area and adds a race area in Lake Sammamish to the designated hydroplane race areas within the Captain of the Port, Puget Sound area of responsibility. When this proposed special local regulation is activated, and thus subject to enforcement, this rule would limit the movement of non-participating vessels within the regulated race areas while hydroplane races are taking place. This rule is needed to provide effective control over these events while ensuring the safety of the maritime public.

DATES: Comments and related material must be received by the Coast Guard on or before February 18, 2011. Requests for public meetings must be received by the Coast Guard on or before January 27, 2011.

ADDRESSES: You may submit comments identified by docket number USCG–2009–0996 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 LTJG Ashley M. Wanzer, Waterways Management, Sector Puget Sound, Coast Guard; telephone 206–217–6175, e-mail *SectorPugetSoundWWM@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–2009–0996), 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–2009–0996" 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–2009–0996" 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 on or before January 27, 2011 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**.

For information on facilities or services for individuals with disabilities or to request special assistance at the public meeting, contact LTJG Ashley M. Wanzer at the telephone number or e-mail address indicated under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Background and Purpose

The Coast Guard receives numerous marine event permits for hydroplane races taking place on the waterways of Dyes Inlet, Lake Washington, and Lake Sammamish, WA. Historically, these marine events involve the establishment of a safety zone which is established on an emergency basis to provide safety to the maritime public, participant and spectators during these races. This proposed rule would establish a special local regulation to restrict vessel movement in designated areas during permitted hydroplane marine events and eliminate the need to draft emergency rules to establish safety zones for hydroplane races in these designated areas. This rule will establish permanent, designated hydroplane race areas under 33 CFR part 100 enabling event sponsors and the Coast Guard to adequately provide safety in support of these marine events.

Discussion of Proposed Rule

The Coast Guard proposes establishing a special local regulation for hydroplane races occurring within the Captain of the Port, Puget Sound Area of Responsibility. This special local regulation is necessary to restrict vessel movement in designated race areas thereby ensuring unencumbered access for rescuers in the event of an emergency as well as to ensure public safety from the numerous dangers associated with high speed watercraft races.

On Tuesday, January 19, 2010, we published a notice of proposed rulemaking (NPRM) entitled "Safety Zones; Hydroplane Races within the Captain of the Port Puget Sound Area of Responsibility" in the **Federal Register** (75 FR 2833). We did not receive any comments on the proposed rule and did not receive any requests for a public meeting. A public meeting was not held. The NPRM published for this regulation included three permanent safety zones on the waters of Port Angeles, Dyes Inlet and Lake Washington. The Port Angeles hydroplane race area is duplicative to 33 CFR 100.1307 and has been removed from this proposed regulation. This proposed rule has been revised to create a special local regulation designating three permanent hydroplane race areas on the waters of Dyes Inlet, Lake Washington, and Lake Sammamish, WA to provide effective control over these hydroplane races while ensuring the safety of the maritime public during these events. The first designated race area is located in the northern section of Dyes inlet, west of Port Orchard, WA to include all waters north to land from a line connecting the following points 47°37.36′ N, 122°42.29′ W and 47°37.74′ N, 122°40.64′ W. The second designated race area is located in Lake Washington, south of the interstate 90 bridge and north of Andrew's Bay, WA to include all waters east of the shoreline within the following points: 47°34.15′ N, 122°16.40′ W; 47°34.31′ N, 122°15.96′ W; 47°35.18′ N, 122°16.31′ W; 47°35.00′ N, 122°16.71′ W. The third designated race area is located in Lake Sammamish south to land from a line connecting the following points 47°33.810′ N, 122°04.810′ W and 47°33.810′ N, 122°03.674′ W.

This special local regulation will restrict vessel movement within these designated hydroplane race areas immediately prior to, during and immediately following these permitted hydroplane marine events. These designated race areas are minimal in size and will be subject to enforcement only during hydroplane racing activities, historically 12 hours or less, with the purpose of providing safety for participants and other waterway users. These designated race areas are located in remote locations and are therefore expected to have a minimal impact on other waterway users. We expect races to occur multiple times throughout the year. Notification of the activation of this special local regulation will be provided to the public via broadcast notice to mariners.

Regulatory Analyses

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. This rule is not a significant regulatory action because it will be activated and thus subject to enforcement for short periods of time in small areas which are not considered high-density vessel traffic areas.

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 not have a significant economic impact on a substantial number of small entities. This rule will affect the following small entities: The owners or operators of vessels intending to transit or anchor within these designated hydroplane race areas while enforced on the waters of northern Dyes Inlet, Lake Washington, and Lake Sammamish, Washington. This proposed rule will not have a significant economic impact on a substantial number of small entities because it is small in size and short in duration. The only vessels likely to be impacted will be recreational boaters. Because the impact of this proposed rule is expected to be so minimal, the Coast Guard certifies under 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this rule will not have a

significant impact on a substantial number of small entities.

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. 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 the Ombudsman at 1–888–REG–FAIR (188–734–3247). 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, under paragraph 34(h) of the Instruction, 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 checklist supporting this determination is available in the docket where indicated under **ADDRESSES**. This proposed rule involves the establishment of a special local regulation which designates three hydroplane race areas in support of hydroplane races events on the waters of Dyes Inlet, Lake Washington and Lake Sammamish, WA. Because marine events which seek to use this area will be required to conduct an environmental analysis as part of the permit process, this proposed rule is excluded from further environmental analysis. 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

Safety of life on navigable waters.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR Part 100 as follows:

PART 100—REGATTAS AND MARINE PARADES

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

Authority: 33 U.S.C. 1233.

2. Add § 100.1308 to read as follows:

§ 100.1308 Special Local Regulation[s]; Hydroplane Races within the Captain of the Port Puget Sound Area of Responsibility.

(a) *Location.* The following areas are designated race areas for the purpose of reoccurring hydroplane races:

(1) All waters of Dyes inlet, west of Port Orchard, WA to include all waters

north to land from a line connecting the following points 47°37.36′ N, 122°42.29′ W and 47°37.74′ N, 122° 40.64′ W.

(2) All waters of Lake Washington south of the interstate 90 bridge and north of Andrew's Bay, WA to include all waters east of the shoreline within the following points: 47°34.15′ N, 122°16.40′ W; 47°34.31′ N, 122°15.96′ W; 47°35.18′ N, 122°16.31′ W; 47°35.00′ N, 122°16.71′ W.

(3) All waters of Lake Sammamish south to land from a line connecting the following points 47°33.810′ N, 122°04.810′ and 47°33.810′ N 122°03.674′ W.

(b) *Notice of Enforcement or Suspension of Enforcement.* This special local regulation will be activated and thus subject to enforcement, under the following conditions: the Coast Guard must receive and approve a marine event permit for each hydroplane event in accordance with 33 CFR part 100. The Captain of the Port will provide notice of the enforcement of this special local regulation by all appropriate means to ensure the widest dissemination among the affected segments of the public, as practicable; such means of notification may include but are not limited to, Broadcast Notice to Mariners or Local Notice to Mariners.

(c) *Regulations.* (1) When this special local regulation is enforced, non-participant vessels are prohibited from entering the designated race areas unless authorized by the designated on-scene Patrol Commander.

Spectator craft may remain in designated spectator areas but must follow the directions of the designated on-scene Patrol Commander. The event sponsor may also function as the designated on-scene Patrol Commander. Spectator craft entering, exiting or moving within the spectator area must operate at speeds which will create a minimum wake.

(2) *Emergency Signaling.* A succession of sharp, short signals by whistle or horn from vessels patrolling the areas under the discretion of the designated on-scene Patrol Commander shall serve as a signal to stop. Vessels signaled shall stop and shall comply with the orders of the patrol vessel. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

Dated: November 24, 2010.

G.T. Blore,

Rear Admiral, U.S. Coast Guard, Commander, Thirteenth Coast Guard District.

[FR Doc. 2011–1022 Filed 1–18–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2010–0960; FRL–9254–9]

Call for Information: Information Related to the Development of Emission-Estimating Methodologies for Animal Feeding Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Call for information.

SUMMARY: The Environmental Protection Agency is publishing this Call for Information to solicit quality-assured emissions and process data that are relevant to developing emissions-estimating methodologies for animal feeding operations. EPA may use the data to supplement the emissions and process data collected under the National Air Emission Monitoring Study for animal feeding operations.

DATES: Information must be received on or before March 7, 2011.

ADDRESSES: Submit your information, identified by Docket ID Number EPA–HQ–OAR–2010–0960, by one of the following methods:

http://www.regulations.gov: Follow the on-line instructions for submitting data.

E-mail: Send your information via electronic mail to *a-and-r-docket@epa.gov,* Attention Docket ID Number EPA–HQ–OAR–2010–0960.

Facsimile: Fax your comments to (202) 566–1741, Attention Docket ID Number EPA–HQ–OAR–2010–0960.

Mail: Send your information to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Mailcode 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID Number EPA–HQ–OAR–2010–0960. Please include two copies. We request that a separate copy also be sent to the contact person identified below (*see* **FOR FURTHER INFORMATION CONTACT**).

Hand Delivery: Deliver your information to: EPA Docket Center (EPA/DC), EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460, Attention Docket ID Number EPA–HQ–OAR–2010–0960. Such deliveries are only accepted during the normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays) and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your data and information to Docket ID Number EPA–HQ–OAR–2010–0960. EPA's policy is that all information received will be included in the public docket and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the submission includes information claimed to be 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 information. If you send an e-mail directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the information that is placed in the public docket and made available on the Internet. If you submit the electronic data and information, EPA recommends that you include your name and other contact information in the body of your information and with any disk or CD–ROM you submit. If EPA cannot read your information due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your information. Electronic files should avoid the use of special characters or any form of encryption, and should be free of any defects or viruses.

Docket: EPA has established a docket for this action under Docket ID Number EPA–HQ–OAR–2010–0960. 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 form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at EPA's Docket Center (EPA/DC), EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for EPA's Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Larry Elmore, Natural Resources and Commerce Group, Sector Policies and Programs Division, (E143–03),

Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–5433; Facsimile number: (919) 541–3470; e-mail address: *elmore.larry@epa.gov.*

SUPPLEMENTARY INFORMATION:

Acronyms and Abbreviations. The following terms and acronyms are used in this document:

AFOs Animal Feeding Operations
CAA Clean Air Act
CBI Confidential Business Information
CD ROM Compact Disc-Read Only Memory
CERCLA Comprehensive Environmental Response, Compensation and Liability Act
EEM Emissions-Estimating Methodology
EPCRA Emergency Planning and Community Right-To-Know Act
H_2S Hydrogen Sulfide
lb/hr Pounds per Hour
NAEMS National Air Emission Monitoring Study
NH_3 Ammonia
PM Particulate Matter
PM_{10} PM less than 10 micrometers in diameter
$PM_{2.5}$ PM less than 2.5 micrometers in diameter
ppmv Parts per Million by Volume
TSP Total Suspended Particulate
VOC Volatile Organic Compounds

Organization of This Document. The following outline is provided to aid in locating information in this preamble.

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I. General Information
A. What is the purpose of this action?
B. What specific information is EPA seeking?
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I. General Information

A. What is the purpose of this action?

In 2005, EPA offered AFOs an opportunity to participate in a voluntary consent agreement (70 FR 4958) referred to as the Air Compliance Agreement. Under the Air Compliance Agreement, participating AFOs provided, among other things, the funding for the NAEMS, a two-year, nationwide industry-run emissions monitoring study of the broiler, egg-layer, swine, and dairy industries. The NAEMS began in the summer of 2007 and consisted of 25 monitoring sites located in 10 states. The study collected process and emissions data for PM_{10}, $PM_{2.5}$, TSP, H_2S, NH_3, and VOC from a representative sample of animal housing structures and manure storage and treatment units across the country. EPA plans to use these data to develop EEMs for AFOs, which will help AFOs determine and comply with their regulatory responsibilities under the CAA, CERCLA, and EPCRA. Additional information regarding the NAEMS can be found at: *http://www.epa.gov/agriculture/airmonitoringstudy.html.*

EPA committed in the January 2005 **Federal Register** notice that it will use data generated from the NAEMS and all other available, relevant data to develop EEMs. Through this Call for Information, EPA is requesting that interested parties submit data that are relevant to EPA's effort to develop EEMs.

B. What specific information is EPA seeking?

EPA is requesting emissions and process data for broiler, egg-layer, swine, dairy, beef, and turkey AFOs. While EPA is interested in all air pollutants emissions data from AFOs, we are specifically seeking PM_{10}, $PM_{2.5}$, TSP, H_2S, NH_3, and VOC emissions data and related process information for animal confinement and manure storage and treatment processes.

Consistent with the Air Compliance Agreement, EPA is focusing in the near term on developing EEMs for AFOs. However, we acknowledge the recommendation made by the National Academy of Sciences in its December 2002 final report ("Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs") that EPA develop a process-based modeling approach that incorporates "mass balance" constraints to determine emissions from AFOs. Unfortunately, manure land application sites, which are a necessary component for developing a process-based approach, were not part of the NAEMS. Although our current focus is on developing the EEMs, we envision developing a process-based modeling approach at a later date. Thus, EPA is also requesting process and emissions data for land application of manure.

We will review all of the information available to us. To ensure compatibility with the NAEMS data, the emissions and related process data provided to EPA should be accompanied, to the extent possible, by documentation that contains detailed descriptions of the following parameters, as applicable.

General information:

- Description of AFO process measured (*e.g.,* animal confinement structure; manure storage and treatment unit; land application site).
- Location of AFO process measured (*e.g.,* physical address, latitude/longitude coordinates of facility).
- Beginning and ending dates of the monitoring period.

Monitoring data:

- Quality assurance and quality control plan.
- Site monitoring plan.
- Test methods, instrumentation, and standard operating procedures used to collect emissions and process data measurements.
- Results of audits conducted on instruments and procedures.
- Field notes and associated documentation collected during the study.
- Emissions data (unanalyzed or analyzed) and associated process data.
- Meteorological data, including average ambient temperature, relative humidity, pressure, wind speed, wind direction, and insolation (solar radiation), for each day that the study was conducted.
- Production data (*e.g.,* number of eggs produced per day or quantity of milk produced per day).
- Calculations and assumptions used to convert concentration data (*e.g.,* ppmv) into mass emissions (*e.g.,* lb/hr).

Animal confinement structures:

- Dimensions of structures monitored.
- Designed and permitted animal capacity.
- Type, age, number, and weight of animals contained in the confinement structure over the duration of the monitoring period.
- Manure management system (*e.g.,* pull-plug pit, scrape).
- Manure removal activities over the duration of the monitoring period.
- Ventilation method (*i.e.,* natural or mechanical).
- Calculations and assumptions used to estimate the ventilation rate of the monitored confinement structure.
- Calibration procedures for instruments (*e.g.,* flow meters, fan relays) used to collect data for calculating ventilation rate of the monitored confinement structure.
- Nitrogen content of process inputs and outputs (*e.g.,* feed, water, bedding, eggs, milk).
- Nitrogen content of manure excreted.
- Description of any control device or work practice used in the monitored structure to reduce emissions.

Manure storage and treatment processes:

- Type, age, number, and weight of animals contributing manure to the storage and treatment process over the monitoring period.
- Dimensions of storage/treatment unit monitored (*e.g.,* storage pile, tank, lagoon).

• Depth of settled solids in storage/treatment unit.

• Temperature, pH, and reduction/oxidation potential of manure contained in the storage/treatment unit.

• Moisture, total solids, volatile solids, total Kjeldahl nitrogen, and ammoniacal nitrogen content and pH of manure entering storage and treatment process over the monitoring period.

Manure land application sites:

• Type, age, number, and weight of animals contributing manure to the land application site.

• Method used to apply manure (*e.g.,* direct injection, broadcast spreading and frequency of application.

• Area (*e.g.,* acres, square feet) used for manure application over the monitoring period.

• Quantity and moisture content of manure applied.

With regard to the format of the information, we request that emissions, process, and production data be submitted to EPA in Microsoft® Excel® spreadsheet or Access® database format. In cases where the emissions, process, and production data correspond to time increments shorter than one hour, please provide sufficient information and supporting documentation with the data to allow EPA to develop emission estimates on a per-hour and per-day basis. For all formats, please clearly label the units of measure of emissions, process, and production data submitted.

C. Submitting Confidential Business Information

Do not submit information you consider to be CBI electronically through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI to only the following address: Mr. Larry Elmore, c/o Office of Air Quality Planning and Standards (OAQPS) Document Control Officer (Room C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID Number EPA–HQ–OAR–2010–0960. 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 information claimed as CBI, a copy of the information that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

Dated: December 14, 2010.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2011–1011 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 98

[EPA–HQ–OAR–2010–0929 and EPA–HQ–OAR–2010–0964; FRL–9252–4]

Extension of Comment Period on Change to the Reporting Date for Certain Data Elements Required Under the Mandatory Reporting of Greenhouse Gases Rule; and Public Hearing and Extension of Comment Period on Call for Information on Inputs to Emission Equations Under the Mandatory Reporting of Greenhouse Gases Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Public hearing notice and extension of public comment periods.

SUMMARY: On December 27, 2010, EPA concurrently published a proposed Change to the Reporting Date for Certain Data Elements Required Under the Mandatory Reporting of Greenhouse Gases Rule and a Call for Information on Inputs to Emission Equations Under the Mandatory Reporting of Greenhouse Gases Rule. In this action, EPA is providing notice of a public hearing on the Call for Information, to be held on February 3, 2011, and extending the comment period for both actions until March 7, 2011.

DATES: *Comments.* This action extends the comment period for the proposed Change to the Reporting Date for Certain Data Elements Required Under the Mandatory Reporting of Greenhouse Gases Rule (75 FR 81350). Comments must be received on or before March 7, 2011. This action also extends the comment period for the Call for Information on Inputs to Emission Equations Under the Mandatory Reporting of Greenhouse Gases Rule (75 FR 81366). Comments must be received on or before March 7, 2011.

Public Hearing. EPA will hold a hearing on the Call for Information on Inputs to Emission Equations Under the Mandatory Reporting of Greenhouse Gases Rule (75 FR 81366). The hearing will be conducted on February 3, 2011, in the Washington, DC area. EPA will provide further information about both hearings on its Web page: *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.*

ADDRESSES:

Proposed Change to the Reporting Date for Certain Data Elements Required Under the Mandatory Reporting of Greenhouse Gases Rule

Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0929, by one of the following methods:

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

E-mail: GHGReportingCBI@epa.gov. Include Docket ID No. EPA–HQ–OAR–2010–0929 (and/or RIN number) in the subject line of the message.

Fax: (202) 566–1741.

Mail: Environmental Protection Agency, EPA Docket Center (EPA/DC), Mailcode 2822T, Attention Docket ID No. EPA–HQ–OAR–2010–0929, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

Hand/Courier Delivery: EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2010–0929. 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 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

Call for Information on Inputs to Emission Equations Under the Mandatory Reporting of Greenhouse Gases Rule

Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0964, by one of the following methods:

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

E-mail: GHGReportingCBI@epa.gov. Include Docket ID No. EPA–HQ–OAR–2010–0964 (and/or RIN number) in the subject line of the message.

Fax: (202) 566–1741.

Mail: Environmental Protection Agency, EPA Docket Center (EPA/DC), Mailcode 2822T, Attention Docket ID No. EPA–HQ–OAR–2010–0964, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

Hand/Courier Delivery: EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2010–0964. 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 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER GENERAL INFORMATION CONTACT: Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9263; fax number: (202) 343–2342; e-mail address: *GHGMRR@epa.gov.* For technical information, contact the Greenhouse Gas Reporting Rule Hotline at: *http://www.epa.gov/climatechange/emissions/ghgrule_contactus.htm.* Alternatively, contact Carole Cook at 202–343–9263.

SUPPLEMENTARY INFORMATION: *Additional Information on Submitting Comments:* To expedite review of your comments by Agency staff, you are encouraged to send a separate copy of your comments, in addition to the copy you submit to the official docket, to Carole Cook, U.S. EPA, Office of Atmospheric Programs, Climate Change Division, Mail Code 6207–J, Washington, DC, 20460, telephone (202) 343–9263, e-mail *GHGReportingCBI@epa.gov.*

Background on Today's Action:

In this action, EPA is providing notice of a public hearing on the Call for Information on Inputs to Emission Equations Under the Mandatory Reporting of Greenhouse Gases Rule (hereinafter referred to as the "Call for Information," 75 FR 81366, December 27, 2010). In this action, EPA is also extending the public comment periods on the Call for Information and another action published on December 27, 2010, the proposed Change to the Reporting Date for Certain Data Elements Required Under the Mandatory Reporting of Greenhouse Gases Rule (hereinafter referred to as the "Proposed Deferral," 75 FR 81350).[1]

EPA received a request for a public hearing on the Call for information. Although EPA was not required to and did not provide for an opportunity to request a public hearing in the Call for information, EPA has decided to grant this request to accommodate the public in providing information and comment solicited in that notice. In addition, EPA is extending the public comment period for the Call for Information. The current deadline for submitting comment and information solicited in the Call for Information is February 25, 2011. EPA is extending this deadline to March 7, 2011 to provide the public additional time to submit comment and other relevant information, especially after the public hearing.

In addition, EPA is extending the public comment period for the Proposed Deferral. The current deadline for submitting public comment on that proposed rule is January 26, 2011. EPA is extending that deadline to March 7, 2011. This extension will provide the public additional time for public participation.

[1] EPA also concurrently published an Interim Final Regulation Deferring the Reporting Date for Certain Data Elements Required Under the Mandatory Reporting of Greenhouse Gases Rule (75 FR 81338), which is not affected by today's action.

List of Subjects 40 CFR Part 98

Environmental protection, Administrative practice and procedure, Greenhouse gases, Reporting and recordkeeping requirements.

Dated: January 12, 2011.

Elizabeth Craig,

Acting Director, Office of Atmospheric Programs.

[FR Doc. 2011–996 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[PS Docket No. 09–19; RM–11514; RM–11531; FCC 10–203]

Travelers Information Stations

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Notice of Proposed Rulemaking (NPRM) solicits comment on whether to modify the existing rules governing the licensing and operation of Travelers' Information Stations (TIS) to expand the scope of permitted operations. By initiating this proceeding, the Federal Communications Commission (the Commission) grants petitions for rulemaking filed by Highway Information Systems, Inc. (HIS) and the American Associations of State Highway and Transportation Officials (AASHTO) requesting the commencement of a proceeding to amend the TIS rules.

DATES: Submit comments on or before February 18, 2011. Submit reply comments March 7, 2011.

ADDRESSES: Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121, May 1 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/* or the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington DC 20554.

FOR FURTHER INFORMATION CONTACT: Eric Ehrenreich, Public Safety and Homeland Security Bureau, at (202) 418–1726, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554; or via the Internet to *Eric.Ehrenreich@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order and Notice of Proposed Rulemaking* in PS Docket No. 09–19, adopted on December 29, 2010, and released on December 30, 2010. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., in person at 445 12th Street, SW., Room CY–B402, Washington, DC 20554, via telephone at (202) 488–5300, via facsimile at (202) 488–5563, or via e-mail at *FCC@BCPIWEB.com.* Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities or by sending an e-mail to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at (202) 418–0530, TTY (202) 418–0432. This document is also available on the Commission's Web site at *http://www.fcc.gov.*

I. Introduction

1. In this NPRM, the Commission solicits comment on whether to modify the existing rules governing the licensing and operation of TIS to expand the scope of permitted operations. Since the inception of TIS in 1977, the Commission has authorized TIS operations to permit Public Safety Pool eligible entities to transmit noncommercial travel-related information to motorists on a localized basis. However, certain parties and licensees have sought to expand the scope of TIS operations in order to transmit more general alerts and public safety-related information to the public, including non-motorists. By initiating this proceeding, the Commission grants petitions for rulemaking filed by HIS and the AASHTO requesting the commencement of a proceeding to amend the TIS rules. The Commission denies the petition for declaratory ruling regarding TIS filed by American Association of Information Radio Operators (AAIRO), but incorporate the issues raised in AAIRO's petition into this rulemaking proceeding.

II. Background

2. The Commission promulgated TIS operations in 1977 in order to "establish an efficient means of communicating certain kinds of information to travelers over low power radio transmitters licensed to Local Government entities." The Commission specifically noted that such stations had been used to reduce traffic congestion and to transmit "road conditions, travel restrictions, and weather forecasts to motorists." Further, the Commission anticipated that such stations also would be used to "transmit travel related emergency messages concerning natural disasters (*e.g.,* forest fires, floods, *etc.*), traffic accidents and hazards, and related bulletins affecting the immediate welfare of citizens."

3. Commercial broadcasters opposed the creation of TIS, claiming that it would duplicate information provided by commercial broadcasts, including "comprehensive weather reports, reports of traffic conditions, names of gasoline stations, restaurants, and lodging conveyed through advertising." The broadcasters worried that this would siphon off advertising revenues. Other licensees averred that TIS operations would cause impermissible interference with their operations.

4. To address these concerns, the Commission prohibited TIS operators from transmitting "commercial" messages and emphasized that strict limits would be placed on other operational aspects of TIS licenses,

including authorized power levels. Regarding the former, the Commission stated that: "No commercial operation of these stations is intended or permitted." The Commission also adopted power and transmitter coverage limitations to ensure that TIS operations typically would be confined to the immediate vicinity of specified, travel-related areas. The Commission imposed this transmitter location restriction with the objective of limiting service to "the traveler in the immediate vicinity of the station." Although the Commission did not preclude TIS operations from multiple transmitters, each TIS site is expected to provide specifically targeted information restricted to the immediate vicinity of certain areas specified by the rules. Multiple TIS site operations working on a network concept would not be allowed. Additionally, TIS licensees operate predominantly on a secondary basis, and their operations may "be suspended, modified, or withdrawn by the Commission without prior notice or right to hearing if necessary to resolve interference conflicts."

5. TIS stations are authorized on a primary basis on 530 kHz and on a secondary basis in the 535–1705 kHz band, all of which is receivable with an AM radio. TIS operates on a low power basis: maximum output power is 50 watts with a cable antenna and 10 watts with a traditional radiating antenna. TIS stations may only transmit "noncommercial voice information pertaining to traffic and road conditions, traffic hazard and travel advisories, directions, availability of lodging, rest stops and service stations, and descriptions of local points of interest." Finally, TIS transmitting sites are restricted to "the immediate vicinity of * * * [a]ir, train, and bus transportation terminals, public parks and historical sites, bridges, tunnels, and any intersection of a Federal Interstate Highway with any other Interstate, Federal, State, or local highway."

6. The Commission has not undertaken a major amendment of the TIS rules since their inception. However, in an effort to address apparent operational limitations imposed by the current TIS rules, a few TIS operators have acted on their own accord to expand the scope of TIS content and operations. This has resulted in at least one Commission enforcement action. Other TIS operators and their sponsors have sought to expand the scope of TIS operations through rule waiver requests. In this proceeding, the Commission considers the petitions filed by HIS, AAIRO, and AASHTO that seek rule changes or clarification of the scope of the Commission's current TIS rules.

7. On July 16, 2008, HIS filed a petition for rulemaking (HIS Petition) to amend the TIS rules. The HIS Petition requests that the Commission: (1) Re-title TIS as the "Local Government Radio Service;" (2) expand the permissible use rule in section 90.242(a)(7) to "provide that stations in the local government radio service may be used to broadcast information of a non-commercial nature as determined by the government entity licensed to operate the station and other government entities with which the licensee cooperates;" and (3) "eliminate the limitation on the sites for local government radio stations that confines such stations to areas near roads, highways and public transportation terminals."

8. On September 9, 2008, AAIRO filed a petition for declaratory ruling (AAIRO Petition). The AAIRO Petition asks for (1) a "[r]uling that any message concerning the safety of life or protection of property that may affect any traveler or any individual in transit or soon to be in transit, may be transmitted on Travelers' Information Stations, at the sole discretion of officials authorized to operate such stations;" and (2) "a clear directive that such messages, by definition, are expressly included in the permissible content categories defined by 47 CFR 90.242(a)(7)." In its petition, AAIRO states that such a declaration would allow the broadcast of a wide range of information over TIS, including NOAA Weather Radio retransmissions, AMBER Alerts, alternate phone numbers when local 911 systems fail, terror threat alert levels, public health warnings "and all manner of civil defense announcement." AAIRO, however, does not seek any expansion of TIS operational limitations currently imposed by the Commission's rules.

9. On March 16, 2009, AASHTO filed a petition for rulemaking seeking revision of the TIS rules to permit the transmission of AMBER Alerts and information regarding the availability of 511 services.

10. On February 13, 2009, the Public Safety and Homeland Security Bureau (Bureau) released a public notice seeking comment on the HIS and AAIRO Petitions. The comment period on those petitions closed on March 30, 2009, with 61 comments received. On April 23, 2009, the Bureau released a public notice seeking comment on the AASHTO Petition. The comment period on that petition closed on June 8, 2009, with 11 comments received.

III. Order

11. The Commission first addresses the AAIRO petition for declaratory ruling. As noted above, AAIRO seeks (1) a "[r]uling that any message concerning the safety of life or protection of property that may affect any traveler or any individual in transit or soon to be in transit, may be transmitted on Travelers' Information Stations, at the sole discretion of officials authorized to operate such stations;" and (2) "a clear directive that such messages, by definition, are expressly included in the permissible content categories defined by 47 CFR 90.242(a)(7)." Under AAIRO's proposed interpretation the current TIS rules would allow the broadcast of a wide range of information over TIS, including NOAA Weather Radio retransmissions, AMBER Alerts, alternate phone numbers when local 911 systems fail, terror threat alert levels, public health warnings, and other civil defense announcements.

12. The Commission concludes that a declaratory ruling is not the appropriate vehicle to decide the issues raised by AAIRO, and it therefore denies the AAIRO Petition. Pursuant to section 1.2 of the Commission's rules, the Commission may issue a declaratory ruling for purposes of "terminating a controversy or removing uncertainty." However, a declaratory ruling may not be used to substantively change a policy. Section 90.242(a)(7) states that TIS stations may only transmit "noncommercial voice information pertaining to traffic and road conditions, traffic hazard and travel advisories, directions, availability of lodging, rest stops and service stations, and descriptions of local points of interest." The Commission concludes that accepting AAIRO's proposed interpretation of the current rules would expand the scope of permitted communications so significantly as to constitute a change in policy. While some of the types of communications AAIRO cites could arguably fall within the scope of the existing rules, other examples cited in the petition—such as NOAA transmissions, alternate phone numbers to 911, terror threat alert levels, and public health warnings—do not appear to be "travel related" as contemplated by the plain language of the TIS rules. Indeed, the Commission previously issued a notice of violation for retransmission of NOAA broadcasts over a TIS transmitter.

13. For these reasons, the Commission denies AAIRO's petition. AAIRO's petition, however, raises matters that are relevant to the general thrust of this proceeding to consider expanding the

travel-related scope of the TIS rules. In fact, these issues overlap with issues raised by the HIS and AASHTO petitions concerning possible changes to the scope of information content transmitted by TIS. Accordingly, the Commission finds that it is in the public interest to address the issues raised by the AAIRO Petition and, on its own motion, it does so as part of the NPRM below.

IV. Notice of Proposed Rulemaking

14. In this NPRM, the Commission seeks to determine whether expansion of the content and location restrictions in the TIS rules would create significant public benefit. To varying degrees, AAIRO, HIS, and AASHTO all contend that conditions have sufficiently changed since the Commission promulgated the TIS rules in 1977 that some expansion of the rules would be in the public interest. However, the changes proposed by the three organizations differ from one another in scope. The Commission therefore seeks comment on the specific changes to the TIS rules proposed by each petitioner, and on the overall approach that the Commission should take. Should the Commission significantly expand the scope of permitted communications and alerts by local governments on TIS stations, or should it adopt more limited changes that are consistent with the traditional travel-related focus of TIS?

A. Issues Raised by the AAIRO Petition

15. Initially, the Commission seeks comment on AAIRO's suggestion that the Commission should allow TIS stations to broadcast information including NOAA Weather Radio retransmissions, AMBER Alerts, alternate phone numbers when local 911 systems fail, terror threat alert levels, public health warnings, and civil defense announcements. Many commenters, most of them emergency managers and first responders, supported the AAIRO petition. Many of these commenters also indicate their desire to utilize TIS transmitters for the uses suggested by AAIRO, as well as a number of other uses. The Commission seeks comment on expanding the scope of the TIS rules to allow a broader array of government information and alerts. Should the Commission identify specific services, such as AMBER Alerts and NOAA weather broadcasts, in the TIS services rules? What limits, if any, should the Commission place on information allowed to be transmitted over TIS?

16. The Commission also seeks comment on whether expansion of the TIS rules as proposed by AAIRO would have any adverse effect on commercial broadcasting. AAIRO states that allowing the uses it proposes will not lead to any competition with commercial broadcasters. The National Association of Broadcasters (NAB), however, opposes the uses proposed by AAIRO, stating that the AAIRO petition does "not provide sufficient evidence to justify approval of their requests for a fundamental transformation of [TIS] operations."

17. AASHTO also raises concerns about expanding the scope of information transmitted over TIS. AASHTO notes that since the original TIS rules were adopted in 1977, "there has been an explosion in the amount of information to which travelers may have access," and proposes that the Commission should re-focus the type of information that should be permitted on TIS stations to include information intended to promote situational awareness * * *."

18. AASHTO also asserts that routine rebroadcast of NOAA weather information would "have a severe affect on the [TIS] service's ability to carry official urgent information in the event of an emergency." AASHTO, however, states that it "supports the ability of a TIS licensee to transmit information regarding [non-routine] adverse conditions." In that regard, AASHTO urges the Commission to clarify that current FCC rules allow rebroadcast of NOAA weather radio on TIS only if "initiated through the reception of an encoded SAME transmission containing a weather message event code" which will terminate on the earlier of (1) receipt of an encoded SAME message canceling the event code, or (2) the passage of six hours.

19. The Commission seeks comment on AASHTO's position and the distinction it makes between the rebroadcast over TIS of routine versus non-routine NOAA weather reports. The Commission asks commenters to frame their comments in the context of: (1) The TIS service rules and whether they should be expanded to make a clear accommodation for non-routine NOAA reports; and (2) sections 90.405(a)(1) and 90.407 of the Commission's rules, which allow for, respectively, the transmission over the TIS service of "emergency communications" under certain circumstances and "any communications related directly to the imminent safety-of-life or property." Are the existing part 90 rules sufficient for the Commission to clarify that non-routine NOAA reports over TIS permitted, as AASHTO requests? The Commission clarifies that it is not proposing to declare permissible under its existing rules anything that would be within the scope of its previous enforcement action against retransmission of NOAA broadcasts.

B. HIS Petition

20. The HIS Petition asks that the Commission (1) Re-title the TIS service rules as "Local Government Radio Service," (2) expand the permissible use rule in section 90.242(a)(7) to "provide that stations in the local government radio service may be used to broadcast information of a non-commercial nature as determined by the government entity licensed to operate the station and other government entities with which the licensee cooperates," and (3) "eliminate the limitation on the sites for local government radio stations that confines such stations to areas near roads, highways and public transportation terminals."

21. In support of these proposed changes to the TIS rules, HIS states that the Commission actively promotes policies to "enhance the reliability, resiliency, and security of emergency alerts to the public by requiring that alerts be distributed over diverse communications platforms," and that "TIS stations provide a means of communicating with all Americans since only an AM radio is necessary to receive these communications. * * * TIS stations provide a communications channel that is diverse and redundant." HIS further notes that many "TIS stations are solar-powered and/or have battery backup systems and as a result they continue to operate during a power blackout."

22. Eleven of seventeen commenters supported the HIS Petition. The majority of the supporting commenters provide additional perspectives on how the TIS service could be used should the Commission determine to revise the rules per the HIS petition.

23. "*Local Government Radio Service*." HIS urges the Commission to re-title the TIS service rules as "Local Government Radio Service," because it is "more consistent with the broader interests and responsibilities of the government." HIS states that given "the highly localized nature of these stations, the particular content broadcast on a station will be best determined by the government entity with jurisdiction over that specific location." Middletown Township also supports a change of the service's name to reflect "less restrictive transmitter siting" as well as expanded content.

24. APCO opposes the proposed name change to "Local Government Radio Service," as this was the previous name of a part 90, land mobile radio service.

As an alternative, APCO suggests "Local Government AM Radio Service." Texas DOT states that "we do not support changing the radio service name to 'Local Government Radio Service' as * * * some agencies may be tempted to broadcast programming which may belong on news media broadcasts rather than a government warning or alert system." The Commission seeks comment on whether it should retain or change the name of the TIS service. Could a name change inadvertently induce TIS licensees to broadcast messages more appropriately delivered by local media broadcasters?

25. *Section 90.242(a)(7)(permissible use rule).* Given the highly localized content of TIS broadcasts, HIS also urges amendment of section 90.242(a)(7) to ensure that editorial control over the content of TIS broadcasts rests squarely with the government entity licensed to operate the station. HIS states that the government entity licensed to operate the station should have discretion to use the TIS service to broadcast any information of a noncommercial nature. HIS's proposal would appear to expand the existing scope of TIS to encompass information pertinent to non-travelers.

26. Middletown Township supports the HIS Petition and notes possible benefits to an expansion of section 90.242(a)(7):

> While the primary purpose of the TIS station is for emergency travel notifications and evacuation information when other media are limited or unavailable, the station also could effectively provide, to non-traveling residents, emergency readiness information related to the county-wide programs noted above, advice on preparation for emergencies, local-area relevant safety announcements related to approaching weather and developing hazards, power outage and restoration information, community announcements, tourist information, and information about the township's history, environment and parks. This latter public interest information would serve to develop listener awareness of the station so that when an emergency develops, the public is already attuned to this valuable information source.

Conversely, NAB opposes the HIS Petition, stating that, "HIS Inc. cites only two instances in which licensees sought unsuccessfully to use TIS operations for prohibited purposes [energy conservation message and NWS forecast loop]. * * * Two examples do not establish that the Commission's long-standing regulations on TIS operations are unwarranted and certainly do not justify wholesale changes to this service." NAB further argues that given the "low-power service with an extremely limited, highly targeted reception area * * * contrary to HIS Inc.'s suggestion that [its proposed amendments] would improve emergency alerting, [they] would not have any significant benefit for the public." Similarly, AASHTO opposes the HIS Petition, stating that "the changes proposed by * * * HIS would inadvisably broaden the type of information that TIS licensees may transmit, potentially diluting the value of the service."

27. The Commission seeks comment on whether and to what extent the changes proposed by HIS would or should alter the Commission's requirement for a nexus between TIS transmissions and traveling motorists. Several commenters contend that the changes proposed by HIS would amount to a *de facto* elimination of the TIS service as presently constituted. The Commission seeks comment on whether the public interest would be served by expanding the scope to include the broadcast of all non-commercial information or whether it is preferable to limit the scope of the changes to emergency alerts only, or some other subset of permissible content. Would it be possible to expand the scope of TIS as proposed by HIS while retaining the travel-nexus requirement? If not, would any subsequent restrictions placed on the scope of permissible TIS transmissions by government entities licensed to use TIS diminish their ability to communicate information of local concern to travelers? Would an expansion of the TIS service to include all non-commercial information affect the reliability of emergency alerts transmitted via TIS? Does continuing to require a traveler-related nexus serve the public interest? With respect to Middletown Township's argument that TIS stations could provide tourist information and information on local landmarks, the Commission notes that the TIS rules already expressly allow for the broadcasting of tourist information, such as directions, availability of lodging, and points of interest. If the travel-related nexus should be retained, the Commission seeks comment on the extent, if any, to which the type of information broadcast over the TIS service might be broadened without "diluting" the value of the service to travelers.

28. *Operational Limitations.* HIS asks that "the Commission eliminate the limitation on the sites for local government radio stations that confines such stations to areas near roads, highways and public transportation terminals." HIS states that the local government licensee should have the discretion to determine site locations, provided that the interference criteria are met with respect to commercial AM radio station.

29. Hatfield & Dawson Consulting Engineers raise interference concerns regarding HIS's proposal to eliminate the TIS transmitter site limitation, claiming that it:

> seeks a change in the rules which almost surely would result in substantial numbers of additional TIS facilities. The result would be a general increase in the background or ambient radio frequency noise levels in the medium wave "AM" broadcast band. This has a potential for increasing the overall level of interference to nighttime operation in the medium wave "AM" broadcasting band.

With regard to interference concerns from expanded TIS operations, HIS indicates that there has been "[no] showing of harmful interference" were the Commission to implement its requested changes to the TIS service. The Commission seeks comment on HIS's assertion. Do the section 90.242 interference protection standards adequately protect AM stations? Should the Commission adopt specific second- and third-adjacent channel protection standards to ensure lack of interference to AM stations? To what extent could TIS broadcast locations be expanded without resulting in harmful interference to other licensees? Even if the risk of harmful interference resulting from expanded TIS broadcast operations is minimal, to what extent would those changes be of any practical usefulness given the limitations on power output presently established in the TIS rules? Would those power output limitations also need to be relaxed in order to provide local governments with any benefits? If power output limitations are relaxed, what rule changes are necessary to ensure that AM stations are adequately protected? Are there any other technical rules that would need to be changed?

30. *Ribbon Systems.* AASHTO suggests that "instead of changing the geographic limitations as HIS suggest, the FCC should consider the elimination of the TIS rules' restriction on 'ribbon systems.'" AASHTO argues that "such ribbon systems could be useful in providing alternative route information to alleviate congestion and manage the flow of traffic during emergencies," such as "in the event of an evacuation due to a natural or manmade disaster." AASHTO continues, "[t]emporary TIS stations could be installed along evacuation routes to provide critical information regarding the availability of temporary emergency facilities and information regarding evacuation areas." The Commission seeks comment on AASHTO's suggestion regarding ribbon systems in response to the HIS Petition.

31. The Commission notes that it currently "precludes an applicant from setting up a 'network,' or 'ribbon' of transmitting stations along a highway for the purpose of continuously attracting a motorist with what could be superfluous information." Do users envision a ribbon system of TIS stations transmitting unique information applicable to each transmitter's immediate area, or a system of stations transmitting in a synchronized mode, where all TIS stations transmit the same message in unison? In the latter scenario, it would not be possible for information to be tailored to the immediate area of each TIS transmitter. How is the latter scenario justified in light of the Commission's intent to ensure that the TIS service is not used to attract travelers with what could be superfluous or redundant information? On the other hand, could AASHTO's examples and other potential uses for ribbons systems provide benefits that outweigh the Commission's original intent?

32. AASHTO argues that "the Commission should recognize that the rules should be modified to permit transmission over broader areas than now permitted." It notes, for example, that "the area encompassed by NOAA SAME [Specific Area Message Encoder] broadcasts generally exceeds the current coverage area of a TIS station." Section 90.242(b)(4)(iv) specifies that the field strength of TIS stations may "not exceed 2 mV/m when measured with a standard field strength meter at a distance of 1.50 km (0.93 miles) from the transmitting antenna system." AASHTO notes that, "[w]hen the Commission set the field strength requirements for this service, the national speed limit was 55 miles per hour." AASHTO contends that "[a] vehicle traveling at this speed would be within the effective service area for approximately two (2) minutes." AASHTO notes that "[s]ince 1977, the national speed limit was rescinded with the last states reverting to 65–70 mile per hour speed limits." Given higher speeds, vehicles would be within TIS service areas for shorter durations. AASHTO asserts that "the 2mV/M radiated power limitation effectively limits the amount of information that may be transmitted by a single location to approximately 90 seconds including station identification."

33. The Commission notes that its Public Safety and Homeland Security Bureau has issued waivers of the field strength limit to permit TIS transmitters to reach broader areas. The Commission seeks comment on AASHTO's suggestion regarding field strength in response to the HIS Petition. Is the field strength limit necessary to protect AM broadcast stations and other TIS stations from interference when other technical limitations exist in the rules, such as power limits, antenna height limits, and minimum spacing requirements between TIS transmitters and AM broadcaster contours? Is the field strength limit only needed because of the present requirement to provide specific information to the "immediate vicinity" of areas listed in section 90.242(a)(5)? Would this limit be unnecessary if TIS stations were to be permitted to provide more general information that is applicable to broader areas? If the Commission allows TIS stations to serve broader areas, what should the new field strength limit be, if any? Would a relaxed field strength limit frustrate the purpose of the Commission's spacing requirements between co-channel TIS stations as set forth in section 90.242(b)(5) of the Commission's rules? Would additional technical or operational changes be necessary if the field strength limits were amended?

34. *Low-Power FM.* In comments, the Local Government Licensees (Wilmington, Delaware; Fairfax, Virginia; and Hanover County, Virginia) contend that the Commission's rules should be expanded to permit TIS stations to transmit a broader scope of noncommercial information, such as "official notices and related communications," similar to government-operated low-power FM stations. The Commission seeks comment on this viewpoint.

C. AASHTO Petition

35. AASHTO's petition seeks expansion of the present scope of the TIS rules to allow the broadcasting of AMBER Alerts and information about the availability of 511 services. The Commission received eleven comments on the AASHTO Petition. Nine comments were in full support, and one was neutral. AAIRO was the sole commenter in opposition, contending that the relief sought by AASHTO could be obtained by granting AAIRO's declaratory ruling petition.

36. The Commission seeks further comment on AASHTO's proposal to allow AMBER alerts and 511 service information. As noted above in denying AAIRO's petition, these issues are not appropriate for resolution by declaratory ruling, but they are suitable for action by rulemaking. The Commission therefore seeks comment on whether it should amend the TIS rules to allow these specific applications.

V. Procedural Matters

A. Paperwork Reduction Act

37. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 47 U.S.C. 3506(c)(4).

B. Ex Parte Presentations

38. The inquiry this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

C. Comment Filing Procedures

39. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121, May 1 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/* or the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the

Secretary, Federal Communications Commission.

• All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington DC 20554.

40. *People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

VI. Ordering Clauses

41. Accordingly, *it is ordered* that pursuant to sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303, this Notice of Proposed Rulemaking *is adopted.*

42. *It is further ordered* that pursuant to sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303, the petitions for rulemaking filed by Highway Information Systems, Inc., on July 16, 2008, and the American Association of State Highway and Transportation Officials on March 16, 2009, *are granted* to the extent indicated herein.

43. *It is further ordered* that pursuant to sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303, the petition for ruling filed by the American Association of Information Radio Operators filed on September 9, 2008, *is denied.*

44. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

45. *It is further ordered* that pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on this Notice of Proposed Rulemaking on or before 30 days after publication in the **Federal Register,** and interested parties may file reply comments on or before 45 days after publication in the **Federal Register**.

Bulah P. Wheeler,

Deputy Manager, Federal Communications Commission.

[FR Doc. 2011–938 Filed 1–18–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2011–0005; 92220–1113–0000–C5]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Delist or Reclassify From Endangered to Threatened Six California Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition findings and initiation of status reviews.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to delist *Oenothera californica (avita)* subsp. *eurekensis* (Eureka Valley evening-primrose) and *Swallenia alexandrae* (Eureka Valley dunegrass), and reclassify the tidewater goby (*Eucyclogobius newberryi*), *Acmispon dendroideus (Lotus scoparius* subsp.) var. *traskiae* (San Clemente Island broom), *Malacothamnus clementinus* (San Clemente Island bush-mallow), and *Castilleja grisea* (San Clemente Island Indian paintbrush) from endangered to threatened under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that the petition presents substantial scientific or commercial information indicating that the petitioned actions may be warranted. Therefore, with the publication of this notice, we are initiating status reviews of these taxa to determine if the respective actions of delisting and reclassifying are warranted. Section 4(c)(2)(A) of the Act also requires a status review of listed species at least once every 5 years. We are therefore electing to conduct these reviews simultaneously. To ensure that these status reviews are comprehensive, we are requesting scientific and commercial data and other information regarding these species and subspecies. Based on these status reviews, we will issue 12-month findings on the petition, which will address whether the petitioned actions are warranted under section 4(b)(3)(B) of the Act.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before March 21, 2011. Please note that if you are using the Federal eRulemaking Portal (*see* **ADDRESSES** section, below), the deadline for submitting an electronic comment is Eastern Standard Time on this date.

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

Federal eRulemaking Portal: http://www.regulations.gov. In the box that reads "Enter Keyword or ID," enter the Docket number for this finding, which is [insert docket number]. Check the box that reads "Open for Comment/Submission," and then click the Search button. You should then see an icon that reads "Submit a Comment." Please ensure that you have found the correct rulemaking before submitting your comment.

U.S. mail or hand-delivery: Public Comments Processing, Attn: [FWS-insert docket number]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

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

After March 21, 2011, you must submit information directly to the Field Office (*see* **FOR FURTHER INFORMATION CONTACT**). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

FOR FURTHER INFORMATION CONTACT: For information regarding *Acmispon dendroideus (Lotus scoparius* subsp.) var. *traskiae, Malacothamnus clementinus* and *Castilleja grisea,* contact Jim Bartel, Field Supervisor, by mail at U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92009; by telephone at (760–431–9440); or by facsimile at (760–431–9624).

For information regarding *Oenothera californica (avita)* subsp. *eurekensis, Swallenia alexandrae,* and the tidewater goby, contact Diane Noda, by mail at Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003; by telephone (805–644–1766); or by facsimile (805–644–3958). If you use

a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Request for Information

When we make a finding that a petition presents substantial information indicating that delisting or reclassifying a species may be warranted, we are required to promptly review the status of the species (status review). For the status reviews to be complete and based on the best available scientific and commercial information, we request information on *Oenothera californica (avita)* subsp. *eurekensis, Swallenia alexandrae,* the tidewater goby, *Acmispon dendroideus (Lotus scoparius* subsp.) var. *traskiae, Malacothamnus clementinus,* and *Castilleja grisea* from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

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

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

(b) Genetics and taxonomy;

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

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

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

(2) The factors that are the basis for making a listing/delisting/downlisting determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:

(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.

Please include sufficient information with your submission (such as references to scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

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

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

Information and supporting documentation that we received and used in preparing this finding is available for you to review at *http://www.regulations.gov,* or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad or Ventura Fish and Wildlife Offices (*see* **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1533(b)(3)(A)) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

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

Section 4(c)(2)(A) of the Act requires that we conduct a review of listed species at least once every 5 years. We are then, under section 4(c)(2)(B), to determine, on the basis of such a review, whether or not any species should be removed from the List (delisted), or reclassified from endangered to threatened, or threatened to endangered. Our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species currently under active review. We published a notice May 21, 2010 (75 FR 28636), announcing the review of *Acmispon* dendroideus (Lotus scoparius subsp.) var. *traskiae, Malacothamnus clementinus,* and *Castilleja grisea.* This notice announces our active review of the *Oenothera californica (avita)* subsp. *eurekensis, Swallenia alexandrae,* and the tidewater goby.

Petition History

On May 18, 2010, we received a petition dated May 13, 2010, from The Pacific Legal Foundation, requesting the Service to delist *Oenothera californica (avita)* subsp. *eurekensis* and *Swallenia alexandrae,* and to reclassify the tidewater goby, *Acmispon dendroideus (Lotus scoparius* subsp.) var. *traskiae, Malacothamnus clementinus,* and *Castilleja grisea* based on the analysis and recommendations contained in the most recent 5-year reviews for these taxa. The petition clearly identified itself as such and included the requisite identification information for the petitioner, as required by 50 CFR 424.14(a). The petition contained minor nomenclatural discrepancies for some taxa. However, we have used the currently accepted names of these taxa in this finding, and the finding addresses all of the petitioned taxa.

Previous Federal Actions

Under the Act, we maintain a List of Endangered and Threatened Wildlife and Plants at 50 CFR 17.11 (for animals) and 17.12 (for plants) (List). We amend the List by publishing final rules in the **Federal Register**. Section 4(c)(2)(A) of the Act requires that we conduct a review of listed species at least once every 5 years. Section 4(c)(2)(B) requires that we determine: (1) Whether a species no longer meets the definition of threatened or endangered and should be removed from the List (delisted); (2) whether a species listed as endangered more properly meets the definition of threatened and should be reclassified to threatened (downlisted); or (3) whether a species listed as threatened more properly meets the definition of endangered and should be reclassified to endangered (uplisted). Using the best scientific and commercial data available, we will consider a species for delisting if the data substantiate that the

species is neither endangered nor threatened for one or more of the following reasons: (1) The species is considered extinct; (2) the species is considered to be recovered; or (3) the original data available when the species was listed, or the interpretation of such data, were in error.

The two Eureka Valley plants were listed as endangered in 1978 (Table 1). A recovery plan was published for both in 1982. Critical habitat has not been designated for either plant. A notice of review initiation was published for the two Eureka Valley plants in 1983 (48 FR 55100; December 8, 1983), 1991 (56 FR 56882; November 6, 1991), and 2005 (70 FR 39327; July 7, 2005). For the review conducted in 1983, the Service concluded in a notice of 5-year review completion that there were no substantial data to suggest a change in status for either of these two plants (50 FR 29900; July 22, 1985). A status review for the two Eureka Valley plants was next completed in 1994 (Noell 1994). Based on this 1994 status review, the Service recommended downlisting each of these two plants. The 5-year review conducted in 2007 for each of these two plants notes that the Service did not publish a proposed rule to downlist either of these species following the 1994 status review, because, under the 1994 Desert Protection Act, the lands where these plants occurred were passed from Bureau of Land Management (BLM) to National Park Service (NPS), and at the time, the Service was uncertain about how the NPS would manage the threats to the species (Service 2007a, p. 4; Service 2007b, p. 2). In the 2007 5-year review, the Service recommended delisting *Oenothera californica (avita)* subsp. *eurekensis* (Service 2007a, p. 14) and *Swallenia alexandrae* (Service 2007b, p. 11).

The tidewater goby was listed as endangered in 1994 (Table 1). In 1999, the Service proposed to delist populations of tidewater goby in areas north of Orange and San Diego Counties and retain populations in Orange and San Diego Counties as an endangered distinct population segment (64 FR 33816; June 24, 1999). Critical habitat in Orange and San Diego Counties was designated in 2000 (65 FR 69693 November 20, 2000). The proposed rule to delist northern populations was withdrawn in 2002 (67 FR 67803; November 7, 2002). In 2003, the U.S. District Court for the Southern District of California ordered the Service to promulgate a revised critical habitat rule that considered the entire geographic range of the tidewater goby, and the Service published a new critical habitat rule in 2008 (73 FR 5920; January 31, 2008). A recovery plan for the tidewater goby was published in 2005. A notice of review initiation was published in 2006 (71 FR 14538; March 22, 2006), and the review was completed in 2007 (73 FR 11945; March 5, 2008). The Service recommended downlisting the tidewater goby (Service 2007c, p. 36); however, the Service recommended that the proposed downlisting action be deferred until taxonomic research referred to in the Genetics section of the 2007 5-year review was published, because there was a high likelihood that taxonomic changes to the tidewater goby were imminent (Service 2007c, p. 35). Part of this research was recently published (Earl *et al.* 2010) and will be considered in the 12-month status review.

The three San Clemente plants were listed as endangered in 1977 (Table 1). A recovery plan was published for each in 1984. Critical habitat has not been designated for any of these three plants. Notice of review initiations were published in 1982 (47 FR 42387; September 27, 1982), 1987 (52 FR 25523; July 7, 1987), 1991 (56 FR 56882; November 6, 1991), 2005 (70 FR 39327; July 7, 2005), and 2010 (75 FR 28636; May 21, 2010). A 5-year status review was completed for each of these three plants in 2007 (73 FR 11945; March 5, 2008). In the 5-year status reviews, the Service recommended downlisting *Acmispon dendroideus (Lotus scoparius* subsp.) var. *traskiae* (Service 2007d, p. 22), *Malacothamnus clementinus* (Service 2007e, p. 28), and *Castilleja grisea* (Service 2007f, p. 19).

TABLE 1—PREVIOUS FEDERAL ACTIONS FOR THE SIX TAXA ADDRESSED IN THIS PETITION FINDING

Species name	Date listed and status	Critical habitat designated	Recovery plan published	Most recent 5-year review and recommendation
Oenothera californica (avita) subsp. *eurekensis* (Eureka Valley evening-primrose).	May 27, 1978 (43 FR 17910) Endangered.	NA	December 13, 1982	September 24, 2007 Delist.
Swallenia alexandrae (Eureka Valley dunegrass).	May 27, 1978 (43 FR 17910). Endangered	NA	December 13, 1982	September 24, 2007 Delist.
Tidewater goby (*Eucyclogobius newberryi*).	February 4, 1994 (59 FR 5494) Endangered.	January 31, 2008 (73 FR 5920).	December 7, 2005	September 28, 2007 Downlist.
Acmispon dendroideus (Lotus scoparius subsp.) var. *traskiae* (San Clemente Island broom).	August 11, 1977 (42 FR 40682) Endangered.	NA	January 26, 1984	September 24, 2007 Downlist.
Malacothamnus clementinus (San Clemente Island bush-mallow).	August 11, 1977 (42 FR 40682) Endangered.	NA	January 26, 1984	September 28, 2007 Downlist.
Castilleja grisea (San Clemente Island Indian paintbrush).	August 11, 1977 (42 FR 40682) Endangered.	NA	January 26, 1984	September 24, 2007 Downlist.

Species Information

Oenothera californica (avita) subsp. *eurekensis* (Eureka Valley evening-primrose) is a short-lived herbaceous perennial in the Onagraceae (evening-primrose) family that forms small basal rosettes of leaves. During years with sufficient rainfall, plants undergo rapid stem elongation in April and May and bloom between April and July. In general, *O. c.* subsp. *eurekensis* occupies the stabilized, gentle dune slopes, extending out onto the shallower sand fields bordering the dune systems of Eureka Valley, Inyo County, California (Bagley 1986). These occupied dune systems include the Eureka Dunes, Saline Spur Dunes, and Marble Canyon Dunes, all of which are public lands managed by Death Valley National Park. For more information on

the life history, biology, and distribution of *O. c.* subsp. *eurekensis, see* the 2007 5-year review of the species on *http://www.regulations.gov* or *http://www.fws.gov/endangered/.*

Swallenia alexandrae (Eureka Valley dunegrass) is a perennial, hummock-forming (traps and accumulates wind-blown soil and sand at the base of plants) grass. *Swallenia* is a monotypic genus of Poaceae (grass family). Plants are dormant during the winter, but begin to produce new shoot growth around February. While growth accelerates in May, plants produce loose, multi-branched clusters of flowers between April and June and disperse seeds between May and July (Service 1982). In general, *S. alexandrae* occupies relatively steep slopes of three dune area systems in the southern portion of Eureka Valley (Bagley 1986): Eureka Dunes, Saline Spur Dunes, and Marble Canyon Dunes. These dunes are all within 9.3 mi (15 km) of each other. All populations are on public lands managed by Death Valley National Park. For more information on the life history, biology, and distribution of *S. alexandrae, see* the 2007 5-year review of the species on *http://www.regulations.gov* or *http://www.fws.gov/endangered/.*

The tidewater goby (*Eucyclogobius newberryi*) is a small fish that inhabits discrete locations of brackish water along the California coast. The species is found from Tillas Slough (mouth of the Smith River, Del Norte County) near the Oregon border south to Cockleburr Canyon (northern San Diego County). The tidewater goby is known to have formerly inhabited at least 135 localities within this range (Service 2005). The northern limit of the species' range has not changed; however, the southern limit is now 9.2 mi (14.8 km) farther north from its historically known southernmost location, Agua Hedionda Lagoon (San Diego County) (Swift *et al.* 1989). Tidewater gobies appear to be naturally absent (now and historically) from three large (50 to 135 mi (80 to 217 km)) stretches of coastline where lagoons or estuaries are absent and steep topography or swift currents may prevent tidewater gobies from dispersing between adjacent localities (Swift *et al.* 1989). For more information on the life history, biology, and distribution of the tidewater goby, *see* the 2007 5-year review of the species on *http://www.regulations.gov* or *http://www.fws.gov/endangered/.*

Acmispon dendroideus (*Lotus scoparius* subsp.) var. *traskiae* (San Clemente Island broom) is a semi-woody, short-lived (less than 5 years), subshrub in the Fabaceae (pea family). The subspecies is endemic to San Clemente Island (Isely 1993) and is one of five representatives of the genus *Acmispon* found on the island (U. S. Department of the Navy, Southwest Division 2002). *Acmispon dendroideus* var. *traskiae* is typically less than 4 feet (1.2 meters) in height, with slender, erect green branches (Munz 1974). Since the 1970s, the distribution of *A. d.* var. *traskiae* has been documented, and its range includes north-facing slopes over most of the eastern and western sides of the island (Service 1984; U. S. Department of the Navy, Southwest Division 2002; Junak and Wilken 1998; Junak 2006). Occurrence data for this species also span the entire length of the island, with several occurrences documented in Wilson Cove, and one occurrence documented at the southern tip of the island east of Pyramid Cove; a distance of approximately 19 mi (31 km) (Junak and Wilken 1998; Junak 2006). The majority of the remaining occurrences tend to be clustered on north-facing slopes on the eastern side of the island. For more information on the life history, biology, and distribution of *A. d.* var. *traskiae, see* the 2007 5-year review of the species as *Lotus dendroideus* var. *traskiae* on *http://www.regulations.gov* or *http://www.fws.gov/endangered/.*

Malacothamnus clementinus (San Clemente Island bush-mallow) is a rounded subshrub (plants with stems woody at the base only) in the Malvaceae (mallow) family. It grows up to 6.6 feet (2 meters) tall, with numerous branched stems arising from its base (Munz and Johnston 1924; Munz and Keck 1959; Bates 1993; S. Junak pers. comm. 2006). The species' leaves are angularly 3–5 lobed or nearly circular or ovate, less than 2 inches (5 centimeters) in length and conspicuously bicolored, with green, sparsely pubescent (covered with short, fine hairs) upper surfaces and veiny, white, and hairy under surfaces that are densely matted with branching hairs (Munz and Johnston 1924). Plants bloom between March and August (California Native Plant Society 2001). *Malacothamnus clementinus* is the only species in its genus that occurs on San Clemente Island (Tierra Data Inc. 2005). *Malacothamnus clementinus* is restricted to San Clemente Island, where it occurs in a range of conditions, including rock crevices along canyon walls, at the base of rocky walls, at the base of escarpments between coastal terraces, along canyon rims and ridgelines, and in vegetated flats (S. Junak pers. comm. 2006; Junak and Wilken 1998; U. S. Department of the Navy, Southwest Division 2001). The plant is often associated with maritime cactus scrub on coastal flats at the southwestern end of the island (Junak and Wilken 1998). The collection of moisture in rock crevices and at the base of canyon walls and escarpments may provide favorable conditions for this species (S. Junak pers. comm. 2006). For more information on the life history, biology, and distribution of *M. clementinus, see* the 2007 5-year review of the species on *http://www.regulations.gov* or *http://www.fws.gov/endangered/.*

Castilleja grisea (San Clemente Island Indian paintbrush) is a highly branched perennial subshrub in the Orobanchaceae (broom-rape) family. The species is endemic to San Clemente Island (Chuang and Heckard 1993) and is the only representative of the genus *Castilleja* found on the island (Helenurm et al. 2005). *Castilleja grisea* is typically 11.5 to 31.5 inches (3 to 8 decimeters) in height and covered with a dense white-wooly felt. The flowers of *C. grisea* are yellow. The original range and distribution of *C. grisea* on San Clemente Island is speculative, because its decline began before thorough botanical studies were completed. However, since initial surveys were conducted in 1996 and 1997, *C. grisea* has expanded its distribution to include steep canyon walls on the western side of the island (Junak and Wilken 1998). Occurrence data (as defined by the reporters, not equivalent to CNDDB occurrences) for this species span the southern two-thirds of the island, a distance of approximately 17.5 mi (28 km). For more information on the life history, biology, and distribution of *C. grisea, see* the 2007 5-year review of the species on *http://www.regulations.gov* or *http://www.fws.gov/endangered/.*

Evaluation of Information for This Finding

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR part 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

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

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

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

We must consider these same five factors in delisting a species. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered nor threatened for the following reasons:

(1) The species is extinct;

(2) The species has recovered and is no longer endangered or threatened; or

(3) The original scientific data used at the time the species was classified were in error.

In making this 90-day finding, we evaluated whether information regarding threats to *Oenothera californica (avita)* subsp. *eurekensis, Swallenia alexandrae,* the tidewater goby, *Acmispon dendroideus* (*Lotus scoparius* subsp.) var. *traskiae, Malacothamnus clementinus* and *Castilleja grisea,* as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned actions may be warranted. Our evaluation of this information is presented below.

Information Provided in the Petition

The petitioner requested the Service to delist *Oenothera californica (avita)* subsp. *eurekensis* and *Swallenia alexandrae,* and reclassify the tidewater goby, *Acmispon dendroideus* (*Lotus scoparius* subsp.) var. *traskiae, Malacothamnus clementinus,* and *Castilleja grisea,* based on the analysis and recommendations contained in the most recent 5-year reviews of these taxa. The petitioner cited the 5-year reviews for each of these respective species as supporting information for the petition.

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

On March 5, 2008 (73 FR 11945), we published a notice of completion of 58 5-year reviews, including the recommendation of status changes for the six petitioned species. Status change recommendations for these species are shown in Table 1. Each 5-year review contains general background and life history information, overview of recovery criteria, an analysis of threats specific to each taxon based on the five listing factors in section 4 the Act, and recommendation of status change, if appropriate. The petitioner cited the 5-year reviews for each of these respective species as supporting information for the petition, but provides no other information. In each 5-year review conducted for the six petitioned species, we analyzed the threats specific to each taxon based on the five listing factors in section 4 of the Act; we hereby cite and incorporate the data and recommendations in the 5-year reviews for each of these respective species. Accordingly, we have already previously evaluated information regarding threats as presented in the petition (*see* the 2007 5-year reviews of the species on *http://www.regulations.gov or http://www.fws.gov/endangered/*.) Based on the analyses and recommendations contained in the 5-year reviews for each of the six petitioned taxa, we conclude the petition and information in our files represent substantial information indicating the petitioned actions may be warranted.

The primary rationale for the recommendations in the 2007, 5-year reviews to delist *Oenothera californica (avita)* subsp. *eurekensis* and *Swallenia alexandrae* was that the primary threat to the two plant taxa at the time of listing—unrestricted off-highway vehicle (OHV) use—has been eliminated (Service 2007a, p. 13; Service 2007b, p. 11). At the time of listing, the Eureka Dunes was managed by the Bureau of Land Management and open to unrestricted OHV use. Following publication of the proposed rule to list the two Eureka Valley plants, the Bureau closed the Eureka Dunes and some of the surrounding area to OHVs in 1976 and designated campsites, closed undesignated routes, installed vehicle barriers, increased ranger patrols to enforce vehicle closures, conducted monitoring, and instituted an educational outreach program (Service 2007a, p. 8; Service 2007b, p. 6). The 1994 Desert Protection Act passed management of the Eureka Valley from the Bureau to Death Valley National Park (Park). The Park designated all of the dune systems within Eureka Valley as wilderness areas, and illegal OHV use within these areas has occurred only on a sporadic basis. Other potential threats have been identified such as horseback riding and sandboarding and competition from Russian thistle, but we were unable to find evidence that these threats were having an adverse effect on the status of *Oenothera californica (avita)* subsp. *eurekensis* or *Swallenia alexandrae* (Service 2007a, p. 13; Service 2007b, p. 11).

The primary rationale for the recommendation in the 2007, 5-year review to downlist tidewater goby was that the number of known occupied localities had more than doubled since the time it was listed from 48 localities to 106, indicating that the species was more resilient to perturbations and climatic factors such as drought than previously believed (Service 2007c, p. 35). In addition, threats identified at the time of listing had been reduced or were not as serious as thought. One of the main threats identified at the time of listing was habitat destruction and alteration. Current laws and regulations have largely eliminated the major destruction of habitat that occurred in the past along the coast of California (Service 2007c, p. 35).

The primary reasons for the recommendations in the 2007, 5-year review to downlist *Acmispon dendroideus (Lotus scoparius* subsp.) var. *traskiae, Malacothamnus clementinus,* and *Castilleja grisea* were removal of feral pigs and goats from San Clemente Island by 1992 and subsequent increases in the distribution and abundance of each of these three plants (Service 2007d, p. 17; Service 2007e, pp. 21–22; Service 2007f, p. 14). In addition, in 2002 the Department of the Navy adopted the San Clemente Island Integrated Natural Resources Management Plan which helps promote the conservation of these three plants by identifying a number of goals and objectives designed to protect and restore habitat (Service 2007d, p. 17; Service 2007e, pp. 21–22; Service 2007f, p. 14).

Since completion of the 5-year reviews for the six petitioned species, additional information has become available and will be considered in our status reviews. Specifically, we have received additional monitoring data for the two Eureka Valley plants, and, as noted above, additional genetic and taxonomic information for the tidewater goby has been published. The recently published genetic information indicates that there is a divergent southern clade of tidewater gobies in northern San Diego County that may warrant classification as a separate species (Earl *et al.* 2010, p. 103). This and any additional information we receive in response to this finding will be incorporated into our status reviews.

Finding

On the basis of our determination under section 4(b)(3)(A) of the Act, we have determined that the petition presents substantial scientific or commercial information indicating that delisting *Oenothera californica (avita)* subsp. *eurekensis* and *Swallenia alexandrae* and reclassifying the tidewater goby, *Acmispon dendroideus* (*Lotus scoparius* subsp.) var. *traskiae, Malacothamnus clementinus,* and *Castilleja grisea* may be warranted. This finding is based on information provided in our analysis of the threats to each taxon contained in the most

recent 5-year reviews for each of these taxa.

Because we have found that the petition presents substantial information indicating that delisting *Oenothera californica (avita)* subsp. *eurekensis* and *Swallenia alexandrae,* and reclassifying the tidewater goby, *Acmispon dendroideus (Lotus scoparius* subsp.) var. *traskiae, Malacothamnus clementinus,* and *Castilleja grisea,* may be warranted, we are initiating status reviews for each taxon to determine whether the petitioned actions of delisting or reclassifying are warranted.

The "substantial information" standard for a 90-day finding differs from the Act's "best scientific and commercial data" standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding does not constitute a status review under the Act. We will complete a thorough status review of the species following a substantial 90-day finding. In the resulting 12-month finding, we will determine whether a petitioned action is warranted. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will result in a warranted finding.

5-Year Reviews

Section 4(c)(2)(A) of the Act requires that we conduct a review of listed species at least once every 5 years. We are then, under section 4(c)(2)(B), to determine, on the basis of such a review, whether or not any species should be removed from the List (delisted), or reclassified from endangered to threatened, or threatened to endangered. Our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species currently under active review. This notice announces our active review of the *Oenothera californica (avita)* subsp. *eurekensis, Swallenia alexandrae,* and tidewater goby. Active reviews for *Acmispon dendroideus* (*Lotus scoparius* subsp.) var. *traskiae, Malacothamnus clementinus,* and *Castilleja grisea* were announced on May 21, 2010 (75 FR 28636).

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Carlsbad or Ventura Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this notice are the staff members of the Carlsbad and Ventura Fish and Wildlife Offices (*see* **FOR FURTHER INFORMATION CONTACT**).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 3, 2011.

Gregory E. Siekaniac,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–1050 Filed 1–18–11; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 76, No. 12
Wednesday, January 19, 2011

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

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0061]

Notice of Decision to Allow Interstate Movement of Guavas From Hawaii Into the Continental United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our decision to begin allowing the interstate movement into the continental United States of fresh guava fruit from Hawaii. Based on the findings of a pest risk analysis, which we made available to the public for review and comment through a previous notice, we believe that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the interstate movement of guavas from Hawaii.

DATES: *Effective Date:* January 19, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. David Lamb, Import Specialist, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236; (301) 734–0627.

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in "Subpart—Regulated Articles From Hawaii and the Territories" (7 CFR 318.13–1 through 318.13–26, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the interstate movement of fruits and vegetables into the United States from Hawaii, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands to prevent plant pests and noxious weeds from being introduced into and spread within the continental United States. (The continental United States is defined in § 318.13–2 of the regulations as the 48 contiguous States, Alaska, and the District of Columbia.)

Section 318.13–4 contains a performance-based process for approving the interstate movement of commodities that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. Under that process, APHIS publishes a notice in the **Federal Register** announcing the availability of the pest risk analysis that evaluates the risks associated with the interstate movement of a particular fruit or vegetable. Following the close of the 60-day comment period, APHIS may begin allowing the interstate movement of the fruit or vegetable subject to the identified designated measures if: (1) No comments were received on the pest risk analysis; (2) the comments on the pest risk analysis revealed that no changes to the pest risk analysis were necessary; or (3) changes to the pest risk analysis were made in response to public comments, but the changes did not affect the overall conclusions of the analysis and the Administrator's determination of risk.

In accordance with that process, we published a notice [1] in the **Federal Register** on August 25, 2010 (75 FR 52304–52305, Docket No. APHIS–2010–0061), in which we announced the availability, for review and comment, of a pest risk analysis that evaluates the risks associated with the interstate movement of guavas (*Psidium guajava* L.) from Hawaii into the continental United States. We solicited comments on the notice for 60 days ending on October 25, 2010. We received one comment by that date, from a State department of agriculture. The commented supported the action described in the notice. Therefore, in accordance with the regulations in § 318.13–4, we are announcing our decision to begin allowing the interstate movement of guavas from Hawaii into the continental United States subject to the following phytosanitary measures:

- The guavas must be irradiated in accordance with 7 CFR part 305 with a minimum absorbed dose of 400 Gy.
- The guavas must be inspected by an inspector in Hawaii and found free of *Eutetranychus orientalis* and *Oligonychus biharensis.*
- The guavas may be moved in as commercial consignments only.

These conditions will be listed in the Hawaii Fruits and Vegetables Manual (available at *http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/hawaii.pdf*). In addition to those specific measures, guavas from Hawaii will be subject to the general requirements listed in § 318.13–3 that are applicable to the interstate movement of all fruits and vegetables from Hawaii.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 12th day of January 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–985 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the notice, the pest risk analysis, and the comment we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2010–0061.*

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0126]

Availability of an Environmental Assessment for Field Testing Feline Leukemia Vaccine, Live Canarypox Vector

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment concerning authorization to ship for the purpose of field testing, and then to field test, an unlicensed Feline Leukemia Vaccine, Live Canarypox Vector. The environmental assessment, which is based on a risk analysis prepared to assess the risks associated with the field testing of this vaccine, examines the potential effects that field testing this veterinary vaccine could have on the

quality of the human environment. Based on the risk analysis, we have reached a preliminary determination that field testing this veterinary vaccine will not have a significant impact on the quality of the human environment, and that an environmental impact statement need not be prepared. We intend to authorize shipment of this vaccine for field testing following the close of the comment period for this notice unless new substantial issues bearing on the effects of this action are brought to our attention. We also intend to issue a U.S. Veterinary Biological Product license for this vaccine, provided the field test data support the conclusions of the environmental assessment and the issuance of a finding of no significant impact and the product meets all other requirements for licensing.

DATES: We will consider all comments that we receive on or before February 18, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2010–0126* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS–2010–0126, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2010–0126.

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

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

FOR FURTHER INFORMATION CONTACT: Dr. Albert P. Morgan, Section Leader, Operational Support Section, Center for Veterinary Biologics, Policy, Evaluation, and Licensing, VS, APHIS, 4700 River Road, Unit 148, Riverdale, MD 20737–1231; phone (301) 734–8245, fax (301) 734–4314.

For information regarding the environmental assessment or the risk analysis, or to request a copy of the environmental assessment (as well as the risk analysis with confidential business information removed), contact Dr. Patricia L. Foley, Risk Manager, Center for Veterinary Biologics, Policy, Evaluation, and Licensing, VS, APHIS, 1920 Dayton Avenue, P.O. Box 844, Ames, IA 50010; phone (515) 337–6100, fax (515) 337–6120.

SUPPLEMENTARY INFORMATION: Under the Virus-Serum-Toxin Act (21 U.S.C. 151 *et seq.*), a veterinary biological product must be shown to be pure, safe, potent, and efficacious before a veterinary biological product license may be issued. A field test is generally necessary to satisfy prelicensing requirements for veterinary biological products. Prior to conducting a field test on an unlicensed product, an applicant must obtain approval from the Animal and Plant Health Inspection Service (APHIS), as well as obtain APHIS' authorization to ship the product for field testing.

To determine whether to authorize shipment and grant approval for the field testing of the unlicensed product referenced in this notice, a risk analysis was prepared to assess the potential effects of this product on the safety of animals, public health, and the environment. Based on the risk analysis, APHIS has prepared an environmental assessment (EA) [1] concerning the field testing of the following unlicensed veterinary biological product:

Requester: Merial, Inc.

Product: Feline Leukemia Vaccine, Live Canarypox Vector.

Field Test Locations: Alabama, California, Florida, Georgia, Missouri, and Tennessee.

The above-mentioned product consists of a live recombinant canarypox vector expressing certain feline leukemia virus proteins. The vaccine is for use in healthy cats at 8 weeks of age or older as an aid in the prevention of disease due to feline leukemia virus.

The EA has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

[1] The risk analysis (with confidential business information removed) and the EA may be viewed on Regulations.gov (*see* **ADDRESSES** above for a link to Regulations.gov).

Unless substantial issues with adverse environmental impacts are raised in response to this notice, APHIS intends to issue a finding of no significant impact (FONSI) based on the EA and authorize shipment of the above product for the initiation of field tests following the close of the comment period for this notice.

Because the issues raised by field testing and by issuance of a license are identical, APHIS has concluded that the EA that is generated for field testing would also be applicable to the proposed licensing action. Provided that the field test data support the conclusions of the original EA and the issuance of a FONSI, APHIS does not intend to issue a separate EA and FONSI to support the issuance of the product license, and would determine that an environmental impact statement need not be prepared. APHIS intends to issue a veterinary biological product license for this vaccine following completion of the field test provided no adverse impacts on the human environment are identified and provided the product meets all other requirements for licensing.

Authority: 21 U.S.C. 151–159.

Done in Washington, DC, this 12th day of January 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–980 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0115]

Availability of an Environmental Assessment for a Biological Control Agent for Air Potato

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability and request for comments.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment (EA) relative to the control of air potato (*Dioscorea bulbifera*). The EA considers the effects of, and alternatives to, the release of an insect, *Lilioceris cheni,* into the continental United States for use as a biological control agent to reduce the severity of air potato infestations. We are making the EA available to the public for review and comment.

DATES: We will consider all comments that we receive on or before February 18, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0115* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS–2010–0115, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2010–0115.

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

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

FOR FURTHER INFORMATION CONTACT: Dr. Shirley Wager-Page, Chief, Pest Permitting Branch, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1237; (301) 734–8453.

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) is proposing to issue permits for the release of an insect, *Lilioceris cheni,* into the continental United States for use as a biological control agent to reduce the severity of air potato (*Dioscorea bulbifera*) infestations.

Air potato is a twining vine that can grow 65 feet long or greater, capable of climbing and out-competing native vegetation. Air potato was introduced in Florida in 1905 and has since become one of the most aggressive weeds in that State. In 1999, the Florida Department of Agricultural and Consumer Services added air potato to its list of noxious weeds in an attempt to protect the State's native plant species from being displaced or hybridized. Presently, the air potato is well established in Florida and probably throughout the Gulf States where it has the potential to severely disrupt entire ecosystems.

Existing air potato management options, which include chemical and mechanical control methods, are ineffective, expensive, temporary, or have non-target impacts. Thus, a permit application has been submitted to APHIS for the purpose of releasing an insect, *L. cheni,* into the continental United States for use as a biological control agent to reduce the severity of air potato infestations.

APHIS' review and analysis of the proposed action are documented in detail in an environmental assessment (EA) titled "Field Release of *Lilioceris cheni* Gressit & Kimoto (Coleoptera: Chrysomelidae) for Biological Control of Air Potato, *Dioscorea bulbifera* (Dioscoreaceae), in the Continental United States" (September 2010). We are making the EA available to the public for review and comment. We will consider all comments that we receive on or before the date listed under the heading DATES at the beginning of this notice.

The EA may be viewed on the Regulations.gov Web site or in our reading room (see **ADDRESSES** above for instructions for accessing Regulations.gov and information on the location and hours of the reading room). You may request paper copies of the EA by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the title of the EA when requesting copies.

The EA has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 12th day of January 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–981 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0059]

Notice of Decision To Revise a Heat Treatment Schedule for Emerald Ash Borer

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our decision to revise a heat treatment schedule for the emerald ash borer in the Plant Protection and Quarantine Treatment Manual and to retain the current treatment schedule with a different treatment number. Based on the findings of a treatment evaluation document, which we made available to the public for review and comment through a previous notice, we believe that the revised treatment schedule will be sufficient to treat emerald ash borer.

DATES: *Effective Date:* January 19, 2011.

FOR FURTHER INFORMATION CONTACT: Dr. Inder P. S. Gadh, Senior Risk Manager–Treatments, Regulations, Permits, and Manuals, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236; (301) 734–8758.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR chapter III are intended, among other things, to prevent the introduction or dissemination of plant pests and noxious weeds into or within the United States. Under the regulations, certain plants, fruits, vegetables, and other articles must be treated before they may be moved into the United States or interstate. The phytosanitary treatments regulations contained in part 305 of 7 CFR chapter III (referred to below as the regulations) set out standards for treatments required in parts 301, 318, and 319 of 7 CFR chapter III for fruits, vegetables, and other articles.

In § 305.2, paragraph (b) states that approved treatment schedules are set out in the Plant Protection and Quarantine (PPQ) Treatment Manual.[1] Section 305.3 sets out a process for adding, revising, or removing treatment schedules in the PPQ Treatment Manual. In that section, paragraph (a) sets out the process for adding, revising,

[1] The Treatment Manual is available on the Internet at *http://www.aphis.usda.gov/import_export/plants/manuals/index.shtml* or by contacting the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Manuals Unit, 92 Thomas Johnson Drive, Suite 200, Frederick, MD 21702.

or removing treatment schedules when there is no immediate need to make a change. The circumstances in which an immediate need exists are described in § 305.3(b)(1).

In accordance with § 305.3(a)(1), we published a notice [2] in the **Federal Register** on August 25, 2010 (75 FR 52305–52306, Docket No. APHIS–2010–0059), in which we announced the availability of a treatment evaluation document (TED). The TED recommended revising treatment schedule T314–a, which provides a heat treatment schedule for ash logs, including firewood, and all hardwood firewood that are moved from emerald ash borer (EAB, *Agrilus planipennis*) quarantined areas. The TED also recommended retaining the current T314–a as a general treatment for various wood pests (rather than just EAB); we stated that we planned to redesignate this treatment schedule as T314–c in the Treatment Manual.

We solicited comments on the notice for 60 days ending October 25, 2010. We received four comments by that date, from State governments. The comments are discussed below.

The previous T314–a had indicated that ash logs, including firewood, and all hardwood firewood must be heat treated at 71.1 °C (160 °F) for 75 minutes in order to kill any EAB that may have infested those products. The TED concluded that this treatment could be changed to heat treatment of those products at 60 °C (140 °F) for 60 minutes. The TED cited three publications in support of this conclusion. The commenters addressed each of these publications.

Myers *et al.* (2009) [3] evaluated a number of possible time-and-temperature combinations for heat treatment of logs and firewood and found that a minimum heat treatment of 60 °C for 60 minutes was an effective quarantine treatment of ash firewood against EAB.

One commenter stated that the experiment in Myers *et al.* (2009) that most closely approximated the treatment described in the TED (i.e., 60 °C for 60 minutes) used a wet bulb depression method of heating (moist heat), which greatly increased the rate of heating. This commenter stated that, because the recommended revision to T314–a does not include the rate or method of heating, it may or may not replicate the treatments used in Myers *et al.* (2009). The commenter stated that given the potential differences in heating methods, it is safer to go with one of the higher temperatures evaluated in Myers *et al.* (2009), 65 °C for 30 minutes, which also produced no EAB emergence.

The commenter is incorrect; while other experiments in Myers *et al.* (2009) were evaluated with wet bulb depression, the experiment with heat treatment at 60 °C for 60 minutes was conducted in ambient humidity.

Another commenter stated that, in experiment 2 in Myers *et al.* (2009), because of the use of the wet bulb depression, the heating rate of the wood was 30 percent faster than in any of the other experiments.

The heating rates in all of the Myers *et al.* (2009) experiments are higher than what would be found in most commercial kilns, though there are some exceptions. In any case, we have not found generally that heating rates affect treatment efficacy; APHIS does not have any heat treatments that specify heating rates. Rather, the key to effective heat treatment is maintaining the treated articles at the stated minimum temperature for the stated time.

One commenter stated that the firewood used in experiment 2 was not handled in a similar fashion to that used in the other experiments. The pieces used in this experiment were cut approximately 30 days prior to testing, and stored at 4 °C. The commenter stated that the authors mention this inconsistency and state, "* * * this would have resulted in some additional drying of the firewood before the treatment. Although the extra storage did not impact emergence from the control groups, it may have increased the insects' susceptibility to the heat treatments as the wood moisture content would have decreased over this period."

Holding firewood for 30 days prior to treatment is not unrealistic for a commercial operation. In addition, the control group used in that experiment clearly indicates the presence of viable EAB in the wood at the time of treatment. Finally, the experiment involving treating the firewood at 60 °C for 60 minutes used firewood held for fewer than 10 days.

Myers *et al.* (2009) states: "In experiment 3, adult emergence was observed in firewood in 45, 50, and 55 °C treatments for both 30- and 60-min time intervals, whereas no emergence occurred in any of the 60 or 65 °C treatments." One commenter expressed concern about the analysis of the data that led to this conclusion. This commenter stated that, in the treatment that is referred to as 60 °C, that temperature was in fact the "target temperature" in the experiment (60 °C for 60 minutes). The firewood in that experiment had a mean treatment temperature of 62.2 °C±0.2 and a maximum treatment temperature of 63.8 °C±0.4. The treatment with a target temperature of 55 °C for 60 minutes actually produced a mean and maximum treatment temperature that was closer to 60.0 °C. In that experiment, the commenter noted, some EAB did survive.

The experiments in Myers *et al.* (2009) were conducted consistent with how APHIS heat treatment schedules are administered. APHIS heat treatment schedules do not indicate a mean temperature to be held during the treatment period; rather, they specify a minimum temperature that must be maintained throughout the treatment period. Thus, the experiment in which firewood was held at 60 °C for 60 minutes corresponds to how treatment schedule T314–a will be administered.

One commenter stated that the results of the Myers *et al.* (2009) experiments on EAB prepupae that were removed from logs and subjected to various time-temperature combinations should not be considered applicable to the discussion of a heat treatment standard for firewood, except to note that the treatment time and temperature were sufficient to kill EAB. Since these treatments occurred in petri dishes, the commenter stated, the raw data from this experiment cannot be compared to the raw data from the experiments that used real pieces of firewood.

We agree with this commenter. We interpreted the experiments on EAB prepupae as providing useful information corroborating the results of the other experiments in Myers *et al.* (2009).

The TED cited two other publications, by McCullough *et al.* (2007) [4] and Nzokou *et al.* (2008),[5] as consistent with the results of Myers *et al.* (2009). One commenter noted that McCullough *et al.* (2007) states: "No *A. planipennis* survived when chips were exposed to 60 °C for ≥ 2 h in either of our studies, but 50% of the prepupae did survive 1 h of exposure to 60 °C." The commenter

[2] To view the notice, the treatment evaluation document, and the comments we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0059.*

[3] Myers, S. W., I. Fraser, and V. C. Mastro. 2009. Evaluation of heat treatment schedules for emerald ash borer (Coleoptera: Buprestidae). J. Econ. Entomol. 102: 2048–2055.

[4] McCullough, D.G., T.M. Poland, D. Cappaert, E. L. Clark, I. Fraser, V. Mastro, S. Smith, and C. Pell. 2007. Effects of chipping, grinding and heat on survival of emerald ash borer (*Agrilus planipennis* Fairmaire) (Coleoptera: Buprestidae) in chips. J. Econ. Entomol. 100: 1304–1315.

[5] Nzokou, P., S. Tourtellot, and D. P. Kamden. 2008. Kiln and microwave heat treatment of logs infested by the emerald ash borer (*Agrilus planipennis* (Fairmaire) C Coleoptera: Buprestidae). For. Prod J. 58: 68–72.

stated that this statement would not support the recommendation to change T314–a.

That specific statement in McCullough *et al.* (2007) appears to be in error; the rest of the publication describes experiments in which wood chips were held at 60 °C for 20 minutes and 2 hours, with no experiment involving treatment at 60 °C for 60 minutes. As noted in the TED, McCullough *et al.* (2007) reported that EAB prepupae were killed at 60°C for 120 minutes, but not when held at the same temperature for 20 minutes.

Another commenter noted that McCullough *et al.* (2007) did not test treatment at 60 °C for 60 minutes and stated that the publication thus did not provide any data to support the current 30-minute treatment recommendation for firewood.

The treatment revision recommended in the TED was for treatment at 60 °C for 60 minutes, not 30 minutes. The McCullough *et al.* (2007) data is thus consistent with the TED's recommendation. We also note that McCullough *et al.* (2007) does not evaluate the treatment schedule described in the TED; McCullough *et al.* (2007) used small chips, which are more prone to drying during treatment than a piece of firewood, and monitored air temperature, not wood temperature, which would be lower. The TED cited the McCullough *et al.* (2007) results as being consistent with the recommended revision of T314–a, not as supporting it directly.

One commenter stated that Nzokou *et al.* (2008) did not test logs treated at 60 °C for 60 minutes. Another commenter noted that Nzokou *et al.* (2008) concludes with the suggestion that "kiln heat treatment at a level of 65 °C or greater could be an effective sanitization process for EAB-infested logs and wood materials." These commenters stated that Nzokou *et al.* (2008) does not support lowering the current treatment requirement to 60 °C for 60 minutes.

As with McCullough *et al.* (2007), the TED cited Nzokou *et al.* (2008) as consistent with the recommended revision to T314–a, not as supporting it. Nzokou *et al.* (2008) observed the emergence of emerald ash borer from logs heated to 60°C for 30 minutes, but there was no emergence at 65°C for 30 minutes.

While Nzokou *et al.* (2008) conclude that 65 °C is an effective treatment, the authors did not test treatment times longer than 30 minutes. For kiln heat treatments of firewood, we prefer to extend treatment times rather than increase treatment temperature. A typical firewood kiln will operate 12 to 36 hours (or longer) during a heat treatment run, so it is not difficult to extend a treatment by 30 minutes. In addition, many of the existing kilns in the United States use hot water to produce heat. That design limits the internal temperature of the kiln to approximately 70 °C and makes it difficult to produce internal wood temperatures greater than 60 °C. Thus, requiring heat treatment at 65 °C for 30 minutes treatment would be as effective as the revised T314–a but may not be as practical to administer.

One commenter stated that, in the commenter's experience with heat treatment of firewood, the current heat treatment requirements require a core temperature reading to be at least 160 °F for 75 minutes on the largest pieces of firewood being treated. In practice, of course, actual air temperatures inside the heat treatment chamber can vary greatly, along with the time required to heat the chamber and its contents to this minimum standard. Both the time and temperature can be greatly influenced by the way the chamber is heated, moisture content of the wood when it is placed into the chamber, outside air temperature, size of the largest firewood pieces, arrangement of the firewood inside the chamber, and management of the air flow inside the chamber. This variability is made up for by the current treatment, the commenter stated, but could be detrimental if a borderline or unproven schedule is implemented, such as the proposed schedule.

APHIS heat treatment schedules identify the time for which a specific minimum temperature must be achieved; they do not set that minimum temperature to take into account variability at a facility. Rather, heat treatment facilities are certified in accordance with the requirements in § 305.8 of the regulations as capable of properly administering treatments. The certification process allows us to determine if and where any cold spots may exist. In addition, each facility is required to record temperatures of the firewood during the heat treatment process and maintain records of each run. We recertify kilns annually to assure that heat treatment facilities continue to comply with the compliance agreement under which treatments are conducted. Thus, the concerns the commenter cites are addressed through the treatment facility certification process. The previous T314–a heat treatment schedule that the commenter refers to was not developed to address variability but based on the scientific evidence available to us at the time.

One commenter expressed concern that the proposed T314–a for hardwood firewood moved from EAB quarantined areas is not sufficient to address the risks presented by other quarantine pests that may be present in those areas.

We recognized the commenter's concern in the TED, which recommended retaining the current treatment schedule of treatment at 71.1 °C for 75 minutes for other quarantine pests in wood articles as described in §§ 319.40–5 and 319.40–6 of our regulations governing the importation of logs, lumber, and other unmanufactured wood articles. If other pests for which treatment at 71.1 °C for 75 minutes is required are present in an area, ash logs and hardwood firewood moved interstate from that area will be required to be treated in accordance with T314–c, which contains the schedule of heat treatment at 71.1 °C for 75 minutes.

Three commenters raised operational concerns with regard to having two treatments, T314–a and T314–c, for hardwood firewood moved interstate.

APHIS policy is to revise treatments to make them less stringent when scientific evidence supports doing so. Any operational issues that may arise from revising T314–a and adding T314–c as described in the TED are outside the scope of this action. We plan to work with State and local cooperating agencies, as well as the firewood industry and other private cooperating entities, to implement the new treatment schedules and resolve any confusion that may result.

Therefore, in accordance with the regulations in § 305.9(a)(2), we are announcing our decision to revise treatment schedule T314–a as described in the TED. We have also decided to retain the current T314–a as a general treatment for various wood pests (rather than just EAB) and to redesignate this treatment schedule as T314–c in the Treatment Manual.

The new treatments will be listed in the PPQ Treatment Manual, which is available at the Web address and mailing address in footnote 1 of this document.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 12th day of January 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–984 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Food Programs Reporting System

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This is a new collection for the electronic submission of programmatic and financial data through the Food Programs Reporting System (FPRS). The data is currently collected on approved Office of Management and Budget (OMB) forms.

DATES: Written comments must be received on or before March 21, 2011.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Maeve Myers, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 706, Alexandria, VA 22302. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov*, and follow the online instructions for submitting comments electronically.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Maeve Myers at 703–305–2158.

SUPPLEMENTARY INFORMATION:

Title: Food Programs Reporting System (FPRS).

OMB Number: 0584NEW.

Expiration Date: Not Yet Determined.

Type of Request: New collection.

Abstract: The Food and Nutrition Service (FNS) is the Federal agency responsible for managing the domestic nutrition assistance programs. Its mission is to increase food security and reduce hunger in partnership with cooperating organizations by providing children and low-income people access to food, a healthful diet, and nutrition education in a manner that supports American agriculture and inspires public confidence. The domestic nutrition assistance programs include the Supplemental Nutrition Assistance Program (SNAP), the National School Lunch Program (NSLP), the School Breakfast Program (SBP), Special Supplemental Nutrition Program for Women, Infants and Children (WIC), Commodity Supplemental Food Program (CSFP), Food Distribution Program on Indian Reservations (FDPIR), the Emergency Food Assistance Program (TEFAP), and the Senior Farmers' Market Nutrition Program (SFMNP). Currently, the nutrition assistance programs managed by FNS touch the lives of 1 in 4 Americans over the course of a year.

Federal nutrition assistance programs operate as partnerships between FNS, State, Indian Tribal Organizations (ITOs), and local organizations that interact directly with program participants. States and ITOs voluntarily enter into agreements with the Federal Government to operate programs according to Federal standards in exchange for program funds that cover all benefit costs, and a significant portion of administrative expenses. Under these agreements, FNS is responsible for implementing statutory requirements that set national program standards for eligibility and benefits, providing Federal funding to States, ITOs, and local partners, and monitoring and evaluating program structures and policies to make sure that they are properly implemented and effective in meeting program missions. States, ITOs, and local organizations are responsible for delivering benefits efficiently, effectively, and in a manner consistent with national requirements. States and ITOs may operate all or some of the 15 different domestic nutrition assistance programs.

The FNS is consolidating certain programmatic and financial data reporting requirements that are currently approved by the Office of Management and Budget, under the Food Programs Reporting System (FPRS), an electronic reporting system. The purpose is to give States and ITO agencies one portal for the various reporting required for the programs that the States and ITOs operate. The data collected is used for a variety of purposes: mainly program evaluation, planning, audits, funding, research, regulatory compliance, and general statistics.

Affected Public: State and Tribal Government.

Estimated Number of Respondents: 5,095.

Estimated Number of Responses per Respondent: 4.

Estimated Total Annual Responses: 18,485.

Estimated Time per Response: 5 hours. The average estimated time of response varies from .2–98 hours depending on respondent group and type of program report; therefore, FNS provided an estimate.

Estimated Total Annual Burden on Respondents: 97,163 hours.

Dated: January 12, 2011.

Julia Paradis,

Administrator, Food and Nutrition Service.

[FR Doc. 2011–1059 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Lassen County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Lassen County Resource Advisory will meet in Susanville, CA. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The business meeting is hearing presentations and reviewing full proposals to recommend for funding.

DATES: The meeting will be held February 2, 2011 from 8 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at the Lassen National Forest Supervisor's Office in the Caribou Conference Room at 2550 Riverside Drive, Susanville, CA.

FOR FURTHER INFORMATION CONTACT: Heidi Perry, Public Affairs Officer for the Lassen National Forest at 530–252–6604 or *hperry@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public.

Dated: January 12, 2011.

Jerry Bird,

Forest Supervisor.

[FR Doc. 2011–1015 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Shoshone Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Shoshone Resource Advisory Committee (Committee) will hold a conference call on January 28, 2011. The Committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose of the conference call is to assess the project recruitment effort, determine whether further steps should be taken to recruit project proposals, and to vote for a new chairperson.

DATES: The conference call will be held January 28, 2011, at 8 a.m.

ADDRESSES: The meeting will be held via conference call.

FOR FURTHER INFORMATION CONTACT: Olga Troxel, Resource Advisory Committee Coordinator, Shoshone National Forest Supervisor's Office, (307) 578–5164. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Members of the public who wish to participate may do so by calling Olga Troxel, Resource Advisory Committee Coordinator, for conference call information. The following business will be conducted: (1) Progress report on how well the word is getting out about the Committee and funding, and (2) Discussion on when and how to elect the new chairperson. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided.

Dated: January 11, 2011.

Joseph G. Alexander,

Forest Supervisor.

[FR Doc. 2011–895 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Sitka Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Sitka Resource Advisory Committee will meet in Sitka, Alaska, February 15, 2011. The purpose of this meeting is to discuss potential projects under the Secure Rural Schools and Community Self-Determination Act of 2008.

DATES: The meeting will be held February 15, 2011 at 4 p.m.

ADDRESSES: The meeting will be held at the Harrigan Hall Visitor Center, 330 Harbor Dr., Sitka, Alaska. Send written comments to Sitka Resource Advisory Committee, c/o District Ranger, USDA Forest Service, 204 Siginaka Way, Sitka, AK 99835, or electronically to Lisa Hirsch, RAC Coordinator at *lisahirsch@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Lisa Hirsch, RAC Coordinator Sitka Ranger District, Tongass National Forest, (907) 747–4214.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: January 10, 2011.

Carol A. Goularte,

District Ranger.

[FR Doc. 2011–893 Filed 1–18–11; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; 2012 Economic Census Covering the Retail Trade and Accommodation and Food Services Sectors

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 March 21, 2011.

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 Fay Dorsett, U.S. Census Bureau, Service Sector Statistics Division, HQ–8K071, 4600 Silver Hill Road, Washington, DC 20233–0001 (301–763–2687 or via the Internet at *rcb@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The economic census, conducted under authority of Title 13, United States Code (USC), is the primary source of facts about the structure and functioning of the Nation's economy. Economic statistics serve as part of the framework for the national accounts and provide essential information for government, business, and the general public. Economic data are the Census Bureau's primary program commitment during nondecennial census years. The 2012 Economic Census covering the Retail Trade and Accommodation and Food Services sectors (as defined by the North American Industry Classification System (NAICS)) will measure the economic activity of more than 1.7 million establishments. The information collected will produce basic statistics by kind of business on the number of establishments, sales, payroll, and employment. It will also yield a variety of subject statistics, including sales by product line, sales by class of customer, and other industry-specific measures. Primary strategies for reducing burden in Census Bureau economic data collections are to increase reporting through standardized questionnaires and broader electronic data collection methods.

II. Method of Collection

Mail Selection Procedures

Establishments in the Retail Trade and Accommodation and Food Services sectors of the economic census will be selected from the Census Bureau's Business Register for a mail canvass. To be eligible for selection, an establishment will be required to satisfy

the following conditions: (i) It must be classified in the Retail Trade or Accommodation and Food Services sector; (ii) it must be an active operating establishment of a multi-establishment firm (*i.e.,* a firm that operates at more than one physical location), or it must be a single-establishment firm with payroll (*i.e.,* a firm operating at only one physical location); and (iii) it must be located in one of the 50 States or the District of Columbia. Mail selection procedures will distinguish the following groups of establishments:

1. Establishments of Multi-Establishment Firms

All active operating establishments of multi-establishment firms will be included in the mail component of the potential respondent universe. We estimate that the 2012 Economic Census mail canvasses for the Retail Trade and Accommodation and Food Services sectors will include approximately 710,000 establishments of multi-establishment firms.

2. Single-Establishment Firms With Payroll

As an initial step in the selection process, we will conduct a study of the potential respondent universe. This study will produce a set of industry-specific payroll cutoffs that we will use to distinguish large versus small single-establishment firms within each industry or kind of business. This payroll size distinction will affect selection as follows:

a. Large Single-Establishment Firms

All single-establishment firms having annualized payroll (from Federal administrative records) that equals or exceeds the cutoff for their industry will be included in the mail component of the potential respondent universe. We estimate that the 2012 Economic Census mail canvasses for the Retail Trade and Accommodation and Food Services sectors will include approximately 274,000 large single-establishment firms.

b. Small Single-Establishment Firms

A sample of single-establishment firms having annualized payroll below the cutoff for their industry will be included in the mail component of the potential respondent universe. Sampling strata and corresponding probabilities of selection will be determined by a study of the potential respondent universe conducted shortly before the mail selection operations begin. We estimate that the 2012 Economic Census mail canvasses for the Retail Trade and Accommodation and Food Services sectors will include approximately 217,000 small single-establishment firms selected in this sample.

All remaining single-establishment firms with payroll will be represented in the census by data from Federal administrative records. Generally, we will not include these small employers in the census mail canvasses. However, administrative records sometimes have fundamental industry classification deficiencies that make them unsuitable for use in producing detailed industry statistics by geographic area. When we find such a deficiency, we will mail the firm a census classification form. We estimate that the 2012 Economic Census mail canvasses for the Retail Trade and Accommodation and Food Services sectors will include approximately 133,000 small single-establishment firms that receive these forms.

III. Data

OMB Control Number: 0607–0927.

Form Number: The 33 standard forms, seven classification forms, and two ownership or control fliers used to collect information from businesses in these sectors of the Economic Census are tailored to specific business practices and are too numerous to list separately in this notice.

Type of Review: Regular submission.

Affected Public: State or local governments, businesses, or other for profit or non-profit institutions or organizations.

Estimated Number of Respondents: 1,334,000.

Estimated Time per Response: .921 hours.

Estimated Total Annual Burden Hours: 1,228,600.

Estimated Total Annual Cost: $35,641,686.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C. Section 131 and 224.

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: January 12, 2011.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–945 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; 2012 Economic Census Covering the Wholesale Trade Sector

AGENCY: U.S. Census Bureau, 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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before March 21, 2011.

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 Robert Nusz, U.S. Census Bureau, Service Sector Statistics Division, HQ–8K162, 4600 Silver Hill Road, Washington, DC (301) 763–7154 or via the Internet at *wcb@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The economic census, conducted under authority of Title 13, United States Code (U.S.C.), is the primary source of facts about the structure and functioning of the Nation's economy. Economic statistics serve as part of the framework for the national accounts and provide essential information for

government, business, and the general public. Economic data are the Census Bureau's primary program commitment during nondecennial census years. The 2012 Economic Census covering the Wholesale Trade sector (as defined by the North American Industry Classification System (NAICS)) will measure the economic activity of more than 450,000 establishments. The information collected will produce basic statistics by kind of business on the number of establishments, sales, payroll, and employment. It will also yield a variety of subject statistics, including sales by product line, sales by class of customer, and other industry-specific measures. Primary strategies for reducing burden in Census Bureau economic data collections are to increase reporting through standardized questionnaires and broader electronic data collection methods.

II. Method of Collection

Mail Selection Procedures

Establishments in the Wholesale Trade sector of the economic census will be selected from the Census Bureau's Business Register for a mail canvass. To be eligible for selection, an establishment will be required to satisfy the following conditions: (i) It must be classified in the Wholesale Trade sector; (ii) it must be an active operating establishment of a multi-establishment firm (*i.e.,* a firm that operates at more than one physical location), or it must be a single-establishment firm with payroll (*i.e.,* a firm operating at only one physical location); and (iii) it must be located in one of the 50 States or the District of Columbia. Mail selection procedures will distinguish the following groups of establishments:

1. Establishments of Multi-Establishment Firms

All active operating establishments of multi-establishment firms will be included in the mail component of the potential respondent universe. We estimate that the 2012 Economic Census mail canvass for the Wholesale Trade sector will include approximately 134,000 establishments of multi-establishment firms.

2. Single-Establishment Firms With Payroll

All single-establishment firms having annualized payroll (from Federal administrative records) will be included in the mail component of the potential respondent universe. We estimate that the 2012 Economic Census mail canvass for the Wholesale Trade sector will include approximately 316,000 establishments of single-establishment firms.

III. Data

OMB Control Number: 0607–0929.

Form Number: The 42 standard forms and ownership or control flier used to collect information from businesses in this sector of the Economic Census are tailored to specific business practices and are too numerous to list separately in this notice.

Type of Review: Regular submission.

Affected Public: State or local governments, businesses or other for-profit or non-profit institutions and organizations.

Estimated Number of Respondents: 450,000.

Estimated Time per Response: 1 hour and 30 minutes.

Estimated Total Annual Burden Hours: 675,000.

Estimated Total Annual Cost: $19,581,750.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13, U.S.C. 131 & 224.

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: January 12, 2011.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–946 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–501]

Certain Welded Carbon Steel Pipe and Tube From Turkey: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Victoria Cho or Dennis McClure, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, Room 4014, 14th Street and Constitution Ave., NW., Washington, DC 20230, telephone: (202) 482–5075 or (202) 482–5973, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 30, 2010, the U.S. Department of Commerce ("the Department") published a notice of initiation of the administrative review of the antidumping duty order on certain welded carbon steel pipe and tube from Turkey covering the period May 1, 2009, through April 30, 2010. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 75 FR 37759 (June 30, 2010). The preliminary results are currently due no later than January 30, 2011.

Extension of Time Limit for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), requires the Department to make a preliminary determination within 245 days after the last day of the anniversary month of an order for which a review is requested. Section 751(a)(3)(A) of the Act further states that if it is not practicable to complete the review within the time period specified, the administering authority may extend the 245-day period to issue its preliminary results to up to 120 days.

We determine that completion of the preliminary results of this review within the 245-day period is not practicable because we have complex technical issues relating to quarterly cost and affiliated parties, which require additional information and analysis for this administrative review. Due to these reasons and in accordance with section 751(a)(3)(A) of the Act, we are extending the time period for issuing the preliminary results of the review by 120 days. The preliminary results are now

due no later than May 31, 2011. The final results continue to be due 120 days after publication of the preliminary results.

This notice is issued and published in accordance with section 751(a)(3)(A) of the Act.

Dated: January 12, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–1053 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–806]

Silicon Metal From the People's Republic of China: Final Results and Partial Rescission of the 2008–2009 Administrative Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 15, 2010, the Department of Commerce ("Department") published *Silicon Metal from the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of Antidumping Duty Administrative Review,* 75 FR 41143 (July 15, 2010) ("*Preliminary Results*"). The period of review ("POR") is June 1, 2008, through May 31, 2009.

The Department received a timely request from Petitioner, Globe Metallurgical Inc. ("Globe"), in accordance with 19 CFR 351.213(b), for an administrative review of the antidumping duty order on silicon metal from the People's Republic of China ("PRC") for three companies: Datong Jinneng Industrial Silicon Co., Ltd. ("Datong Jinneng"),[1] Jiangxi Gangyuan Silicon Industry Co., Ltd. ("Jiangxi Gangyuan"),[2] and Shanghai Jinneng International Trade Co., Ltd. ("Shanghai Jinneng"). The Department also received a timely request from Shanghai Jinneng and Datong Jinneng (Shanghai Jinneng's affiliated producer of subject merchandise) for an administrative review of Shanghai Jinneng. On July 29, 2009, the Department published a notice of initiation of an antidumping duty administrative review on silicon metal from the PRC, in which we initiated a review of Datong Jinneng, Jiangxi Gangyuan, and Shanghai Jinneng.[3] In the *Preliminary Results,* the Department preliminarily rescinded this review with respect to Jiangxi Gangyuan and Datong Jinneng[4] because they certified that they had no shipments and we found no indication through our examination of U.S. Customs and Border Protection (CBP) data that there were any shipments of subject merchandise by these parties during the POR. The Department has not obtained any evidence to contradict this preliminary finding, and no interested parties commented on the finding. Accordingly, we are rescinding the review with respect to Datong Jinneng and Jiangxi Gangyuan. Consequently, the administrative review covers one respondent, Shanghai Jinneng.

We invited interested parties to comment on our *Preliminary Results.* Based on our analysis of the comments received, we made certain changes to our margin calculation for Shanghai Jinneng. The final dumping margin for this review is listed in the "Final Results Margins" section below.

DATES: *Effective Date:* January 19, 2011.

FOR FURTHER INFORMATION CONTACT: Demitri Kalogeropoulos or Andrew Medley, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2623 and (202) 482–4987, respectively.

Background

On July 15, 2010, the Department published its *Preliminary Results* in the antidumping duty administrative review of silicon metal from the PRC.

For the final results, Globe requested a hearing with the Department on August 16, 2010. Shanghai Jinneng and Globe submitted briefs and rebuttal briefs on August 23, 2010, and September 6, 2010, respectively. We returned Globe's August 23, 2010, case brief because it included untimely filed, new factual information. We allowed Globe to redact the new information and resubmit. Globe submitted its redacted case brief on September 3, 2010. On October 13, 2010, the Department published a notice extending the deadline for the final results of the 2008–2009 administrative review to January 11, 2011. *See Silicon Metal From the People's Republic of China; Extension of Time Limit for the Final Results of the 2008–2009 Administrative Review of the Antidumping Duty Order,* 75 FR 62765 (October 13, 2010). The Department released industry-specific wage rate information on November 18, 2010, and revised data on November 23, 2010. Shanghai Jinneng submitted comments for wage rate issues on November 30, 2010. Globe submitted rebuttal comments for wage rate issues on December 6, 2010. On December 9, 2010, the Department conducted a hearing with interested parties.

Analysis of Comments Received

All issues raised in the case briefs, rebuttal briefs, and wage rate comments filed by parties in this review are addressed in the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to, Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, regarding Silicon Metal from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2008–2009 Administrative Review, dated concurrently with this notice, ("Issues and Decision Memorandum"), which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum follows as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit ("CRU"), Main Commerce Building, Room 7046, and is also accessible on the Web at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Period of Review

The POR is June 1, 2008, through May 31, 2009.

Scope of the Order

The product covered by the order is silicon metal containing at least 96.00 but less than 99.99 percent of silicon by weight, and silicon metal with a higher aluminum content containing between 89 and 96 percent silicon by weight. The subject merchandise is currently classifiable under item numbers 2804.69.10 and 2804.69.50 of the

[1] The abbreviation "Inc." incorrectly appeared after "Datong Jinneng Industrial Silicon Co." in the *Initiation Notice.* The abbreviation "Ltd." should have been used.

[2] We have used the abbreviation "Co." rather than "Company", which was used in the *Initiation Notice,* because "Co." is used in the Automated Customs System Module.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review,* 74 FR 37690 (July 29, 2009) ("*Initiation Notice*").

[4] Datong Jinneng was Shanghai Jinneng's affiliated producer of subject merchandise during the POR and is involved in the instant administrative review as such (*see* Shanghai Jinneng's Response to Section A (October 16, 2009) at 14). However, we are rescinding the review with respect to Datong Jinneng (as an exporter of subject merchandise), based on its no shipments certification, which we confirmed using CBP data.

Harmonized Tariff Schedule of the United States ("HTSUS") as a chemical product, but is commonly referred to as a metal. Semiconductor-grade silicon (silicon metal containing by weight not less than 99.99 percent of silicon and provided for in subheading 2804.61.00 of the HTSUS) is not subject to this order. This order is not limited to silicon metal used only as an alloy agent or in the chemical industry. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Changes Since the Preliminary Results

Based on an analysis of the comments received, the Department has made certain changes in the margin calculation. For the final results, the Department has made the following changes:

- *Valuation of Wage Rate*

For the *Preliminary Results,* the Department revised the calculation of wage rate pursuant to a recent decision by the U.S. Court of Appeals for the Federal Circuit ("CAFC").[5] For the final results, we have calculated a revised hourly wage rate to use in valuing reported labor. The revised wage rate is calculated by averaging earnings and/or wages for ISIC Rev.3 Sub-Classification 27 (Manufacture of basic metals) in countries that are economically comparable to the PRC and that are also significant producers of comparable merchandise. *See* Comment 8 of the Issues and Decision Memorandum. *See also* Memorandum titled "Antidumping Duty Administrative Review of Silicon Metal from the People's Republic of China: Selection of Surrogate Values" ("Surrogate Value Memorandum").

- *Valuation of Silica Fume*

For the final results, we have valued the byproduct, silica fume, using the silica fume value from the previous review of this proceeding, after adjusting for inflation. *See* Comment 5 of the Issues and Decision Memorandum. *See also* Surrogate Value Memorandum.

- *Selection of Financial Ratios*

For the final results, we have included the financial statements of Vipra Ferro Alloys Private Ltd. and Lalwani Ferro Alloys Ltd. in our calculation of surrogate financial ratios. *See* Comment 9 of the Issues and Decision Memorandum. *See also* Surrogate Value Memorandum.

- *Adjustments to Financial Statements*

We made a correction to the financial ratios of Saturn Ferro Alloys Private Ltd. See Comment 10 of the Issues and Decision Memorandum. *See also* Surrogate Value Memorandum.

Final Results Margin

We determine the weighted-average dumping margin for Shanghai Jinneng for the period June 1, 2008, through May 31, 2009, to be 3.14 percent.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Tariff Act of 1930, as amended ("Act"), and 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For assessment purposes, we calculated importer (or customer)-specific assessment rates for merchandise subject to this review. Where appropriate, we calculated an *ad valorem* rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total entered values associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting *ad valorem* rate against the entered customs values for the subject merchandise. Where appropriate, we calculated a per-unit rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise. Where an importer (or customer)-specific assessment rate is *de minimis* (*i.e.,* less than 0.50 percent), the Department will instruct CBP to assess that importer (or customer's) entries of subject merchandise without regard to antidumping duties, in accordance with 19 CFR 351.106(c)(2). We intend to instruct CBP to liquidate entries containing subject merchandise exported by the PRC-wide entity at the PRC-wide rate. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these 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 Shanghai Jinneng, the cash deposit rate will be the rate as listed above in the "Final Results Margins" section of this notice; (2) for previously investigated or reviewed PRC and non-PRC 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 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 139.49 percent; and (4) 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 exporter that supplied that non-PRC exporter. The deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final 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 the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice also serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

We are issuing and publishing the final results and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

[5] *See Dorbest* v. *United States,* 604 F.3d 1363 (Fed. Cir. 2010).

Dated: January 11, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix I

Comment 1: VAT and Export Taxes
Comment 2: Use of Entries Versus Sales
Comment 3: Whether To Adjust Datong Jinneng's Electricity Consumption
Comment 4: Whether To Adjust Datong Jinneng's Labor Hours
Comment 5: Valuation and Treatment of Silica Fume
Comment 6: Valuation of Coal
Comment 7: Valuation of Electricity
Comment 8: Valuation of Labor
Comment 9: Selection of Financial Statements
Comment 10: Adjustments to Financial Ratios

[FR Doc. 2011–1051 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 15, 2010, the Department of Commerce ("Department") published the preliminary results of the 2008–2009 administrative review of tapered roller bearings ("TRBs") from the People's Republic of China ("PRC"). *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of the 2008–2009 Administrative Review of the Antidumping Duty Order,* 75 FR 41148 (July 15, 2010) ("*Preliminary Results*"). The period of review ("POR") is June 1, 2008, through May 31, 2009.

This review covers three respondents: (1) The majority Spungen family-owned joint-venture Peer Bearing Company Ltd.—Changshan ("PBCD/CPZ," also referred to as "PBCD"); (2) the wholly AB SKF-owned Changshan Peer Bearing Company, Ltd. ("SKF/CPZ," also referred to as "SKF"); and 3) Hubei New Torch Science & Technology Company Co., Ltd. ("New Torch").

We invited interested parties to comment on our *Preliminary Results.* Based on our analysis of the comments received, we made certain changes to our margin calculations for PBCD, SKF, and New Torch. The final dumping margins for this review are listed in the "Final Results Margins" section below.

DATES: *Effective Date:* January 19, 2011.

FOR FURTHER INFORMATION CONTACT: Brendan Quinn or Trisha Tran, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5848 and (202) 482–4852, respectively.

Background

On July 15, 2010, the Department published its *Preliminary Results* in the antidumping duty administrative review of TRBs from the PRC. On July 26, 2010, New Torch submitted its response to the Department's supplemental questionnaire regarding its wheel hub units. On August 16, 2010, the Timken Company ("Petitioner") submitted a request for a public and closed hearings. On August 17, 2010, New Torch submitted its response to the Department's second supplemental questionnaire regarding its wheel hub units. Petitioner submitted comments regarding New Torch's response to the Department's second supplemental questionnaire on August 27, 2010. PBCD submitted post-preliminary surrogate value data on August 19, 2010. On August 30, 2010, Petitioner submitted surrogate value information to rebut PBCD's post-preliminary surrogate value data submission. The Department released U.S. Customs and Border Protection ("CBP") information on September 9, 2010. On September 17, 2010, Petitioner submitted public information regarding the Department's release of the September 9, 2010, CBP data.

Between October 1 and October 4, 2010, Petitioner, PBCD, and New Torch submitted their case briefs, and between October 12 and October 13, 2010, Petitioner, PBCD, New Torch, and SKF submitted their rebuttal briefs. On October 14, 2010, Petitioner withdrew its request for a public and closed hearings. On October 18, 2010, PBCD commented on SKF's rebuttal brief, requesting that the Department strike new factual information contained in SKF's rebuttal brief. On October 19, 2010, SKF responded to PBCD's October 18, 2010, submission. On November 4, 2010, the Department requested that SKF strike new factual information contained in SKF's rebuttal brief. On November 8, 2010, SKF resubmitted its redacted rebuttal brief.

The Department released industry-specific wage rate information on October 26, 2010, and solicited new factual information from parties, as well as comments on the Department's intended use of industry-specific wage data. On November 1 and November 2, 2010, respectively, SKF and Petitioner submitted new factual information regarding the wage rate. Petitioner and SKF submitted addenda to their case briefs with respect to the wage rate on November 9, 2010, and addenda to their rebuttal briefs with respect to the wage rate on November 15, 2010.

On September 21, 2010, the Department published an extension of time for the final results to December 12, 2010. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Extension of Time Limit for the Final Results of the 2008–2009 Administrative Review of the Antidumping Duty Order,* 75 FR 57443 (September 21, 2010). On November 26, 2010, the Department extended the deadline for the final results of review to January 11, 2011. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Notice of Second Extension of Time Limit for the Final Results of the 2008–2009 Administrative Review of the Antidumping Duty Order,* 75 FR 72801 (November 26, 2010).

Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by parties in this review are addressed in the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, regarding, "Tapered Roller Bearings from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2008–2009 Administrative Review," dated concurrently with this notice ("Issues and Decision Memorandum"), which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum follows as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit ("CRU"), Main Commerce Building, Room 7046, and is also accessible on the Web at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Period of Review

The POR is June 1, 2008, through May 31, 2009.

Scope of the Order

Imports covered by the order are shipments of tapered roller bearings and parts thereof, finished and unfinished, from the PRC; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use. These products are currently classifiable under Harmonized Tariff Schedule of the United States ("HTSUS") item numbers 8482.20.00, 8482.91.00.50, 8482.99.15, 8482.99.45, 8483.20.40, 8483.20.80, 8483.30.80, 8483.90.20, 8483.90.30, 8483.90.80, 8708.99.80.15 [1] and 8708.99.80.80.[2] Although the HTSUS item numbers are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Scope Determination—New Torch's Wheel Hub Units

In the *Preliminary Results,* the Department initiated a scope inquiry to determine whether New Torch's sales of wheel hub units were subject to the antidumping duty order on TRBs, and stated that we intended to seek additional information with respect to New Torch's merchandise. Based on New Torch's supplemental responses,[3] we find that New Torch's wheel hub units do not contain TRBs and are, therefore, outside the scope of the order.

Affiliation—SKF/CPZ and Company A [4]

In its questionnaire responses, SKF/CPZ indicated that it was affiliated with Company A. For purposes of the *Preliminary Results,* the Department determined not to conduct a collapsing analysis, pursuant to 19 CFR 351.401(f)(1) and (2), with respect to SKF/CPZ and Company A due to insufficient information on the record. Immediately prior to the *Preliminary Results,* we solicited additional information from SKF with respect to the level of common ownership and management and the integration of sales and production operations between SKF/CPZ and Company A, as well as information regarding Company A's sales of subject merchandise during the POR.[5] On July 12, 2010, we received SKF's response to the Department's request for information, which stated that: (a) CPZ/SKF has no direct ownership interest in Company A, or vice versa; (b) the companies do not share common managerial employees or board members; (c) the operations of the two companies are not intertwined; and (d) Company A provided quantity and value information for the products it exported and sold domestically during the POR.[6] We received no further comments on the collapsing issue for these final results and, based on the information provided in SKF's July 12, 2010, letter, we have found that: (a) There is no significant potential for price or production manipulation between SKF/CPZ and Company A; and (b) Company A did not produce subject merchandise for export to the United States. Thus, we have determined that Company A should not be collapsed with SKF for the purposes of the instant review, in accordance with 19 CFR 351.401(f)(2).

Successor in Interest—SKF/CPZ

On September 11, 2008, approximately three and a half months into the POR, PBCD/CPZ and its Illinois-based U.S. sales affiliate, Spungen-owned Peer Bearing Company ("PBCD/Peer"), were each acquired by AB SKF, a Swedish conglomerate, and henceforth known as SKF/CPZ and SKF-owned Peer Bearing Company ("SKF/Peer"), respectively. In addition, on August 28, 2009, SKF submitted a request for a changed circumstance review ("CCR") to determine that SKF/CPZ is not the successor-in-interest to PBCD/CPZ. On September 30, 2009, the Department informed parties that the information provided in SKF's August 28, 2009, submission was sufficient to warrant a successor-in-interest analysis regarding SKF's acquisition of PBCD/CPZ, and that this determination would be performed within the context of the instant administrative review. For the *Preliminary Results,* the Department determined that the totality of the circumstances demonstrated that SKF/CPZ is not the successor-in-interest to PBCD/CPZ.[7] Since the publication of the *Preliminary Results,* no party has challenged the Department's preliminary successor-in-interest determination and no new information was submitted with respect to the Department's preliminary successor-in-interest determination. As such, we continue to find that SKF/CPZ is not the successor-in-interest to the pre-acquisition PBCD/CPZ.

Changes Since the Preliminary Results

Based on an analysis of the comments received, the Department has made certain changes to the margin calculations. For the final results, the Department has made the following changes:

Changes to New Torch's Margin Calculation:

- We deducted domestic inland freight from New Torch's U.S. gross unit price because New Torch explained that it incurred domestic inland freight expenses for the transport of subject merchandise by truck from its factory to the port of export.[8]
- We have deducted domestic brokerage and handling charges from New Torch's reported U.S. prices because New Torch would have incurred some charges for loading the subject merchandise onto vessels for export to the United States based on New Torch's reported terms of delivery.[9]
- We have revised New Torch's entered value calculation to be consistent with the Department's normal practice.[10]

Changes to SKF's and PBCD's Margin Calculations:

- We have used the PBCD-specific and SKF-specific U.S. sales databases, and not the combined joint U.S. sales database used in the *Preliminary Results,* in order to properly calculate

[1] Effective January 1, 2007, the HTSUS subheading 8708.99.8015 is renumbered as 8708.99.8115. See United States International Trade Commission ("USITC") publication entitled, "Modifications to the Harmonized Tariff Schedule of the United States Under Section 1206 of the Omnibus Trade and Competitiveness Act of 1988," USITC Publication 3898 (December 2006) found at www.usitc.gov.

[2] Effective January 1, 2007, the HTSUS subheading 8708.99.8080 is renumbered as 8708.99.8180; *see id.*

[3] *See* New Torch's July 26, 2010, submission; *see also* New Torch's August 17, 2010, submission.

[4] The identity of "Company A" is proprietary. *See* the Department's letter to SKF entitled, "2008–2009 Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings from the People's Republic of China: Second Section A Supplemental Questionnaire," dated July 2, 2010.

[5] *See id.*

[6] *See* SKF's Letter to the Department entitled, "SKF's Response to the Department's Second Section A Supplemental Questionnaire," dated July 12, 2010.

[7] *See Preliminary Results,* 75 FR at 41151–52. *See also* Memorandum to Wendy Frankel, Director, AD/CVD Operations, Office 8, Import Administration, through Erin Begnal, Program Manager, AD/CVD Operations, Office 8, from Brendan Quinn, International Trade Analyst, AD/CVD Operations, Office 8, entitled "Tapered Roller Bearings from the People's Republic of China: Preliminary Successor-In-Interest Determination," dated July 7, 2010.

[8] *See* Issues and Decision Memorandum at Comment 2.

[9] *See* Issues and Decision Memorandum at Comment 3.

[10] *See* Issues and Decision Memorandum at Comment 4. *See also* 2008–2009 Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Analysis of the Final Results Margin Calculation for Hubei New Torch Science & Technology Co., Ltd., dated concurrently with this notice.

each company's net U.S. prices for use in each company's margin calculation.[11]

- We are including the international freight expense associated with sending the unfinished bearings to the third country for further processing, as reported, in the further manufacturing direct materials cost (FURMAT) component of total third-country further manufacturing (TOTFMG or FURMANU) calculation.[12]
- We have calculated SKF's assessment rates based on its reported entered values for the final results, based on SKF's December 8, 2010 submission of entered value information not previously on the record.[13]
- The Department has adjusted SKF's net U.S. price calculation for the amount of duty owed, based on SKF's December 8, 2010, submission of information regarding duty owed.[14]
- We have used PBCD's steel consumption as reported.[15]

Changes to Surrogate Values

- We have calculated a revised hourly wage rate to use in valuing reported labor. The revised wage rate is calculated by averaging earnings and/or wages for ISIC Rev. 3 Sub-Classification 29 (Manufacture of machinery and equipment) in countries that are economically comparable to the PRC that are also significant producers of comparable merchandise.[16]
- We have revised the steel bar surrogate value to exclude imports from certain countries under the relevant Indian HTS category.[17]

Final Results Margins

We determine that the following weighted-average dumping margins exist for the period June 1, 2008, through May 31, 2009:

TRBs FROM THE PRC

Exporter	Weighted-average margin
Peer Bearing Company—Changshan (Spungen-Owned, "PBCD")	38.39%
Changshan Peer Bearing Co., Ltd. (SKF-Owned, "SKF")	14.13%
Hubei New Torch Science & Technology Co., Ltd	0.00%

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For assessment purposes, we calculated importer- (or customer-) specific assessment rates for merchandise subject to this review. Where appropriate, we calculated an *ad valorem* rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total entered values associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting *ad valorem* rate against the entered customs values for the subject merchandise. Where appropriate, we calculated a per-unit rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise. Where an importer- (or customer-) specific assessment rate is *de minimis* (*i.e.,* less than 0.50 percent), the Department will instruct CBP to assess that importer's (or customer's) entries of subject merchandise without regard to antidumping duties, in accordance with 19 CFR 351.106(c)(2). We intend to instruct CBP to liquidate entries containing subject merchandise exported by the PRC-wide entity at the PRC-wide rate of 92.84 percent. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these 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 PBCD, SKF, and New Torch, the cash deposit rate will be the margins listed above; (2) for previously investigated or reviewed PRC and non-PRC 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 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 92.84 percent; and (4) 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 exporter that supplied that non-PRC exporter. These deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final 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 the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice also serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

We are issuing and publishing the final results and notice in accordance

[11] *See* Issues and Decision Memorandum at Comment 9.

[12] *See* Issues and Decision Memorandum at Comment 10.

[13] *See* Issues and Decision Memorandum at Comment 11.

[14] *See* Issues and Decision Memorandum at Comment 12.

[15] *See* Issues and Decision Memorandum at Comment 13.

[16] *See* Issues and Decision Memorandum at Comment 17.

[17] *See* Issues and Decision Memorandum at Comment 14. *See also* Factors Valuations for the Final Results of the 2008–2009 Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China, dated concurrently with this notice.

with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: January 11, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix I

Comment 1: Whether To Apply Partial Facts Available to New Torch's Sales of Wheel Hub Units
Comment 2: Treatment of Domestic Inland Freight
Comment 3: Treatment of Brokerage and Handling
Comment 4: Entered Value Calculation
Comment 5: Correcting for Alleged Distortions Associated With a Three-Month Production Period
Comment 6: Country of Origin
Comment 7: Importer-Specific Assessment Rates
Comment 8: Valuation of Acquired Inventory
Comment 9: Which U.S. Sales Database To Use
Comment 10: Calculation of Further Processing Costs
Comment 11: Corrections to Entered Value
Comment 12: Correction of Duty Amount
Comment 13: Treatment of Certain Steel Inputs in PBCD/CPZ's Normal Value
Comment 14: Valuation of Steel Bar
Comment 14A: Market Economy Inputs
Comment 14B: Surrogate Value
Comment 15: Surrogate Value for Steel Rod
Comment 16: Adjustments to Financial Ratio
Comment 17: Wages

[FR Doc. 2011–1026 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Roundtable on Federal Government Engagement in Standards

AGENCY: National Institute of Standards and Technology (NIST), United States Department of Commerce (DoC).

ACTION: Notice of public meeting.

SUMMARY: NIST invites stakeholders (*e.g.,* industry, standards setting organizations, academia, trade associations, professional societies, and Federal, State and local government agencies, *etc.*) involved in standardization (standards setting and the use of standards) to attend a public meeting. The purpose of the meeting is to discuss the Federal government's role in standards development and use to address national priorities. Registration for attending the event is strongly encouraged. The roundtable will also be webcast live.

DATES: The public meeting will be held on Tuesday, January 25, 2011 from 9:30 a.m. to 12 p.m. Pre-registration must be completed by 12 p.m. on Monday, January 24, 2011.

ADDRESSES: The public meeting will be held in the U.S. Department of Commerce Herbert C. Hoover Building Auditorium, 1401 Constitution Avenue, NW., Washington, DC. Please note registration and admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice. A link to the webcast will be posted at: *http://www.nist.gov* prior to the event.

FOR FURTHER INFORMATION CONTACT: Nick Sinai at 240–751–5615 or by e-mail at *Nick.sinai@nist.gov.* Media inquiries should be directed to NIST Public and Business Affairs at 301–975–NIST or *inquiries@nist.gov.*

SUPPLEMENTARY INFORMATION: Achieving national priorities such as the development and deployment of a Smart Grid, secure and interoperable electronic health records, cybersecurity, cloud computing, and interoperability in emergency communications depends upon interoperable standards. Consensus standards for these new technology sectors are helping drive innovation, economic growth, and job creation.

The DoC and NIST are hosting a moderated panel discussion with thought leaders from industry and academia to address the following questions: What is an appropriate role for the Federal government in convening industry stakeholders and catalyzing standards development and use? How should the Federal government engage in sectors where there is a compelling national interest? How are existing public-private initiatives in standardization working?

On December 8, 2010, NIST issued a Request for Information (RFI) (75 FR 76397) seeking stakeholder input on the "Effectiveness of Federal Agency Participation in Standardization in Select Technology Sectors for the National Science and Technology Council's Sub-Committee on Standardization." All interested parties are encouraged to respond to the RFI, regardless of their attendance at the roundtable.

All visitors to the event are strongly encouraged to pre-register. Admittance without pre-registration cannot be assured. The deadline for registration is 12 p.m. on Monday, January 24, 2011. Information about the event, including a draft agenda, confirmed panelists, registration information and webcast information will be available at: *http://www.nist.gov/allevents.cfm.* Registration for the roundtable can be done at: *https://www-s.nist.gov/CRS/conf_disclosure.cfm?CFID%3D2300429%26CFTOKEN%3D60db85ca1a63b0f5%2DF8BD1368%2DB117%2DE1FB%2D3C762C197F4DAA57%26jsessionid%3D84304151c01bdf203d52252a124b13192e13&conf_id=4627.* Stakeholders following the roundtable on the webcast can e-mail questions to *Standards_Roundtable@nist.gov.*

Dated: January 13, 2011.

Charles H. Romine,

Acting Associate Director for Laboratory Programs.

[FR Doc. 2011–1003 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Alaska Region Bering Sea & Aleutian Islands Crab Permits

AGENCY: National Oceanic and Atmospheric Administration (NOAA), 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 March 21, 2011.

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 and instructions should be directed to Patsy A. Bearden, (907) 586–7008 or *patsy.bearden@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This is an extension of a currently approved collection.

The Crab Rationalization Program allocates Bering Sea and Aleutian Islands (BSAI) crab resources among harvesters, processors, and coastal communities through a limited access system that balances the interests of these groups who depend on these

fisheries. Program components include quota share allocation, processor quota share allocation, individual fishing quota and individual processing quota issuance, quota transfers, use caps, crab harvesting cooperatives, protections for Gulf of Alaska groundfish fisheries, arbitration system, monitoring, economic data collection, and cost recovery fee collection.

II. Method of Collection

On paper (faxed or mailed) or electronically. The Annual RCR Ex-Vessel Volume and Value Report, Crab Inter-Cooperative IFQ Transfer, and Transfer of Crab IPQ may be completed online.

III. Data

OMB Control Number: 0648–0514.

Form Number: None.

Type of Review: Regular Submission (extension of a currently approved collection).

Affected Public: Business or other for-profit organizations; individuals or households.

Estimated Number of Respondents: 1,920.

Estimated Time per Response: 2.5 hours for Application for Crab Individual Fishing Quota (IFQ) permit; 2.5 hours for Application for Crab Individual Processor Quota (IPQ) permit; 2.5 hours for Application for annual crab harvesting cooperative IFQ permit; 30 minutes for Application for Registered Crab Receiver (RCR) permit; 35 minutes for Application for crab IFQ hired master; 35 minutes for Application for Federal crab vessel permit; 2.5 hours for Application to become an eligible crab community organization (ECCO); 2 hours for Application for eligibility to receive Crab QS/IFQ or PQS/IPQ by transfer; 2 hours for Application for transfer of Crab QS/IFQ or PQS/IPQ; 2 hours for Application to transfer QS/IFQ to or from an ECCO; 2 hours for Application for Transfer of IFQ between Crab Harvesting Cooperatives; 30 minutes for RCR fee submission form; 40 hours for Right of First Refusal Provisions (ROFR); 30 minutes for ROFR Waiver; and 4 hours to file an appeal to NMFS Permit Decisions.

Estimated Total Annual Burden Hours: 4,472.

Estimated Total Annual Cost to Public: $ 12,425 in recordkeeping/reporting costs.

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: January 13, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–957 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Alaska Region; Bering Sea and Aleutian Islands Crab Arbitration

AGENCY: National Oceanic and Atmospheric Administration (NOAA), 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 March 21, 2011.

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 and instructions should be directed to Patsy A. Bearden, (907) 586–7008 or *patsy.bearden@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This is an extension of a currently approved collection.

The Crab Rationalization Program allocates Bering Sea and Aleutian Islands (BSAI) crab resources among harvesters, processors, and coastal communities through a limited access system that balances the interests of these groups who depend on these fisheries. Program components include quota share allocation, processor quota share allocation, individual fishing quota and individual processing quota issuance, quota transfers, use caps, crab harvesting cooperatives, protections for Gulf of Alaska groundfish fisheries, arbitration system, monitoring, economic data collection, and cost recovery fee collection.

The Crab Rationalization Program Arbitration System is established by the contracts required pursuant to 50CF 680.20, including the process by which the Market Report and Non-Binding Price Formula are produced, as well as the negotiation approaches, the Binding Arbitration process, and fee collection.

II. Method of Collection

Responses are mailed, except the Non-Binding Price Formula Report may be submitted electronically.

III. Data

OMB Control Number: 0648–0516.

Form Number: None.

Type of Review: Regular Submission (extension of a currently approved collection).

Affected Public: Business or other for-profit organizations; individuals or households.

Estimated Number of Respondents: 49.

Estimated Time per Response: Market Reports and Non-Binding Price Formula Reports, 40 hours each; Annual Arbitration Organization Reports, 4 hours; Miscellaneous Organization Reports, 1 hour; establishing price for arbitration negotiations, 45 minutes.

Estimated Total Annual Burden Hours: 743.

Estimated Total Annual Cost to Public: $ 5,374 in recordkeeping/reporting costs.

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: January 13, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–956 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA153

Fisheries of the South Atlantic and Gulf of Mexico; South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The South Atlantic Fishery Management Council's Scientific and Statistical Committee will hold a meeting of its SSC to discuss the findings of its Socio-Economic sub-panel. *See* **SUPPLEMENTARY INFORMATION.**

DATES: The meeting will be held March 3, 2011, via conference call. *See* **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The meeting will be held by conference call from 10 a.m. to 12 p.m., EST on Thursday, March 3, 2011. Listening stations are available at the South Atlantic Fishery Management Council, 4055 Faber Place Drive #201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366; e-mail: *Kim.Iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: Under the Magnuson-Stevens Reauthorized Act, the SSC is the body responsible for reviewing the Council's scientific materials. The SSC will discuss recommendations of the Council's Social and Economic Sciences sub-Panel and develop recommendations for Regulatory Amendment 9 to the Snapper-Grouper Regulatory FMP. The amendment addresses commercial trip limits alternatives for greater amberjack, vermilion snapper, black sea bass, and gag.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (*see* **ADDRESSES**) at least 3 business days prior to the meeting.

Dated: January 12, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–941 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA133

National Annual Catch Limit Science Workshop; Meeting Announcement

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

ACTION: Notice of a public meeting.

SUMMARY: NMFS announces a workshop which will focus potential areas of improvement in scientific information needed to support Annual Catch Limits (ACL) and Accountability Measures (AM). The meeting will be held on February 15–17, 2011, at the Crowne Plaza, Silver Spring, MD. Meeting topics are provided under the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: The meeting will be held on February 15–17, 2011, from 9 a.m. to 5 p.m. EST.

ADDRESSES: The meeting will be held at the Crowne Plaza, Silver Spring, 8777 Georgia Avenue, Silver Spring, MD, telephone 1–877–270–1393.

FOR FURTHER INFORMATION CONTACT: Richard Methot, Office of Science and Technology, NMFS at *richard.methot@noaa.gov,* or at (206) 860–3365.

SUPPLEMENTARY INFORMATION: NOAA Fisheries Service is announcing a National Annual Catch Limit (ACL) Science Workshop on February 15–17, 2011, in Silver Spring, MD. The meeting will be held in conjunction with the regional Fishery Management Councils (Councils) and will involve NOAA Fisheries Service staff, Council representatives and nationally recognized fishery science experts.

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) was amended in 2007, to include a requirement to implement ACLs and accountability measures in the nation's fisheries. This mandate, and the subsequent update of National Standard 1 Guidelines, substantially changed the nature and amount of data needed to manage the nation's fisheries. The workshop will focus on scoping potential improvements in the state of scientific information needed to support implementation of the MSA, particularly the determination and implementation of Annual Catch Limits (ACL). The scope of this science issues associated with ACLs is quite broad, and not all topics can be fully covered. The proposed topics to be addressed include:

- Identifying data needs, and related costs, of conducting additional stock assessments.
- Calculating and communicating uncertainty in stock assessments.
- Considering socio-economic and ecosystem considerations, in the definition of optimum yield.
- Developing cost-effective approaches to developing ACLs and AMs for data-poor stocks.
- How to best use cooperative research programs to augment needed data.
- Coordinating the roles of Science Centers, SSCs, and peer review systems in providing the best scientific information available.
- Identifying improvements to commercial and recreational fishery monitoring programs to provide scientists and managers with the data they need.

Special Accommodations

The meeting location is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mark Nelson at (301) 713–2341 at least five working days prior to the meeting.

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

Dated: January 13, 2011.

James P. Burgess,

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

[FR Doc. 2011–1025 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA147

Endangered Species Permit No. 1578–01 and Permit No. 1595–04

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

ACTION: Notice; issuance of permit amendments.

SUMMARY: Notice is hereby given the following applicants have been issued a modification to research permits (Permit Nos. 1578 and 1595–03) to take shortnose sturgeon for purposes of scientific research:

Maine Department of Marine Resources (MDMR) (Gail S. Wippelhauser, Principal Investigator), 21 State House Station, Augusta, ME, 04333 (Permit No. 1578); and

Michael M. Hastings, University of Maine, 5717 Corbett Hall, Orono, ME 04469, (Permit No. 1595–03).

ADDRESSES: The permit amendments and related documents are available for review upon written request or by appointment in the following offices(s):

- Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376; and
- Northeast Region, NMFS, Protected Resources Division, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281–9328; fax (978) 281–9394.

FOR FURTHER INFORMATION CONTACT: Malcolm Mohead or Colette Cairns, (301) 713–2289.

SUPPLEMENTARY INFORMATION: On September 24, 2010, notice was published in the **Federal Register** (75 FR 58350) that a request for an amendment to Permit No. 1578 and Permit No. 1595–03 to conduct research on shortnose sturgeon had been submitted by the above-named organizations. The requested permit modifications have been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit Modification No. 1578–01

The existing permit authorized sampling of 500 shortnose sturgeon adults and sub-adults annually in the main stem of the Kennebec River between Augusta, ME and Lockwood Dam focusing on the location of spawning and foraging habitat, migratory pathways, and effects of river flow on migration and habitat use. The researcher is now authorized to document the use of other river systems by shortnose sturgeon in the Gulf of Maine (GOM) capturing up to 600 from (1) The Kennebec River mouth to Lockwood Dam; (2) the Androscoggin River mouth to Brunswick Dam; (3) the Sheepscot River mouth to Reversing Falls; (4) the Sasanoa River, the Back River, and Sagadahoc Bay; (5) Tottman Cove; and (6) the lower Saco River. New research methods include: use of Floy tags for external identification; endoscopic examination with borescopes to verify sex; blood sampling; gastric lavage for diet analysis; scute sampling for elemental analysis; and electro-narcosis for anesthetization. Researchers are also authorized an increase in the number of fish acoustically tagged (up to 60 annually); and an increase of early life stage sampling (up to 60 annually) in the Kennebec complex and Saco River.

Permit Modification No. 1595–03

The objectives of the original research remains the same as the modification, assessing the distribution, movements, abundance and spawning of shortnose sturgeon in the Penobscot River system; however, the number of shortnose sturgeon captured with gill and trammel nets is increased from 200 to 300 annually. Other new research activities include: (1) Lowering the minimum water temperature to 0°C in order to sample shortnose sturgeon adults and sub-adults; (2) using Floy tags for externally identifying; (3) using electro-narcosis for anesthetization; (4) using scute sampling for elemental analysis; (5) using gastric lavage for diet analysis; and (6) including September to December to sample early life stages.

As required by the ESA, issuance of this permit was based on a finding that such permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: January 12, 2011.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–1039 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA100

Taking and Importing Marine Mammals: Taking Marine Mammals Incidental to Navy's Mission Activities at the Naval Surface Warfare Center Panama City Division

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

ACTION: Notice; issuance of a Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notification is hereby given that NMFS has issued a one-year Letter of Authorization (LOA) to take marine mammals by harassment incidental to the U.S. Navy's Research, Development, Test and Evaluation (RDT&E) mission activities at the Naval Surface Warfare Center Panama City Division (NSWC PCD) to the Commander, U.S. Naval Surface Warfare Center Panama City Division, 110 Vernon Avenue, Panama City, FL 32407–7001 and persons operating under his authority.

DATES: Effective from January 21, 2011, through January 20, 2012.

ADDRESSES: Copies of the Navy's September 2, 2010, LOA application, the LOA, the Navy's 2010 marine species monitoring report and the Navy's 2010 annual mission activities report are available by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910, by telephoning the contact listed here (*See* **FOR FURTHER INFORMATION CONTACT**), or online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS (301) 713–2289 x137.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a military readiness activity if certain findings are made and regulations are issued.

Authorization may be granted for periods of 5 years or less if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, NMFS must prescribe regulations that include permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance. The regulations also must include requirements pertaining to the monitoring and reporting of such taking.

Regulations governing the taking of marine mammals incidental to the U.S. Navy's RDT&E activities at the NSWC PCD were published on January 21, 2010 (75 FR 3395), and remain in effect through January 21, 2015. They are codified at 50 CFR part 218 subpart S. These regulations include mitigation, monitoring, and reporting requirements for the incidental taking of marine mammals by the Navy's RDT&E activities. For detailed information on these actions, please refer to the January 21, 2010 **Federal Register** notice and 50 CFR part 218 subpart S.

Summary of LOA Request

NMFS received an application from the U.S. Navy for an LOA covering the Navy's RDT&E activities at NSWC PCD off the U.S. Gulf of Mexico under the regulations issued on January 21, 2010 (75 FR 3395). The application requested authorization, for a period not to exceed one year, to take, by harassment, marine mammals incidental to proposed RDT&E activities that involve underwater explosive detonation, projectile firing, and sonar testing.

Summary of Activity Under the 2010 LOA

As described in the Navy's exercise report, which covered the period between January and August 2010, the RDT&E activities conducted by the Navy were within the scope and amounts contemplated by the final rule. None of the testing events exceeded the average annual allotment except for the AN/AQS–20 in non-territorial waters, which exceeded the annual allotment by 9.3%, but was still within the five-year total allotment for this type of event. No test activities involving underwater explosive detonations and projectile firing were conducted between January and August 2010.

As shown in Tables 1 and 2, most of the mid-frequency active sonar (MFAS) and high-frequency active sonar (HFAS) testing events were far below the levels authorized in the annual LOA.

TABLE 1—TOTAL ANNUAL NUMBER OF EACH TYPE OF MFAS AND HFAS LISTED AT 50 CFR 218.180 CONDUCTED IN THE NSWC PCD STUDY AREA IN TERRITORIAL WATERS (NUMBER AUTHORIZED VS. CONDUCTED).

Sonar system	Number authorized (hrs)	Number conducted (hrs)
AN/SQS–53/56 Kingfisher	3	0
Sub-bottom profiler (2–9 kHz)	21	0
REMUS SAS–LF	12	12
REMUS Modem	25	25
Sub-bottom profiler (2–16 kHz)	24	24
AN/SQQ–32	30	0
REMUS–SAS–LF	20	20
SAS–LF	35	35
AN/WLD–1RMS–ACL	33.5	26.3
BPAUV Sidescan	25	0
TVSS	15	0
F84Y	15	0
BPAUV Sidescan	25	0
REMUS–SAS–HF	10	0
SAS–HF	11.5	0
AN/AQS–20*	545	27.3
AN/WLD–11 RMS Navigation	15	0
BPAUV Sidescan	30	0

*In the 2010 LOA, this system was incorrectly listed as the AN/SQS–20.

TABLE 2—TOTAL ANNUAL NUMBER OF EACH TYPE OF MFAS AND HFAS LISTED AT 50 CFR 218.180 CONDUCTED IN THE NSWC PCD STUDY AREA IN NON-TERRITORIAL WATERS (NUMBER AUTHORIZED VS. CONDUCTED).

Sonar system	Number authorized (hrs)	Number conducted (hrs)
AN/SQS–53/56 Kingfisher	1	0
Sub-bottom profiler (2–9 kHz)	1	0
REMUS Modem	12	1.3
Sub-bottom profiler (2–16 kHz)	1	0
AN/SQQ–32	1	0
SAS–LF	1	0
AN/WLD–1RMS–ACL	5	0
BPAUV Sidescan	38	0
TVSS	16.5	0
F84Y	15	0
REMUS–SAS–HF	25	0
SAS–HF	15	0
AN/AQS–20*	15	16.4
BPAUV Sidescan	25	0

*In the 2010 LOA, this system was incorrectly listed as the AN/SQS–20.

Planned Activities for 2010

In 2010, the Navy expects to conduct the same type and amount of RDT&E activities identified in the final rules and 2010 LOA. No modification is proposed by the Navy for its planned 2010 activities.

Estimated Take for 2010

The estimated takes for the Navy's proposed 2010 RDT&E activities are the same as those in authorized in 2010. No change has been made in the estimated takes from the 2010 LOA.

Summary of Monitoring, Reporting, and Other Requirements Under the 2009 LOA

Annual Mission Activities Report

The Navy submitted their 2010 annual mission activities report covering the period from January through August 2010 within the required timeframes and it is posted on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* NMFS has reviewed the report and it contains the information required by the 2010 LOA. The report lists the amount of hours sonar testing was conducted between January and August 2010. During this time period, NSWC PCD conducted 187.3 hours of sonar testing, 169.6 hours in territorial waters (Table 1) and 17.7 hours in non-territorial waters (Table 2). No RDT&E activities associated with underwater detonations were conducted during this period.

Monitoring and Annual Monitoring Reports

In the 2010 LOA to the Navy, it states that the Navy "shall visually survey a minimum of 2 HFAS/MFAS activities and 2 explosive events per year" as monitoring activities for the Navy's NSWC PCD RDT&E activities. NMFS realized late that this was an error as this was inconsistent with what was agreed upon between NMFS and the Navy. The Navy stated, and NMFS agreed, that since the rule and the associated LOA was expected to be issued in late January 2010 (it was actually issued on January 21, 2010), it would not be feasible to conduct a monitoring activity within the remaining eight months of FY 2010 (between February and September 2010). Therefore, NMFS agreed with the Navy that no monitoring would be required for FY 2010. Nevertheless, the Navy will be required to monitor a minimum of 2 HFAS/MFAS activities and 2 explosive events per year for the remaining four years of the rule, given that an adequate number of RDT&E activities will be conducted during the period.

The Navy submitted a marine species monitoring report within the required timeframes and it is posted on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* The monitoring report covers the period between January and August 2010. From January to August 2010, there have been no monitoring opportunities available for explosive or projectile firing events in the NSWC PCD study area as none of these activities were conducted. No monitoring was conducted for sonar activities during this period as the Navy was working on awarding a monitoring contract and developing standard operating procedures. The Navy states that the NSWC PCD Environmental Office and Test and Evaluation Branch has since identified the appropriate contracting vehicle and worked with the consulting firm to develop annual budgetary, scheduling, and monitoring support requirements.

The Navy will conduct two monitoring activities for sonar activities and two for explosive events in FY2011.

Integrated Comprehensive Management Program (ICMP) Plan

The ICMP will be used both as: (1) A planning tool to focus Navy monitoring priorities (pursuant to ESA/MMPA requirements) across Navy Range Complexes and Exercises; and (2) an adaptive management tool, through the consolidation and analysis of the Navy's monitoring and marine observer data, as well as new information from other Navy programs (e.g., research and development), and other appropriate newly published information. The Navy updated its 2010 ICMP Plan and will comply with the Plan. The ICMP may be viewed at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

NOAA Workshops

In a January 19, 2010, letter to the Council on Environmental Quality, NOAA identified the need for two interrelated workshops on marine mammals and sound in the ocean. To address this commitment, NOAA is convening two parallel, focused, relatively small, and product-driven working groups. One will identify and map cetacean "hot spots", defined as areas of known, or reasonably predictable, biological importance (*i.e.,* for reproduction, feeding, migration) and/or high densities. The second working group will be directed toward developing a comprehensive data collection and analysis plan for describing and predicting underwater sound fields in different areas. The outcomes of these working groups will be integrated and analyzed in a broader follow-on symposium to include a larger audience of scientists, industries, federal agencies, conservation managers, and environmental NGOs. The final products and analyses will provide a more robust, comprehensive, and context-specific biological and acoustic basis by which to inform subsequent management decisions regarding human noise in our oceans. The steering committee has been convened and met for the first time in October 2010. The working group efforts should take about a year to complete, and we expect the final symposium to be held in early 2012. The results of these working groups will be analyzed by NMFS in an adaptive management context, as related to the Panama City final rule, and mitigation or monitoring measures may be modified, as appropriate.

Adaptive Management and 2010 Monitoring Plan

NMFS and the Navy conducted an adaptive management meeting in October 2010 wherein we reviewed the Navy monitoring results through August 1, 2010, discussed other Navy research and development efforts, and discussed other new information that could potentially inform decisions regarding Navy mitigation and monitoring. Since there was no monitoring conducted at PCD during the first seven months of 2010 (from January 21 to August 1, 2010) as discussed above, no modifications were made concerning the monitoring plan for the NSWC PCD RDT&E activities.

Additionally, the monitoring conducted under the Atlantic Fleet Active Sonar Training (AFAST) regulations (which also cover the Gulf of Mexico), as well as under the Hawaii Range Complex and Southern California (SOCAL) Range Complex regulations, was also considered at the October adaptive management meeting. The Navy's implementation of the monitoring plans under these other regulations successfully contributed to the following larger bodies of data: (1) A greater knowledge and understanding of the density and distribution of species within the AFAST study area; (2) the vocalizations of different species, which advances the development of automated classification software; (3) the movement patterns of individual (both vertically in the water column as well as horizontally for the duration of a DTAG deployment); and (4) observable behavioral patterns of marine mammals, before, during, and after exposure to Navy training activities. However, while the data collected by the Navy through monitoring and reporting builds upon the existing body of information in a valuable way, none of the new data contradict, or amend, the assumptions that underlie the findings in the 2010 PCD rule in a manner that would suggest changing the current mitigation or monitoring.

Authorization

The Navy complied with the requirements of the 2010 LOA. Based on our review of the Navy's annual mission activities report, which shows that the amount of sonar testing hours was far below the annual authorized levels and that no underwater detonation and projectile firing were conducted during FY 2010, NMFS has determined that the effects to marine mammals that resulted from the 2010 NWSC PCD RDT&E activities were likely lower than analyzed. Although no monitoring activities were conducted during the Navy's first seven months' of activity for FY 2010, the low level of activity supports a conclusion that the total number of marine mammals taken by the RDT&E activities at the NSWC PCD will have no more than a negligible impact on the affected species or stock of marine mammals. (There is no subsistence use of marine mammals that could potentially be impacted by the Navy's activities at NSWC PCD.) Accordingly, NMFS has issued a one-year LOA for Navy RDT&E activities at the NSWC PCD from January 21, 2011, through January 20, 2012.

Dated: January 13, 2011.

Helen Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–1030 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA025

Taking and Importing Marine Mammals; U.S. Navy Training in the Hawaii Range Complex

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

ACTION: Notice of issuance of a Letter of Authorization; request for comments on Integrated Comprehensive Management Program Plan.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notice is hereby given that NMFS has issued a Letter of Authorization (LOA) to the U.S. Navy (Navy) to take marine mammals incidental to training and research activities conducted within the Hawaii Range Complex (HRC) for the period of January 15, 2011, through January 14, 2012.

NMFS also provides notice that the Integrated Comprehensive Management Program (ICMP) Plan, which is intended for use as a planning tool to focus Navy monitoring priorities pursuant to the MMPA and Endangered Species Act (ESA), has been updated for 2010. NMFS encourages the public to review this document and provide comments, information, and suggestions on the ICMP Plan.

DATES: This Authorization is effective from January 15, 2011, through January 14, 2012. Comments and information on the ICMP Plan must be received no later than February 28, 2011.

ADDRESSES: The LOA and supporting documentation may be obtained by writing to P. Michael Payne, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, or by telephoning one of the contacts listed here. The mailbox address for providing e-mail comments on the ICMP Plan is *ITP.Hopper@noaa.gov.* Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

FOR FURTHER INFORMATION CONTACT: Michelle Magliocca, Office of Protected Resources, NMFS, 301–713–2289, ext. 123.

SUPPLEMENTARY INFORMATION: Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs NMFS to allow, upon request, the incidental taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing), if certain findings are made by NMFS and regulations are issued. Under the MMPA, the term "take" means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture, or kill marine mammals.

Regulations governing the taking of marine mammals by the Navy incidental to training and research activities conducted within the Hawaii Range Complex (HRC) became effective on January 5, 2009 (74 FR 1484, January 12, 2009), and remain in effect until January 5, 2014. For detailed information on this action, please refer to that document. These regulations include mitigation, monitoring, and reporting requirements and establish a framework to authorize incidental take through the issuance of LOAs.

Summary of Request

On August 1, 2010, NMFS received a request from the Navy for a renewal of an LOA issued on January 8, 2009, for the taking of marine mammals incidental to training and research activities conducted within the HRC under regulations issued on January 5, 2009 (74 FR 1484, January 12, 2009). The Navy has complied with the measures required in 50 CFR 216.174 and 216.175, as well as the associated 2010 LOA, and submitted the reports and other documentation required in the final rule and the 2010 LOA.

Summary of Activity Under the 2010 LOA

As described in the Navy's exercise reports (both classified and unclassified), in 2010, the training activities conducted by the Navy were within the scope and amounts authorized by the 2010 LOA and the levels of take remain within the scope and amounts contemplated by the final rule.

Planned Activities and Estimated Take for 2011

In 2011, the Navy expects to conduct the same type and amount of training identified in the 2010 LOA. Therefore, NMFS is authorizing the same amount of take authorized in 2010. Summary of Monitoring, Reporting, and other Requirements under the 2010 LOA

Annual Exercise Reports

The Navy submitted their classified and unclassified 2010 exercise reports within the required timeframes and the unclassified report is posted on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* NMFS has reviewed both reports and they contain the information required by the 2010 LOA. The reports indicate the amounts of different types of training that occurred from August 2, 2009, through August 1, 2010. The Navy conducted two Major Training Exercises (MTEs)—one Rim of the Pacific exercise (RIMPAC) and one Undersea Warfare Exercise (USWEX) (the rule authorizes one RIMPAC every other year and five USWEXs each year)—for a total of 30 days, and three Sinking Exercises (SINKEX) (the rule authorizes an average of six per year). No active sonar use occurred in the period from December 15, 2009, through April 15, 2010, either in the Humpback Cautionary Area or the larger dense humpback area generally shown on the Mobley map (73 FR 35520) plus a 5-km buffer but not including the Pacific Missile Range Facility.

The reports also list specific information gathered when marine mammals were detected by Navy watchstanders, such as how far an animal was from the vessel, whether sonar was in use, and whether it was powered or shut down. This information indicates that the Navy implemented the safety zone mitigation measures as required. No instances of obvious behavioral disturbance were reported by the Navy watchstanders in their 47 marine mammal sightings totaling 286 animals. Furthermore, there were zero marine mammal sightings reported at a range less than 1,000 yards during the MTEs, concurrent with use of MFAS. Ranges associated with NMFS criteria levels for permanent threshold shift (PTS) and temporary threshold shift (TTS) are much shorter than 200 yards.

2010 Monitoring

The Navy conducted the monitoring required by the 2010 LOA and described in the Monitoring Plan, which included aerial and vessel surveys of sonar and explosive exercises by dedicated MMOs, as well as ordering and purchasing acoustic recording devices to be used to gather data in subsequent years. The Navy submitted their 2010 Monitoring Report, which is posted on NMFS' Web site (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm*), within the required timeframe. The Navy included a summary of their 2010 monitoring

effort and results (beginning on page 7 of the monitoring report) and the specific reports for each individual effort are presented in the appendices. Because data is gathered through August 1 and the report is due in October, some of the data analysis will occur in the subsequent year's report. Navy-funded marine mammal monitoring accomplishments within the HRC from August 1, 2009 to August 1, 2010, include the following:

Visual Surveys

The Navy completed over 163 hours of visual surveys during three different types of military readiness events. During this time, there were no marine mammal sightings at ranges of 1,000 yards or less and no strandings were observed during coastline and pelagic surveys performed after training events. The aerial surveys proved successful in working with marine mammal observers (MMOs) on board vessels to coordinate sightings. This success also illustrated that marine mammal behavioral observations can be conducted safely and effectively with minimal interference with at-sea naval training involving multiple large vessels and aircraft. The collection of vessel-based survey data is anticipated to be a relatively long-term effort that will provide baseline information regarding marine mammal populations in the Navy exercise areas.

Passive Acoustics

Four Ecological Acoustic Recording (EAR) devices were deployed for Passive Acoustic Monitoring (PAM) in areas of the HRC where underwater detonations and ASW exercises may occur nearby. New EARs have been in the water for approximately 5 months and collaboration between the Navy and the Hawaii Institute of Marine Biology (HIMB) is underway to share acoustic data. Results from the February 2010 Pacific Missile Range Facility (PMRF) instrumented acoustic range training event were analyzed, showing passive acoustic evidence of beaked and minke whale presence both before and after the exercise. While there were differences detected in the number of beaked whale clicks pre- and post-exercise, a better understanding of normal variations in beaked whale clicks and dives is still needed. Successful use of the EAR devices suggests that these species are good candidates for PAM, especially considering the difficulty of visual observation.

Marine Mammal Observations

MMOs monitored for over 239 hours aboard Navy vessels to commence a Lookout effectiveness study and gather sighting and behavioral information during ASW and/or explosive events. The study was initiated to determine the effectiveness of the Navy Lookout team in spotting marine mammals. Marine mammal monitoring during this study allowed for the successful implementation of three separate goals: (1) Collect data to determine the effectiveness of the Navy Lookouts; (2) Obtain data to characterize the possible exposure of marine species to MFAS; and (3) Achieve close coordination between the contracted aerial survey team, Navy aircraft, and the MMO team to facilitate maximizing survey time and project safety. Data collected from this study will be combined with future monitoring efforts in order to determine the effectiveness of Navy Lookouts as a whole, rather than specific to each vessel.

Between each shooting component of SINKEX events in July, MMOs also participated in a Battle Damage Assessment (BDA) to look for any live, injured, or dead marine mammals. These surveys, conducted via helicopter, were performed at low altitude combined with slow speeds and judged by the MMOs to provide excellent observer coverage and sightability of the mitigation radius surrounding the vessel's hulk. Due to the close range of the helicopter to the hulk, observational effort for marine mammals was possible on both sides of the aircraft. BDA began at approximately 300 ft, an altitude lower than the 800–1,000 ft typically used for aerial marine mammal surveys. Although no marine mammals were sighted during this assessment, details such as flying sea birds and floating surface debris were easily detectable.

Tagging

Eleven Hawaiian monk seals were tagged with "cell phone tags" and tagging efforts will continue into the coming year. At the time of submitting their monitoring report, the Navy was still receiving reports from tracking devices deployed as early as March 1, 2010. These devices are providing surface movements for Hawaiian monk seals, which preliminarily show both very localized and long-distance movement, as well as travel between Kauai and Oahu. The tags also illustrate dive movements during foraging.

In conclusion, the Navy's implementation of the monitoring plan accomplished several goals, primarily through contributions to larger bodies of data intended to better characterize the abundance, distribution, life history, and behaviors of the species in the HRC area. The monitoring satisfied the objectives of the monitoring plan and specifically contributed to a greater knowledge and understanding of: the density and distribution of species within the HRC area; the vocalizations of different species, which contributes to the development of automated classification software and the future use of PAM for monitoring species which are difficult to observe visually; the movement patterns of individuals (both vertically in the water column on a daily basis, as well as horizontally over weeks and months); and the observable behavioral patterns of marine mammals, both with and without exposure to Navy training activities.

Except as described below in the Adaptive Management section, NMFS concludes that the results of these monitoring efforts, when taken together with the findings presented in the 2010 exercise report (*see* Annual Exercise Report section), do not warrant making changes to the current monitoring and mitigation requirements identified in the LOA. While the data collected by the Navy through monitoring and reporting builds on the existing body of information in a valuable way, none of the new data contradict, or amend, the assumptions that underlie the findings in the 2009 rule in a manner that would suggest that the mitigation or monitoring should change.

Included in the Navy's 2010 Monitoring Report were detailed descriptions of the monitoring conducted during different exercises and training events. Results help illustrate the effectiveness of the Navy's current monitoring plan.

Adaptive Management

NMFS and the Navy conducted an adaptive management meeting in October, 2010, which representatives from the Marine Mammal Commission participated in, wherein we reviewed the Navy monitoring results through August 1, 2010, discussed other Navy research and development efforts, and discussed other new information that could potentially inform decisions regarding Navy mitigation and monitoring. Based on the implementation of the 2010 monitoring, the Navy proposed some slight modifications to their monitoring plan for 2011, which NMFS agreed were appropriate. Beyond those changes, none of the information discussed led NMFS to recommend any modifications to the existing mitigation or monitoring measures. The final modifications to the monitoring plan and justifications are described in Section 13 of the Navy's 2011 LOA Application, which may be

viewed at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

Integrated Comprehensive Monitoring Report

The 2010 LOA required that the Navy update the ICMP Plan to reflect development in three areas, specifically: (1) Identifying more specific monitoring sub-goals under the major goals that have been identified; (2) Characterizing Navy Range Complexes and study areas within the context of the prioritization guidelines described in the ICMP Plan; and (3) Continuing to develop data management, organization, and access procedures. The Navy has updated the ICMP Plan as required. Because the ICMP is an evolving Program, we have posted the ICMP on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* and are specifically requesting input, which the Navy and NMFS will consider and apply as appropriate.

Further, the Navy convened a monitoring meeting in October, 2010 to solicit input from NMFS and marine mammal and acoustic scientists regarding the comprehensive development and improvement of the more specific monitoring that should occur across the Navy's training areas. Subsequent to those discussions, the Navy has developed a scientific advisory group composed of individuals from the research community and academia that will develop a proposed Strategic Plan for Navy monitoring that better considers the biological, logistical, and resource-specific factors that are applicable in each training area (and which are summarized in the updated ICMP) to maximize the effectiveness of Navy monitoring within the context of the information that is most needed. Subsequently, NMFS and MMC representatives will review this proposed Strategic Plan for marine species monitoring, which may reflect monitoring differences in some Navy training areas from what is required in the 2010 LOA.

This Navy-wide Strategic Monitoring Plan will then be available for review and discussion at the required 2011 Navy Monitoring Meeting, which will take place in mid-2011. The Navy and NMFS will then modify the Navy-wide Strategic Plan for monitoring based on applicable input from the 2011 Monitoring Meeting and propose appropriate changes to the monitoring measures in specific LOAs for the different Range Complexes and training areas. For training areas with substantive monitoring modifications, NMFS will subsequently publish proposed LOAs, with the modifications, in the **Federal Register** and solicit public input. After addressing public comments and making any necessary changes, NMFS would, as appropriate, issue new LOAs for the different training areas that reflect the updated ICMP and associated new Strategic Plan for Navy monitoring.

NOAA Workshops

In a January 19, 2010 letter to the Council on Environmental Quality, NOAA identified the need for two interrelated workshops on marine mammals and sound in the ocean. To address this commitment, NOAA is convening two parallel, focused, relatively small, and product-driven working groups. One will identify and map cetacean "hot spots," defined as areas of known, or reasonably predictable, biological importance (*i.e.,* for reproduction, feeding, migration) and/or high densities. The second working group will be directed toward developing a comprehensive data collection and analysis plan for describing and predicting underwater sound fields in different areas. The outcomes of these working groups will be integrated and analyzed in a broader symposium to include a larger audience of scientists, industries, Federal agencies, conservation managers, and environmental NGOs. The final products and analyses will provide a more robust, comprehensive, and context-specific biological and acoustic basis by which to inform subsequent management decisions regarding human noise in our oceans. The steering committee has been convened and met for the first time in October, 2010. The working group efforts should take about a year to complete, and we expect the final symposium to be held in early 2012. The results of these working groups will be analyzed by NMFS in an adaptive management context, as related to the January 5, 2009 (74 FR 1484, January 12, 2009) HRC final rule, and mitigation or monitoring measures may be modified, as appropriate.

Authorization

The Navy complied with the requirements of the 2010 LOA. Based on our review of the record, NMFS has determined that the marine mammal takes resulting from the 2010 military readiness training and research activities falls within the levels previously anticipated, analyzed, and authorized. Further, the level of taking authorized in 2011 for the Navy's HRC training and research activities is consistent with our previous findings made for the total taking allowed under the HRC regulations. Finally, the record supports NMFS' conclusion that the total number of marine mammals taken by the 2011 HRC activities will have no more than a negligible impact on the affected species or stock of marine mammals and will not have an unmitigable adverse impact on the availability of these species or stocks for taking for subsistence uses. Accordingly, NMFS has issued a one-year LOA for Navy training exercises conducted in the HRC from January 15, 2011, through January 14, 2012.

Dated: January 13, 2011.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–1035 Filed 1–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

U.S. Court of Appeals for the Armed Forces Code Committee Meeting

AGENCY: DoD.

ACTION: Notice of Public Meeting.

SUMMARY: This notice announces the forthcoming public meeting of the Code Committee established by Article 146(a), Uniform Code of Military Justice, 10 U.S.C. 946(a), to be held at the Courthouse of the United States Court of Appeals for the Armed Forces, 450 E Street, NW., Washington, DC 20442–0001, at 11 a.m. on Tuesday, March 1, 2011. The agenda for this meeting will include consideration of proposed changes to the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, and other matters relating to the operation of the Uniform Code of Military Justice throughout the Armed Forces.

FOR FURTHER INFORMATION CONTACT: William A. DeCicco, Clerk of Court, United States Court of Appeals for the Armed Forces, 450 E Street, Northwest, Washington, DC 20442–0001, telephone (202) 761–1448.

Dated: January 11, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–961 Filed 1–18–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Advisory Committee Meeting Cancellation

AGENCY: Missile Defense Agency (MDA), DoD.

ACTION: Notice.

SUMMARY: On Tuesday, January 4, 2011 (Volume 76, Number 2, Page 335) the Department of Defense announced meeting date changes to the closed meetings of the Missile Defense Advisory Committee. Due to administrative matters, these meetings scheduled for January 19–20, 2011, have been cancelled.

FOR FURTHER INFORMATION CONTACT: Mr. David Bagnati, Designated Federal Officer at *MDAC@mda.mil,* phone/voice mail 703–695–6438, or mail at 7100 Defense Pentagon, Washington, DC 20301–7100.

Dated: January 11, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–943 Filed 1–18–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2011–OS–0002]

Privacy Act of 1974; Systems of Records

AGENCY: National Security Agency/Central Security Service, DoD.

ACTION: Notice To Add a System of Records.

SUMMARY: The National Security Agency/Central Security Service proposes to add a system of records notices in its inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on February 18, 2011 unless comments are received which would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/Regulatory Information Number (RIN) 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, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) 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: 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, or Ms. Anne Hill at (301) 688–6527.

SUPPLEMENTARY INFORMATION: The National Security Agency's record system notices for records systems 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 **FOR FURTHER INFORMATION CONTACT** address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on November 23, 2010, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FT 6427).

Dated: January 12, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

GNSA 28

SYSTEM NAME:

Freedom of Information Act, Privacy Act and Mandatory Declassification Review Records.

SYSTEM LOCATION:

National Security Agency/Central Security Service, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who submit Freedom of Information Act (FOIA) requests, Privacy Act (PA) requests, and Mandatory Declassification Review (MDR) requests or administrative appeals. Individuals whose requests and/or records have been referred to the National Security Agency/Central Security Service (NSA/CSS) by other agencies and in some instances includes attorneys representing individuals submitting such requests and appeals.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records created or compiled in response to FOIA, PA, MDR requests and administrative appeals. Records include the original requests and administrative appeals, responses to such requests and administrative appeals, copies of requested records and records under administrative appeal, all related memoranda, correspondence, notes and any related or supporting documentation; name of requester or appellant, home address, home phone numbers, Social Security Numbers (SSN), case number, and name and address of attorney representing a requester or appellant.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 5 U.S.C. 552, Freedom of Information Act; 5 U.S.C. 552a, The Privacy Act of 1974 (as amended); E.O. 13526, Classified National Security Information; DoD 5400.7–R, Department of Defense Freedom of Information Act Program; DoD 5400.11–R, Department of Defense Privacy Program; NSA/CSS Policy 1–5; NSA/CSS Freedom of Information Act Program; NSA/CSS Policy 1–34; Implementation of the Privacy Act of 1974; NSA/CSS Policy 1–15, Mandatory Declassification Review Program; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

This system is maintained for the purpose of processing requests and administrative appeals under the FOIA, PA, and MDR; for participating in Interagency Security Classification Appeals Panel (ISCAP) review of MDR; for participating in litigation regarding agency actions on such FOIA and PA requests and appeals, and to provide information for compiling reports.

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:

Information in this system may be provided to other Federal agencies when it is necessary to coordinate responses.

The DoD 'Blanket Routine Uses' set forth at the beginning of the NSA/CSS compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

Records are retrieved by the name of the requester or appellant, the number assigned to the request or appeal, and in some instances may be retrieved by the name of the attorney representing the requester or appellant.

SAFEGUARDS:

Buildings are secured by a series of guarded pedestrian gates and checkpoints. Access to facilities is limited to security-cleared personnel and escorted visitors only. Within the facilities themselves, access to paper and computer printouts are controlled by limited-access facilities and lockable containers. Access to electronic means is limited and controlled by computer password protection, as well as other access controls placed on specific case types.

RETENTION AND DISPOSAL:

FOIA AND MDR RECORDS:

Granted access—destroy 2 years after date of Agency reply. Denied access, but no appeal by requester—destroy 6 years after date of Agency reply. Contested records—destroy 6 years after final denial by Agency, or 3 years after final adjudication by courts, whichever is later.

PRIVACY ACT RECORDS:

Granted access—destroy 2 years after date of Agency reply. Denied access, but no appeal by requester—destroy 5 years after date of Agency reply. Contested records—destroy 4 years after final denial by Agency, or 3 years after final adjudication by courts, whichever is later.

Records are destroyed by pulping, burning, shredding, or erasure or destruction of magnet media.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Associate Director, Policy and Records, National Security Agency/Central Security Service, 9800 Savage Road, Fort George G. Meade, MD 20755–6000.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether records about themselves is contained in this record 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 requests should contain the individual's full name, individual's full name who is the subject of the record if different from the requester, current address and telephone number. All requests must be signed.

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 requests should contain the individual's full name, individual's full name who is the subject of the record if different from the requester, current address and telephone number. All requests must be signed.

CONTESTING RECORD PROCEDURES:

The NSA/CSS rules for contesting contents and appealing initial agency determinations may be obtained by written request addressed to the National Security Agency/Central Security Service, Freedom of Information Act (FOIA)/Privacy Act Office, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

RECORD SOURCE CATEGORIES:

Information is collected from the individual requesters, agency officials, and other Federal agencies that have referred requests concerning NSA/CSS records, or have consulted with NSA/CSS regarding the handling of particular requests.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

During the course of an FOIA/Privacy Act and/or MDR action, exempt materials from other system of records may become part of the case records in this system of records. To the extent that copies of exempt records from those other systems of records are entered into these case records, NSA/CSS hereby claims the same exemptions for the records as claimed in the original primary system of records of which they are a part.

An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2) and (3), (c) and (e) and published in 32 CFR part 322. For additional information contact the system manager.

[FR Doc. 2011–931 Filed 1–18–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2011–OS–0006]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Notice to Add a System of Records.

SUMMARY: The Office of the Secretary of Defense proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action would be effective without further notice on February 18, 2011 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/Regulatory Information Number (RIN) 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, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) 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. Cindy Allard at (703) 588–6830, or the Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on January 7, 2011 to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: January 11, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DA&M 01

SYSTEM NAME:

Civil Liberties Program Case Management System.

SYSTEM LOCATION:

Defense Privacy and Civil Liberties Office, 1901 S. Bell Street, Suite 920, Arlington, VA 22202–4512.

Records are maintained by offices within the Office of the Secretary of Defense (OSD) and Joint Staff (JS); for a complete list of these offices contact the system manager.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who submit allegations of civil liberties violations by the DoD, its civilian employees, members of the Military Services, DoD contractors, or others acting under the authority of the DoD. Individuals alleged and/or identified to be involved in civil liberties violations.

CATEGORIES OF RECORDS IN THE SYSTEM:

May include full names, home or work addresses, home or work telephone numbers, e-mail addresses, Military Service or DoD component involved, and case number. Also contains complaints, comments, inquiries, investigative notes and memoranda, correspondence, supporting documents, material, and reports relating to the allegation, investigation, or redress of alleged civil liberties violations.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 113, Secretary of Defense; 42 U.S.C. 2000ee–1, Privacy and Civil Liberties Officers.

PURPOSE(S):

To receive, log and track the processing of allegations of civil liberties violations by the DoD, its civilian employees, members of the Military Services, DoD contractors, or others acting under the authority of the DoD and document the review, investigation, and redress provided. Records may also be used as a management tool for statistical analysis, tracking, reporting, evaluating program effectiveness and conducting research.

ROUTINE USES OF THESE 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, the 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 the Office of Management and Budget (OMB), the Department of Justice (DOJ), or the Office of Special Counsel (OSC), to obtain advice regarding statutory and other requirements related to civil liberties.

The DoD 'Blanket Routine Uses' set forth at the beginning of the OSD's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic storage media.

RETRIEVABILITY:

Individuals submitting allegations or complaints: by full name, home or work address, home or work telephone numbers, e-mail addresses, Military Service or DoD component involved.

Individuals alleged and/or identified to be involved in civil liberties violations: by name and DoD component involved.

SAFEGUARDS:

Records are stored in secure facilities that are locked when not attended. Electronic records are password-protected and common access card (CAC) enabled. All personnel with access receive Privacy Act and Information Assurance training prior to gaining initial access and annually thereafter.

RETENTION AND DISPOSAL:

Disposition pending (treat records as permanent until the National Archives and Records Administration has approved the retention and disposition schedule).

SYSTEM MANAGER(S) AND ADDRESS:

Director, Defense Privacy and Civil Liberties Office, 1901 S. Bell Street, Suite 920, Arlington, VA 22202–4512.

NOTIFICATION PROCEDURE:

Individuals seeking to determine if information about themselves is contained in this system should address written inquiries to the Director, Defense Privacy and Civil Liberties Office, 1901 S. Bell Street, Suite 920, Arlington, VA 22202–4512.

For verification purposes, the requestor should provide his/her full name, home or work address, home or work telephone number, e-mail addresses, Military Service or DoD component involved, and case number.

RECORD ACCESS PROCEDURE:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155.

Written requests should include full names, home or work addresses, home or work telephone number, e-mail address, Military Service or DoD component involved and case number, and the name and number of this system of records and be signed.

CONTESTING RECORD PROCEDURE:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

The individual, investigators, and civil liberties staff members.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Records contained in this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1), (2), (3), and (4); (e)(1) and (e)(4)(G), (H), and (I); and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1). Records may be exempted from these subsections or, additionally, from the requirements of subsections (c)(4); (e)(2), (3), and (8) of the Privacy Act of 1974 consistent with any exemptions claimed under 5 U.S.C. 552a (j)(2) or (k)(1), (k)(2), or (k)(5) by the originator of the record, provided the reason for the exemption remains valid and necessary.

An exemption rule for this system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and is published at 32 CFR part 311.

[FR Doc. 2011–962 Filed 1–18–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Revised Non-Foreign Overseas Per Diem Rates

AGENCY: Per Diem, Travel and Transportation Allowance Committee, DoD.

ACTION: Notice of revised non-foreign overseas per diem rates.

SUMMARY: The Per Diem, Travel and Transportation Allowance Committee is publishing Civilian Personnel Per Diem Bulletin Number 273. This bulletin lists revisions in the per diem rates prescribed for U.S. Government employees for official travel in Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands and Possessions of the United States. AEA changes announced in Bulletin Number 194 remain in effect. Bulletin Number 273 is being published in the **Federal Register** to assure that travelers are paid per diem at the most current rates.

DATES: *Effective Date:* January 1, 2011.

SUPPLEMENTARY INFORMATION: This document gives notice of revisions in per diem rates prescribed by the Per Diem Travel and Transportation Allowance Committee for non-foreign areas outside the continental United States. It supersedes Civilian Personnel Per Diem Bulletin Number 272. Distribution of Civilian Personnel Per Diem Bulletins by mail was discontinued. Per Diem Bulletins published periodically in the **Federal Register** now constitute the only notification of revisions in per diem rates to agencies and establishments outside the Department of Defense. For more information or questions about per diem rates, please contact your local travel office. The text of the Bulletin follows: The changes in Civilian Bulletin 273 are updated rates for Alaska.

Dated: January 11, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
ALASKA						
[OTHER]						
01/01 - 12/31	100		71		171	1/1/2009
ADAK						
01/01 - 12/31	120		79		199	7/1/2003
ANCHORAGE [INCL NAV RES]						
05/15 - 09/15	181		104		285	1/1/2011
09/16 - 05/14	99		96		195	1/1/2011
BARROW						
01/01 - 12/31	159		95		254	10/1/2002
BETHEL						
01/01 - 12/31	139		108		247	1/1/2011
BETTLES						
01/01 - 12/31	135		62		197	10/1/2004
CLEAR AB						
01/01 - 12/31	90		82		172	10/1/2006
COLDFOOT						
01/01 - 12/31	165		70		235	10/1/2006
COPPER CENTER						
09/16 - 05/14	95		95		190	1/1/2011
05/15 - 09/15	139		99		238	1/1/2011
CORDOVA						
01/01 - 12/31	95		130		225	1/1/2011
CRAIG						
10/01 - 03/31	151		76		227	3/1/2010
04/01 - 09/30	236		84		320	3/1/2010
DELTA JUNCTION						
05/01 - 09/30	145		65		210	1/1/2011
10/01 - 04/30	115		64		179	1/1/2011
DENALI NATIONAL PARK						
06/01 - 08/31	135		88		223	1/1/2011

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
09/01 - 05/31	90		84		174	1/1/2011
DILLINGHAM						
05/15 - 10/15	185		111		296	1/1/2011
10/16 - 05/14	169		109		278	1/1/2011
DUTCH HARBOR-UNALASKA						
01/01 - 12/31	121		157		278	1/1/2011
EARECKSON AIR STATION						
01/01 - 12/31	90		77		167	6/1/2007
EIELSON AFB						
05/05 - 09/15	175		107		282	1/1/2011
09/16 - 05/04	75		98		173	1/1/2011
ELFIN COVE						
01/01 - 12/31	200		45		245	8/1/2010
ELMENDORF AFB						
05/15 - 09/15	181		104		285	1/1/2011
09/16 - 05/14	99		96		195	1/1/2011
FAIRBANKS						
05/05 - 09/15	175		107		282	1/1/2011
09/16 - 05/04	75		98		173	1/1/2011
FOOTLOOSE						
01/01 - 12/31	175		18		193	10/1/2002
FT. GREELY						
05/01 - 09/30	145		65		210	1/1/2011
10/01 - 04/30	115		64		179	1/1/2011
FT. RICHARDSON						
05/15 - 09/15	181		104		285	1/1/2011
09/16 - 05/14	99		96		195	1/1/2011
FT. WAINWRIGHT						
05/05 - 09/15	175		107		282	1/1/2011
09/16 - 05/04	75		98		173	1/1/2011
GAMBELL						
01/01 - 12/31	105		39		144	1/1/2011
GLENNALLEN						
05/15 - 09/15	139		99		238	1/1/2011

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
09/16	- 05/14	95		95		190	1/1/2011
HAINES							
01/01	- 12/31	107		101		208	1/1/2011
HEALY							
06/01	- 08/31	135		88		223	1/1/2011
09/01	- 05/31	90		84		174	1/1/2011
HOMER							
05/15	- 09/15	167		117		284	1/1/2011
09/16	- 05/14	79		115		194	1/1/2011
JUNEAU							
05/01	- 09/30	149		127		276	1/1/2011
10/01	- 04/30	109		123		232	1/1/2011
KAKTOVIK							
01/01	- 12/31	165		86		251	10/1/2002
KAVIK CAMP							
01/01	- 12/31	150		69		219	10/1/2002
KENAI-SOLDOTNA							
05/01	- 08/31	159		90		249	3/1/2010
09/01	- 04/30	79		82		161	3/1/2010
KENNICOTT							
01/01	- 12/31	259		94		353	1/1/2009
KETCHIKAN							
05/01	- 09/30	140		67		207	3/1/2010
10/01	- 04/30	99		63		162	3/1/2010
KING SALMON							
05/01	- 10/01	225		91		316	10/1/2002
10/02	- 04/30	125		81		206	10/1/2002
KLAWOCK							
04/01	- 09/30	236		84		320	3/1/2010
10/01	- 03/31	151		76		227	3/1/2010
KODIAK							
05/01	- 09/30	141		80		221	3/1/2010
10/01	- 04/30	99		76		175	3/1/2010
KOTZEBUE							

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01 - 12/31	189		93		282	3/1/2010
KULIS AGS						
05/15 - 09/15	181		104		285	1/1/2011
09/16 - 05/14	99		96		195	1/1/2011
MCCARTHY						
01/01 - 12/31	259		94		353	1/1/2009
MCGRATH						
01/01 - 12/31	165		69		234	10/1/2006
MURPHY DOME						
05/05 - 09/15	175		107		282	1/1/2011
09/16 - 05/04	75		98		173	1/1/2011
NOME						
01/01 - 12/31	150		97		247	3/1/2010
NUIQSUT						
01/01 - 12/31	180		53		233	10/1/2002
PETERSBURG						
01/01 - 12/31	100		71		171	7/1/2008
POINT HOPE						
01/01 - 12/31	200		49		249	1/1/2011
POINT LAY						
01/01 - 12/31	225		23		248	1/1/2011
PORT ALEXANDER						
01/01 - 12/31	150		43		193	8/1/2010
PORT ALSWORTH						
01/01 - 12/31	135		88		223	10/1/2002
PRUDHOE BAY						
01/01 - 12/31	170		68		238	1/1/2011
SELDOVIA						
09/16 - 05/14	79		115		194	1/1/2011
05/15 - 09/15	167		117		284	1/1/2011
SEWARD						
10/01 - 04/30	99		81		180	3/1/2010
05/01 - 09/30	174		89		263	3/1/2010
SITKA-MT. EDGECUMBE						

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
05/01	- 09/30	119		75		194	3/1/2010
10/01	- 04/30	99		73		172	3/1/2010
SKAGWAY							
05/01	- 09/30	140		67		207	3/1/2010
10/01	- 04/30	99		63		162	3/1/2010
SLANA							
10/01	- 04/30	99		55		154	2/1/2005
05/01	- 09/30	139		55		194	2/1/2005
SPRUCE CAPE							
05/01	- 09/30	141		80		221	3/1/2010
10/01	- 04/30	99		76		175	3/1/2010
ST. GEORGE							
01/01	- 12/31	129		55		184	6/1/2004
TALKEETNA							
01/01	- 12/31	100		89		189	10/1/2002
TANANA							
01/01	- 12/31	150		97		247	3/1/2010
TOK							
05/01	- 09/30	129		76		205	3/1/2010
10/01	- 04/30	99		73		172	3/1/2010
UMIAT							
01/01	- 12/31	350		35		385	10/1/2006
VALDEZ							
10/01	- 04/30	119		85		204	3/1/2010
05/01	- 09/30	179		91		270	3/1/2010
WAINWRIGHT							
01/01	- 12/31	175		83		258	1/1/2011
WASILLA							
10/01	- 04/30	96		83		179	1/1/2009
05/01	- 09/30	151		89		240	1/1/2009
WRANGELL							
05/01	- 09/30	140		67		207	3/1/2010
10/01	- 04/30	99		63		162	3/1/2010
YAKUTAT							

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01 - 12/31	105		94		199	1/1/2011
AMERICAN SAMOA						
AMERICAN SAMOA						
01/01 - 12/31	139		122		261	12/1/2010
GUAM						
GUAM (INCL ALL MIL INSTAL)						
01/01 - 12/31	159		94		253	7/1/2010
HAWAII						
[OTHER]						
01/01 - 12/31	121		104		225	5/1/2010
CAMP H M SMITH						
01/01 - 12/31	177		106		283	5/1/2008
EASTPAC NAVAL COMP TELE AREA						
01/01 - 12/31	177		106		283	5/1/2008
FT. DERUSSEY						
01/01 - 12/31	177		106		283	5/1/2008
FT. SHAFTER						
01/01 - 12/31	177		106		283	5/1/2008
HICKAM AFB						
01/01 - 12/31	177		106		283	5/1/2008
HONOLULU						
01/01 - 12/31	177		106		283	5/1/2008
ISLE OF HAWAII: HILO						
01/01 - 12/31	121		104		225	5/1/2010
ISLE OF HAWAII: OTHER						
01/01 - 12/31	180		108		288	5/1/2009
ISLE OF KAUAI						
01/01 - 12/31	198		115		313	5/1/2009
ISLE OF MAUI						
01/01 - 12/31	169		104		273	5/1/2009
ISLE OF OAHU						
01/01 - 12/31	177		106		283	5/1/2008
KEKAHA PACIFIC MISSILE RANGE FAC						

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01 - 12/31	198		115		313	5/1/2009
KILAUEA MILITARY CAMP						
01/01 - 12/31	121		104		225	5/1/2010
LANAI						
01/01 - 12/31	229		124		353	5/1/2009
LUALUALEI NAVAL MAGAZINE						
01/01 - 12/31	177		106		283	5/1/2008
MCB HAWAII						
01/01 - 12/31	177		106		283	5/1/2008
MOLOKAI						
01/01 - 12/31	135		91		226	5/1/2010
NAS BARBERS POINT						
01/01 - 12/31	177		106		283	5/1/2008
PEARL HARBOR						
01/01 - 12/31	177		106		283	5/1/2008
SCHOFIELD BARRACKS						
01/01 - 12/31	177		106		283	5/1/2008
WHEELER ARMY AIRFIELD						
01/01 - 12/31	177		106		283	5/1/2008
MIDWAY ISLANDS						
MIDWAY ISLANDS						
01/01 - 12/31	125		49		174	5/1/2010
NORTHERN MARIANA ISLANDS						
[OTHER]						
01/01 - 12/31	55		72		127	10/1/2002
ROTA						
01/01 - 12/31	129		102		231	7/1/2010
SAIPAN						
01/01 - 12/31	121		98		219	6/1/2007
TINIAN						
01/01 - 12/31	85		71		156	7/1/2010
PUERTO RICO						
[OTHER]						

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01 - 12/31	62		57		119	10/1/2002
AGUADILLA						
01/01 - 12/31	124		113		237	9/1/2010
BAYAMON						
01/01 - 12/31	195		128		323	9/1/2010
CAROLINA						
01/01 - 12/31	195		128		323	9/1/2010
CEIBA						
01/01 - 12/31	210		141		351	11/1/2010
FAJARDO [INCL ROOSEVELT RDS NAVSTAT]						
01/01 - 12/31	210		141		351	11/1/2010
FT. BUCHANAN [INCL GSA SVC CTR, GUAYNABO]						
01/01 - 12/31	195		128		323	9/1/2010
HUMACAO						
01/01 - 12/31	210		141		351	11/1/2010
LUIS MUNOZ MARIN IAP AGS						
01/01 - 12/31	195		128		323	9/1/2010
LUQUILLO						
01/01 - 12/31	210		141		351	11/1/2010
MAYAGUEZ						
01/01 - 12/31	109		112		221	9/1/2010
PONCE						
01/01 - 12/31	149		87		236	9/1/2010
SABANA SECA [INCL ALL MILITARY]						
01/01 - 12/31	195		128		323	9/1/2010
SAN JUAN & NAV RES STA						
01/01 - 12/31	195		128		323	9/1/2010
VIRGIN ISLANDS (U.S.)						
ST. CROIX						
04/15 - 12/14	135		92		227	5/1/2006
12/15 - 04/14	187		97		284	5/1/2006
ST. JOHN						
04/15 - 12/14	163		98		261	5/1/2006
12/15 - 04/14	220		104		324	5/1/2006

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
ST. THOMAS							
04/15	- 12/14	240		105		345	5/1/2006
12/15	- 04/14	299		111		410	5/1/2006
WAKE ISLAND							
WAKE ISLAND							
01/01	- 12/31	152		16		168	5/1/2009

[FR Doc. 2011–967 Filed 1–18–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2011–0004]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice To Alter a System of Records.

SUMMARY: The Department of the Air Force is proposing to alter a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: The proposed action will be effective on February 18, 2011 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/Regulatory Information Number (RIN) 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, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) 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: Charles Shedrick, (703) 696–6488, or the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCPPF, 1800 Air Force Pentagon, Washington, DC 20330–1800.

SUPPLEMENTARY INFORMATION: The Department of the Air Force systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above.

The proposed systems reports, as required by 5 United States Code 552a(r) of the Privacy Act, were submitted on January 7, 2011 to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget pursuant to paragraph 4c of Appendix I to Office of Management and Budget Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: January 11, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F051 AFJA C

SYSTEM NAME:

Judge Advocate Personnel Records (December 30, 2008, 73 FR 79836).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420; Headquarters Air Force Personnel Center, 550 C Street W, Randolph Air Force Base, TX 78150; at Headquarters of major commands and all levels down to and including Air Force installations. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices."

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "All Air Force Active Duty and Reserve/Guard Judge Advocates and paralegals; Air Force Judge Advocate Corp civilian attorneys and paralegals, including Air National Guard personnel; applicants for the Funded Legal Education Program and Excess Leave Program."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Individual's name, Social Security Number (SSN), duty location, rank, job series, date of birth, professional and personal information related to the employment of the categories of individuals covered by this system, including educational background information.

Certificates of admission to the bar, career objective statements, active duty and reassignment orders, correspondence relating to the individual, personnel information from the Air Force Personnel Center, locator information, professional education and training records, pay records, notification of personnel actions, civilian employment records to include nomination packages, and award records.

Statement of good standing before the bar and other State Bar records, law school records, letters of acceptance from law schools, Judge Advocate General application and agreement, Law School Data Assembly Service (LSDAS) report; undergraduate and graduate education records to include transcripts of courses attended and grades, letters of recommendation; information related to attorney bar dues reimbursement requests to include loan account numbers and loan holder information."

AUTHORITY FOR THE MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8037, Judge Advocate General, Deputy Judge Advocate General: Appointment and duties; Air Force Instruction 51–802, Assignments to the Judge Advocate General's Department Reserve, Air Force Instruction 36–2110, Assignments; and E.O. 9397 (SSN), as amended."

PURPOSE(S):

Delete entry and replace with "Records are used by authorized personnel in the performance of their duties to determine assignments, deployments, certifications, areas of legal practice specialties, attorney bar dues reimbursements, law school loan reimbursements; selection of civilian attorney and other civilian personnel positions, appointment to position vacancies and promotions, evaluation and performance issues and reports, and all other related personnel actions. Funded Legal Education and Excess Leave Program records are used by authorized personnel in the performance of their duties in monitoring, evaluating and selecting the qualified applicants for these programs and other programs as necessary."

* * * * *

STORAGE:

Delete entry and replace with "Maintained in paper and electronic storage media."

RETRIEVABILITY:

Delete entry and replace with "Retrieved by name and or Social Security Number (SSN), duty location, rank, and or job series."

* * * * *

RETENTION AND DISPOSAL:

Delete entry and replace with "Records are retained for three (3) years after separation, termination of employment, or when no longer needed.

Paper records are disposed of by tearing into pieces, shredding, pulping, macerating or burning. Computer records are destroyed by deleting, erasing, degaussing, or by overwriting."

* * * * *

NOTIFICATION PROCEDURES:

Delete entry and replace with "Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

For verification purposes, individuals should provide their full name, Social Security Number (SSN), any details, which may assist in locating records, and their signature. In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

RECORD ACCESS PROCEDURES:

Delete entry and replace with, "Individuals seeking to access records about themselves contained in this system should address written requests to the Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

For verification purposes, individuals should provide their full name, Social Security Number (SSN), any details, which may assist in locating records, and their signature. In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

* * * * *

F051 AFJA C

SYSTEM NAME:

Judge Advocate Personnel Records.

SYSTEM LOCATION:

The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420; Headquarters Air Force Personnel Center, 550 C Street W, Randolph Air Force Base, TX 78150; at Headquarters of major commands and all levels down to and including Air Force installations. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All Air Force Active Duty and Reserve/Guard Judge Advocates and paralegals; Air Force Judge Advocate Corp civilian attorneys and paralegals, including Air National Guard personnel; applicants for the Funded Legal Education Program and Excess Leave Program.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, Social Security Number (SSN), duty location, rank, job series, date of birth, professional and personal information related to the employment of the categories of individuals covered by this system, including educational background information.

Certificates of admission to the bar, career objective statements, active duty and reassignment orders, correspondence relating to the individual, personnel information from the Air Force Personnel Center, locator information, professional education and training records, pay records, notification of personnel actions, civilian employment records to include nomination packages, and award records.

Statement of good standing before the bar and other State Bar records, law school records, letters of acceptance from law schools, Judge Advocate General application and agreement, Law School Data Assembly Service (LSDAS) report; undergraduate and graduate education records to include transcripts of courses attended and grades, letters of recommendation; information related to attorney bar due reimbursement requests to include loan account numbers and loan holder information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8037, Judge Advocate General, Deputy Judge Advocate General: Appointment and duties; Air Force Instruction 51–802, Assignments to the Judge Advocate General's Department Reserve, Air Force Instruction 36–2110, Assignments; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

Records are used by authorized personnel in the performance of their duties to determine assignments, deployments, certifications, areas of legal practice specialties, attorney bar dues reimbursements, law school loan reimbursements; selection of civilian attorney and other civilian personnel positions, appointment to position vacancies and promotions, evaluation and performance issues and reports, and all other related personnel actions. Funded Legal Education and Excess Leave Program records are used by authorized personnel in the performance of their duties in monitoring, evaluating and selecting the qualified applicants for these programs and other programs as necessary.

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 and State agencies or bar associations charged with licensing and authorizing attorneys to practice law, and to courts authorizing attorneys to practice before said courts. To other government, State, and local licensing authorities, such as State Bar offices, in the course of their official duties.

The DoD 'Blanket Routine Uses' published at the beginning of the Air Force's compilation of systems of records notices apply to this system.

STORAGE:

Maintained in paper and electronic storage media.

RETRIEVABILITY:

Retrieved by name and or Social Security Number (SSN), duty location, rank, and or job series.

SAFEGUARDS:

Records are accessed by person(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records are stored in locked rooms and cabinets. Those in computer storage devices are protected by computer system software. Computers must be accessed with the

use of a Common Access Card (CAC) and password.

RETENTION AND DISPOSAL:

Records are retained for three (3) years after separation, termination of employment, or when no longer needed. Paper records are disposed of by tearing into pieces, shredding, pulping, macerating or burning. Computer records are destroyed by deleting, erasing, degaussing, or by overwriting.

SYSTEM MANAGER(S) AND ADDRESS:

Office of the Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

For verification purposes, individuals should provide their full name, Social Security Number (SSN), any details, which may assist in locating records, and their signature. In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system should address written requests to the Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

For verification purposes, individual should provide their full name, Social Security Number (SSN), any details, which may assist in locating records, and their signature. In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332; 32 CFR Part 806b; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information obtained directly from the individual or from previous employers, educational institutions, automated system interfaces, State and local governments, State bar associations, and from military personnel centers.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–963 Filed 1–18–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2011–0002]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice To Alter a System of Records.

SUMMARY: The Department of the Air Force proposing to alter 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 proposed action will be effective on February 18, 2011 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by dock number and/RIN 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, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Charles J. Shedrick, 703–696–6488, or Department of the Air Force Privacy Office, Air Force Privacy Act Office, Office of Warfighting Integration and Chief Information officer, ATTN: SAF/XCPPI, 1800 Air Force Pentagon, Washington, DC 20330–1800.

SUPPLEMENTARY INFORMATION: The Department of the Air Force's notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above. The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act, were submitted on January 6, 2011 to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: January 11, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F033 AF PC A

SYSTEM NAME:

Congressional and Other High Level Inquiries (June 11, 1997, 62 FR 31793).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Headquarters Air Force Personnel Center; major commands; field operating agencies; Military Personnel Sections at Air Force installations, and headquarters of unified and specified commands for which Air Force is Executive Agent. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices."

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Air Force active duty, Reserve, Air National Guard and personnel retired or discharged from the Air Force, current or former Air Force DoD civilian personnel; personnel attending Air Force training institutions or courses; other component personnel assigned to an Air Force installation where Air Force is the Executive Agent."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Individuals name, background information and information reflecting Air Force personnel policies and procedures; Members of Congress requesting information on behalf of a constituent; copies of replies to such inquiries including transmittal media used en route from and to the Secretary of the Air Force, Office of Legislative Liaison (SAF/LL)."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8032, The Air Staff, general duties; implemented by Air Force Instruction 90–401, Air Force Relations with Congress."

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry and replace with "In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' published at the beginning of the Air Force's compilation of record system notices apply to this system."

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Delete entry and replace with "Electronic storage media."

* * * * *

SAFEGUARDS:

Delete entry and replace with "Records are accessed by the custodian of the record system and by persons responsible for servicing the records in performance of their official duties who are properly cleared for need-to-know. Records are stored on electronic media and accessed by use of the Common Access Card (CAC)."

RETENTION AND DISPOSAL:

Delete entry and replace with "Destroyed after one year for Congressional communication at Office of the Secretary of the Air Force and all activities below and destroyed two years after calendar year case is closed for administrative reviews, inquiries and investigations. Records are deleted from electronic media."

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Headquarters Air Force Personnel Center; major commands; field operating agencies; Military Personnel Sections at Air Force installations, and headquarters of unified and specified commands. Official mailing addresses are published as an appendix to the Air Force's compilation of record systems notices."

NOTIFICATION PROCEDURES:

Delete entry and replace with "Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to Headquarters Air Force Personnel Center, Inspector General (HQ AFPC/IG) or visit the system manager or respective local system manager. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices. Official mailing address for the Air Force Personnel Center Inspector General's office is Headquarters Air Force Personnel Center, Inspector General Office (HQ AFPC/IG), 550 C Street West, Suite 37, Randolph Air Force Base, TX 78150–4703.

For verification purposes, individual should provide their full name, any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths:

'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

RECORD ACCESS PROCEDURES:

Delete entry and replace with "Individuals seeking to access records about themselves contained in this system of records should address written inquiries to the system manger or respective local system manger. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices.

For verification purposes, individual should provide their full name, any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths:

'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

CONTESTING RECORD PROCEDURES:

Delete entry and replace with "The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332; 32 CFR part 806b; or may be obtained from the system manager."

RECORD SOURCE CATEGORIES:

Delete entry and replace with "Information provided by major command or Military Personnel Section personnel, Air Force policies and procedures, copies of inquiries, congressional/high level officials'/ constituents' comments or requests and Air Force replies thereto."

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F036 AF PC A

SYSTEM NAME:

Congressional and Other High Level Inquiries.

SYSTEM LOCATION:

Headquarters Air Force Personnel Center; major commands; field operating agencies; Military Personnel Sections at Air Force installations, and headquarters of unified and specified commands for which Air Force is Executive Agent. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Air Force active duty, Reserve, Air National Guard and personnel retired or discharged from the Air Force, current or former Air Force DoD civilian personnel; personnel attending Air Force training institutions or courses; other component personnel assigned to an Air Force installation where Air Force is the Executive Agent.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individuals name, background information and information reflecting Air Force personnel policies and procedures; Members of Congress requesting information on behalf of a constituent; copies of replies to such inquiries including transmittal media used en route from and to the Secretary of the Air Force, Office of Legislative Liaison (SAF/LL).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8032, The Air Staff, general duties; implemented by Air Force Instruction 90–401, Air Force Relations with Congress.

PURPOSE(S):

Information pertinent to an inquiry forwarded to SAF/LL for preparation of the reply to the high level requester. In some instances response may be direct to the requester without referral through SAF/LL. However, when required by directives, copies of such responses are furnished SAF/LL. The records may be used in responding to subsequent inquiries concerning the same individual. The record system is audited periodically to determine trends on the nature of complaints and questions and for statistical purposes.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' published at the beginning of the Air Force's compilation of record system notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

Retrieved by name.

SAFEGUARDS:

Records are accessed by the custodian of the record system and by persons responsible for servicing the records in performance of their official duties who are properly cleared for need-to-know. Records are stored on electronic media and accessed by use of the Common Access Card (CAC).

RETENTION AND DISPOSAL:

Destroyed after one year for Congressional communication at Office of the Secretary of the Air Force and all activities below and destroyed two years after calendar year case is closed for administrative reviews, inquiries and investigations. Records are deleted from electronic media.

SYSTEM MANAGERS(S) AND ADDRESS:

Headquarters Air Force Personnel Center; major commands; field operating agencies; Military Personnel Sections at Air Force installations, and headquarters of unified and specified commands. Official mailing addresses are published as an appendix to the Air Force's compilation of record systems notices.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to Headquarters Air Force Personnel Center, Inspector General (HQ AFPC/IG) or visit the system manager or respective local system manager. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices. Official mailing address for the Air Force Personnel Center Inspector General's office is Headquarters Air Force Personnel Center, Inspector General Office (HQ AFPC/IG), 550 C Street West, Suite 37, Randolph Air Force Base, TX 78150–4703.

For verification purposes, individual should provide their full name, any details, which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system of records should address written inquiries to the system manager or respective local system manager. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices.

For verification purposes, individual should provide their full name, any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths:

'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332; 32 CFR part 806b; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information provided by major command or Military Personnel Section personnel, Air Force policies and procedures, copies of inquiries, congressional/high level officials'/ constituents' comments or requests and Air Force replies thereto.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–966 Filed 1–18–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2011–0003]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice To Alter a System of Records.

SUMMARY: The Department of the Air Force is proposing to alter a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: The proposed action will be effective on February 18, 2011, unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/Regulatory Information Number (RIN) 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, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Charles J. Shedrick, 703–696–6488, or Department of the Air Force Privacy Office, Air Force Privacy Act Office, Office of Warfighting Integration and Chief Information Officer, ATTN: SAF/XCPPI, 1800 Air Force Pentagon, Washington, DC 20330–1800.

SUPPLEMENTARY INFORMATION: The Department of the Air Force systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above.

The proposed systems reports, as required by 5 United States Code 552a(r) of the Privacy Act, were submitted on January 6, 2011, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget pursuant to paragraph 4c of Appendix I to Office of Management and Budget Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: January 11, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F036 AF DP A

SYSTEM NAME:

Family Support Center Accountability and Data Collection System (June 11, 1997, 62 FR 31793).

* * * * *

CHANGES:

SYSTEM NAME:

Delete entry and replace with "Air Force Family Integrated Results and Statistical Tracking."

SYSTEM LOCATION:

Delete entry and replace with "Headquarters Air Force Personnel Center, Directorate of Personnel Services, Airman, Family and Community Operations Branch (HQ AFPC/DPSIA), 550 C. Street West, Suite 37, Randolph Air Force Base, TX 78150–4739."

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Active duty Air Force, Air Reserve, and Air National Guard, Air Force DoD civilians, Air Force Retirees and their respective family members."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Demographic data containing Social Security Number (SSN), name, gender, date of birth, home address, home phone, work phone, work e-mail, branch of service, rank, squadron on customer, client visit/service notes on description of services provided and needs assessment information composing of a 10-question Personal Readiness Inventory questionnaire designed to identify needs, referrals to other agencies, customer service plan, and activity results."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 8013, Secretary of the Air Force; Air Force Instruction 36–3009, Airman and Family Readiness Centers; and E.O. 9397 (SSN), as amended."

PURPOSE:

Delete entry and replace with "The system is used to collect customer service data that in turn helps determine the effectiveness of Airman and Family Readiness Center activities and services as well as collect and provide reports that reflect impact of services on mission and family readiness to leadership. Information is compiled for statistical reporting to base, major commands, Headquarters United States Air Force, Department of Defense, and Congress."

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry and replace with "In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may be specifically disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' published at the beginning of the Air Force compilation of systems of records notices apply to this system."

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Delete entry and replace with "Electronic storage media."

RETRIEVABILITY:

Delete entry and replace with "Individual files are retrieved by name and/or Social Security Number (SSN)."

SAFEGUARDS:

Delete entry and replace with "Records are accessed by person(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. The system additionally incorporates integrated system security features to protect data from unauthorized access or use: Common Access Card (CAC) login and Personal Identification Number (PIN) is required for access to the system. Records are stored on a secure server in a controlled environment with monitoring 24 hours a day, 7 days a week."

RETENTION AND DISPOSAL:

Delete entry and replace with "Electronic records are deactivated due to Permanent Change of Station (PCS) or deleted due to discharge or retirement by losing/last installation.

Electronic records are destroyed by deleting, overwriting, or disassociating customer service data (raw data needed for short-/long-term trend analysis) from basic customer demographic data (visibility of basic demographic data automatically transferred by system to gaining installation so basic record will not need to be re-created)."

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Headquarters Air Force Personnel Center, Directorate of Personnel Services, Airman, Family and Community Operations Branch (HQ AFPC/DPSIA), 550 C. Street West, Suite 37, Randolph Air Force Base, TX 78150–4739."

NOTIFICATION PROCEDURES:

Delete entry and replace with "Individuals seeking to determine whether this system of records contains information on themselves should address inquiries to or visit the Chief, Airman, Family and Community Operations Branch, Directorate of Personnel Services, AFPC. Official mailing address is Headquarters Air Force Personnel Center, Directorate of Personnel Services, Airman, Family and Community Operations Branch (HQ AFPC/DPSIA), 550 C. Street West, Suite 37, Randolph Air Force Base, TX 78150–4739."

For verification purposes, individuals should provide their full name, Social Security Number (SSN), any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths:

'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

RECORD ACCESS PROCEDURES:

Delete entry and replace with "Individuals seeking to access records about themselves contained in this system should address requests to the Chief Airman, Family and Community operations Branch, Directorate of Personnel Services, HQ AFPC or the Chief of the Airman and Family Readiness Center at Air Force installations. Official mailing address is Headquarters Air Force Personnel Center, Directorate of Personnel Services, Airman, Family and Community Operations Branch (HQ AFPC/DPSIA), 550 C. Street West, Suite 37, Randolph Air Force Base, TX 78150–4739."

For verification purposes, individual should provide their full name, Social Security Number (SSN), any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

CONTESTING RECORD PROCEDURES:

Delete entry and replace with: "The Air Force rules for accessing records and for contesting contents and appealing initial agency determinations are published in 32 CFR part 806b, Air Force Instruction 33–332, Air Force Privacy Program and may be obtained from the system manager.

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F036 AF DP A

SYSTEM NAME:

Air Force Family Integrated Results and Statistical Tracking.

SYSTEM LOCATION:

Headquarters Air Force Personnel Center, Directorate of Personnel Services, Airman, Family and Community Operations Branch (HQ AFPC/DPSIA), 550 C. Street West, Suite 37, Randolph Air Force Base, TX 78150–4739.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active duty Air Force, Air Reserve, and Air National Guard, Air Force DoD civilians, Air Force Retirees and their respective family members.

CATEGORIES OF RECORDS IN THE SYSTEM:

Demographic data containing Social Security Number (SSN), name, gender, date of birth, home address, home phone, work phone, work e-mail, branch of service, rank, squadron on customer, client visit/service notes on description of services provided and needs assessment information composing of a 10 question Personal Readiness Inventory questionnaire designed to identify needs, referrals to other agencies, customer service plan, and activity results.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; Air Force Instruction 36–3009, Airman and Family Readiness Centers; and E.O. 9397 (SSN), as amended.

PURPOSE:

The system is used to collect customer service data that in turn helps determine the effectiveness of Airman and Family Readiness Center activities and services as well as collect and provide reports that reflect impact of services on mission and family readiness to leadership. Information is compiled for statistical reporting to base, major commands, Headquarters United States Air Force, Department of Defense, and Congress.

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 be specifically disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' published at the beginning of the Air Force compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

Individual files are retrieved by name and/or Social Security Number (SSN).

SAFEGUARDS:

Records are accessed by person(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. The system additionally incorporates integrated system security features to protect data from unauthorized access or use: Common Access Card (CAC) login and Personal Identification Number (PIN) is required for access to the system. Records are stored on a secure server in a controlled environment with monitoring 24 hours a day, 7 days a week.

RETENTION AND DISPOSAL:

Electronic records are deactivated due to Permanent Change of Station (PCS) or deleted due to discharge or retirement by losing/last installation.

Electronic records are destroyed by deleting, overwriting, or disassociating customer service data (raw data needed

for short/long term trend analysis) from basic customer demographic data (visibility of basic demographic data automatically transferred by system to gaining installation so basic record will not need to be re-created).

SYSTEM MANAGER(S) AND ADDRESS:

Headquarters Air Force Personnel Center, Directorate of Personnel Services, Airman, Family and Community Operations Branch (HQ AFPC/DPSIA), 550 C. Street West, Suite 37, Randolph Air Force Base, TX 78150–4739.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether this system of records contains information on themselves should address inquiries to or visit the Chief, Airman, Family and Community Operations Branch, Directorate of Personnel Services, HQ AFPC. Official mailing address is Headquarters Air Force Personnel Center, Directorate of Personnel Services, Airman, Family and Community Operations Branch (HQ AFPC/DPSIA), 550 C. Street West, Suite 37, Randolph Air Force Base, TX 78150–4739.

For verification purposes, individual should provide their full name, Social Security Number (SSN), any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths:

'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system should address requests to the Chief Airman, Family and Community operations Branch, Directorate of Personnel Services, HQ AFPC or the Chief of the Airman and Family Readiness Center at Air Force installations. Official mailing address is Headquarters Air Force Personnel Center, Directorate of Personnel Services, Airman, Family and Community Operations Branch (HQ AFPC/DPSIA), 550 C. Street West, Suite 37, Randolph Air Force Base, TX 78150–4739.

For verification purposes, individual should provide their full name, Social Security Number (SSN), any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths:

'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records and for contesting contents and appealing initial agency determinations are published in 32 CFR part 806b, Air Force Instruction 33–332, Air Force Privacy Program and may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information obtained from individual, medical institutions, and personnel records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–965 Filed 1–18–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability of Advanced Battery Technology Related Patents for Exclusive, Partially Exclusive, or Non-Exclusive Licenses; Patent Licensing Meeting

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The Department of the Army announces the general availability of exclusive, partially exclusive or non-exclusive licenses relative to the following listing of intellectual property. A patent licensing meeting will be held February 16, 2011 at the SAIC Enterprise Bldg Conference Center, 8301 Greensboro Drive, McLean, VA 22102; Wednesday. Please pre-register for this event at *https://www.seeuthere.com/AdvancedBattery TechnicalBriefing2011* NLT 4 February 2011. Seating will be limited so early registration is encouraged.

1. ARL 01–37—Choosing Electrolytes for Lithium/Air Batteries (US 7,585,579).
2. ARL 02–06—Solvent Systems Comprising a Mixture of Lactams and Esters for Non-Aqueous Electrolytes and Non-Aqueous Electrolyte Cells Comprising the Same (US 7,442,471 B1).
3. ARL 02–27—Additive for Enhancing the Performance of Electrochemical Cells (US 7,172,834 B1).
4. ARL 02–27 D1—Non-aqueous solvent electrolyte battery with additive alkali metal salt of a mixed anhydride combination of oxalic acid and boric acid (US 7,524,579 B1).
5. ARL 04–29—Safer, Less Expensive Lithium Ion Batteries (US 7,629,080).
6. ARL 05–18—High Capacity Metal/Air Battery.

Filed with USPTO on 4/1/2009 (S/N #12/416,309).

7. ARL 08–15—Improvement through Protection: Enabling More Powerful Lithium Batteries.

Provisional filed with USPTO on 5/13/2010 (S/N #61/334,265); non-provisional due by 5/13/2011.

8. ARL 08–37—Higher Voltage, Safer Lithium-Carbon Fluoride Battery.

Filed with USPTO on 9/8/2010 (S/N #12/877,153).

9. ARL 08–39—Better Performing Lithium/Carbon Fluoride Battery.

Filed with USPTO on 11/24/10; (S/N 61/416,923).

10. ARL 09–18—Increasing Performance by Reducing Resistance in Lithium Ion Batteries.

Filed with USPTO on 2/3/2010 (S/N #12/699,182).

11. ARL 09–33—Pure LiBOB Salt & Purification Process.

Filed with USPTO on 10/27/10 (S/N 61/407,153).

12. ARL 09–41—Longer Lasting Lithium/Oxygen Battery.

Provisional filed with USPTO on 1/11/11, (S/N 61/431,602).

13. ARL 10–14—Ultra-fast Bi-directional Solid State Circuit Breaker (battery related).

PATENT STATUS—To be filed prior to meeting.

14. ARL 10–28—Electrolyte for Next Generation 5V Li-ion Batteries.

Provisional filed with USPTO on 7/6/2010 (S/N # 61/361,625).

FOR FURTHER INFORMATION CONTACT: Michael D. Rausa, U.S. Army Research Laboratory, Office of Research and Technology Applications, ATTN:

RDRL–DB/Bldg. 434, Aberdeen Proving Ground, MD 21005–5425, Telephone: (410) 278–5028.

SUPPLEMENTARY INFORMATION: None.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2011–960 Filed 1–18–11; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Availability for Exclusive, Non-Exclusive, or Partially-Exclusive Licensing of an Invention Concerning a Urinary Field Sampling Kit for the Determination of Nerve Agent Exposure and Method of Use Thereof

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Announcement is made of the availability for licensing of the invention set forth in U.S. Provisional Patent Application Serial No. 61/458,797, entitled "Urinary Field Sampling Kit for the Determination of Nerve Agent Exposure and Method of Use Thereof," filed on November 15, 2010. The United States Government, as represented by the Secretary of the Army, has rights to this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research and Technology Applications (ORTA), (301) 619–6664, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: The invention relates to a urinary field sampling kit and method of its use for collecting and processing urine samples to be analyzed to confirm, identify and measure human exposure to nerve agents.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2011–959 Filed 1–18–11; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 21, 2011.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: January 13, 2011.

Darrin A. King,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Type of Review: NEW.

Title of Collection: Teacher Quality Distribution Study.

OMB Control Number: Pending.

Agency Form Number(s): N/A.

Frequency of Responses: On Occasion.

Affected Public: State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

Total Estimated Number of Annual Responses: 197.

Total Estimated Number of Annual Burden Hours: 1,183.

Abstract: Title II, Part A, the Improving Teacher State Formula Grants program is the primary Federal funding under the Elementary and Secondary Education Act to support a high quality teacher in every classroom. The American Recovery and Reinvestment Act supports reform in four key areas including increasing teacher effectiveness and promoting the equitable distribution of effective teachers. Therefore, this study describes the distribution of teacher quality within districts over time and any changes in that distribution associated with district strategies to promote an equitable distribution of high quality teachers.

This study will provide information over time about the distribution of teacher quality and will document district efforts to promote teacher equity within a select number of districts. The research questions are:

- What is the distribution of teacher quality across schools within districts?
- What strategies and policies are districts promoting to address inequitable distribution of teacher quality? How are these strategies/policies enacted (*e.g.* strategy determination, goals and objectives, theory of action, features, administration, necessary resources, challenges to administration, intended duration)?
- What is the relationship between the district policies/strategies and the distribution of teacher quality? The study will be conducted in up to 30 geographically-dispersed school districts. The study will document the distribution of teacher quality, within participating districts, using teacher value-added analyses. The study will also describe changes in the distribution of teacher quality across the outcomes years 2010–2011 through 2012–2013. Data collection will include student achievement obtained from

administrative records, annual semi-structured district leadership interviews about district strategies and policies to address inequitable distribution of teacher quality, and district administrative records/personnel data.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4484. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–987 Filed 1–18–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before February 18, 2011.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: January 13, 2011.

Darrin A. King,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: New.

Title of Collection: Study of Teacher Residency Programs.

OMB Control Number: Pending.

Agency Form Number(s): N/A.

Frequency of Responses: On Occasion.

Affected Public: Individuals or households; State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

Total Estimated Number of Annual Responses: 2,132.

Total Estimated Annual Burden Hours: 2,092.

Abstract: This package requests clearance to conduct a rigorous evaluation of Teacher Residency Programs (TRPs). This evaluation will provide important implementation information on TRPs funded by the U.S. Department of Education. It will also provide information on the impact of teachers who participate in TRPs (including some funded by ED) on student achievement and on their retention rates. Study findings will be presented in two reports, one scheduled for release in Fall 2013 and the other in Fall 2014.

Requests for copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4409. When you access the information collection, click on "Download Attachments " to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–1046 Filed 1–18–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Native American and Alaska Native Children in School Program; Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students; Overview Information; Native American and Alaska Native Children in School Program Notice Inviting Applications for New Awards for Fiscal Year (FY) 2011

Catalog of Federal Domestic Assistance (CFDA) Number: 84.365C.

DATES: *Applications Available:* January 19, 2011.

Deadline for Transmittal of Applications: March 21, 2011.

Deadline for Intergovernmental Review: May 20, 2011.

Pre-application technical assistance for potential applicants: A webinar for novice applicants will be conducted two weeks after the publication of this notice in the **Federal Register.** For further information on this webinar, contact Stephanie Guillen at (202) 401–0049, or by e-mail at *Stephanie.Guillen@ed.gov.*

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of this program is to provide grants for eligible entities to develop high levels of academic attainment in English among English learners (ELs) [1], and to promote parental and community participation in language instruction educational programs. Projects funded under the

[1] The term English learner, as used in this notice, is synonymous with the term limited English proficient (LEP), as defined in section 9101(25) of the ESEA.

Native American and Alaska Native Children in School Program, authorized under title III of the Elementary and Secondary Education Act of 1965, as amended (ESEA), may support the teaching and studying of Native American languages, but must have, as a project objective, an increase in English language proficiency for participating students.

Priorities: This notice includes three competitive preference priorities and two invitational priorities. Competitive Preference Priority 1 is from 34 CFR 75.255 of the Education Department General Administrative Regulations (EDGAR). Competitive Preference Priorities 2 and 3 are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78485).

Competitive Preference Priorities: For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award an additional 5 points to an application that meets Competitive Preference Priority 1, and, with respect to each of Competitive Preference Priority 2 and Competitive Preference Priority 3, an additional 3 points, depending on how well the application meets the priority (i.e., an applicant could attain up to 6 additional points if it meets both Competitive Preference Priority 2 and Competitive Preference Priority 3).

Note: We will add competitive preference priority points for Priorities 2 and 3 only to applications with a score of 75 or higher.

These priorities are:

Competitive Preference Priority 1—Novice Applicants. (5 points)

To meet this priority, you must be a novice applicant, as defined in 34 CFR 75.225. A novice applicant means any applicant for a grant under this competition that—

(i) Has never received a grant or subgrant under the Native American and Alaska Native Children in School Program;

(ii) Has never been a member of a group application, submitted in accordance with 34 CFR 75.127 through 75.129, that received a grant under the Native American and Alaska Native Children in School Program; and

(iii) Has not had an active discretionary grant from the Federal Government in the five years before the deadline date for applications under the Native American and Alaska Native Children in School Program. For the purposes of this requirement, a grant is active until the end of the grant's project or funding period, including any extensions of those periods that extend the grantee's authority to obligate funds.

In the case of a group application submitted in accordance with 34 CFR 75.127 through 75.129, a group includes only parties that meet the requirements listed in this priority.

Competitive Preference Priority 2—Increasing Postsecondary Success. (up to 3 points)

Projects that are designed to address the following priority area:

Increasing the number and proportion of high-need students (as defined in this notice) who are academically prepared for and enroll in college or other postsecondary education and training.

Note: *High-need children and high-need students* means children and students at risk of educational failure, such as children and students who are living in poverty, who are English learners, who are far below grade level or who are not on track to becoming college- or career-ready by graduation, who have left school or college before receiving, respectively, a regular high school diploma or a college degree or certificate, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who are pregnant or parenting teenagers, who have been incarcerated, who are new immigrants, who are migrant, or who have disabilities.

Competitive Preference Priority 3—-Enabling More Data-Based Decision-Making. (up to 3 points)

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in one or more of the following priority areas:

(a) Improving postsecondary student outcomes relating to enrollment, persistence, and completion and leading to career success.

(b) Improving instructional practices, policies, and student outcomes in elementary or secondary schools.

Note: *Privacy requirements* means the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations in 34 CFR part 99, the Privacy Act, 5 U.S.C. 552a, as well as all applicable Federal, State and local requirements regarding privacy.

Invitational Priorities: For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1) we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

Invitational Priority 1—Parental Involvement to Improve School Readiness and Success.

Projects that are designed to provide parental involvement activities to improve school readiness and success for high-need children and high-need students (as defined in this notice) from birth through third grade (or any age group of high-need children and high-need students within that range) through a focus on language and literacy development.

Invitational Priority 2—Supporting Native American Language Instruction.

Projects that are designed to support the teaching and studying of Native American languages, while maintaining the objective of increasing English language proficiency for participating students.

Note: The term *Native American language* means the historical, traditional languages spoken by Native Americans, consistent with section 103 of the Native American Languages Act (25 U.S.C. 2902).

Program Authority: 20 U.S.C. 6821(c)(1)(A) and 6822.

Applicable Regulations: (a) EDGAR in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78485).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $5,000,000 for new awards for this program for FY 2011. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2012 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $175,000–$200,000.

Estimated Range of Awards for IHEs applying in consortia with a Secondary School: $200,000–$300,000.

Estimated Average Size of Awards: $237,000.

Estimated Number of Awards: 21.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* The following entities, when they operate elementary, secondary, and postsecondary schools primarily for Native American children (including Alaska Native children), are eligible applicants under this program: Indian tribes; tribally sanctioned educational authorities; Native Hawaiian or Native American Pacific Islander native language educational organizations; elementary schools or secondary schools that are operated or funded by the Department of the Interior's Bureau of Indian Education (BIE), or a consortium of these schools; elementary schools or secondary schools operated under a contract with or grant from the BIE in consortium with another such school or a tribal or community organization; and elementary schools or secondary schools operated by the BIE and an IHE, in consortium with an elementary school or secondary school operated under a contract with or a grant from the BIE or a tribal or community organization.

Note: Any eligible entity that receives Federal financial assistance under this program is not eligible to receive a subgrant under section 3114 of title III of the ESEA.

Note: Eligible applicants applying as a consortium should read and follow the regulations in 34 CFR 75.127 through 75.129.

Note: Charter schools meeting the eligibility requirement described in this section are eligible to apply for a grant under the Native American and Alaska Native Children in School Program.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other: Participation by Private School Children and Teachers.*

An entity that receives a grant under the Native American and Alaska Native Children in School Program must provide for the equitable participation of private school children and their teachers or other educational personnel.

In order to ensure that grant program activities address the needs of private school children, the applicant must engage in timely and meaningful consultation with appropriate private school officials during the design and development of the program. This consultation must take place before the applicant makes any decision that affects the opportunities of eligible private school children, teachers, and other educational personnel to participate. Administrative direction and control over grant funds must remain with the grantee. (*See* section 9501, Participation by Private School Children and Teachers, of the ESEA.)

IV. Application and Submission Information

1. *Address to Request Application Package:* Yvonne Mathieu, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C138, Washington, DC 20202–6510.

Telephone: (202) 401–1461 or by e-mail: *Yvonne.Mathieu@ed.gov.*

Note: Please include "84.365C Application Request" in the subject heading of your e-mail.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to the equivalent of no more than 35 pages using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the three-page abstract. However, the page limit does apply to all of the application narrative section in Part III.

We will reject your application if you exceed the page limit; or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: January 19, 2011.

Deadline for Transmittal of Applications: March 21, 2011.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the persons listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: May 20, 2011.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov 3–Step Registration Guide *(see http://www.grants.gov/section910/Grants.gov RegistrationBrochure.pdf).*

7. *Other Submission Requirements.*

Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Native American and Alaska Native Children in School Program, CFDA number 84.365C, must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Native American and Alaska Native Children in School Program at *http://www.Grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.365, not 84.365C).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must attach any narrative sections of your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an

explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; and
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Trini Torres, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C145, Washington, DC 20202. FAX: (202) 260–1292.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.365C) LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.365C) 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 of EDGAR. The maximum score for all of these criteria is 100 points. The maximum score for each criterion is indicated in parentheses.

The Notes we have included after each criterion are guidance to assist applicants in understanding the criterion as they prepare their applications and are not required by statute or regulation.

(a) *Quality of the project design.* (30 points)

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable. (20 points)

Note: For example, applicants may, in addressing this factor, consider including in their application ambitious measurable objectives that reflect the performance measures discussed in section VI of this notice regarding improved student English language proficiency and reading proficiency, and that include annual targets of expected student achievement in English language proficiency and in reading proficiency. Applicants also may want to include measurable objectives that reflect Competitive Preference Priorities 2 and 3, if they choose to address those priorities.

(ii) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance. (5 points)

(iii) The extent to which the proposed project encourages parental involvement. (5 points)

(b) *Quality of project personnel.* (10 points)

The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the following factors:

(i) The extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. (2 points)

(ii) The qualifications, including relevant training and experience, of the

project director or principal investigator. (4 points)

(iii) The qualifications, including relevant training and experience, of key project personnel. (4 points)

(c) *Quality of the management plan.* (30 points)

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks. (30 points)

Note: For example, applicants, in addressing this criterion, may consider whether to include in their application information on how management activities support the accomplishment of each objective, costs associated with the accomplishment of each objective, persons responsible for each management activity, and timeframes for the completion of each management activity.

(d) *Quality of the project evaluation.* (30 points)

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project. (5 points)

Note: For example, applicants, in addressing this factor, may consider including in their application information on how each proposed objective including those objectives addressing Competitive Preference Priorities 2 and 3, if the applicants choose to address those priorities, will be evaluated.

(ii) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible. (15 points)

Note: For example, applicants, in addressing this factor, may consider including in their application information on how the proposed project will collect, analyze, and report quantitative data on the performance measures discussed in section VI of this notice.

(iii) The extent to which the methods of evaluation provide for examining the effectiveness of project implementation strategies. (5 points)

(iv) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes. (5 points)

2. Review and Selection Process: We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

Note: After awards are made under this competition, all of the successful applications, together with reviewers' scores and comments, will be posted on the Department's Web site at: *http://www2.ed.gov/about/offices/list/oela/index.html?src=oc.*

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), Federal departments and agencies must clearly describe the goals and objectives of programs, identify resources and actions needed to accomplish goals and objectives, develop a means of measuring progress made, and regularly report on achievement. One important source of program information on successes and lessons learned is the project evaluation conducted under individual grants. The Department has developed the following GPRA performance measures for evaluating the overall effectiveness of the Native American and Alaska Native Children in School Program:

(i) The percentage of English learners (ELs) served by the program who score proficient or above on the State reading assessment.

(ii) The percentage of ELs served by the program who are making progress in learning English as measured by the State approved English language proficiency assessment.

(iii) The percentage of ELs served by the program who are attaining proficiency in English as measured by the State approved English language proficiency assessment.

Grantees funded under this competition will be expected to collect and report to the Department data related to these measures in their Annual Performance Report and in their Final Performance Report. Applicants should discuss in the application narrative how they propose to collect these data.

5. *Continuation Awards:* In making a continuation award, the Secretary may

consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: Trini Torres, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C145, Washington, DC 20202–6510. Telephone: (202) 401–1445, or by e-mail: *trinidad.torres-carrion@ed.gov* or Itzetht Testa-Sanchez, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C151, Washington, DC 20202–6510. Telephone: (202) 401–1459, or by e-mail: *Itzetht.testa-sanchez@ed.gov*.

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., Braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: January 13, 2011.

Rosalinda B. Barrera,

Assistant Deputy Secretary and Director, Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students.

[FR Doc. 2011–1041 Filed 1–19–11; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R03–OW–2009–0985; FRL–9254–8]

Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This is a notice of EPA's Final Determination pursuant to section 404(c) of the Clean Water Act to withdraw the specification of Pigeonroost Branch, Oldhouse Branch, and their tributaries, within Logan County, West Virginia, as a disposal site for dredged or fill material in connection with construction, operation, and reclamation of the Spruce No. 1 Surface Mine, as authorized by DA Permit No. 199800436–3 (Section 10: Coal River). This determination also prohibits the specification of the defined area constituting Pigeonroost Branch, Oldhouse Branch, and their tributaries for use as a disposal site associated with future surface coal mining that would be expected to result in a nature and scale of adverse chemical, physical, and biological effects similar to the Spruce No. 1 mine. EPA's determination is based upon a finding that the discharge of dredged or fill material associated with the construction and operation of the Spruce No. 1 Mine would result in unacceptable adverse effects on wildlife.

DATES: *Effective Date:* The effective date of the Final Determination is January 13, 2011.

ADDRESSES: U.S. Environmental Protection Agency, Office of Water, Wetlands Division, Mail Code 4502T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. EPA has established a docket for this action under Docket ID No. EPA–R03–OW–2009–0985. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information may not be 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 electronically through *http://www.regulations.gov* or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Mr. Chris Hunter, Office of Wetlands, Oceans, and Watersheds; U.S. Environmental Protection Agency, Mail Code 4502T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Additional information and copies of EPA's Final Determination are available at the following Web site: *http://www.epa.gov/404c/.*

SUPPLEMENTARY INFORMATION: Section 404(c) of the CWA, 33 U.S.C. 1344(c), authorizes EPA to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site. EPA is authorized to restrict or deny the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever it determines, after notice and opportunity for public hearing, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

EPA's regulations for implementing section 404(c) are set forth in 40 CFR part 231. Four major steps in the process are: (1) The Regional Administrator's notice to the U.S. Army Corps of Engineers (the Corps), the applicant or permittee, the property owner, and the State, as appropriate, of the intention to initiate the section 404(c) process; (2) the Regional Administrator's publication of a Proposed Determination to withdraw, deny, restrict, or prohibit the use of the site, soliciting public comment and offering an opportunity for a public hearing; (3) the Regional Administrator's recommendation to the Assistant Administrator for Water at EPA Headquarters to withdraw, deny, restrict, or prohibit the use of the site (Recommended Determination); and, (4) the Assistant Administrator for Water's

Final Determination to affirm, modify, or rescind the Regional recommendation.

As a result of significant new scientific information confirming and strengthening EPA's concerns regarding the environmental effects of mountaintop mining operations, and in particular those operations on the scope and scale of the Spruce No. 1 Mine, EPA Region III initiated the Clean Water Act § 404(c) process for the Spruce No. 1 Mine on October 16, 2009. The Spruce No. 1 Mine, as authorized in 2007 by Department of the Army (DA) Permit No. 199800436–3 (Section 10: Coal River), is one of the largest mountaintop mining projects ever authorized in West Virginia. The DA Permit authorizes the Mingo Logan Coal Company to construct six valley fills, associated sedimentation structures, and other discharges of fill material to the Right Fork of Seng Camp Creek, Pigeonroost Branch, Oldhouse Branch, and their tributaries. If fully constructed, the project will disturb approximately 2,278 acres (about 3.5 square miles) and bury approximately 7.48 miles of streams beneath 110 million cubic yards of excess spoil.[1]

Following initiation of the Section 404(c) process, EPA Region III communicated with representatives of Mingo Logan (a subsidiary of Arch Coal, Inc.) and the Corps both in person and by telephone and electronic mail on several occasions to determine whether corrective action would be taken to address EPA Region III's concerns. However, corrective action was not taken to resolve EPA's concerns. On April 2, 2010, EPA Region III published in the **Federal Register** a Proposed Determination to prohibit, restrict, or deny the specification or the use for specification (including withdrawal of specification) of certain waters at the project site as disposal sites for the discharge of dredged or fill material for the construction of the Spruce No. 1 Surface Mine. EPA Region III took this step because it believed that discharges authorized by DA Permit No. 199800436–3 (Section 10: Coal River) would result in a significant loss of wildlife habitat and also cause significant degradation of downstream aquatic ecosystems and therefore could have unacceptable adverse effects on wildlife. A public hearing regarding the Proposed Determination was conducted on May 18, 2010. EPA Region III received more than 100 oral comments and more than 50,000 written comments both supporting and opposing its Proposed Determination.

On September 24, 2010, EPA Region III submitted to EPA Headquarters its Recommended Determination that the specification embodied in DA Permit No. 199800436–3 (Section 10: Coal River) of Pigeonroost Branch and Oldhouse Branch as disposal sites for discharges of dredged or fill material for construction of the Spruce No. 1 Surface Mine be withdrawn. EPA Region III based this recommendation upon a conclusion that the discharges of dredged or fill material to Pigeonroost Branch and Oldhouse Branch for the purpose of constructing the Spruce No. 1 Surface Mine as authorized would likely have unacceptable adverse effects on wildlife.

The U.S. Fish and Wildlife Service (USFWS), in its comments on both the Proposed and Recommended Determinations, concurred with EPA Region III's conclusion that the project, as authorized, would result in unacceptable adverse effects on wildlife and that this conclusion is supported by the available scientific information. USFWS also noted that it has consistently expressed concerns regarding the loss of headwater streams and adjacent riparian and terrestrial habitats associated with the Spruce No. 1 Mine, as well as its likely impacts on downstream water quality, aquatic organisms, and terrestrial and aquatic wildlife that depend on those resources.

Following receipt of the Recommended Determination, and consistent with EPA's Section 404(c) regulations, EPA Headquarters provided an opportunity for the project's proponents to propose corrective actions intended to prevent the unacceptable adverse environmental impacts presented in the Recommended Determination. On November 16, 2010, a consultation meeting was held at EPA Headquarters in Washington, DC to discuss the Region III Recommended Determination and potential corrective actions that could be undertaken to avoid the unacceptable adverse impacts that were of concern to EPA. Participants at the meeting included the EPA Assistant Administrator for Water; the EPA Region III Regional Administrator; other EPA staff; representatives from Arch Coal, Inc. (parent company of Mingo Logan) and their legal counsel; the United Company (a mineral rights owner) and their legal counsel; the West Virginia Department of Environmental Protection, and the District Engineer of the Corps' Huntington District. At that meeting, and in subsequent communications, Arch Coal did not provide EPA with corrective actions that would meaningfully address the likely unacceptable adverse effects outlined in Region III's Recommended Determination.

Following review of the public comments received, existing and recently developed scientific data, and EPA Region III's Recommended Determination, EPA has concluded that the discharge of dredged or fill material to Pigeonroost Branch and Oldhouse Branch, in connection with the construction of valley fills and sedimentation ponds, as authorized by DA Permit No. 199800436–3 (Section 10: Coal River), will result in unacceptable adverse effects on wildlife. The administrative record developed in this case fully supports the conclusion that the Spruce No. 1 Surface Mine will have unacceptable adverse effects to wildlife, due to the filling of Pigeonroost Branch, Oldhouse Branch, and their tributaries. In addition, the administrative record demonstrates that the Spruce No. 1 Surface Mine will have unacceptable adverse effects on wildlife downstream of the project site as a result of increased pollution that the project will contribute to downstream waters.

EPA has determined that unacceptable adverse impacts to Pigeonroost Branch, Oldhouse Branch, and their tributaries will occur through the direct burial of 6.6 miles of high-quality stream habitat, including all wildlife in this watershed that utilize these streams for all or part of their life cycles (*e.g.,* macroinvertebrate, salamander, fish, and water-dependent bird populations). Pigeonroost Branch, Oldhouse Branch, and their tributaries contain diverse and high-quality wildlife communities that are consistent with the ecological richness of high-quality Appalachian headwater stream systems. With their adjacent riparian areas, these streams provide important habitat for 84 taxa of macroinvertebrates, up to 46 species of amphibians and reptiles, 4 species of crayfish, and 5 species of fish, as well as birds, bats, and other mammals. As some of the last remaining high quality,

[1] EPA's Final Determination addresses only the 6.6 miles of fill authorized in Pigeonroost Branch, Oldhouse Branch, and their tributaries. While the permit also authorizes construction of valley fills and other discharges to the Right Fork of Seng Camp Creek and its tributaries, EPA is not withdrawing specification of those waters, in part because some of those discharges have already occurred and because the stream resources in Right Fork of Seng Camp Creek were subject to a higher level of historic and ongoing human disturbance than those found in Pigeonroost Branch or Oldhouse Branch. Due to litigation and an agreement with environmental groups, represented by Ohio Valley Environmental Coalition, operations following the issuance of this DA Permit have been limited to the Seng Camp Creek watershed, and as part of that agreement one valley fill is partially constructed.

least-disturbed headwater stream habitat within the sub-basin, these streams not only support resident wildlife, but also provide ecosystem functions for downstream waters, serve as refugia for aquatic life and potential sources for recolonizing nearby waters, and ultimately serve to maintain the aquatic ecosystem integrity in the sub-basin and the rich animal diversity in the ecoregion.

Burial of Pigeonroost Branch, Oldhouse Branch, and their tributaries will also result in unacceptable adverse effects on wildlife downstream through the removal of functions performed by the buried streams and by transformation of the buried areas into pollution sources that will contribute contaminants to downstream waters. Based on recent peer-reviewed literature, as well as available data from adjacent mine sites and from the active portion of the Spruce No. 1 Mine, EPA has concluded that the full construction of the Spruce No. 1 Mine will transform these headwater streams from high-quality habitat into sources of pollutants (particularly total dissolved solids and selenium) that will travel downstream and adversely impact the wildlife communities that utilize these downstream waters. Increased pollutant levels will lead to loss of macroinvertebrate communities and population shifts to more pollution-tolerant taxa, specifically the extirpation of ecologically important macroinvertebrates. Through the loss of stream macroinvertebrate communities, there will be, in turn, substantial effects on fish, amphibian, and bird populations that rely on these communities as a food source.

Furthermore, the increased loading of pollutants to downstream receiving waters will increase the potential for harmful golden algal blooms, while increased selenium exposure will result in impaired salamander populations and adverse effects to the reproduction of fish and bird species, thus harming the ability of these local populations to rebound. The loss of macroinvertebrate prey populations, increased risk of harmful golden algal blooms, and additional exposure to selenium will have an unacceptable adverse effect on the 26 fish species found in Spruce Fork (the receiving stream for Pigeonroost Branch and Oldhouse Branch), and will also have an unacceptable adverse effect on amphibians, reptiles, crayfish, and bird species that depend on downstream waters for food or habitat.

Furthermore, these adverse impacts do not comply with the requirements of the Clean Water Act (CWA) and EPA's implementing regulations under section 404(b)(1). EPA has determined that the Spruce No. 1 Surface Mine fails to adequately evaluate less environmentally damaging alternatives, will cause or contribute to significant degradation of waters of the United States (especially when considered in the context of the significant cumulative losses and impairment of streams across the Central Appalachian ecoregion), and lacks compensatory mitigation to adequately offset the impacts to Pigeonroost Branch and Oldhouse Branch. These failures to comply with the Guidelines serve to strengthen EPA's judgment about the unacceptability of the significant adverse impacts that will occur.

Based on these findings and pursuant to section 404(c) of the CWA, EPA's Final Determination withdraws the specification of Pigeonroost Branch, Oldhouse Branch, and their tributaries, as described in DA Permit No. 199800436–3 (Section 10: Coal River), as a disposal site for the discharge of dredged or fill material for the purpose of construction, operation, and reclamation of the Spruce No. 1 Surface Mine. This Final Determination also prohibits the specification of the defined area constituting Pigeonroost Branch, Oldhouse Branch, and their tributaries for use as a disposal site associated with future surface coal mining that would be expected to result in a nature and scale of adverse chemical, physical, and biological effects similar to the Spruce No. 1 mine. This Final Determination does not affect discharges to Seng Camp Creek as authorized in DA Permit No. 19980043603 (Section 10: Coal River) associated with the Spruce No.1 Surface Mine.

EPA continues to work effectively with the Corps, the mining industry, and the public to evaluate proposed Appalachian surface coal mining projects and to enable permitting of environmentally responsible mining projects that authorize continued coal production while preventing unacceptable adverse effects on wildlife.

Dated: January 13, 2011.

Peter S. Silva,

Assistant Administrator, Office of Water.

[FR Doc. 2011–1013 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9254–2]

Intent to Grant Patent License

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Intent to Grant Co-Exclusive Patent License.

SUMMARY: Pursuant to 35 U.S.C. 207 (Patents) and 37 CFR part 404 (U.S. Government patent licensing regulations), EPA hereby gives notice of its intent to grant a co-exclusive, royalty-bearing, revocable license to practice the inventions described and claimed in the U.S. patents and patent applications listed at the end of this message, and all corresponding patents issued throughout the world, and all reexamined patents and reissued patents granted in connection with such patent applications, to Oakland Technology, LLC of Farmington Hills, Michigan.

The inventions pertain to hybrid vehicle technology, particularly hydraulic hybrid drive systems, methods, and components. The proposed license will contain appropriate terms, limitations, and conditions negotiated in accordance with 35 U.S.C. 209 and 37 CFR 404.5 and 404.7 of the U.S. Government patent licensing regulations. EPA will finalize terms and conditions and grant the license unless, within 15 days from the date of this notice, EPA receives, at the address below, written objections to the grant, together with supporting documentation. The documentation from objecting parties having an interest in practicing the inventions listed in the patents and patent applications below should include an application for a nonexclusive license with the information set forth in 37 CFR 404.8. The EPA Patent Attorney and other EPA officials will review all written responses and then make recommendations on a final decision to the Director or Deputy Director of the Office of Transportation and Air Quality, who have been delegated the authority to issue patent licenses under EPA Delegation 1–55.

The proposed license will apply to the following patents and patent applications:

Method or Vehicle Licensed Inventions

Patent No.	Title	Date issued
5,495,912	Hybrid Powertrain Vehicle	March 5, 1996.

Patent No.	Title	Date issued
5,887,674	Continuously Smooth Transmission	March 30, 1999.
6,719,080	Hydraulic Hybrid Vehicle	April 13, 2004.
6,876,098	Methods of Operating a Series Hybrid Vehicle	April 5, 2005.
7,456,509	Methods of Operating a Series Hybrid Vehicle (div)	November 25, 2008.
7,337,869	Hydraulic Hybrid Vehicle with Integrated Drive Module and Four-Wheel-Drive, and Method of Operation Thereof.	March 4, 2008.
7,252,020	Vehicle Drivetrain including a Clutchless Transmission, and Method of Operation	August 7, 2007.
6,998,727	Methods of Operating a Parallel Hybrid Vehicle Having an Internal Combustion Engine and a Secondary Power Source.	February 14, 2006.
7,104,349	Hybrid Powertrain Motor Vehicle with Homogenous Charge Compression Ignition (HCCI) Engine, and Method of Operation Thereof.	September 12, 2006.
7,857,082	Methods of Operating a Series Hybrid Vehicle (Div.)	December 28, 2010.
Application No.	**Title**	**Date filed**
12/229,099	Hydraulic Hybrid Vehicle with Integrated Hydraulic Drive Module and Four-Wheel-Drive, and Method of Operation Thereof (Div.).	August 19, 2008.
11/583,205	Hydraulic Hybrid Vehicle Methods of Safe Operation	October 18, 2006.
61/311,835	Hydraulic Hybrid Vehicle with Safe and Efficient Hydrostatic Operation	March 9, 2010.
12/654,321	Methods of Optimizing Efficiency of a Series Hybrid Vehicle with Multi-Gear Transmission.	December 17, 2009.
12/711,603	Hydraulic-Electric Regenerative Energy Storage System	February 24, 2010.
61/326,317	Methods for Safe Operation of Hydraulic Hybrid Vehicles with Over-Center Pump/Motors.	April 21, 2010.
12/731,326	Regenerative Energy Storage System for Hybrid Locomotive	March 25, 2010.
12/955,795	Methods of Operating a Series Hybrid Vehicle (Div.)	November 29, 2010.

Hydraulic Component Licensed Inventions

Patent No.	Title	Date issued
6,619,325	Hydraulic Hybrid Accumulator Shut-off Valve	September 16, 2003.
6,996,982	Method and Device for Switching Hydraulic Fluid Supplies, such as for a Hydraulic Pump/Motor.	February 14, 2006.
7,014,429	High-Efficiency, Large Angle, Variable Displacement Hydraulic Pump/Motor	March 21, 2006.
7,108,016	Lightweight Low Permeation Piston-in-Sleeve Accumulator	September 19, 2006.
7,121,304	Low Permeation Hydraulic Accumulator	October 17, 2006.
7,305,914	Hydraulic Actuator Control Valve	December 11, 2007.
6,170,524	Fast Valve and Actuator	January 9, 2001.
7,305,915	Efficient Pump/Motor with Reduced Energy Loss	December 11, 2007.
7,374,005	Opposing Pump/Motors	May 20, 2008.
7,500,424	Hydraulic Machine Having Pressure Equalization	March 10, 2009.
7,527,074	Hydraulic Pressure Accumulator	May 5, 2009.
7,537,075	Hydraulic Hybrid Vehicle with Integrated Hydraulic Drive Module and Four-Wheel-Drive, and Method of Operation Thereof (Div.).	May 26, 2009.
7,553,085	Fluid Bearing and Method of Operation	June 30, 2009.
7,594,802	Large Angle Sliding Valve Plate Pump/Motor	September 29, 2009.
7,617,761	Opposing Pump/Motors (divisional)	November 17, 2009.
7,677,871	High-Efficiency, Large Angle, Variable Displacement Hydraulic Pump/Motor (Divisional).	March 16, 2010.
Application No.	**Title**	**Date filed**
11/233,822	Independent Displacement Opposing Pump/Motors and Method of Operation	September 22, 2005.
11/540,765	Quiet Fluid Supply Valve	September 29, 2006.
11/540,089	Safe Over-Center Pump/Motor	September 29, 2006.
12/156,734	Piston-in-Sleeve Hydraulic Pressure Accumulator	June 4, 2008.
12/701,438	Variable Length Bent-Axis Pump/Motor	February 5, 2010.
12/384,789	Hydraulic Accumulator and Fire Suppression System	April 9, 2009.
12/567,938	Hydraulic Circuit and Manifold with Multi-Function Valve	September 28, 2009.
11/999,884	Engine-Off Power Steering System	December 7, 2007.
12/215,438	On-Demand Power Brake System and Method	June 26, 2008.

DATES: Comments on this notice must be received by EPA at the address listed below by February 3, 2011.

FOR FURTHER INFORMATION CONTACT: David Read, Attorney Advisor, Environmental Protection Agency, National Vehicle Fuel Emissions Laboratory, Office of Air and Radiation, 2565 Plymouth Road, Ann Arbor, MI 48105, telephone (734) 214–4367.

Dated: January 12, 2011.

Geoff Cooper,

Assistant General Counsel, General Law Office.

[FR Doc. 2011–1016 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–1023; FRL–8858–6]

Notice of Intent To Suspend Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice, pursuant to section 6(f)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), announces a notice of intent to suspend issued by EPA pursuant to section 3(c)(2)(B) of FIFRA. The Notice of Intent to Suspend was issued following the Agency's issuance of a Data Call-In notice (DCI), which required the registrants of the affected pesticide products containing a certain pesticide active ingredient to take appropriate steps to secure certain data, and following the registrant's failure to submit these data or to take other appropriate steps to secure the required data. The subject data were determined to be required to maintain in effect the existing registrations of the affected products. Failure to comply with the data requirements of a DCI is a basis for suspension of the affected registrations under section 3(c)(2)(B) of FIFRA.

DATES: The Notice of Intent to Suspend included in this **Federal Register** notice will become a final and effective suspension order automatically by operation of law 30 days after the date of the registrant's receipt of the mailed Notice of Intent to Suspend or February 18, 2011 (if the mailed notice of intent to suspend is returned to the Administrator as undeliverable, if delivery is refused, or if the Administrator otherwise is unable to accomplish delivery to the registrant after making reasonable efforts to do so), unless during that time a timely and adequate request for a hearing is made by a person adversely affected by the Notice of Intent to Suspend or the registrant has satisfied the Administrator that the registrant has complied fully with the requirements that served as a basis for the Notice of Intent to Suspend. Unit IV. explains what must be done to avoid suspension under this notice (*i.e.,* how to request a hearing or how to comply fully with the requirements that served as a basis for the Notice of Intent to Suspend).

FOR FURTHER INFORMATION CONTACT: Terria Northern, Pesticide Re-evaluation Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7093; e-mail address: *northern.terria@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 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–2010–1023. 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. Registrant Issued Notice of Intent To Suspend Active Ingredient, Product Affected, and Dates Issued

The Notice of Intent to Suspend was sent via the U.S. Postal Service (USPS) return receipt requested to the registrant for the product listed in Table 1 of this unit.

TABLE 1—LIST OF PRODUCTS

Registrant affected	Active ingredient	EPA registration number	Product name	Date EPA issued notice of intent to suspend
Stet Acquisition, Inc	Rotenone	74343–1	True Stop Insecticide	December 6, 2010

III. Basis for Issuance of Notice of Intent To Suspend; Requirement List

The registrant failed to submit the required data or information or to take other appropriate steps to secure the required data for their pesticide products listed in Table 2 of this unit.

TABLE 2—LIST OF REQUIREMENTS

EPA registration number	Guideline # as listed in applicable DCI	Requirement name	Date EPA issued DCI	Date registrant received DCI	Final data due date	Reason for notice of intent to suspend *
74343–1	830.1550	Product identity and composition.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.1600	Description of materials used to produce the product.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.1620	Description of production process.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.1650	Description of formulation process.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.1670	Discussion of formation of impurities.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.1700	Preliminary analysis	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.1750	Certified limits	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.1800	Enforcement analytical method.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6302	Color	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6303	Physical state	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6304	Odor	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6313	Stability to normal and elevated temperatures, metals, and metal ions.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6314	Oxidizing or reducing action.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6315	Flammability	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6316	Explodability	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6317	Storage stability	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6319	Miscibility	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6320	Corrosion characteristics.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.6321	Dielectric breakdown voltage.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7000	pH	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7050	UV/Visible absorption.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7100	Viscosity	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7200	Melting point/melting range.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7220	Boiling point/Boiling range.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7300	Density/relative density.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7370	Dissociation constants in water.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7550	Partition coefficient (n-octanol/water) shake flask method.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7570	Partition coefficient (n-octanol/water), estimation by liquid chromatography.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7840	Water solubility: Column elution method, shake flask method.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7860	Water solubility, generator column method.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	830.7950	Vapor pressure	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	870.1100	Acute Oral Toxicity	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	870.1200	Acute dermal toxicity.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	870.1300	Acute inhalation toxicity.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	870.2400	Acute eye irritation	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.

TABLE 2—LIST OF REQUIREMENTS—Continued

EPA registration number	Guideline # as listed in applicable DCI	Requirement name	Date EPA issued DCI	Date registrant received DCI	Final data due date	Reason for notice of intent to suspend *
	870.2500	Acute dermal irritation.	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.
	870.2600	Skin sensitization ...	January 21, 2010 ...	January 29, 2010 ...	September 30, 2010	No data received.

IV. How To Avoid Suspension Under this Notice?

You may avoid suspension under this notice if you or another person adversely affected by this notice properly request a hearing within 30 days of your receipt of the Notice of Intent to Suspend by mail or, if you did not receive the notice that was sent to you via USPS first class mail return receipt requested, then within 30 days from the date of publication of this **Federal Register** notice (*see* **DATES**). If you request a hearing, it will be conducted in accordance with the requirements of section 6(d) of FIFRA and the Agency's procedural regulations in 40 CFR part 164. Section 3(c)(2)(B) of FIFRA, however, provides that the only allowable issues which may be addressed at the hearing are whether you have failed to take the actions which are the bases of this notice and whether the Agency's decision regarding the disposition of existing stocks is consistent with FIFRA. Therefore, no substantive allegation or legal argument concerning other issues, including but not limited to the Agency's original decision to require the submission of data or other information, the need for or utility of any of the required data or other information or deadlines imposed, any allegations of errors or unfairness in any proceedings before an arbitrator, and the risks and benefits associated with continued registration of the affected product, may be considered in the proceeding. The Administrative Law Judge shall by order dismiss any objections which have no bearing on the allowable issues which may be considered in the proceeding. Section 3(c)(2)(B)(iv) of FIFRA provides that any hearing must be held and a determination issued within 75 days after receipt of a hearing request. This 75–day period may not be extended unless all parties in the proceeding stipulate to such an extension. If a hearing is properly requested, the Agency will issue a final order at the conclusion of the hearing governing the suspension of your products. A request for a hearing pursuant to this notice must:

- Include specific objections which pertain to the allowable issues which may be heard at the hearing.
- Identify the registrations for which a hearing is requested.
- Set forth all necessary supporting facts pertaining to any of the objections which you have identified in your request for a hearing.

If a hearing is requested by any person other than the registrant, that person must also state specifically why he/she asserts that he/she would be adversely affected by the suspension action described in this notice. Three copies of the request must be submitted to: Hearing Clerk, 1900, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

An additional copy should be sent to the person who signed this notice. The request must be received by the Hearing Clerk by the applicable 30th day deadline as measured from your receipt of the Notice of Intent to Suspend by mail or publication of this notice, as set forth in **DATES** and in Unit IV.1., in order to be legally effective. The 30-day time limit is established by FIFRA and cannot be extended for any reason. Failure to meet the 30-day time limit will result in automatic suspension of your registrations by operation of law and, under such circumstances, the suspension of the registration for your affected products will be final and effective at the close of business on the applicable 30-day deadline as measured from your receipt of the Notice of Intent to Suspend by mail or publication of this notice, as set forth in **DATES** and in Unit IV.1., and will not be subject to further administrative review. The Agency's rules of practice at 40 CFR 164.7 forbid anyone who may take part in deciding this case, at any stage of the proceeding, from discussing the merits of the proceeding *ex parte* with any party or with any person who has been connected with the preparation or presentation of the proceeding as an advocate or in any investigative or expert capacity, or with any of their representatives. Accordingly, the following EPA offices, and the staffs thereof, are designated as judicial staff to perform the judicial function of EPA in any administrative hearings on this Notice of Intent to Suspend: The Office of the Administrative Law Judges, the Office of the Environmental Appeals Board, the Administrator, the Deputy Administrator, and the members of the staff in the immediate offices of the Administrator and Deputy Administrator. None of the persons designated as the judicial staff shall have any *ex parte* communication with trial staff or any other interested person not employed by EPA on the merits of any of the issues involved in this proceeding, without fully complying with the applicable regulations.

You may also avoid suspension if, within the applicable 30-day deadline period as measured from your receipt of the Notice of Intent to Suspend by mail or publication of this notice, as set forth in **DATES** and in Unit IV.1., the Agency determines that you have taken appropriate steps to comply with the FIFRA section 3(c)(2)(B) Data Call-In notice. In order to avoid suspension under this option, you must satisfactorily comply with Table 2.—List of Requirements in Unit II., for each product by submitting all required supporting data/information described in Table 2. of Unit. II. and in the Explanatory Appendix (in the docket for this **Federal Register** notice) to the following address (preferably by certified mail): Office of Pesticide Programs, Pesticide Re-evaluation Division, Environmental Protection Agency, 1200 Pennsylvania Ave., NW.,Washington, DC 20460–0001.

For you to avoid automatic suspension under this notice, the Agency must also determine within the applicable 30-day deadline period that you have satisfied the requirements that are the bases of this notice and so notify you in writing. You should submit the necessary data/information as quickly as possible for there to be any chance the Agency will be able to make the necessary determination in time to avoid suspension of your products. The suspension of the registrations of your company's products pursuant to this notice will be rescinded when the Agency determines you have complied

fully with the requirements which were the bases of this notice. Such compliance may only be achieved by submission of the data/information described in Table 2 of Unit II.

V. Status of Products That Become Suspended

Your product will remain suspended, however, until the Agency determines you are in compliance with the requirements which are the bases of this notice and so informs you in writing.

After the suspension becomes final and effective, the registrants subject to this notice, including all supplemental registrants of products listed in Table 1 of Unit II., may not legally distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the products listed in Table 1 of Unit II. Persons other than the registrants subject to this notice, as defined in the preceding sentence, may continue to distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the products listed in Table 1 of Unit II. Nothing in this notice authorizes any person to distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the products listed in Table 1 of Unit II. in any manner which would have been unlawful prior to the suspension.

If the registrations for your products listed in Table 1 of Unit II. are currently suspended as a result of failure to comply with another FIFRA section 3(c)(2)(B) DCI notice or section 4 data requirements notice, this notice, when it becomes a final and effective order of suspension, will be in addition to any existing suspension, i.e., all requirements which are the bases of the suspension must be satisfied before the registration will be reinstated.

It is the responsibility of the basic registrant to notify all supplementary registered distributors of a basic registered product that this suspension action also applies to their supplementary registered products. The basic registrant may be held liable for violations committed by their distributors.

Any questions about the requirements and procedures set forth in this notice or in the subject FIFRA section 3(c)(2)(B) DCI notice, should be addressed to the person listed under **FOR FURTHER INFORMATION CONTACT**.

VI. What is the Agency's Authority for Taking this Action?

The Agency's authority for taking this action is contained in sections 3(c)(2)(B) and 6(f)(2) of FIFRA, 7 U.S.C. 136 *et seq.*

List of Subjects

Environmental protection, Pesticides and pests.

Dated: January 10, 2011.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2011–935 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9254–5]

Science Advisory Board Staff Office; Notification of a Public Teleconference of the Science Advisory Board Nutrient Criteria Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public teleconference of the SAB Nutrient Criteria Review Panel. The Panel will discuss its draft report reviewing EPA's technical support document on development of numeric nutrient criteria for Florida's estuarine and coastal waters, and southern canals.

DATES: The public teleconference will be held on Monday, February 7, 2011, from 2 p.m. to 5 p.m. (Eastern Time).

ADDRESSES: The public teleconference will be conducted by telephone only.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information about this meeting may contact Ms. Stephanie Sanzone, Designated Federal Officer (DFO), EPA Science Advisory Board Staff Office (1400R),

U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; by telephone/voice mail: (202) 564–2067 or via e-mail at *sanzone.stephanie@epa.gov.* General information about the SAB is available 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 Nutrient Criteria Review Panel will hold a public teleconference to discuss its draft review report on the EPA draft technical support document (TSD), *Methods and Approaches for Deriving Numeric Criteria for Nitrogen/Phosphorus Pollution in Florida's Estuaries, Coastal Waters, and Southern Inland Flowing Waters.* The draft TSD describes methods and approaches for developing numeric nutrient criteria for Florida's estuarine and coastal waters, downstream protection values in streams to protect those waters, and criteria for flowing waters in the south Florida region (including canals). The Nutrient Criteria Review Panel met on December 13–14, 2010 (75 FR 66759) to receive technical briefings from the Agency, hear public comments, and deliberate on responses to the charge questions posed by the Agency. The purpose of the February 7 teleconference is for the Panel to discuss its draft report on the review of EPA's draft TSD. Background on this advisory activity is available on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activities/FL%20Estuaries%20TSD?OpenDocument.*

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 chartered under FACA. The SAB Nutrient Criteria Review Panel will provide advice through the chartered SAB. The SAB Panel will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Availability of Meeting Materials: The EPA draft technical support document is available on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activities/FL%20Estuaries%20TSD?OpenDocument.* The EPA Office of Water technical contact for the draft TSD is Elizabeth Behl, at (202) 566–0788, or via e-mail at *behl.betsy@epa.gov.* The draft Panel advisory report and the meeting agenda for the February teleconference will be posted on the SAB Web site at *http://www.epa.gov/sab* in advance of the meeting.

Procedures for Providing Public Input: Public comment for consideration by EPA's Federal advisory committees and panels have a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a Federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent

advice to EPA. Members of the public can submit comments for a Federal advisory committee to consider as it develops advice for EPA. They should send their comments directly to the Designated Federal Officer for the relevant advisory committee. Interested members of the public may submit written or oral information for the Panel to consider on the topics of this review. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to three (3) minutes per speaker. Interested parties should contact Ms. Sanzone at the contact information provided above by February 1, 2011, to be placed on the public speaker list for the February 7, 2011 teleconference. *Written Statements:* Written statements should be received in the SAB Staff Office by February 1, 2011, so that the information can be made available to the Panel for their consideration prior to the meeting. Written statements should be supplied to the DFO via e-mail to *sanzone.stephanie@epa.gov* (acceptable file formats: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC format). Submitters are asked to provide versions of each document submitted with *and* without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Ms. Sanzone at (202) 564–2067, or via e-mail at *sanzone.stephanie@epa.gov,* preferably at least ten (10) days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: December 11, 2011.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2011–1014 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2010–0970; FRL–9254–7]

Human Studies Review Board; Notice of Public Meeting; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

SUMMARY: The U.S. Environmental Protection Agency (EPA) published a document in the Federal Register of January 12, 2011, announcing the January 26, 2011 public meeting of the Human Studies Review Board. The document contained incorrect Docket ID Number.

FOR FURTHER INFORMATION CONTACT: Lu-Ann Kleibacker, 202–564–7189.

Correction

In the **Federal Register** of January 12, 2011, in FR Doc. 2011–625, on page 2107, in the title, correct the "Docket ID No." to read EPA–HQ–ORD–2010–0970.

On page 2108, in the first column, correct the "Docket ID No." to read EPA–HQ–ORD–2010–0970.

ADDRESSES: Submit your written comments, identified by Docket ID No. EPA–HQ–ORD–2010–0970:

Internet: *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

E-mail: *ord.docket@epa.gov.*

Mail: Environmental Protection Agency, EPA Docket Center (EPA/DC), ORD Docket, Mailcode: 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

Hand Delivery: The EPA/DC Public Reading Room is located in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Avenue, NW., Washington, DC 20460. The hours of operation are 8:30 a.m. to 4:30 p.m. Eastern Time, Monday through Friday, excluding Federal holidays. Please call (202) 566–1744 or e-mail the ORD Docket at *ord.docket@epa.gov* for instructions. Updates to Public Reading Room access are available on the Web site (*http://www.epa.gov/epahome/dockets.htm*).

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD-2010–0970. 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 the disclosure of which 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 withoutgoing 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.

On page 2109, in the first column, correct the "Docket ID No." to read EPA–HQ–ORD–2010–0970:

D. How may I participate in this meeting?

You may participate in this meeting by following the instructions in this section. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–ORD–2010–0970 in the subject line on the first page of your request.

Dated: January 13, 2011.

Paul T. Anastas,

EPA Science Advisor.

[FR Doc. 2011–1062 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD; FRL–9254–6]

Environmental Laboratory Advisory Board (ELAB) Meeting Dates and Agenda

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of teleconference and face-to-face meetings.

SUMMARY: The Environmental Protection Agency's Environmental Laboratory Advisory Board (ELAB), as previously announced, holds teleconference meetings the third Wednesday of each month at 1 p.m. ET and two face-to-face meetings each calendar year. For 2011, teleconference only meetings will be February 16, 2011 at 1 p.m. ET; March 16, 2011 at 1 p.m. ET; April 20, 2011 at 1 p.m. ET; May 18, 2011 at 1 p.m. ET; June 15, 2011 at 1 p.m. ET; July 20, 2011 at 1 p.m. ET; September 21, 2011 at 1 p.m. ET; October 19, 2011 at 1 p.m. ET; November 16, 2011 at 1 p.m. ET; and December 21, 2011 at 1 p.m. ET to discuss the ideas and views presented at the previous ELAB meetings, as well as new business. Items to be discussed by ELAB over these coming meetings include: (1) Issues in continuing the

expansion of national environmental accreditation; (2) ELAB support to the Agency on issues relating to measurement and monitoring for all programs; and (3) follow-up on some of ELAB's past recommendations and issues. In addition to these teleconferences, ELAB will be hosting their two face-to-face meetings on January 31, 2011 at the Hyatt Regency Savannah in Savannah, GA at 1:30 p.m. (ET) and on August 15, 2011 at the Hyatt Regency Bellevue in Bellevue, WA at 9 a.m. (PT). Teleconference lines will also be available for these meetings.

Written comments on laboratory accreditation issues and/or environmental monitoring or measurement issues are encouraged and should be sent to Ms. Lara P. Autry, Designated Federal Officer, U.S. EPA (E243–05), 109 T.W. Alexander Drive, Research Triangle Park, NC 27709, or e-mailed to *autry.lara@epa.gov.* Members of the public are invited to listen to the teleconference calls, and time permitting, will be allowed to comment on issues discussed during the ELAB meetings. Those persons interested in attending should call Lara P. Autry on (919) 541–5544 to obtain teleconference information. For information on access or services for individuals with disabilities or to request accommodation of a disability, please contact Lara P. Autry on the number above, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: January 3, 2011.

Kevin Teichman,

Acting EPA Science Advisor.

[FR Doc. 2011–995 Filed 1–13–11; 4:15 pm]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0608; FRL–8855–3]

Pesticide Experimental Use Permit; Receipt of Extension Application; Comment Request

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's receipt of an application 67979–EUP–8 from Syngenta Seeds Inc. requesting to extend an experimental use permit (EUP) for the plant-incorporated protectant (PIP) [Event 5307] *Bacillus thuringiensis* eCry3.1Ab protein and the genetic material necessary for its production (vector pSYN12274) in Event 5307 corn (SYN–Ø53Ø7–1) and combined and single trait hybrids with one or more of the following additional PIPs: 1) [Bt11] *Bacillus thuringiensis* Cry1Ab delta-endotoxin and the genetic material (as contained in plasmid vector pZO1502) necessary for its production in corn, 2) [DAS–59122–7] *Bacillus thuringiensis* Cry34Ab1 and Cry35Ab1 proteins and the genetic material (vector PHP 17662) necessary for their production in Event DAS–59122–7 corn, 3) [MIR162] *Bacillus thuringiensis* Vip3Aa20 and the genetic material necessary for its production (vector pNOV1300) in event MIR162 maize (SYN–IR162–4), 4) [MIR604] Modified Cry3A protein and the genetic material necessary for its production (via elements of pZM26) in corn (SYN–IR604–8), and 5) [TC1507] *Bacillus thuringiensis* Cry1F protein and the genetic material (vector PHP8999) necessary for its production in Event TC1507 corn. The Agency has determined that the permit may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments must be received on or before February 18, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–0608, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2009–0608. 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 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 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: Mike Mendelsohn, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8715; e-mail address: *mendelsohn.mike@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 those persons interested in agricultural biotechnology or those who are or may be required to conduct

testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA) or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 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 person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

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

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

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

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

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

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

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

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

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

II. What action is the agency taking?

Under section 5 of FIFRA, 7 U.S.C. 136c, EPA can allow manufacturers to field test pesticides under development. Manufacturers are required to obtain an EUP before testing new pesticides or new uses of pesticides if they conduct experimental field tests on 10 acres or more of land or one acre or more of water.

In accordance with 40 CFR 172.11(a), the Agency has determined that the following EUP application may be of regional and national significance, and therefore is seeking public comment on the EUP application:

Submitter: Syngenta Seeds Inc., (67979–EUP–8).

Pesticide Chemical: [Event 5307] *Bacillus thuringiensis* eCry3.1Ab protein and the genetic material necessary for its production (vector pSYN12274) in Event 5307 corn (SYN–Ø53Ø7–1).

Summary of Request: In the **Federal Register** of September 22, 2010 (75 FR 57778) (FRL–8844–4) EPA announced issuance of 67979–EUP–8. This extension application is for 3,791 acres of Event 5307 and related PIP acreage as described under **SUMMARY** and 3,122 acres of non-PIP corn from March 2012 to December 2013. Two protocols will be conducted, including: Efficacy evaluation and regulatory studies. States and Commonwealth involved include: Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Oklahoma, Puerto Rico, South Carolina, South Dakota, Texas, Washington, and Wisconsin.

A copy of the application and any information submitted is available for public review in the docket established for this EUP application as described under **ADDRESSES**.

Following the review of the application and any comments and data received in response to this solicitation, EPA will decide whether to issue or deny the EUP request, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

List of Subjects

Environmental protection, Experimental use permits.

Dated: January 6, 2011.

Keith A. Matthews,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 2011–1021 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R07–OW–2010–1084; FRL–9254–3]

Notice of a Regional Project Waiver of Section 1605 (Buy American) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the City of Columbia, MO

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA is hereby granting a waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to the City of Columbia, MO ("City") for the purchase of two (2) foreign manufactured Toshiba LQ500 Density Analyzers in Columbia, Missouri. This is a project specific waiver and only applies to the use of the specified product for the ARRA project being proposed. Any other ARRA recipient that wishes to use the same product must apply for a separate waiver based on project specific circumstances. Based upon critical performance requirements and project specifications for the Toshiba LQ500 density analyzer, a list of potential manufacturers, project schedule, and a price comparison worksheet of the different manufacturers submitted by the City and its consulting engineer, it has been determined that there are currently no domestically manufactured density analyzers available to meet the City's project specifications. The Regional Administrator is making this determination based on the review and recommendations of the Clean Water

State Revolving Fund (CWSRF) staff. The Assistant Administrator of the Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of ARRA. This action permits the purchase of two foreign manufactured Toshiba LQ500 density analyzers. City of Columbia, MO has provided sufficient documentation to support their waiver request.

DATES: *Effective Date:* January 6, 2011 .

FOR FURTHER INFORMATION CONTACT: Christopher Simmons, Environmental Engineer, Water Wetlands and Pesticides Division (WWPD), (913) 551–7237, U.S. EPA Region 7, 901 N. Fifth Street, Kansas City, KS 66101.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c), the EPA hereby provides notice that it is granting a project waiver of the requirements of Section 1605 (a) of Public Law 111–5, Buy American requirements, to the City of Columbia, MO ("City") for the purchase of two non-domestically manufactured Toshiba LQ500 density analyzers, to meet the City's design and performance specifications as part of its proposed Wastewater Treatment Facility Phase 1 Improvement project in Columbia, MO.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or a public works project unless all of the iron, steel, and manufactured goods used in the project is produced in the United States, or unless a waiver is provided to the recipient by the head of the appropriate agency, here the EPA. A waiver may be provided if EPA determines that (1) Applying these requirements would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

The City of Columbia, MO is proposing a wastewater treatment facility (WWTF) improvement project phase 1 that includes the use of a non-domestically manufactured Toshiba LQ500 density analyzer. The Toshiba LQ500 density analyzers measure the density of the WWTF's primary sludge as a parameter for sludge waste process control. The Toshiba LQ500 density analyzer provides improved settling of microbiological populations, provides improved nutrient removal, maintains constant mass solids loading to activated sludge thickeners, and reduces variability of Total Solids (TS) concentrations which results in a considerable improvement of thickener performance. Project specifications for a density analyzer require the following to meet the design and performance criteria:

(1) The density analyzer shall consist of an element and transmitter that utilizes the microwave phase difference method to determine the density of that process fluid;

(2) The element shall consist of an obstruction-less microwave source;

(3) The element shall mount, non-intrusively, in line with the process piping using mounting hardware furnished with the device;

(4) The element components shall be rated for explosion proof service; and

(5) The transmitter shall be microprocessor based, generate an isolated 4–20 mA dc output proportional to the process density, and be provided in a NEMA 4 rated, wall mounted enclosure.

The Clean Water State Revolving Fund (CWSRF) staff has reviewed this waiver request and has determined that the supporting documentation provided by the City of Columbia, MO establishes both a proper basis to specify a particular manufactured good, and that there is no domestic manufactured good currently available. The information provided is sufficient to meet the following criteria listed under Section 1605(b) of the ARRA and in the April 28, 2009 Memorandum: Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

The LQ500 density/consistency analyzer is manufactured non-domestically by the Toshiba Corporation. The supporting documentation and independent research and communication with manufacturers of in-line, non-intrusive sludge density analytical process analyzers conducted by EPA's national contractor demonstrate that there are no U.S. manufacturers able to meet the project specifications. None of the companies contacted by EPA's national contractor manufacture their density analytical instruments in the United States.

EPA has also evaluated Columbia, MO's waiver request to determine if its submission is considered late or if it could be considered timely, as per the OMB Guidance at 2 CFR 176.120. EPA will generally regard waiver requests with respect to components that were specified in the bid solicitation or in a general/primary construction contract as "late" if submitted after the contract date. However, EPA could also determine that a request be evaluated as timely, though made after the date that the contract was signed, if the need for a waiver was not reasonably foreseeable. If the need for a waiver is reasonably foreseeable, then EPA could still apply discretion in these late cases as per the OMB Guidance, which says "the award official may deny the request." For those waiver requests that do not have a reasonably unforeseeable basis for lateness, but for which the waiver basis is valid and there is no apparent gain by the ARRA recipient or loss on behalf of the government, then EPA will still consider granting a waiver.

In this case, there are no U.S. manufacturers that meet Columbia, MO's project specification for the density analyzer. The waiver request was not made prior to the contract being signed because initially the manufacturer said their product was substantially transformed in the U.S.; however, Columbia, MO did not accept this documentation. There is no indication that Columbia, MO failed to request a waiver in order to avoid the requirements of the ARRA, particularly since there are no domestically manufactured products available that meet the project specifications. EPA will consider Columbia, MO's waiver request, a foreseeable late request, as though it had been timely made since there is no gain by Columbia, MO and no loss by the government due to the late request.

Furthermore, the purpose of the ARRA is to stimulate economic recovery by funding current infrastructure construction, not to delay projects that are "shovel ready" by requiring potential SRF eligible recipients, such as the City of Columbia, MO, to revise their design standards and specifications as well as their construction schedule. There are no domestic manufacturers that can provide density analyzers that meet the specifications of this WWTF improvement project. To delay this construction would directly conflict with a fundamental economic purpose of ARRA, which is to create or retain jobs.

The April 28, 2009 EPA HQ Memorandum, "Implementation of Buy American provisions of Public Law 111–5, the 'American Recovery and Reinvestment Act of 2009' " ("Memorandum"), defines *reasonably available quantity* as "the quantity of iron, steel, or relevant manufactured good is available or will be available at the time needed and place needed, and

in the proper form or specification as specified in the project plans and design." The same Memorandum defines "satisfactory quality" as "the quality of steel, iron or manufactured good specified in the project plans and designs."

The March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the temporary authority to issue exceptions to Section 1605 of the ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients.

Having established both a proper basis to specify the particular manufactured good required for this project and that this manufactured good was not available from a producer in the United States, the City is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111–5. This waiver permits use of ARRA funds for the purchase of a non-domestic manufactured Toshiba LQ500 Density Analyzers documented in City's waiver request submittal dated August 11, 2010. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b).

Authority: Pub. L. 111–5, section 1605.

Dated: *January 6, 2011.*

Karl Brooks,

Regional Administrator, Region 7.

[FR Doc. 2011–1018 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0014; FRL–8857–1]

Notice of Receipt of Requests To Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw their requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registrations have been canceled only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before July 14, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0014, 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.
- *Submit written withdrawal request by mail to:* Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Attention: Maia Tatinclaux.
- *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–2010–0014. 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 *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 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: 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; 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. If you have any questions regarding the information in this notice, 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 *http://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.

II. What action is the agency taking?

This notice announces receipt by the Agency of requests from registrants to cancel 67 pesticide products registered under FIFRA section 3 or 24(c). These registrations are listed in sequence by registration number (or company number and 24(c) number) in Table 1 of this unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrants withdraw their requests, EPA intends to issue an order in the **Federal Register** canceling all of the affected registrations.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Active ingredient
000004–00059	Bonide Rose and Flower Dust	Malathion. Carbaryl. Captan.
000004–00360	Bonide Prometon 3.75% Liquid Vegetation Killer.	Prometon.
000004–00414	Total Weed Killer	Prometon.
000004–00446	Bonide Total Vegetation Killer Concentrate.	Prometon.
000228–00186	Riverdale 1D + 1DP Low Vol	2,4-D, 2-ethylhexyl ester. 2-Ethylhexyl (R)-2-(2,4-dichlorophenoxy) propionate.
000961–00396	Lebanon Moss Control	Ferrous sulfate monohydrate.
001022–00409	Copper Naphthenate WR Wood Preservative Ready to Use.	Copper naphthenate.
001022–00507	Copper Naphthenate 1%	Copper naphthenate.
001022–00528	Copper Naphthenate Concentration 8%.	Copper naphthenate.
001022–00568	Chapco CU–Nap 800 EC	Copper naphthenate.
001022–00571	Chapco CU–Nap 400	Copper naphthenate.
001022–00579	Curap 20 Pak	Borax. Copper naphthenate.
001448–00149	T-30-1	2-(Thiocyanomethylthio) benzothiazole.
001448–00150	T-30-2	2-(Thiocyanomethylthio) benzothiazole.
001448–00152	T-5-1	2-(Thiocyanomethylthio) benzothiazole.
001448–00153	T-5-2	2-(Thiocyanomethylthio) benzothiazole.
001677–00199	Quantum TB Disinfectant	Caprylic acid.
001719–00044	Zin-Tox Wood Preservative	Zinc naphthenate.
002217–00755	Vegetation Killer 150	Prometon.
002217–00756	Vegetation Killer 250	Prometon.
002217–00757	Vegetation Killer 375	Prometon.
002517–00066	Sergeant's Skip Flea & Tick Spray Shampoo Plus Conditioner for Dogs.	Piperonyl butoxide. Permethrin.
002829–00082	Vinyzene BP-5	10,10'-Oxybisphenoxarsine.
003008–00093	Copper 8-Quinolinolate	Copper, bis(8-quinolinolato-N1,O8)-.
004822–00503	8539 Disinfectant Spray Cleaner	1-Octanaminium, N,N-dimethyl-N-octyl-, chloride. 1-Decanaminium, N-decyl-N,N-dimethyl-, chloride. 1-Decanaminium, N,N-dimethyl-N-octyl-, chloride.
004822–00504	Tough Act The Heavy Duty Bathroom Cleaner.	Alkyl*dimethyl benzyl ammonium chloride. Alkyl*dimethyl ethylbenzyl ammonium chloride.
004822–00505	Dow Aerosol Disinfectant Bathroom Cleaner.	Alkyl*dimethyl benzyl ammonium chloride. Alkyl*dimethyl ethylbenzyl ammonium chloride.
004822–00506	Tough Act The Heavy Duty Aerosol Bathroom Cleaner.	Alkyl*dimethyl benzyl ammonium chloride. Alkyl*dimethyl ethylbenzyl ammonium chloride.
004822–00507	Dow Liquid Bathroom Cleaner	Alkyl*dimethyl benzyl ammonium chloride. Alkyl*dimethyl ethylbenzyl ammonium chloride.
007364–00042	Tabex Quick Shot Tablets	Tricloro-s-triazinetrione.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product name	Active ingredient
007969–00078	Basagran M-60 Herbicide	MCPA, dimethylamine salt; 3-Isopropyl-1H-2, 1,3-benzothiadiazin-4 (3H)-one-2,2-dioxide, sodium salt.
010707–00005	Magnacide 434	1-(Alkyl* amino)-3-aminopropane hydroxyacetate *(as in fatty acids of coconut oil).
010707–00006	Magnacide 461	1-(Alkyl* amino)-3-aminopropane hydroxyacetate *(as in fatty acids of coconut oil).
010707–00033	Magnacide B-615	1-(Alkyl* amino)-3-aminopropane hydroxyacetate *(as in fatty acids of coconut oil).
010707–00054	Microbiocide 56	1-(Alkyl* amino)-3-aminopropane hydroxyacetate *(as in fatty acids of coconut oil).
010707–00055	X-cide 305	1-(Alkyl* amino)-3-aminopropane hydroxyacetate *(as in fatty acids of coconut oil).
019713–00151	Drexel MSMA 8	MSMA.
019713–00267	Drexel MSMA 4 Plus	MSMA.
019713–00278	Drexel MSMA Liquid 6 Plus	MSMA.
019713–00529	Drexel MSMA 600 Herbicide	MSMA.
033955–00454	ACME Vegetation Killer	Prometon.
034704–00816	Liquid Moss Control	Ferric sulfate.
051036–00415	Laddock 5L Herbicide	Atrazine. 3-Isopropyl-1H-2,1,3-benzothiadiazin-4 (3H)-one-2,2-dioxide, sodium salt.
051036–000421	Basagran AG	3-Isopropyl-1H-2,1,3-benzothiadiazin-4 (3H)-one-2,2-dioxide, sodium salt.
051036–00363	Prompt 5L Herbicide	Atrazine. 3-Isopropyl-1H-2,1,3-benzothiadiazin-4 (3H)-one-2,2-dioxide, sodium salt.
053883–00064	Martin's Fire Bait 2	Hydramethylnon.
053883–00065	Martin's Fire Ant Bait 1	Hydramethylnon.
053883–00066	Martin's Insect Bait 2	Hydramethylnon.
053883–00067	Martin's Insect Bait 1	Hydramethylnon.
061282–00007	Ramik Meal Rodenticide for Control of Commensal Rats and Mice.	Diphacinone.
062719–00339	MSMA 6.6	MSMA.
062719–00340	MSMA Plus "S"	MSMA.
062719–00343	MSMA 51%	MSMA.
066330–00386	Fluroxypyr Technical	Fluroxypyr 1-methylheptyl ester.
086203–00019	Yard and Patio Fogger	Piperonyl butoxide. Ethofenprox. Tetramethrin.
086203–00020	Flying Insect Killer II	Piperonyl butoxide. Ethofenprox. Tetramethrin.
086203–00021	Crawling Insect Killer I	Piperonyl butoxide. Ethofenprox. Tetramethrin.
086203–00022	Premium Roach Spray	Piperonyl butoxide. Ethofenprox. Tetramethrin. Pyrethrins.
CA–020006	Linex 50 DF	Gas Cartridge (as a device for burrowing animal control); Linuron.
ID–060002	Platinum Insecticide	Thiamethoxam.
OR–050004	Subdue Maxx	D-Alanine, N-(2,6-dimethylphenyl)-N-(methoxyacetyl)-, methyl ester.
OR–060002	LSP Flowable Fungicide	Thiabendazole.
OR–060014	Outlook Herbicide	Dimethenamide-P.
OR–060015	Platinum	Thiamethoxam.
WA–000031	Pear Wrap III	Copper carbonate, basic. Ethoxyquin.
WA–050007	Sencor DF 75% Dry Flowable Herbicide.	Metribuzin.
WA–090006	Nemacur 3 Emulsifiable Insecticide-Nematicide.	Fenamiphos.

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 this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA company No.	Company name and address
4	Bonide Products, Inc., Agent Registrations By Design, Inc., P.O. Box 1019, Salem, VA 24153–3805.
228	Nufarm Americas Inc., 150 Harvester Drive, Suite 200, Burr Ridge, IL 60527.
961	Lebanon Seaboard Corporation, 1600 East Cumberland St., Lebanon, PA 17042.
1022	IBC Manufacturing Co., 416 E. Brooks Rd., Memphis, TN 38109.
1448	Buckman Laboratories Inc., 1256 North McLean Blvd., Memphis, TN 38108.
1677	Ecolab Inc., 370 North Wabasha Street, St. Paul, MN 55102.
1719	Mobile Paint Manufacturing Company Inc., P.O. Box 717, Theodore, AL 36582.
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.
2829	Rohm and Haas Company, 100 South Independence Mall West, Suite 1A, Philadelphia, PA 19106–2399.
3008	Osmose Inc., 980 Ellicott Street, Buffalo, NY 14209.
4822	S.C. Johnson & Son Inc., 1525 Howe Street, Racine, WI 53403.
7364	GLB Pool & Spa, (An Arch Chemicals, Inc. Business), W175 N11163 Stonewood Drive, Suite 234, Germantown, WI 53022–4799.
7969	BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709–3528.
10707	Baker Petrolite Corporation, 12645 West Airport Blvd., Sugar Land, TX 77478.
19713	Drexel Chemical Company, 1700 Channel Ave., P.O. Box 13327, Memphis, TN 38113–0327.
33955	PBI/Gordon Corp., 1217 West 12th Street, P.O. Box 014090, Kansas City, MO 64101–0090.
34704	Loveland Products, Inc., P.O. Box 1286, Greeley, Colorado 80632–1286.
51036	BASF Sparks LLC, P.O. Box 13528, Research Triangle Park, NC 27709–3528.
53883	Control Solutions, Inc., Agent Name: D. O'Shaughnessy Consulting, Inc., 427 Hide Away Circle, Cub Run, KY 42729.
61282	Hacco, Inc., 110 Hopkins Drive, Randolph, WI 53956–1316.
62719	Dow Agrosciences LLC, 9330 Zionsville Rd 308/2E, Indianapolis, IN 46268–1054.
66330	Arysta LifeScience North America, LLC, 15401 Weston Parkway, Suite 150, Cary, NC 27513.
86203	Mitsui Chemicals Agro, Inc., P.O. Box 5126, Vadosta, GA 31603–5126.
OR–060014	BASF Corporation, Agricultural Products, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709–3528.
CA–020006	Pan American Seed Co., PO Box 506, Lompoc, CA 93438.
ID–060002; OR–060015; OR–050004.	Syngenta Crop Protection, Inc., ATTN: Regulatory Affairs, P.O. Box 18300, Greensboro, NC 27419–8300.
OR–060002; WA–050007	Bayer CropScience LP, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709.
WA–000031	Wrap Pack Inc., Agent: Technology Sciences Group, Inc., 1150 18th St., NW., Suite 100, Washington, DC 20036.
WA–090006	Bayer CropScience LP, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709.

III. 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. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30–day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) requires that EPA provide a 180–day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants in Table 2 of Unit II. have not requested that EPA waive the 180–day comment period. Accordingly, EPA will provide a 180–day comment period on the proposed requests.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action.

A. Disposition of Existing Stocks for All Table 1 Products except EPA Reg. No. 61282–7

Because the Agency has identified no significant potential risk concerns associated with these pesticide products, upon cancellation of the products identified in Table 1 of Unit II., EPA anticipates allowing registrants to sell and distribute existing stocks of these products for 1 year after publication of the Cancellation Order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 1 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such 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. 61282–7

Following the publication of the Cancellation Order in the **Federal Register**, the EPA will not allow the registrant to sell or distribute any existing stocks of product 61282–7, except when consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute,

or use existing stocks until such 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 product.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: January 11, 2011.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2011–936 Filed 1–18–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Release of Exposure Draft Technical Bulletins; Accounting for Oil and Gas Resources and Federal Natural Resources Other Than Oil and Gas

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Board Action: Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules of Procedure, as amended in October, 2010, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has released *Exposure Draft Technical Bulletin 2011–1, Accounting for Federal Natural Resources Other Than Oil and Gas,* and an *Exposure Draft that Proposes to Defer the Effective Date of SFFAS 38, Accounting for Federal Oil and Gas Resources.*

The Exposure Drafts are available on the FASAB home page *http://www.fasab.gov/exposure.html.* Copies can be obtained by contacting FASAB at (202) 512–7350.

Respondents are encouraged to comment on any part of the exposure drafts. Written comments on the Exposure Draft Technical Bulletin 2011–1 are requested by January 31, 2011. Written comments on the Exposure Draft to Defer the Effective Date of SFFAS 38 are requested by February 11, 2011. Comments on the Exposure Drafts should be sent to: Wendy M. Payne, Executive Director, Federal Accounting Standards Advisory Board, 441 G Street, NW., Suite 6814, Mail Stop 6K17V, Washington, DC 20548.

FOR FURTHER INFORMATION CONTACT: Wendy Payne, Executive Director, at (202) 512–7350.

Authority: Federal Advisory Committee Act, Pub. L. 92–463.

Dated: January 11, 2011.

Charles Jackson,

Federal Register Liaison Officer.

[FR Doc. 2011–846 Filed 1–18–11; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2011–N–01]

Notice of Annual Adjustment of the Cap on Average Total Assets That Defines Community Financial Institutions

AGENCY: Federal Housing Finance Agency.

ACTION: Notice.

SUMMARY: The Federal Housing Finance Agency (FHFA) has adjusted the cap on average total assets that defines a "Community Financial Institution" based on the annual percentage increase in the Consumer Price Index for all urban consumers (CPI–U) as published by the Department of Labor (DOL). These changes took effect on January 1, 2011.

FOR FURTHER INFORMATION CONTACT: Patricia L. Sweeney, Division of Federal Home Loan Bank Regulation, 202–408–2872, *Pat.Sweeney@fhfa.gov,* Federal Housing Finance Agency, 1625 Eye Street NW., Washington, DC 20006–4001; Eric M. Raudenbush, Assistant General Counsel, 202–414–6421, *Eric.Raudenbush@fhfa.gov,* Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

The Federal Home Loan Bank Act (Bank Act) confers upon insured depository institutions that meet the statutory definition of a "Community Financial Institution" (CFI) certain advantages over non-CFI insured depository institutions in qualifying for Federal Home Loan Bank (Bank) membership, and in the purposes for which they may receive long-term advances and the collateral they may pledge to secure advances. *See* 12 U.S.C. 1424(a), 1430(a). Section 2(10)(A) of the Bank Act and § 1263.1 of FHFA's regulations define a CFI as any Bank member the deposits of which are insured by the Federal Deposit Insurance Corporation and that has average total assets below a statutory cap. *See* 12 U.S.C. 1422(10)(A); 12 CFR 1263.1. The Bank Act was amended in 2008 to set the statutory cap at $1 billion and to require the Director of FHFA to adjust the cap annually to reflect the percentage increase in the CPI–U, as published by the DOL, for the prior year. *See* 12 U.S.C. 1422(10); 12 CFR 1263.1 (defining the term *CFI asset cap*). For 2010, FHFA set the CFI asset cap at $1,029,000,000, which reflected a 1.8 percent increase over 2009, based upon the increase in the CPI–U between 2008 and 2009. *See* 75 FR 9601 (Mar. 3, 2010).

II. The CFI Asset Cap for 2011

As of January 1, 2011, FHFA has increased the CFI asset cap from $1,029,000,000 to $1,040,000,000, which reflects a 1.1 percent increase in the unadjusted CPI–U from November 2009 to November 2010. The new amount was obtained by rounding to the nearest million, as has been the practice for all prior adjustments. Consistent with the practice of other Federal agencies, FHFA bases the annual adjustment to the CFI asset cap on the percentage increase in the CPI–U from November of the year prior to the preceding calendar year to November of the preceding calendar year, because the November figures represent the most recent available data as of January 1st of the current calendar year.

In calculating the CFI asset cap, FHFA uses CPI–U data that have not been seasonally adjusted (*i.e.,* the data have not been adjusted to remove the estimated effect of price changes that normally occur at the same time and in about the same magnitude every year). The DOL encourages use of unadjusted CPI–U data in applying "escalation" provisions such as that governing the CFI asset cap, because the factors that are used to seasonally adjust the data are amended annually, and seasonally adjusted data that are published earlier are subject to revision for up to five years following their original release. Unadjusted data are not routinely subject to revision, and previously published unadjusted data are only corrected when significant calculation errors are discovered.

Dated: January 11, 2011.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2011–991 Filed 1–18–11; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Office of Child Care; Delegation of Authority

Notice is hereby given that I have delegated to the Director, Office of Child Care, Administration for Children and Families, the authorities vested in me by the Secretary of Health and Human Services in the memorandum dated August 20, 1991, pertaining to the Head Start Program and the Child Development Associate Scholarship Assistance Grants Program; in the memorandum dated August 20, 1991, pertaining to the Omnibus Budget Reconciliation Act of 1981; in the memorandum dated August 20, 1991, pertaining to the Omnibus Budget Reconciliation Act of 1990 (OBRA 1990, Pub. L. 101–508); and in the memorandum dated September 16, 1997, pertaining to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, Pub. L. 104–193), as amended, as they pertain to the functions assigned to the Office of Child Care.

(a) Authorities Delegated

1. Authority to administer the provisions of the Child Development Associate Scholarship Assistance Act, 42 U.S.C. 10901–10905, and as amended now and hereafter.

2. Authority to administer the provisions of Subchapter D—Grants for Planning and Development of Dependent Care Programs and for other purposes (Chapter 8, Title VI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35, 42 U.S.C. 9871 *et seq.*) and as amended now and hereafter.

3. Authority for the Child Care and Development Block Grants, under Section 5082 of OBRA 1990, (42 U.S.C. 9858 *et seq.*), and as amended now and hereafter.

4. Authority to administer the provisions of the Child Care and Development Block Grant Amendments of 1996, 42 U.S.C. 9801 note, under Sections 601–615 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. 1305 note, 42 U.S.C. 601 *et seq.,* and as amended now and hereafter.

(b) Limitations

1. These authorities shall be exercised under the Department's policy on regulations and the existing delegation of authority to approve and issue regulations.

2. This delegation does not include the authority to submit reports to Congress and shall be exercised under financial and administrative requirements applicable to all Administration for Children and Families authorities.

3. The approval or disapproval of grant applications and the making of grant awards require concurrence of the appropriate Grants Officer. The approval or disapproval of contract proposals and awards are subject to the requirements of the Federal Acquisition Regulations and requires the concurrence of the Contracting Officer.

4. This delegation of authority does not include the authority to sign and issue notices of grant awards.

5. This delegation of authority does not include the authority to appoint Action Officials for Audit Resolution.

6. This delegation of authority does not include the authority to appoint Central Office or Regional Office Grant Officers for the administration of the child care related programs.

7. This delegation of authority does not include the authority to hold hearings.

8. This delegation of authority does not include the authority to approve or disapprove awards for grants or contracts for research, demonstration, or evaluations relating to child care.

9. Any re-delegation shall be in writing and prompt notification must be provided to all affected managers, supervisors, and other personnel, and requires the concurrence of the Deputy Assistant Secretary for Administration.

(c) Effect on Existing Delegations

This delegation supersedes all existing delegations of these authorities.

(d) Effective Date

This delegation is effective immediately. I hereby affirm and ratify any actions taken by the Director, Office of Child Care, or his or her subordinates, which involved the exercise of the authorities delegated herein prior to the effective date of this delegation.

Dated: January 10, 2011.

David A. Hansell,

Acting Assistant Secretary for Children and Families.

[FR Doc. 2011–1067 Filed 1–18–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–P–0431]

Determination That ALBAMYCIN (Novobiocin Sodium) Capsule, 250 Milligrams, Was Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that ALBAMYCIN (novobiocin sodium) capsule, 250 milligrams (mg) was withdrawn from sale for reasons of safety or effectiveness. The Agency will not accept or approve abbreviated new drug applications (ANDAs) for ALBAMYCIN (novobiocin sodium) capsule, 250 mg.

FOR FURTHER INFORMATION CONTACT: Nancy Hayes, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6244, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the "listed drug," which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the "Approved Drug Products With Therapeutic Equivalence Evaluations," which is known generally as the "Orange Book." Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or

ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162). Under § 314.161(a)(1) (21 CFR 314.161(a)(1)), the Agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness before an ANDA that refers to that listed drug may be approved. FDA may not approve an ANDA that does not refer to a listed drug.

ALBAMYCIN (novobiocin sodium) capsule, 250 mg, is the subject of NDA 50–339, held by Pfizer, Inc. (Pfizer), and initially approved on September 4, 1964. ALBAMYCIN is indicated for the treatment of serious infections due to susceptible strains of *Staphylococcus aureus* when other less toxic antibiotics such as the penicillins, cephalosporins, vancomycin, lincomycin, erythromycin, and the tetracyclines cannot be used.

Novobiocin antibiotic drug products were reviewed for efficacy under the Drug Efficacy Study Implementation (DESI) program. Under this program, implemented in response to the 1962 amendments to the FD&C Act requiring demonstration of effectiveness (The Kefauver-Harris Amendments, Public Law 87–781 (1962)), the National Academy of Sciences-National Research Council (NAS–NRC) undertook a study of some 4,000 drug formulations to assess the efficacy of the products. Upon consideration of the findings and recommendations of the NAS–NRC, FDA set forth in the **Federal Register** its conclusions and assessment of whether and under what circumstances the reviewed drug products are considered "effective" for use as required by the FD&C Act.

In the **Federal Register** of May 2, 1969 (34 FR 7252), FDA announced its conclusions following consideration of the findings and recommendations of the NAS–NRC regarding oral and parenteral forms of novobiocin including ALBAMYCIN (novobiocin sodium) capsule, 250 mg. The announcement stated that FDA had concluded that novobiocin is effective for certain indications and provided labeling guidelines in accordance with this conclusion. We note, however, that the initial panel review of a syrup form of novobiocin raised questions, even at that time, concerning the safety and effectiveness of this antibiotic. The panel report included the following statement: "The development of safer and more effective drugs has virtually eliminated the need for novobiocin. The majority of the Panel believes that orally administered novobiocin should be taken off the market." Report of the Anti-Infectives Panel, National Academy of Sciences-National Research Council, Albamycin Syrup.

In an annual report received on June 9, 1999, Pharmacia & Upjohn (now Pfizer, Inc.) notified FDA that ALBAMYCIN (novobiocin sodium) capsule, 250 mg, was no longer being manufactured. In a letter dated June 27, 2007, Pfizer, then the current holder of NDA 50–339, notified FDA that ALBAMYCIN (novobiocin sodium) capsule, 250 mg, had been discontinued. In the **Federal Register** of February 11, 2009 (74 FR 6896), FDA announced that it was withdrawing approval of NDA 50–339 in response to Pfizer's withdrawal request. As a result, ALBAMYCIN (novobiocin sodium) capsule, 250 mg, was moved to the "Discontinued Drug Product List" section of the Orange Book.

Crixmore LLC submitted a citizen petition dated July 9, 2008 (Docket No. FDA–2008–P–0431), under 21 CFR 10.30, requesting that the Agency determine whether ALBAMYCIN (novobiocin sodium) capsule, 250 mg, was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records, FDA has determined under § 314.161 that ALBAMYCIN (novobiocin sodium) capsule, 250 mg, was withdrawn for reasons of safety or effectiveness. The petitioner stated that it had identified no data or other information suggesting that ALBAMYCIN (novobiocin sodium) capsule, 250 mg, was withdrawn for reasons of safety or effectiveness and speculated that the discontinuation of this product was an economic/strategic decision totally unrelated to safety and/or efficacy. We have carefully reviewed our files for records concerning the withdrawal of ALBAMYCIN (novobiocin sodium) capsule, 250 mg, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. The literature and adverse event reports reveal several significant safety concerns. Reported adverse reactions include relatively common skin reactions, jaundice, hepatic failure, and blood dyscrasias (neutropenia, anemia, and thrombocytopenia). The literature also reveals concern about the development of novobiocin-resistant *Staphylococci* during treatment, and a potential for drug interactions. In light of the significant safety concerns with this product, we conclude that the withdrawal of this product from the market was on the basis of safety or effectiveness.

Accordingly, the Agency will remove ALBAMYCIN (novobiocin sodium) capsule, 250 mg, from the list of drug products published in the Orange Book. FDA will not accept or approve ANDAs that refer to this drug product.

Dated: January 13, 2011.

David Dorsey,

Acting Deputy Commissioner for Policy, Planning and Budget.

[FR Doc. 2011–1000 Filed 1–18–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0024]

Draft Guidance for Industry on Size of Beads in Drug Products Labeled for Sprinkle; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled "Size of Beads in Drug Products Labeled for Sprinkle." This draft guidance provides sponsors of new drug applications (NDAs), abbreviated new drug applications (ANDAs), and biologics licensing applications (BLAs) the Center for Drug Evaluation and Research's (CDER's) current thinking on appropriate size ranges for beads in drug products that are labeled to be administered via sprinkling (*e.g.,* capsules or packets containing beads).

DATES: Although you can comment on any guidance at any time (*see* 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by April 19, 2011.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Laurie Muldowney, Center for Drug Evaluation and Research (HFD–003), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 4154, Silver Spring, MD 20993–0002, 301–796–1571.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Size of Beads in Drug Products Labeled for Sprinkle." This draft guidance provides sponsors of NDAs, ANDAs, and BLAs CDER's current thinking on appropriate size ranges for beads in drug products that are labeled to be administered via sprinkling (*e.g.,* capsules or packets containing beads).

Certain drug products that contain beads within a capsule indicate on the labeling that the capsule can be broken and the internal beads can be sprinkled on soft foods and swallowed without chewing as an alternative administration technique. This is particularly common with drug products designed to have extended- or delayed-release characteristics (*i.e.,* the beads are manufactured to release the drug product at different rates). To make certain that the intended product performance is achieved—be it from a capsule that has been broken or from a packet containing beads—it is important to have reasonable assurance that the patient will be able to swallow the beads with the food that the beads are mixed with without stimulating the urge to chew. Additional assurances may be needed when the label also includes language for alternate administration via an enteral feeding tube.

The recommendations in this draft guidance are based on literature on chewing and swallowed particle size and on Agency experience with NDAs and ANDAs submitted for these dosage forms. Three parameters are considered in this draft guidance as they relate to drug products labeled for sprinkle: (1) Appropriate maximum size for the beads, (2) special considerations for sprinkle drug products that include language for alternate administration via an enteral feeding tube, and (3) how to address potential bead size differences between reference listed drugs and ANDAs and meet bioavailability (BA) or bioequivalence (BE) recommendations.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on size of beads in drug products labeled for sprinkle. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. The Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Information submitted in an NDA, ANDA, or BLA supporting the appropriate size for beads in drug products that are labeled to be administered via sprinkling, including related BA and BE studies, is approved by OMB under control number 0910–0001 for NDAs and ANDAs and control number 0910–0338 for BLAs.

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: January 12, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–1001 Filed 1–18–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0611]

Pediatric Device Consortia Grant Program (P50)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of grant funds for the support of the Office of Orphan Products Development (OOPD) Pediatric Device Consortia Grant Program. The goal of the Pediatric Device Consortia Grant Program is to promote pediatric device development by providing grants to nonprofit consortia whose business model and approach to device development will either result in, or substantially contribute to, market approval of medical devices designed specifically for use in children. The program does not support the development of single device projects. Although administered by the Office of Orphan Products Development, this grant program is intended to encompass devices that could be used in all pediatric conditions or diseases, not just rare diseases. The pediatric population (neonates, infants, children, and adolescents) includes patients who are 21 years of age or younger at the time of diagnosis or treatment.

DATES: Important dates are as follows:

1. The application due date is May 2, 2011.
2. The anticipated start date is September, 2011.
3. The opening date is January 15, 2011.
4. The expiration date is May 3, 2011.

For Further Information and Additional Requirements Contact:

Linda C. Ulrich or Debra Y. Lewis, Office of Orphan Products Development, Food and Drug Administration, 10903 New Hampshire Ave., Bldg 32, rm. 5271, Silver Spring, MD 20993–0002, 301–796–8660 or Camille Peake, Office of Acquisitions & Grant Services, Food and Drug Administration, 5630 Fishers Lane, rm. 2139, Rockville, MD 20852, 301–827–7175.

For more information on this funding opportunity announcement (FOA) and to obtain detailed requirements, please refer to the full FOA when posted and located at: *http://grants.nih.gov/grants/guide/index.html.*

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

RFA–FD–011–002.

Catalog of Federal Domestic Assistance Number: 93.103.

A. Background

The development of pediatric medical devices currently lags 5 to 10 years behind the development of devices for adults. Children differ from adults in terms of their size, growth, development, and body chemistry,

adding to the challenges of pediatric device development. There currently exists a great need for medical devices designed specifically with children in mind. Such needs include the original development of pediatric medical devices, as well as the specific adaptation of existing adult devices for children. Thus, as part of the Food and Drug Administration Amendments Act of 2007 (FDAAA), Congress passed the Pediatric Medical Device Safety and Improvement Act of 2007. Section 305 of FDAAA requires the Secretary of Health and Human Services to provide demonstration grants or contracts to nonprofit consortia to promote pediatric device development.

B. Research Objectives

The goal of FDA's Pediatric Device Consortia Grant Program is to promote pediatric device development by providing grants to nonprofit consortia. The consortia will facilitate the development, production, and distribution of pediatric medical devices by: (1) Encouraging innovation and connecting qualified individuals with pediatric device ideas with potential manufacturers; (2) mentoring and managing pediatric device projects through the development process, including product identification, prototype design, device development, and marketing; (3) connecting innovators and physicians to existing Federal and non-Federal resources; (4) assessing the scientific and medical merit of proposed pediatric device projects; and (5) providing assistance and advice as needed on business development, personnel training, prototype development, post-marketing needs, and other activities.

C. Eligibility Information

The grants are available to any domestic, public or private, nonprofit entity (including State and local units of government). Federal agencies that are not part of the Department of Health and Human Services (HHS) may apply. Agencies that are part of HHS may not apply. Organizations that engage in lobbying activities, as described in section 501(c)(4) of the Internal Revenue Code of 1968, are not eligible to receive grant awards.

II. Award Information/Funds Available

A. Award Amount

Approximately $2.5 million will fund two to four new awards. Grants will be awarded up to $1,500,000 in total cost (direct costs plus indirect costs) per year.

B. Length of Support

Grants will be awarded on a competitive basis for up to 2 years.

III. Paper Application, Registration, and Submission Information

To submit a paper application in response to this FOA, applicants should first review the full announcement when posted and located at *http://grants.nih.gov/grants/guide/index.html.* (The 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**). Persons interested in applying for a grant may obtain an application at *http://grants.nih.gov/grants/funding/phs398/phs398.html.* For all paper application submissions, the following steps are required:

- *Step 1:* Obtain a Dun and Bradstreet (DUNS) Number.
- *Step 2:* Register With Central Contractor Registration.

Steps 1 and 2, in detail, can be found at *http://www07.grants.gov/applicants/organization_registration.jsp.* After you have followed these steps, submit paper applications to: Division of Acquisition Support and Grants, Office of Acquisition & Grant Services, 5630 Fishers Lane, rm. 2128, Rockville, MD 20857, 301–827–7175.

Dated: January 13, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–997 Filed 1–18–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; The Atherosclerosis Risk in Communities Study (ARIC)

Summary: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Heart, Lung, and Blood Institute (NHLBI), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval the information collection listed below. This proposed information collection was previously published in the **Federal Register** on October 12, 2010, page 62544, and allowed 60 days for public comment. No comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: The Atherosclerosis Risk in Communities Study (ARIC). *Type of Information Collection Request:* Revision of a currently approved collection (OMB NO. 0925–0281). *Need and Use of Information Collection:* ARIC will conduct a clinical examination of the cohort over a 24-month period (May 2011 to April 2013). In addition, this project involves biennual follow-up by telephone of participants in the ARIC study, review of their medical records, and interviews with doctors and family to identify disease occurrence. Interviewers will contact doctors and hospitals to ascertain participants' cardiovascular events. Information gathered will be used to further describe the risk factors, occurrence rates, and consequences of cardiovascular disease in middle aged and older men and women. *Frequency of Response:* The participants will be contacted bi-annually for follow-up. A subset of the cohort may choose to volunteer for the clinical examination; these individually will be contacted once in a 3 year period. *Affected Public:* Individuals or households; Businesses or other for profit; Small businesses or organizations. *Type of Respondents:* Individuals or households; doctors and staff of hospitals and nursing homes. The annual reporting burden is as follows: *Estimated Number of Respondents:* 12,673; *Estimated Number of Responses per Respondent:* 2.7; *Average Burden Hours per Response:* 0.5916; and *Estimated Total Annual Burden Hours Requested:* 20,434. The annualized cost to respondents is estimated at $355,882, assuming respondent's time at the rate of $17.00 per hour and physician time at the rate of $75.00 per hour. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

ESTIMATES OF HOUR BURDEN

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Participants	10,933	3	0.6165	20,220.6
Physician (or coroner) (for CHD)	420	1	0.1667	70
Physician (for heart failure)	920	1	0.0833	76.6
Participants' next of kin	400	1	0.1667	66.7
Totals	12,673			20,433.9 or 20,434

(Note: reported and calculated numbers differ slightly due to rounding.)

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Hanyu Ni, NIH, NHLBI, 6701 Rockledge Drive, MSC 7934, Bethesda, MD 20892–7934, or call non-toll-free number (301) 435–0448 or E-mail your request, including your address to: *nihanyu@nhlbi.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Suzanne Freeman,

NHLBI Project Clearance Liaison, National Institutes of Health.

Michael Lauer,

Director, DCVS, National Institutes of Health.

[FR Doc. 2011–1038 Filed 1–18–11; 8:45 am]

BILLING CODE 4141–01–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: February 17, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037.

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; Lactation and Diabetes Ancillary Studies.

Date: February 18, 2011.

Time: 1 p.m. to 2 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: Carol J. Goter-Robinson, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 748, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7791, *goterrobinsonc@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; LRP Reviews.

Date: March 7, 2011.

Time: 2 p.m. to 4 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: D. G. Patel, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 756, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7682, *pateldg@niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Coordinating and Bioinformatics Unit for the MMPC and DCC (U24).

Date: March 7, 2011.

Time: 2 p.m. to 4 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.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK Centers for Diabetes Translation Research.

Date: March 14–16, 2011.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Michele L. Barnard, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@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: January 12, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–1047 Filed 1–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Fogarty International Center; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Fogarty International Center Advisory Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the Discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Fogarty International Center Advisory Board.

Date: February 7–8, 2011.

Closed: 2 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, C Wing, Room B2C07, Bethesda, MD 20892.

Open: February 8, 2011, 8:30 a.m. to 3:30 p.m.

Agenda: Presentations and discussions will include: The Sub-Saharan African Medical Schools Study (SAMSS), by Dr. Fitzhugh Mullan, Murdock Head Professor of Medicine and Health Policy, George Washington University School of Public Health; Human Heredity and Health in Africa (H^3 Africa), by Dr. Charles Rotimi, Director of the Center for Research on Genomics and Global Health, NHGRI, NIH; Medical Education Partnership Initiative (MEPI), by Dr. Michael Johnson, Deputy Director, FIC, NIH.

Place: National Institutes of Health, Lawton Chiles International House, Bethesda, MD 20892.

Contact Person: Robert Eiss, Public Health Advisor, Fogarty International Center, National Institutes of Health, 31 Center Drive, Room B2C02, Bethesda, MD 20892, (301) 496–1415, *EISSR@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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nih.gov/fic/about/advisory.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: January 12, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–1045 Filed 1–18–11; 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 Initial Review Group; Biological Aging Review Committee.

Date: February 9, 2011.

Time: 12 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: Bita Nakhai, PhD, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7701, *nakhaib@nia.nih.gov.*

Name of Committee: National Institute on Aging Initial Review Group; Clinical Aging Review Committee.

Date: March 3–4, 2011.

Time: 6 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavillion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Alicja L. Markowska, PhD, DSC, National Institute on Aging, National Institutes of Health, Gateway Building 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 11, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–1036 Filed 1–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of 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 Mental Health Special Emphasis Panel; ITVA Conflicts 2011.

Date: February 7, 2011.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Francois Boller, MD, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6142, MSC 9606, Bethesda, MD 20892–9606, 301–443–1513, *bollerf@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; NIMH Research Education Applications.

Date: March 10, 2011.

Time: 12:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Rebecca C Steiner, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6149, MSC 9608, Bethesda, MD 20892–9608, 301–443–4525, *steinerr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: January 11, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–1043 Filed 1–18–11; 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 Molecular and Integrative Signal Transduction Study Section, January 27, 2011, 8 a.m. to January 28, 2011, 5:30 p.m., Hotel Palomar, 2121 P Street, NW., Washington, DC, 20037 which was published in the **Federal Register** on December 10, 2010, 75 FR 76994–76995.

The meeting will be one day only January 27, 2011. The meeting time remains the same. The meeting is closed to the public.

Dated: January 11, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–1042 Filed 1–18–11; 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: March 1–3, 2011.

Open: March 1, 2011, 4 p.m. to 4:30 p.m.

Agenda: To review procedures and discuss policy.

Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.

Closed: March 1, 2011, 4:30 p.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.

Closed: March 2, 2011, 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.

Closed: March 3, 2011, 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.

Contact Person: Barbara A. Woynarowska, Ph.D, 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: March 2–4, 2011.

Open: March 2, 2011, 5 p.m. to 5:30 p.m.

Agenda: To review procedures and discuss policy.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Closed: March 2, 2011, 5:30 p.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Closed: March 3, 2011, 8:30 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.

Closed: March 4, 2011, 8:30 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: John F. Connaughton, Ph.D, 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: January 12, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–1033 Filed 1–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of Biotechnology Activities; Recombinant DNA Research: Action Under the NIH Guidelines for Research Involving Recombinant DNA Molecules (NIH Guidelines)

AGENCY: National Institutes of Health (NIH), PHS, DHHS.

ACTION: Action under the *NIH Guidelines.*

SUMMARY: The *NIH Guidelines* currently require that recombinant DNA experiments designed to create new transgenic rodents be registered with the Institutional Biosafety Committee (IBC). Specifically, Section III–E–3 of the *NIH Guidelines* addresses the generation of transgenic rodents that may be housed under biosafety level (BL) 1 conditions and allows the work to proceed simultaneously with registration of the experiment with the IBC. The IBC must then review and approve the experiment. The *NIH Guidelines* address two pathways for generation of a transgenic rodent: altering the animal's genome using recombinant DNA technology, or breeding one or more transgenic rodents to create a new transgenic rodent (*i.e.,* breeding of two different transgenic rodents or the breeding of a transgenic rodent and a non-transgenic rodent).

On July 20, 2010 the NIH Office of Biotechnology Activities (OBA) published a proposed action (75 FR 42114) to amend Section III–E–3 and to add a new Section to Appendix C (Appendix C–VII) of the *NIH Guidelines* so as to exempt breeding of almost all transgenic rodents that can be housed at BL1, with the exception of rodents that contain a transgene encoding more than fifty percent of an exogenous eukaryotic virus and transgenic rodents in which the transgene is under the control of a gammaretroviral promoter. After receiving public comment on the proposed changes, OBA is implementing these changes.

FOR FURTHER INFORMATION CONTACT: If you have questions, or require additional information about these changes, please contact OBA by e-mail at *oba@od.nih.gov,* telephone, 301–496–9838 or mail to the Office of Biotechnology Activities, National Institutes of Health, 6705 Rockledge Drive, Suite 750, MSC 7985, Bethesda, Maryland 20892.

Background: Section III–E of the *NIH Guidelines* addresses experiments for which IBC registration is required at the time the research is initiated. Experiments covered in this section of the *NIH Guidelines* are considered to be of low biosafety risk and although IBC review and approval is still required, such approval need not be obtained prior to initiating the research. This is in contrast to all other experiments described in the *NIH Guidelines* for which IBC review and approval is required prior to initiation of the experiment.

Under the *NIH Guidelines* (Section III–F–6), certain experiments can be exempted from the *NIH Guidelines* if they do not present a significant risk to public health or the environment and the NIH Director approves this action. These exemptions are delineated in Appendix C of the *NIH Guidelines.*

Currently, the purchase or transfer of transgenic rodents that require BL1 containment are exempt from the *NIH Guidelines* under Appendix C. This action would extend that exemption to most experiments that involve the generation of transgenic rodents by breeding, as long as the transgenic rodents can be appropriately maintained under BL1 conditions. The rationale for this change is that three decades of working with and breeding transgenic rodents have demonstrated that the overwhelming majority of experiments involving breeding of transgenic rodents that can be housed under BL1 conditions results in progeny that can also be housed under BL1 conditions. Thus these breeding experiments do not pose an appreciable risk to human health or to the environment. In addition, while registration with the IBC is not a significant burden, the total number of registrations required can constitute a significant collective administrative burden on the IBC and researchers that does not appear to be commensurate with the very low biosafety risk.

There are still two categories of breeding experiments for which IBC registration will be required in order to ensure that a risk assessment is conducted and that the resulting rodent is disposed of appropriately:

(a) Breeding experiments involving transgenic rodents that contain more than 50 percent of the genome of an exogenous eukaryotic virus from a single family, in order to prevent inadvertent reconstitution of an exogenous virus in the resultant transgenic rodent; and

(b) breeding experiments in which the transgenic rodent's transgene is under the control of a gammaretroviral long terminal repeat (LTR), in order to address the small risk of recombination with endogenous retroviruses which could potentially result in mobilization of the transgene via a replication-competent mouse retrovirus.

As the risk of recombination and possible transmission to humans is more likely with gammaretroviral LTRs (*e.g.,* murine leukemia virus, feline leukemia virus, xenotropic murine leukemia-related virus), the requirement for registration is limited to rodents containing a transgene under control of these LTRs.

OBA received nine comments in response to the July 20, 2010 **Federal Register** notice of proposed changes. All were supportive of the change and emphasized that the current registration requirements impose a significant administrative burden on IBCs that is not necessary to protect public health, laboratory workers or the environment. One comment noted that making these experiments exempt would free up valuable resources (time and money) for their IBC, Institutional Animal Care and Use Committee, and researchers. One comment asked for clarification regarding how to assess whether breeding a transgenic rodent containing a partial gammaretroviral LTR sequence must be registered with the IBC. The key issue is not the percentage of the LTR sequence, but rather whether it is functional or not, i.e. whether there is sufficient LTR sequence to direct the expression of a transgene.

The following changes will be made to Appendix C of the *NIH Guidelines:*

Appendix C–VII. Generation of BL1 Transgenic Rodents via Breeding

The breeding of two different transgenic rodents or the breeding of a transgenic rodent and a non-transgenic rodent with the intent of creating a new strain of transgenic rodent that can be housed at BL1 containment will be exempt from the *NIH Guidelines* if:

(1) Both parental rodents can be housed under BL1 containment; *and*

(2) Neither parental transgenic rodent contains the following genetic modifications:

(a) Incorporation of more than one-half of the genome of an exogenous eukaryotic virus from a single family of viruses; or

(b) Incorporation of a transgene that is under the control of a gammaretroviral long terminal repeat (LTR); and

(3) The transgenic rodent that results from this breeding is not expected to contain more than one-half of an exogenous viral genome from a single family of viruses.

The current Appendix C–VII and Appendices C–VII–A through C–VII–E will be renumbered to Appendix C–VIII and Appendices C–VIII–A though C–VIII–E, respectively.

For clarity the following is added to Section III–E–3.

Section III–E–3–a. Experiments involving the breeding of certain BL1

transgenic rodents are exempt under Section III–F, *Exempt Experiments* (See Appendix C–VII, *Generation of BL1 Transgenic Rodents via Breeding*).

Dated: January 10, 2011.

Jacqueline Corrigan-Curay,

Acting Director, Office of Biotechnology Activities, National Institutes of Health.

[FR Doc. 2011–1037 Filed 1–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Record of Vessel Foreign Repair or Equipment Purchase

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651–0027.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Record of Vessel Foreign Repair or Equipment Purchase (CBP Form 226). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before March 21, 2011, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Record of Vessel Foreign Repair or Equipment Purchase.

OMB Number: 1651–0027.

Form Number: CBP Form 226.

Abstract: 19 U.S.C. 1466(a) provides for a 50 percent *ad valorem* duty assessed on a vessel master or owner for any repairs, purchases, or expenses incurred in a foreign country by a commercial vessel registered in the United States. CBP Form 226, Record of Vessel Foreign Repair or Equipment Purchase, is used by the master or owner of a vessel to declare and file entry on equipment, repairs, parts, or materials purchased for the vessel in a foreign country. This information enables CBP to assess duties on these foreign repairs, parts or materials. CBP Form 226 is provided for by 19 CFR 4.7 and 4.14 and is accessible at *http://forms.cbp.gov/pdf/CBP_Form_226.pdf.*

Current Actions: CBP proposes to extend the expiration date of this information collection with a change to the burden hours. There is no change to the information being collected.

Type of Review: Extension (with change).

Affected Public: Businesses.

Estimated Number of Respondents: 100.

Estimated Number of Responses per Respondent: 11.

Estimated Number of Total Annual Responses: 1,100.

Estimated Time per Response: 45 minutes.

Estimated Total Annual Burden Hours: 825.

Dated: January 12, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–947 Filed 1–18–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5496–N–01]

Notice of Federal Advisory Committee Meeting—the Manufactured Housing Consensus Committee

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Announcement of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the Manufactured Housing Consensus Committee (the Committee) to be held via telephone conference. This meeting is open to the general public, which may participate by following the instructions below.

DATES: The conference call meeting will be held on Thursday, January 27, 2011, by conference call from 11 a.m. to 1 p.m. EST.

Conference Call: Members of the public who wish to join the call may call the toll free number 877–320–2367 and enter pass code 4191690. Additional information concerning the conference call can be obtained from the Department's Consensus Committee Administering Organization, the National Fire Protection Association (NFPA). Interested parties can access the NFPA Web site to obtain additional information about the Manufactured Housing Consensus Committee and the Administering Organization. The link can be found at: *http://www.nfpa.org/categoryList.asp?categoryID=858*. Locate *Quick Links* on the webpage and select *Meeting Notices.*

Alternately, interested parties may contact Jill McGovern of NFPA at (617) 984–7404 (this is not a toll-free number) for conference call information.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Cocke, Deputy Administrator, Office of Manufactured Housing Programs, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–6409 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with Sections 10(a) and (b) of the Federal Advisory Committee Act (5 U.S.C. App. 2) and 41 CFR 102–3.150. The Manufactured Housing Consensus Committee was established under Section 604(a)(3) of the National Manufactured Housing Construction

and Safety Standards Act of 1974, as amended, 42 U.S.C. 5403(a)(3). The Committee is charged with providing recommendations to the Secretary to adopt, revise, and interpret manufactured home construction and safety standards and procedural and enforcement regulations, and with developing and recommending proposed model installation standards to the Secretary. The purpose of this conference call meeting is to conduct general business of the Committee.

Tentative Agenda

A. Convening of Federal Advisory Committee Statement
B. Roll Call
C. Welcome and Opening Remarks
D. Introductions (new member appointees participating from HUD Headquarters)
E. Public Comment and Questions
F. Committee Status Reports
G. Administering Organization Report on § 5403(a)(4) Two-year Code Cycle Management
H. Adjournment

Dated: January 11, 2011.

David H. Stevens,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2011–1057 Filed 1–18–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management, Regulation and Enforcement

[Docket ID No. BOEM–2010–0066]

Agency Information Collection Activity: 1010–NEW, Upcoming Projects Considering the Use of Outer Continental Shelf (OCS) Sand, Gravel, and Shell Resources for Coastal Restoration and/or Beach Nourishment, Submitted for Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), Interior.

ACTION: Notice of a new information collection (1010–NEW).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to OMB an information collection request (ICR) for approval of the paperwork requirements that respondents will submit to BOEMRE to obtain OCS sand, gravel, and shell resources for use in shore protection and beach and coastal restoration, which is considered a noncompetitive negotiated agreement program. This notice also provides the public a second opportunity to comment on the paperwork burden of these program requirements.

DATES: Submit written comments by February 18, 2011.

ADDRESSES: Submit comments by either fax (202) 395–5806 or e-mail (*OIRA_DOCKET@omb.eop.gov*) directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of the Interior (1010–NEW). Please also submit a copy of your comments to BOEMRE by any of the means below.

- Electronically: go to *http://www.regulations.gov.* In the entry titled "Enter Keyword or ID," enter BOEM–2010–0066 then click search. Follow the instructions to submit public comments and view supporting and related materials available for this collection. BOEMRE will post all comments.
- E-mail *cheryl.blundon@boemre.gov.*

Mail or hand-carry comments to Department of the Interior; Bureau of Ocean Energy Management, Regulation and Enforcement; Attention: Cheryl Blundon; 381 Elden Street, MS–4024; Herndon, Virginia 20170–4817. Please reference ICR 1010–NEW in your comment and include your name and return address.

FOR FURTHER INFORMATION CONTACT: Cheryl Blundon, Regulations and Standards Branch, (703) 787–1607 to obtain a copy, at no cost, of the ICR and the authority that requires the subject collection of information. Information and procedures for obtaining sand, gravel, and shell resources can be found on the BOEMRE Web site *http://www.boemre.gov/sandandgravel* or by contacting the Marine Minerals Program at (703) 787–1215.

SUPPLEMENTARY INFORMATION: *Title:* Upcoming Projects Considering the Use of Outer Continental Shelf Sand, Gravel, and Shell Resources for Coastal Restoration and/or Beach Nourishment.

OMB Control Number: 1010–NEW.

Abstract: BOEMRE, under the authority delegated by the Secretary of the Interior, is authorized pursuant to section 8(k)(2) of the OCS Lands Act (43 U.S.C. 1337(k)(2)), to convey rights to OCS sand, gravel, and shell resources by noncompetitive negotiated agreement (NNA) for use in shore protection and beach and coastal restoration, or for use in construction projects funded, in whole or part by, or authorized by the Federal Government.

Since 1995, 22 shore protection or beach and coastal restoration projects have been completed using OCS sand resources. Recently, the program has seen an increase in projects and need for OCS resources due to the decreasing amounts of sand located in State waters. Because of this increase, BOEMRE needed to develop a mechanism to plan for future projects and anticipated workload. Therefore, BOEMRE will issue an annual call for information about resources and locations from interested parties to develop an annual NNA Project Schedule. The NNA Project Schedule will help BOEMRE determine appropriate future resource allocation, conduct environmental analyses, develop NNAs, and meet all necessary environmental and legal requirements.

Responses are submitted to BOEMRE annually and are to obtain or retain a benefit (43 U.S.C. 1337). No questions of a sensitive nature are asked. BOEMRE will protect any proprietary information according to the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR 2).

Frequency: Annually.

Description of Respondents: Approximately 9 States and 50 counties associated with the States.

Estimated Reporting and Recordkeeping Hour Burden: The estimated annual hour burden for this information collection is a total of 95 hours. Individual County Compilation: 50 counties × 1 hour/county = 50 hours; Individual State Compilation: 9 States × 5 hours/State = 45 hours (50 county hours and 45 State hours = 95 total burden hours). In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Estimated Reporting and Recordkeeping Non-Hour Cost Burden: We have identified no paperwork non-hour cost burdens associated with the collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3501, *et seq.*) requires each agency "* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *" Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is

necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

To comply with the public consultation process, on September 7, 2010, we published a **Federal Register** notice (75 FR 54369) announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day comment period. We received one comment in response to these efforts, but the comment did not pertain to the paperwork burden associated with the ICR.

If you wish to comment in response to this notice, you may send your comments to the offices listed under the **ADDRESSES** section of this notice. The OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days. Therefore, to ensure maximum consideration, OMB should receive public comments by February 18, 2011.

Public Availability of Comments: Before including your address, phone number, email 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.

BOEMRE Information Collection Clearance Officer: Arlene Bajusz (703) 787–1025.

Dated: December 9, 2010.

Doug Slitor,

Acting Chief, Office of Offshore Regulatory Programs.

[FR Doc. 2011–1063 Filed 1–18–11; 8:45 am]

BILLING CODE 4310–MR–W–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2010–N289; 30120–1113–0000–F6]

Endangered and Threatened Wildlife and Plants; Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (Act) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act requires that we invite public comment before issuing these permits.

DATES: We must receive any written comments on or before February 18, 2011.

ADDRESSES: Send written comments by U.S. mail to the Regional Director, Attn: Lisa Mandell, U.S. Fish and Wildlife Service, Ecological Services, 1 Federal Drive, Fort Snelling, MN 55111–4056; or by electronic mail to *permitsR3ES@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Lisa Mandell, (612) 713–5343.

SUPPLEMENTARY INFORMATION:

Background

We invite public comment on the following permit applications for certain activities with endangered species authorized by section 10(a)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*) and our regulations governing the taking of endangered species in the Code of Federal Regulations (CFR) at 50 CFR 17. Submit your written data, comments, or request for a copy of the complete application to the address shown in **ADDRESSES**.

Permit Applications

Permit Application Number: TE023666.
Applicant: Eric R. Britzke, U.S. Army Corps of Engineers, Clinton, MS.

The applicant requests a permit renewal to take (capture and release, nonlethal tissue sampling) Indiana bat (*Myotis sodalis*), gray bat (*Myotis grisescens*), Virginia big-eared bat (*Corynorhinus townsendii virginianus*), Ozark big eared bat (*Corynorhinus townsendii ingens*), and Northern flying squirrel (*Glaucomys sabrinus*) throughout the species' range. Proposed activities include a range of activities aimed at recovery of the species in the wild, including population assessments, monitoring, and tissue sampling.

Permit Application Number: TE105320.
Applicant: Tragus Environmental Consulting, Akron, OH.

The applicant requests a permit renewal to take (capture and release, nonlethal tissue sampling) Indiana bats and gray bats throughout the ranges of the species. Proposed activities are aimed at recovery of the species and enhancement of survival of the species in the wild.

Permit Application Number: TE31208A.
Applicant: Julian J. Lewis, Lewis & Associates LLC, Borden, IN.

The applicant requests a permit to take (capture and release) Illinois cave amphipod (*Gammarus acherondytes*) in Monroe County, IL, to monitor the status of the species. The proposed research is for the recovery of the species in the wild.

Permit Application Number: TE31215A.
Applicant: Christopher A. Hamm, Okemos, MI.

The applicant requests a permit to take (capture and release) Mitchell's satyr butterflies (*Neonympha mitchellii mitchellii*) in Alabama, Indiana, Michigan, Mississippi, and Virginia for activities to enhance the survival of the species in the wild.

Permit Application Number: TE042946–5.
Applicant: Southern Illinois University, Carbondale, IL.

The applicant requests a permit renewal/amendment to take (capture and release, hold propagated stock) Pallid sturgeon (*Scaphirhynchus albus*) within the Mississippi River from St. Louis, MO, to the mouth of the Ohio River. The proposed activities are for the enhancement of survival of the species in the wild.

Permit Application Number: TE206783.
Applicant: Marlo M. Perdicas, Marshallville, OH.

The applicant requests a permit renewal to take (capture and release) Indiana bats and gray bats throughout the ranges of the species. Proposed activities are for the enhancement of survival of the species in the wild.

Permit Application Number: TE113009.
Applicant: Stephen A. Ahlstedt, Norris, TN.

The applicant requests a permit renewal to take (capture and release) White cat's paw pearlymussel (*Epioblasma obliquata perobliqua*) and purple cat's paw pearlymussel (*E.o. obliquata*) throughout the State of Ohio and within DeKalb and Steuben Counties, Indiana. Proposed activities are for the enhancement of survival of the species in the wild.

Permit Application Number: TE212440.
Applicant: Bat Conservation International, Carlisle, PA.

The applicant requests a permit renewal to take (capture and release) Indiana bats and gray bats throughout Illinois, Indiana, Iowa, Michigan,

Missouri, Ohio, and Wisconsin. Proposed activities are for the enhancement of survival of the species in the wild.

Permit Application Number: TE31310A.
Applicant: Minnesota Pollution Control Agency, St. Paul, MN.

The applicant requests a permit to take (capture and release) Topeka shiners (*Notropis topeka*) throughout the State of Minnesota. Proposed activities are for the recovery and enhancement of survival of the species in the wild.

Permit Application Number: TE207178.
Applicant: Amy L. Halsall, Geneva, IL.

The applicant requests a permit renewal to take (capture and release) Indiana bats within the States of Illinois and Indiana. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE839777.
Applicant: Don R. Helms, Helms & Associates, Bellevue, IA.

The applicant requests a permit renewal to take (capture and release) the following unionid species—Clubshell (*Pleurobema clava*), Northern riffleshell (*Epioblasma torulosa rangiana*), Orange-footed pimpleback pearlymussel (*Plethobasus cooperianus*), Pink mucket pearlymussel (*Lampsilis orbiculata*), Rough pigtoe (*Pleurobema plenum*), Purple cat's paw pearlymussel, White cat's paw pearlymussel, Fanshell (*Cyprogenia stegaria*), Fat pocketbook (*Potamilus capax*), Higgins' eye pearlymussel (*Lampsilis higginsii*), Winged mapleleaf (*Quadrula fragosa*), and Scaleshell mussel (*Leptodea leptodon*)—throughout the Upper Mississippi River, its tributaries, and the Ohio River, within the States of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, South Dakota, and Wisconsin. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE174388.
Applicant: Metroparks of the Toledo Area, Toledo, OH.

The applicant requests a permit renewal to take (harass/kill through habitat management) the Karner blue butterfly (*Lycaeides melissa samuelis*) within Lucas County, Ohio. Habitat management activities are proposed to enhance the recovery and survival of the species in the wild.

Permit Application Number: TE120231.
Applicant: John Timpone, Tucson, AZ.

The applicant requests an amendment to his permit to take (capture and release) Indiana bats for enhancement of survival of the species in the wild. The proposed amendment would increase the geographic area in which the applicant may work, and would add the following species to the permit if they become federally listed during the permit term: Small footed bat (*Myotis leibii*) and Northern long-eared bat (*Myotis septentrionalis*).

Permit Application Number: TE182436.
Applicant: Illinois Natural History Survey, Champaign, IL.

The applicant requests a renewal of their permit to take (capture and release) Indiana bats throughout the State of Illinois. Proposed activities are to monitor and evaluate the population to enhance the recovery and survival of the species in the wild.

Permit Application Number: TE088720.
Applicant: George T. Watters, Columbus, OH.

The applicant requests a permit renewal/amendment to take (capture and release, relocate, capture, and hold for propagation and recovery research) the following mussel species: Clubshell, Northern riffleshell, Orange-footed pimpleback pearlymussel, Pink mucket pearlymussel, Rough pigtoe, Purple cat's paw pearlymussel, White cat's paw pearlymussel, Fanshell, Fat pocketbook, Winged mapleleaf, White wartyback (*Plethobathus cicatricosus*), Salamander mussel (*Simpsonaias ambigua*), Ring pink (*Obovaria retusa*), Cumberland bean (*Villosa trabalis*), Crackling pearly mussel (*Hemistena lata*), Fat threeridge (*Amblema neslerii*), Chipola slabshell (*Elliptio chipolaensis*), Purple bankclimber (*Elliptoideus sloatianus*), Shinyrayed pocketbook (*Lampsilis subangulata*), Gulf moccasinshell (*Medionidus penicillatus*), Oval pigtoe (*Pleurobema pyriforme*), Sheepnose (*Plethobasus cyphyus*), Rayed bean (*Villosa fabalis*), and Spectaclecase (*Cumberlandia monodonta*). Proposed activities are aimed at recovery of the species and enhancement of survival in the wild.

Permit Application Number: TE135297.
Applicant: St. Louis Zoo, St. Louis, MO.

The applicant requests a renewal of permit TE135297 to capture, handle, transport, hold, and captively propagate the American burying beetle (*Nicrophorus americanus*). The application requests renewal of authority throughout Missouri and Arkansas. Proposed activities are aimed at recovery of the species and enhancement of survival in the wild.

Permit Application Number: TE106220.
Applicant: Brianne L. Walters, Terre Haute, IN.

The applicant requests a renewal of her permit to take (capture and release) Indiana bats in Illinois, Indiana, and Ohio. Proposed activities are for the recovery of the species and enhancement of survival of the species in the wild.

Permit Application Number: TE839763.
Applicant: John O. Whitaker, Terre Haute, IN.

The applicant requests a renewal of his permit to take (capture and release) Indiana bats and gray bats throughout the ranges of the species. Proposed activities are for the recovery of the species and enhancement of survival of the species in the wild.

Permit Application Number: TE049738.
Applicant: Third Rock Consultants, Lexington, KY.

The applicant requests a renewal of permit TE049738 to take (capture and release) Indiana bats, gray bats, Virginia big-eared bats, and Ozark big-eared bats, along with nine federally listed fish and 17 federally listed mussels, throughout the ranges of each species in USFWS's Midwest and Southeast Regions. Proposed activities are for the recovery of the species and enhancement of survival of the species in the wild.

Permit Application Number: TE212427.
Applicant: Ecology and Environment, Inc., Lancaster, NY.

The applicant requests a renewal of his permit to take (capture and release) Indiana bats, gray bats, and Ozark big-eared bats throughout the ranges of the species. Proposed activities are for the recovery of the species and enhancement of survival of the species in the wild.

Permit Application Number: TE206778.
Applicant: Field Supervisor, Twin Cities Field Office (USFWS), Bloomington, MN.

The applicant requests a renewal of his permit to take (capture and release, relocate, capture and hold) Higgins' eye pearlymussels and winged mapleleaf mussels within the States of Minnesota, Wisconsin, Illinois, and Iowa. Proposed activities are for the recovery of the species and enhancement of survival of the species in the wild.

Permit Application Number: TE207180.
Applicant: Ohio Department of Natural Resources, Division of Wildlife, Columbus, OH.

The applicant requests a permit renewal/amendment to take Karner blue butterflies within Ohio and Michigan. Proposed take of the butterfly is in the form of capture, propagation, transfer, release, and monitoring to enhance populations, as well as take through habitat restoration and management to create/maintain suitable habitat. Captive propagation is proposed to continue at the Toledo Zoological Gardens under

the permit renewal and habitat management activities are proposed on State-owned and managed lands in Ohio. Proposed activities are aimed at enhancement of the recovery and survival of the species in the wild.

Permit Application Number: TE206781.

Applicant: Ecological Specialists, Inc., O'Fallon, MO.

The applicant requests a permit renewal to take (capture and release; capture and relocate) clubshell, fanshell, fat pocketbook, Higgins' eye pearlymussel, northern riffleshell, orange-footed pimpleback pearlymussel, pink mucket pearlymussel, and scaleshell mussels within Arkansas, Iowa, Illinois, Indiana, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, South Dakota, Tennessee, West Virginia, and Wisconsin. Proposed activities are for the enhancement of survival of the species in the wild.

Permit Application Number: TE31861A.

Applicant: Mark Twain National Forest (Lynda Mills), Potosi, MO.

The applicant requests a permit to take (capture and release) Indiana bats and gray bats within the Mark Twain National Forest in Missouri. Proposed activities are for the enhancement of survival of the species in the wild.

Public Comments

We seek public review and comments on these permit applications. Please refer to the permit number when you submit comments. Comments and materials we receive are available for public inspection, by appointment, during normal business hours at the address shown in the **ADDRESSES** section. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

National Environmental Policy Act (NEPA)

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

Sean Marsan,

Acting Assistant Regional Director, Ecological Services, Midwest Region.

[FR Doc. 2011–1012 Filed 1–18–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–EA–2010–N288]

Wildlife and Hunting Heritage Conservation Council

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a public meeting of the Wildlife and Hunting Heritage Conservation Council (Council).

DATES: *Meeting:* Monday and Tuesday, February 14 and 15, 2011, from 8 a.m. to 4 p.m. (Eastern time). *Meeting Participation:* Notify Joshua Winchell (*See* **FOR FURTHER INFORMATION CONTACT**) by close of business on February 4, 2011, if requesting to make an oral presentation (limited to 2 minutes per speaker). The meeting will accommodate no more than a total of 30 minutes for all public speakers. Written statements must be received by February 7, so that the information may be made available to the Council for their consideration prior to this meeting.

ADDRESSES: The meeting will be held in the Secretary's Conference Room at the Department of the Interior, Room 5160, 1849 C Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Joshua Winchell, Council Coordinator, 4401 North Fairfax Drive, Mailstop 3103–AEA, Arlington, VA 22203; telephone (703) 358–2639; fax (703) 358–2548; or e-mail *joshua_winchell@fws.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., we announce that Wildlife and Hunting Heritage Conservation Council will hold a meeting.

Background

Formed in February 2010, the Council provides advice about wildlife and habitat conservation endeavors that

(a) Benefit recreational hunting;

(b) Benefit wildlife resources; and

(c) Encourage partnership among the public, the sporting conservation community, the shooting and hunting sports industry, wildlife conservation organizations, the States, Native American tribes, and the Federal Government.

The Council advises the Secretary of the Interior and the Secretary of Agriculture, reporting through the Director, U.S. Fish and Wildlife Service (Service), in consultation with the Director, Bureau of Land Management (BLM); Chief, Forest Service (USFS); Chief, Natural Resources Service (NRCS); and Administrator, Farm Services Agency (FSA). The Council's duties are strictly advisory and consist of, but are not limited to, providing recommendations for:

(a) Implementing the Recreational Hunting and Wildlife Resource Conservation Plan—A Ten-Year Plan for Implementation;

(b) Increasing public awareness of and support for the Sport Wildlife Trust Fund;

(c) Fostering wildlife and habitat conservation and ethics in hunting and shooting sports recreation;

(d) Stimulating sportsmen and women's participation in conservation and management of wildlife and habitat resources through outreach and education;

(e) Fostering communication and coordination among State, Tribal, and Federal Government; industry; hunting and shooting sportsmen and women; wildlife and habitat conservation and management organizations; and the public;

(f) Providing appropriate access to Federal lands for recreational shooting and hunting;

(g) Providing recommendation to improve implementation of Federal conservation programs that benefit wildlife, hunting and outdoor recreation on private lands; and

(h) When requested by the agencies' designated ex officio members or the DFO in consultation with the Council Chairman, performing a variety of assessments or reviews of policies, programs, and efforts through the Council's designated subcommittees or workgroups.

Background information on the Council is available at *http://www.fws.gov/whhcc.*

Meeting Agenda

The Council will convene to consider: (1) The Recreational Hunting and Wildlife Resource Conservation Plan—A Ten-Year Plan for Implementation; (2) America's Great Outdoors initiative; (3) programs of the Department of the Interior and Department of Agriculture, and its bureaus, that enhance hunting

opportunities and support wildlife conservation; and (4) other Council business. The final agenda will be posted on the Internet at *http://www.fws.gov/whhcc.*

Public Input

Interested members of the public may present, either orally or through written comments, information for the Council to consider during the public meeting. Questions from the public will not be considered during this period. Speakers who wish to expand upon their oral statements, or those who had wished to speak but could not be accommodated on the agenda, are encouraged to submit these comments in written form to the Council after the meeting.

Individuals or groups requesting an oral presentation at the public Council meeting will be limited to 2 minutes per speaker, with no more than a total of 30 minutes for all speakers. Interested parties should contact Joshua Winchell, Council Coordinator, in writing (preferably via e-mail), by February 4 (*See* **FOR FURTHER INFORMATION CONTACT**), to be placed on the public speaker list for this meeting. Written statements must be received by February 7, so that the information may be made available to the Council for their consideration prior to this meeting. Written statements must be supplied to the Council Coordinator in both of the following formats: One hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, Microsoft Word, Microsoft PowerPoint, or RTF (Rich Text File) in IBM–PC/Windows 2007 format).

In order to attend this meeting, you must register by close of business February 4. Because entry to Federal buildings is restricted, all visitors are required to pre-register to be admitted. Please submit your name, time of arrival, e-mail address, and phone number to Joshua Winchell via e-mail at *joshua_winchell@fws.gov,* or by phone at (703) 358–2639.

Summary minutes of the conference will be maintained by the Council Coordinator at 4401 N. Fairfax Drive, MS–3103–AEA, Arlington, VA 22203, and will be available for public inspection during regular business hours within 30 days following the meeting. Personal copies may be purchased for the cost of duplication.

Dated: January 7, 2011.

Gregory E. Siekaniec,

Acting Deputy Director.

[FR Doc. 2011–1007 Filed 1–18–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–8103–15, AA–8103–17; LLAK965000–L14100000–KC0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision will be issued by the Bureau of Land Management to Doyon, Limited. The decision approves conveyance of the surface and subsurface estates in the lands described below pursuant to the Alaska Native Claims Settlement Act. The lands are in the vicinity of Flat, Alaska, and are located in:

Seward Meridian, Alaska

T. 26 N., R. 47 W.,
Sec. 3, those lands formerly within mining claim recordations AA–32360, AA–32362, AA–32363, AA–32364, and AA–32365;
Sec. 10, those lands formerly within mining claim recordation AA- 32365.
Containing approximately 155 acres.

T. 27 N., R. 47 W.,
Sec. 34, those lands formerly within mining claim recordations AA–32360, AA–32361, and AA–32362.
Containing approximately 55 acres.
Aggregating approximately 210 acres.

Notice of the decision will also be published four times in the *Fairbanks Daily News-Miner.*

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until February 18, 2011 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, Subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management by phone at 907–271–5960, by e-mail at *ak.blm.conveyance@blm.gov,* or by telecommunication device (TTD) through the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, seven days a week.

John Leaf,

Land Law Examiner, Land Transfer Adjudication II Branch.

[FR Doc. 2011–989 Filed 1–18–11; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–6691–F, AA–6691–I, AA–6691–A2; LLAK965000–L14100000–KC0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision will be issued by the Bureau of Land Management to Oceanside Corporation. The decision approves the surface estate in the lands described below for conveyance pursuant to the Alaska Native Claims Settlement Act. The subsurface estate in these lands will be conveyed to Bristol Bay Native Corporation when the surface estate is conveyed to Oceanside Corporation. The lands are in the vicinity of Perryville, Alaska, and are located in:

Seward Meridian, Alaska

T. 49 S., R. 63 W.,
Secs. 2, 3, 11, and 12.
Containing approximately 2,400 acres.

T. 50 S., R. 64 W.,
Sec. 11.
Containing approximately 548 acres.

T. 48 S., R. 65 W.,
Secs. 22 to 27, inclusive.
Containing approximately 3,840 acres.
Aggregating approximately 6,788 acres.

Notice of the decision will also be published four times in the *Bristol Bay Times.*

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not

certified, return receipt requested, shall have until February 18, 2011 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management by phone at 907–271–5960, by e-mail at *ak.blm.conveyance@blm.gov,* or by telecommunication device (TTD) through the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

Jason Robinson,

Land Law Examiner, Land Transfer Adjudication II Branch.

[FR Doc. 2011–990 Filed 1–18–11; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR957000–L631000000–HD000: HAG11–0099]

Filing of Plats of Survey: Oregon/Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management Oregon/Washington State Office, Portland, Oregon, 30 days from the date of this publication.

Willamette Meridian

Oregon

T. 21 S., R. 27 E., accepted December 3, 2010
T. 27 S., R. 11 W., accepted December 16, 2010
T. 13 S., R. 7 W., accepted December 16, 2010
T. 27 S., R. 13 W., accepted December 20, 2010

Washington

T. 35 N., R. 30 E., accepted December 3, 2010
T. 38 N., R. 38 E., accepted December 30, 2010

ADDRESSES: A copy of the plats may be obtained from the Land Office at the Bureau of Land Management, Oregon/Washington State Office, 333 SW. 1st Avenue, Portland, Oregon 97204, upon required payment. A person or party who wishes to protest against a survey must file a notice that they wish to protest (at the above address) with the Oregon/Washington State Director, Bureau of Land Management, Portland, Oregon.

FOR FURTHER INFORMATION CONTACT: Kyle Hensley, (503) 808–6124, Branch of Geographic Sciences, Bureau of Land Management, 333 SW. 1st Avenue, Portland, Oregon 97204.

Cathie Jensen,

Acting Chief, Branch of Land, Mineral, and Energy Resources.

[FR Doc. 2011–977 Filed 1–18–11; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Joint Operations Center Relocation Project, Sacramento County, CA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of intent to prepare an environmental impact statement/environmental impact report (EIS/EIR) and notice of public scoping meetings.

SUMMARY: Pursuant to the National Environmental Policy Act and the California Environmental Quality Act, the Bureau of Reclamation (Reclamation), the lead Federal agency, and the California Department of Water Resources (DWR), the lead State agency, will prepare a joint EIS/EIR for the proposed Joint Operations Center (JOC) Relocation Project (Proposed Action). The purpose of the Proposed Action is to construct a new JOC in the Sacramento area to be occupied by June 2015. The new JOC would provide typical office space and special needs/essential services space for combined occupancy by Reclamation, DWR, and the NOAA's National Weather Service (NWS) to replace jointly occupied space at 3310 El Camino Avenue in Sacramento.

DATES: Written comments on the scope of the EIS/EIR will be accepted until February 17, 2011.

Two public scoping meetings will be held to solicit public input on the scope and content of the EIS/EIR:

- Thursday February 3, 2011, 2 p.m. to 4 p.m., Sacramento, California.
- Thursday February 3, 2011, 6:30 p.m. to 8:30 p.m., Sacramento, California.

ADDRESSES: Send written comments on the content and scope of the EIS/EIR to Ms. Elizabeth Vasquez, Division of Environmental Affairs, Bureau of Reclamation, 2800 Cottage Way, Sacramento, CA 95825 or e-mail *evasquez@usbr.gov.*

The public scoping meetings will be held at Sacramento State Aquatics Center, 1901 Hazel Avenue, Gold River, California.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth Vasquez, 916–978–5040; e-mail at *evasquez@usbr.gov.*

SUPPLEMENTARY INFORMATION: As with the currently occupied space, the proposed JOC would be shared by the following departments:

- DWR's Division of Operations and Maintenance, Operations Control Office, State Water Project Power and Risk Office, and Division of Flood Management offices;
- Reclamation's Central Valley Project Operations Office; and
- The National Oceanic and Atmospheric Administration's NWS and River Forecast Center.

Along with evaluating a No-Action Alternative, the EIS/EIR will analyze two potential sites for the proposed JOC at an equal level of detail—both of which are located in Sacramento County, California. The sites under consideration are:

- Site 1 (Preferred): The Nimbus site is an 18-acre parcel owned by Reclamation and located adjacent to the California Department of Fish and Game (DFG) Nimbus Fish Hatchery, near the Nimbus Dam on the American River. The site is adjacent to the Upper Sunrise Area of the American River Parkway and contains dredge spoils from gold mining on the American River. Access to the site is from U.S. Highway 50 via Hazel Avenue and Gold Country Boulevard.
- Site 2: The Kilgore/Crawford site is a privately owned 18-acre property located northeast of the intersection of Kilgore Road and Crawford Drive. The site is in a commercial area adjacent to office buildings and is bounded on the south side by the Folsom South Canal. Access to the site is from U.S. Highway 50 via Sunrise Boulevard and Kilgore Road.

At this time, there are no known Indian trust assets or environmental justice issues associated with the Proposed Action.

Special Assistance for Public Scoping Meetings

If special assistance is required to participate in the public scoping meetings, please contact Ms. Elizabeth Vasquez (see **FOR FURTHER INFORMATION CONTACT** above) as far in advance as possible to enable Reclamation to secure

the needed services. If a request cannot be honored, the requestor will be notified. A telephone device for the hearing impaired (TDD) is available at 916–989–7285.

Public Disclosure

Before including your name, 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 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: November 23, 2010.

Anastasia T. Leigh,

Acting Regional Environmental Officer, Mid-Pacific Region.

[FR Doc. 2011–1004 Filed 1–18–11; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–755]

Certain Starter Motors and Alternators; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 9, 2010, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Remy International, Inc. of Pendleton, Indiana. A letter supplementing certain exhibits to the complaint was filed on December 30, 2010. An amended complaint was filed on January 3, 2011 on behalf of Remy International, Inc. and Remy Technologies, LLC, both of Pendleton, Indiana. The amended complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain starter motors and alternators by reason of infringement of certain claims of U.S. Patent No. 5,105,114 ("the '114 patent"); U.S. Patent No. 5,252,878 ("the '878 patent"); U.S. Patent No. 5,268,605 ("the '605 patent"); U.S. Patent No. 5,295,404 ("the '404 patent"); U.S. Patent No. 5,307,700 ("the '700 patent"); U.S. Patent No. 5,315,195 ("the '195 patent"); and U.S. Patent No. 5,453,648 ("the '648 patent). The amended complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The amended complaint, except for any confidential information contained therein, is 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., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server 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.*

FOR FURTHER INFORMATION CONTACT: Anne Goalwin, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2574.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2010).

Scope of Investigation: Having considered the amended complaint, the U.S. International Trade Commission, on January 12, 2011, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain starter motors and alternators that infringe one or more of claims 1–4 of the '114 patent; claims 1–3 of the '878 patent; claims 1–5 of the '605 patent; claims 1–4 of the '404 patent; claims 1–6 of the '700 patent; claims 1–6 of the '195 patent; and claims 1–12 of the '648 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Remy International, Inc., 600 Corporation Drive, Pendleton, IN 46064.

Remy Technologies, L.L.C., 600 Corporation Drive, Pendleton, IN 46064.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the amended complaint is to be served:

Wetherill Associates, Inc. d/b/a WAIGlobal, 4491 S. State Road 7, Suite 210, Fort Lauderdale, FL 33314.

Linhai Yongci, Liangshui Foreign Investment Zone, Linhai City, Zhenjiang 317000, China.

Metric Sales & Engineering, 1622 Willow Road, Suite 205, Northfield, IL 60093.

Wan Li Industrial Developement, Inc., 1845 Belcroft Avenue, South El Monte, CA 91733.

Yongkang Boyu Auto Motor Company, Haers Road #5, Hardware Science and Technology Industrial Park, Yongkang, Zhenjiang 321300, China.

Wuxi Susan Auto Parts Company, 7 Dajishan Road, South Side, Wuxi City, Changzhou 214064, China.

American Automotive Parts, Inc., 7007 N. Austin Avenue, Niles, IL 60714.

Motorcar Parts of America, Inc., 2929 California Street, Torrance, CA 90503.

(c) The Commission investigative attorney, party to this investigation, is Anne Goalwin, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the amended complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the amended complaint and the notice of investigation. Extensions of time for submitting responses to the amended

complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the amended complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the amended complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the amended complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: January 13, 2011.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2011–1002 Filed 1–18–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1084–1087 (Review)]

Purified Carboxymethylcellulose From Finland, Mexico, Netherlands, and Sweden

AGENCY: United States International Trade Commission.

ACTION: Revised schedule for the subject reviews.

DATES: *Effective Date:* January 7, 2011.

FOR FURTHER INFORMATION CONTACT: Cynthia Trainor (202–205–3354), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On September 15, 2010, the Commission established a schedule for the conduct of this review (75 FR 57815, September 22, 2010). Due to a scheduling conflict with the hearing in another proceeding, the Commission is issuing a revised schedule. Specifically, the public hearing in connection with the reviews, scheduled to begin at 9:30 a.m. on February 16, 2011, is rescheduled to begin at 9:30 a.m. on February 15, 2011 at the U.S. International Trade Commission Building.

For further information concerning this investigation see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to sections 207.24 and 207.66 of the Commission's rules.

By order of the Commission.

Issued: January 12, 2011.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2011–948 Filed 1–18–11; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of a Consent Decree Under the Clean Water Act

Notice is hereby given that on January 6, 2011, a proposed Consent Decree in *United States and State of Indiana* v. *City of Evansville, Indiana and Evansville Water and Sewer Utility Board,* Civil Action No. 3:09–CV–128, was lodged with the United States District Court for the Southern District of Indiana.

In this action the United States and the State of Indiana seek civil penalties and injunctive relief for violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* in connection with the City of Evansville's operation of its municipal wastewater and sewer system. The United States' and State of Indiana's Complaint alleges that Evansville violated the Clean Water Act and Indiana law by, *inter alia:* (1) Discharging untreated sewage in such a way as to cause violations of applicable water quality standards for E. coli in the receiving streams; (2) discharging untreated sewage from the combined sewer collection system during dry weather into "waters of the United States" and "waters of the state"; (3) failing to maximize treatable flow to the city's two wastewater treatment plants, known as the "East Plant" and the "West Plant," during wet weather events, causing discharges of untreated sewage from combined sewer overflow ("CSO") outfalls during times when there is remaining treatment capacity at the East Plant and the West Plant; (4) failing to properly operate and maintain the city's combined sewer and separate sanitary sewer collection systems in violation of the city's two NPDES permits; (5) illegally discharging untreated sewage from the city's sanitary sewer collection systems into navigable waters and their tributaries in violation of the city's two NPDES permits; (6) creating an imminent and substantial endangerment by releasing sewage onto public and private property and into residential dwellings and other buildings; and (7) failing to adequately report discharges from the collection system and CSO outfalls in violation of the reporting provisions in the city's NPDES permits.

Under the proposed Decree, the City will be required to remedy the deficiencies in the capacity, operation and maintenance of Evansville's East Plant and West Plant, combined sewer system, and sanitary sewer system at a cost that may exceed $500 million. Evansville must make these improvements by calendar year 2032 or, if Evansville demonstrates a lack of financial capability, by calendar year 2037. In addition, the proposed Decree requires Evansville to pay the United States a civil penalty of $420,000 and the State of Indiana a civil penalty of $70,000, and spend an estimated $4 million to connect homes with failing septic systems to the city's sewer system.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States and State of Indiana* v. *City of Evansville, Indiana,* D.J. Ref. 90–5–1–1–08738.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Southern District of Indiana, 10 W. Market Street, Suite 2100, Indianapolis, IN 46204 (contact Assistant United States Attorney Tom Kieper (317/226–6333)), and at U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3590 (contact Associate Regional Counsel Nicole Cantello (312/886–2870)). During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice

Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $26.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen M. Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–973 Filed 1–18–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated May 28, 2010 and published in the **Federal Register** on June 8, 2010, (75 FR 32504), Stepan Company, Natural Products Department, 100 W. Hunter Avenue, Maywood, New Jersey 07607, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Coca Leaves (9040), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance for the manufacture of a bulk controlled substance for distribution to its customer.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Stepan Company to import the basic class of controlled substance is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Stepan Company to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: December 20, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2011–939 Filed 1–18–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances Notice of Registration

By Notice dated May 28, 2010, and published in the **Federal Register** on June 8, 2010 (75 FR 32505), Meda Pharmaceuticals, Inc. 705 Eldorado Street, Decatur, Illinois 62523, made application by letter to the Drug Enforcement Administration (DEA) to be registered as an importer of Nabilone (7379), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance as a finished drug product in dosage form only for distribution to its customers. The company does not import the listed controlled substance in bulk active pharmaceutical ingredient (API) form.

There are no domestic sources of Nabilone in finished drug product form available in the United States. The U.S. Food and Drug Administration has approved this product for medical use in the United States.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and § 952(a), and determined that the registration of Meda Pharmaceuticals Inc. to import the basic classes of controlled substances is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Meda Pharmaceuticals Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and § 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: December 20, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2011–942 Filed 1–18–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated April 20, 2010 and published in the **Federal Register** on April 26, 2010, (75 FR 21661), Stepan Company, Natural Products Department, 100 W. Hunter Avenue, Maywood, New Jersey 07607, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances:

Drug	Schedule
Cocaine (9041)	II
Benzoylecgonine (9180)	II

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Stepan Company to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Stepan Company to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: December 20, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2011–940 Filed 1–18–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of Individual Exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: 2011–01, Wasatch Advisers, Inc., D–11400; 2011–02, Morgan Stanley & Co. Incorporated, D–11489; and 2011–03, The West Coast Bancorp 401(k) Plan (the Plan), D–11611: A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Wasatch Advisers, Inc.; Located in Salt Lake City, Utah

[Prohibited Transaction Exemption 2011–01; Exemption Application Number D–11400]

Exemption

Section I. Exemption and Conditions

Wasatch Advisors, Inc. (Wasatch) shall not be precluded from qualifying as a "qualified professional asset manager" (a QPAM) pursuant to Prohibited Transaction Exemption 84–14 (hereinafter, either PTE 84–14 or the QPAM Class Exemption) [1] for the period from April 19, 2006 through July 13, 2007, solely because of its failure to satisfy the shareholders' equity requirement of PTE 84–14, section V(a)(4) (the Shareholders' Equity Requirement), provided that the following conditions were met:

(a) Upon learning that it did not have adequate shareholders' equity to satisfy the Shareholders' Equity Requirement, Wasatch took all steps necessary to protect the interests of its ERISA Clients (as defined in section II(b)), including obtaining a letter of credit (the Letter of Credit);

(b) The Letter of Credit was an irrevocable standby letter of credit for $1,000,000, structured in a manner that covered any ERISA Claim (as defined in section II(a)) occurring from April 19, 2006 (the date Wasatch learned it did not satisfy the Shareholders' Equity Requirement) through July 13, 2007 (the date on which Wasatch determined it satisfied the Shareholders' Equity Requirement);

(c) The Letter of Credit was issued by Zions First National Bank, which was independent of Wasatch and regulated by federal banking authorities;

(d) The Letter of Credit was held by Zions First National Bank for the benefit of all ERISA Clients;

(e) The Letter of Credit was payable on demand solely to an ERISA Client (or its agent) if the ERISA Client provided:

(1) A certified copy of the final order for damages against Wasatch based on an ERISA Claim from a court of competent jurisdiction with all rights of appeal having expired or having been exhausted; or a true copy of a settlement agreement between the ERISA Client and Wasatch providing for damages to the ERISA Client with respect to an ERISA Claim;

(2) In the case of a final court judgment, a certified true copy of a Sheriff's or Marshall's levy and execution on the judgment, returned unsatisfied, or such other documentation, certified by an officer of the court in which the judgment was entered, stating that the judgment remains unsatisfied following attempts to collect the judgment in accordance with local court rules; and

(3) A certificate of an authorized representative of the ERISA Client stating the amount of the judgment or settlement which remains unsatisfied;

(f) From 1996 through 2007, Joseph S. Call, a certified public accountant who is independent of Wasatch, performed a yearly audit on Wasatch, using generally acceptable accounting principles to quantify Wasatch's shareholders' equity; and

(g) From 1996 through 2007, Wasatch's reliance on Mr. Call's determinations as to the dollar amount relevant to the Shareholders' Equity Requirement was reasonable.

Section II. Definitions

(a) The term "ERISA Claim" means: a civil proceeding for monetary relief which is commenced by the filing or service of a civil complaint or similar pleading or a request for monetary relief which could have been the subject of such a complaint or pleading but for a settlement agreement, filed against Wasatch or with respect to which a settlement is reached prior to July 13, 2007, by reason of Wasatch's breach or violation of a duty described in sections 404 or 406 of ERISA;

(b) The term "ERISA Client" means any employee benefit plan covered by Title I of ERISA to which Wasatch provides or provided investment management services on or before July 13, 2007;

(c) A person will be "independent" of another person only if:

(i) For purposes of this exemption, such person is not an affiliate of that other person; and

(ii) The other person, or an affiliate thereof, is not a fiduciary that has investment management authority or renders investment advice with respect to the assets of such person;

(d) An "affiliate" of a person means:

(i) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph, the term

[1] 49 FR 9494 (Mar. 13, 1984), as corrected at 50 FR 41430 (Oct. 10, 1985), and amended at 70 FR 49305 (Aug. 23, 2005) and at 75 FR 38837 (Jul. 6, 2010).

"control" means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(ii) Any officer, director, employee or relative (as defined in section 3(15) of the Act) of any such other person or any partner in any such person; and

(iii) Any corporation or partnership of which such person is an officer, director or employee or in which such person is a partner.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice of Proposed Exemption published in the **Federal Register** on September 16, 2010 at 75 FR 56569.

FOR FURTHER INFORMATION CONTACT: Chris Motta of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

Morgan Stanley & Co. Incorporated Located in New York, New York

[Prohibited Transaction Exemption 2011–02; Exemption Application No. D–11489]

Exemption

Section I. Transactions Involving Plans Described in Both Title I and Title II of ERISA

The restrictions of section 406(a)(1)(A) through (D) and section 406(b) of ERISA, and the sanctions resulting from the application of sections 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply, effective February 1, 2008, to the following transactions, if the conditions set forth in Section III have been met: [2]

(a) The sale or exchange of an "Auction Rate Security" (as defined in Section IV (b)) by a "Plan" (as defined in Section IV(h)) to the "Sponsor" (as defined in Section IV (g)) of such Plan; or

(b) A lending of money or other extension of credit to a Plan in connection with the holding of an Auction Rate Security by the Plan, from (1) Morgan Stanley & Co. Incorporated or an "Affiliate" (Morgan Stanley); (2) an "Introducing Broker" (as defined in Section IV (f)); or (3) a "Clearing Broker" (as defined in Section IV (d))—where the loan is (i) repaid in accordance with its terms, and (ii) guaranteed by the Plan Sponsor.

[2] For purposes of this exemption, references to section 406 of ERISA should be read to refer also to the corresponding provisions of section 4975 of the Code.

II. Transactions Involving Plans Described in Title II of ERISA Only

The sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply, effective February 1, 2008, to the following transactions, if the conditions set forth in Section III have been met:

(a) The sale or exchange of an Auction Rate Security by a "Title II-Only Plan" (as defined in Section IV(i)) to the "Beneficial Owner" (as defined in Section IV(c)) of such Plan; or

(b) A lending of money or other extension of credit to a Title II-Only Plan in connection with the holding of an Auction Rate Security by the Title II-Only Plan, from (1) Morgan Stanley; (2) an Introducing Broker; or (3) a Clearing Broker—where the loan is (i) repaid in accordance with its terms, and (ii) guaranteed by the Beneficial Owner.

III. Conditions

(a) Morgan Stanley acted as a broker or dealer, non-bank custodian, or fiduciary in connection with the acquisition or holding of the Auction Rate Security that is the subject of the transaction;

(b) For transactions involving a Plan (including a Title II-Only Plan) not sponsored by Morgan Stanley for its own employees, the decision to enter into the transaction is made by a Plan fiduciary who is "Independent" (as defined in Section IV(e)) of Morgan Stanley. Notwithstanding the foregoing, an employee of Morgan Stanley who is the Beneficial Owner of a Title II-Only Plan may direct such Plan to engage in a transaction described in Section II, if all of the other conditions of this Section III have been met;

(c) The last auction for the Auction Rate Security was unsuccessful;

(d) The Plan does not waive any rights or claims in connection with the loan or sale as a condition of engaging in the above described transaction;

(e) The Plan does not pay any fees or commissions in connection with the transaction;

(f) The transaction is not part of an arrangement, agreement, or understanding designed to benefit a party in interest or disqualified person;

(g) With respect to any sale described in Section I(a) or Section II(a):

(1) The sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security; and

(2) For purposes of the sale, the Auction Rate Security is valued at par, plus any accrued but unpaid interest; [3]

(h) With respect to an in-kind exchange described in Section (I)(a) or Section II(a), the exchange involves the transfer by a Plan of an Auction Rate Security in return for a "Delivered Security," as such term is defined in Section IV(j), where:

(1) The exchange is unconditional;

(2) For purposes of the exchange, the Auction Rate Security is valued at par, plus any accrued but unpaid interest;

(3) The Delivered Security is valued at fair market value, as determined at the time of the in-kind exchange by a third party pricing service or other objective source;

(4) The Delivered Security is appropriate for the Plan and is a security that the Plan is otherwise permitted to hold under applicable law; [4]

(5) The total value of the Auction Rate Security (*i.e.,* par, plus any accrued but unpaid interest) is equal to the fair market value of the Delivered Security;

(i) With respect to a loan described in Section I(b) or II(b):

(1) The loan is documented in a written agreement containing all of the material terms of the loan, including the consequences of default;

(2) The Plan does not pay an interest rate that exceeds one of the following three rates as of the commencement of the loan:

(A) The coupon rate for the Auction Rate Security;

[3] The Department notes that this exemption does not address tax issues. The Department has been informed by the Internal Revenue Service and the Department of the Treasury that they are considering providing limited relief from the requirements of sections 72(t)(4), 401(a)(9), and 4974 of the Code with respect to retirement plans that hold Auction Rate Securities. The Department has also been informed by the Internal Revenue Service that if Auction Rate Securities are purchased from a Plan in a transaction described in Sections I and II at a price that exceeds the fair market value of those securities, then the excess value would be treated as a contribution for purposes of applying applicable contribution and deduction limits under sections 219, 404, 408, and 415 of the Code.

[4] The Department notes that ERISA's general standards of fiduciary conduct would also apply to the transactions described herein. In this regard, section 404 requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a plan fiduciary must act prudently with respect to, among other things: (1) The decision to exchange an Auction Rate Security for a Delivered Security; and (2) the negotiation of the terms of such exchange (or a cash sale or loan described above), including the pricing of such securities. The Department further emphasizes that it expects plan fiduciaries, prior to entering into any of the transactions, to fully understand the risks associated with these types of transactions, following disclosure by Morgan Stanley of all the relevant information.

(B) The Federal Funds Rate; or

(C) The Prime Rate;

(3) The loan is unsecured; and

(4) The amount of the loan is not more than the total par value of the Auction Rate Securities held by the Plan.

(j) Morgan Stanley maintains, or causes to be maintained, for a period of at least six (6) years from the date of a covered transaction, such records as are necessary to enable the persons described in paragraph (k), below, to determine whether the conditions of this exemption, if granted, have been met, except that—

(1) No party in interest with respect to a Plan that engages in a covered transaction, other than Morgan Stanley shall be subject to a civil penalty under section 502(i) of ERISA or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination, as required, below, by paragraph (k); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Morgan Stanley, such records are lost or destroyed prior to the end of the six-year period; and

(k)(1) Except as provided in subparagraph (2), below, and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of ERISA, the records referred to in paragraph (j), above, are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the U.S. Securities and Exchange Commission;

(B) The fiduciary of any Plan, including any IRA owner, that engages in a covered transaction, or any duly authorized employee or representative of such fiduciary; or

(C) The employer of participants and beneficiaries and the employee organization whose members are covered by the Plan that engages in a covered transaction, or any authorized employee or representative of these entities;

(2) None of the persons described above in paragraph (k)(1)(B) or (C) shall be authorized to examine trade secrets of Morgan Stanley, or commercial or financial information which is privileged or confidential; and

(3) Should Morgan Stanley refuse to disclose information on the basis that such information is exempt from disclosure, Morgan Stanley shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

IV. Definitions

(a) The term "Affiliate" means any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term "Auction Rate Security" or "ARS" means a security:

(1) That is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and

(2) With an interest rate or dividend that is reset at specific intervals through a Dutch Auction process;

(c) The term "Beneficial Owner" means the individual for whose benefit the Title II-Only Plan is established and includes a relative or family trust with respect to such individual;

(d) The term "Clearing Broker" means a member of a securities exchange who acts as a liaison between an investor and a clearing corporation, helps to ensure that a trade is settled appropriately, ensures that the transaction is successfully completed, and is responsible for maintaining the paper work associated with the clearing and execution of a transaction;

(e) The term "Independent" means a person who is (1) not Morgan Stanley or an Affiliate, and (2) not a "relative" (as defined in ERISA section 3(15)) of the party engaging in the transaction;

(f) The term "Introducing Broker" means a registered broker who is able to perform all the functions of a broker, except for the ability to accept money, securities, or property from a customer;

(g) The term "Sponsor" means a plan sponsor as described in section 3(16)(B) of ERISA and any Affiliates;

(h) The term "Plan" means any plan described in section 3(3) of ERISA and/or section 4975(e)(1) of the Code;

(i) The term "Title II-Only Plan" means any plan described in section 4975(e)(1) of the Code that is not an employee benefit plan covered by Title I of ERISA;

(j) The term "Delivered Security" means a security that is (1) Listed on a national securities exchange (excluding OTC Bulletin Board-eligible securities and Pink Sheets-quoted securities); or (2) A U.S. Treasury obligation; or (3) A fixed income security that has a rating at the time of the exchange that is in one of the two highest generic rating categories from an Independent nationally recognized statistical rating organization (*e.g.,* a highly rated municipal bond or a highly rated corporate bond); or (4) A certificate of deposit insured by the Federal Deposit Insurance Corporation. Notwithstanding the above, the term "Delivered Security" shall not include any Auction Rate Security, or any related Auction Rate Security, including derivatives or securities materially comprised of Auction Rate Securities or any illiquid securities.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on July 2, 1010 at 75 FR 38557. In addition, a notice of technical correction was published on July 12, 2010 at 75 FR 39707.

Written Comments

The Department received one written comment with respect to the notice of proposed exemption (Proposal). The comment was submitted by the applicant, who requests certain modifications to the exemption language.

Specifically, the applicant requests deletion of the recordkeeping and record access conditions in Section III(j) and (k) of the Proposal. The applicant argues that the Proposal covers transactions that are identical to the those covered in certain individual prohibited transaction exemptions that the Department has previously granted and that these exemptions do not contain any recordkeeping and record access conditions.

In the event, however, that the Department decides to impose the aforementioned conditions, the applicant requests the following modifications. (1) Because the covered transactions are not pursuant to a settlement with the U.S. Securities and Exchange Commission (SEC), the applicant requests deletion of the reference to the SEC in Section III(k)(1)(A); (2) The applicant objects to permitting access to its records not only by plan fiduciaries but all clients as "unreasonable, unwarranted and burdensome," and requests that Section III(k)(1)(B) be modified to limit record access to fiduciaries of plans that engage in a covered transaction and then only to their own plan's records; (3) The applicant objects to permitting access to its records not only by plan sponsors but to all plan participants and their representatives as an "unwarranted burden" and one that "makes absolutely no sense in the context of an IRA," and requests deletion of the reference to participants and their representatives from Section III(k)(1)(C); (4) The applicant objects to the 30-day deadline for providing a written explanation for any refusal to disclose information that

it believes is exempt from disclosure on grounds that "it is practically impossible to meet this deadline, because the request would likely be received in a branch office and would have to be forwarded to headquarters for analysis and determination whether in fact the information sought should be disclosed." The applicant therefore requests that Section III(k)(3) be modified to provide for a 60-day deadline; and 5) Finally, the applicant objects to the requirement in Section III(k)(3) that the applicant's written explanation for any refusal to disclose information to a requesting person include a notice advising that the Department may request such information on grounds that "such advice may mislead the person into thinking that the Department could request the information on behalf of the person." The applicant therefore requests deletion of this requirement from Section III(k)(3).

In response to the applicant's written comment, the Department notes that an individual prohibited transaction exemption is granted on a particular set of facts and circumstances to a particular applicant and may not be relied upon by any other entity. Thus, the Department is not persuaded by the applicant's argument that, because the recordkeeping and record access conditions were not contained in certain 2009 individual exemptions, therefore such conditions should not be imposed on the applicant. Moreover, the Department notes that the record-keeping and record access conditions are, in general, contained in a number of other similar recently issued exemptions during 2010 involving ARS.

Regarding the applicant's requested modification to proposed Section III(k)(1)(B), however, the Department agrees that access to the records should be limited to the fiduciary of the Plan involved in the covered transaction, and, accordingly, has modified this condition.

Regarding the applicant's requested modification to proposed Section III(k)(1)(C), the Department disagrees with the applicant's objection to this condition because it refers to record access by "any employer of participants and beneficiaries" including any authorized employee—not directly by all participants and their representatives. Although the Department has not made this requested change, it has revised the language contained in Section III(k)(1)(C) so it is parallel to the language contained in Section III(k)(1)(B). The Department further notes that Section III(k)(1)(C) has no relevance in the context of a Title II only IRA since there is no employer to request access to records.

Accordingly, except as indicated, the Department has not adopted the applicant's alternative requests either to delete the recordkeeping and record access conditions in Section III(j) and (k), or to modify the language of those conditions in the final exemption and has granted the exemption as proposed.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 693–8557. (This is not a toll-free number.)

The West Coast Bancorp 401(k) Plan (the Plan) Located in Lake Oswego, Oregon

[Prohibited Transaction Exemption 2011–03; Exemption Application No. D–11611]

Exemption

The restrictions of sections 406(a)(1)(A) and (E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a) and the sanctions resulting from the application of section 4975(c)(1)(A) and (E) of the Code, shall not apply, effective January 29, 2010, to: (1) The acquisition of stock rights (the Rights) by the Plan issued by the West Coast Bancorp, Inc. (Bancorp), the Plan sponsor and a party in interest with respect to the Plan under the terms and conditions of a Rights offering (the Offering); and (2) the holding of the Rights by the Plan until their expiration, during the subscription period of the Offering, provided that the following conditions were met:

(a) The receipt of the Rights by the Plan occurred in connection with the Offering and was made available by Bancorp on the same terms to all shareholders (the Shareholders) of the common stock of Bancorp (Common Stock);

(b) The acquisition of the Rights by the Plan resulted from an independent act of Bancorp as a corporate entity, and all holders of the Rights, including the Plan, were treated in the same manner with respect to such acquisition;

(c) All Shareholders of Common Stock, including the Plan, received the same proportionate number of Rights based on the number of shares of Common Stock held by such Shareholders;

(d) All decisions regarding the Rights held by the Plan were made by the individual Plan participants whose accounts in the Plan received the Rights, in accordance with the provisions under the Plan for individually-directed investment of such account; and

(e) The Plan did not pay any fees or commissions in connection with the acquisition and or holding of the Rights.

DATES: *Effective Date:* This exemption is effective as of January 29, 2010, the commencement date of the Offering.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on October 6, 2010 at 75 FR 61953.

FOR FURTHER INFORMATION CONTACT: Mr. Anh-Viet Ly of the Department at (202) 693–8648. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 13th day of January 2011.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2011–975 Filed 1–18–11; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following proposed exemptions: D–11580, Robert W. Baird & Co. Incorporated and its Current and Future Affiliates and subsidiaries (collectively, Baird); and D–11611, Security Benefit Mutual Holding Company (MHC) Benefit Life Insurance Company (SBL, and together with the Applicants), *et al.*

DATES: All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice.

ADDRESSES: Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No._____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *moffitt.betty@dol.gov,* or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Warning: If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

SUPPLEMENTARY INFORMATION:

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Robert W. Baird and Co. Incorporated and Its Current and Future Affiliates and Subsidiaries (Collectively, Baird), Located in Milwaukee, Wisconsin

[Application No. D–11580]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code and in accordance with the procedures set forth in 29 CFR 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

Section I. Transactions

If the proposed exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective October 9, 2009, to the cash sale (the Sale) by a Plan (as defined in Section II(d)) of an Auction Rate Security (as defined in Section II(b)) to Baird, provided that the following conditions are met: [1]

(a) The Sale was a one-time transaction made on a delivery versus payment basis in the amount described in paragraph (b);

(b) The Plan received an amount equal to par value of the Auction Rate Securities (the ARS or the Securities) plus accrued but unpaid income (interest or dividends, as applicable) as of the date of the Sale;

(c) The last auction for the Securities was unsuccessful;

(d) The Sale was made in connection with a written offer (the Offer) by Baird containing all of the material terms of the Sale;

(e) The Plans did not bear any commissions or transaction costs with respect to the Sale;

(f) The decision to accept the Offer or retain the Auction Rate Security was made by a Plan fiduciary or Plan participant or an individual retirement account (an IRA (as defined in Section II(d)) owner who is independent (as defined in Section II(c)) of Baird. Notwithstanding the foregoing, in the case of an IRA which is beneficially owned by an employee, officer, director or partner of Baird, the decision to accept the Offer or retain the Auction Rate Security may be made by such employee, officer, director or partner if all of the other conditions of this Section I have been met;

(g) The Plan does not waive any rights or claims in connection with the Sale;

(h) The Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest with respect to the Plan;

(i) If the exercise of any of Baird's rights, claims or causes of action in

[1] For purposes of this proposed exemption, references to section 406 of ERISA to refer as well to the corresponding provisions of section 4975 of the Code.

connection with its ownership of the Securities results in Baird recovering from the issuer of the Securities, or any third party, an aggregate amount that is more than the sum of:

(1) The purchase price paid to the Plan for the Securities by Baird; and

(2) The income (interest or dividends, as applicable) due on the Securities from and after the date Baird purchased the Securities from the Plan, at the rate specified in the respective offering documents for the Securities or determined pursuant to a successful auction with respect to the Securities, Baird will refund such excess amount promptly to the Plan (after deducting all reasonable expenses incurred in connection with the recovery);

(j) Neither Baird nor any affiliate exercises investment discretion or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to the decision to accept the written Offer or retain the Security (unless the Sale involves an IRA whose owner is an employee, officer, director or partner of Baird);

(k) Baird and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of the Sale such records as are necessary to enable the person described below in paragraph (l)(i), to determine whether the conditions of this proposed exemption, if granted, have been met, except that—

(i) No party in interest with respect to a Plan which engages in a Sale, other than Baird and its affiliates, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (l)(i);

(ii) A separate prohibited transaction shall not be considered to have occurred solely because due to circumstances beyond the control of Baird, such records are lost or destroyed prior to the end of the six-year period.

(l)(i) Except as provided, below, in paragraph (l)(ii), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to, above, in paragraph (k) are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities and Exchange Commission;

(B) Any fiduciary of any Plan that engages in the covered transactions, or any duly authorized employee or representative of such fiduciary;

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the covered transactions, or any authorized employee or representative of these entities; or

(D) Any IRA owner, participant or beneficiary of a Plan that engages in the Sale, or duly authorized representative of such IRA owner, Plan participant or beneficiary;

(ii) None of the persons described, above, in paragraph (l)(i)(B)–(D) shall be authorized to examine trade secrets of Baird, or commercial or financial information which is privileged or confidential; and

(iii) Should Baird refuse to disclose information on the basis that such information is exempt from disclosure, Baird shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section II. Definitions

(a) The term "affiliate" of another person means: Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term "Auction Rate Security" means a security:

(1) That is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and

(2) with an interest rate or dividend that is reset at specific intervals through a "Dutch Auction" process.

(c) The term "Independent" means a person who is not Baird or an affiliate (as defined in Section II(a)).

(d) The term "Plan" means an individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); or an employee benefit plan as defined in section 3(3) of the Act.

Effective Date: If this proposed exemption is granted, it will be effective October 9, 2009.

Summary of Facts and Representations

1. Founded in 1919, Robert W. Baird & Co. Incorporated ("Baird") is an employee-owned wealth management, capital markets, asset management and private equity firm. With its headquarters in Milwaukee, Wisconsin, Baird has offices in the United States, Europe and Asia. Baird is a registered broker-dealer under the Securities Exchange Act of 1934 and a member of the Financial Industry Regulatory Authority. Baird is also a federally registered investment adviser. It provides trade execution, custody and other standard brokerage services, as well as investment advice and asset management services to individual, trust, institutional, corporate and other clients, including pension, profit-sharing and retirement plans and accounts.

2. In October 2009, Baird communicated in writing to its clients, including the Plans, its offer (the Offer) to purchase certain auction rate securities (*i.e.,* the Securities) for an amount equal to the par value of the applicable Security, plus any accrued and unpaid income (interest or dividends, as applicable) thereon. The purchase transactions occurred on the first regular auction date for the applicable Security that followed the Plan's submission to Baird of its written acceptance of the Offer.

3. The Plans that have so far purchased the Securities from Baird pursuant to the Offer include sixty-six Individual Retirement Accounts (IRAs), subject to section 4975 of the Code, for which Baird serves as a nonbank custodian or trustee.

4. Baird represents that the Securities are debt or preferred equity auction rate securities issued with an interest or dividend rate that is reset on a regular basis (generally between every 7 and 35 days) through a "Dutch Auction" process. Historically, by means of such auction process, the interest or dividend rate was periodically adjusted to a level at which demand for the Security depleted the available supply at a purchase price equal to the par value of the Securities. In this way, the auctions served as a form of secondary market for the Securities, by providing liquidity at par on a regular, periodic basis to any holder who wished to sell the Securities. The applicant represents that the Securities were frequently purchased by, or for the benefit of, clients seeking a reasonable short-term return and a high degree of liquidity.

5. If an auction for one of the Securities fails (*e.g.,* because there is insufficient demand for the Security), the interest or dividend rate will be reset to the "maximum rate" or "failed auction rate" (in either case, "default rate") for that Security as specified in the offering documents for such Security. In some cases, the default rate changes from time to time as specified in the relevant documents.

6. Baird states that auctions for the Securities have failed consistently since approximately February, 2008. In addition, because the auctions have failed consistently since February, 2008 and given the absence of any other

meaningful secondary market for the Securities, the Securities no longer provide the liquidity that had been anticipated when they were acquired. The proposed exemption, if granted, will be retroactive to October 9, 2009, the date of the written Offer by Baird to acquire the Securities from the Plans.

7. Baird represents that the Securities that were held by the IRAs were issued by a variety of issuers.

8. Generally, the IRAs purchased the Securities through Baird or another broker-dealer.

9. Baird states that the terms of the Offer expressly provided that a client is not obligated to sell Securities and must affirmatively agree to enter into a sale of Securities to Baird, (*i.e.,* a Sale). Baird represents that any IRA's decision to sell the Securities to Baird pursuant to its Offer has been made by the IRA owner.

10. Baird estimates that the total aggregate par value plus accrued and unpaid income (interest or dividends, as applicable) thereon for Securities held by the IRAs represent $8.125 million.

11. Baird represents that the Sale of the Securities by an IRA benefited the IRA because of the IRA's inability to sell the Securities at par as a result of continuing failed auctions. In addition, Baird states that each transaction was a one-time Sale for cash in connection with which such IRA did not bear any brokerage commissions, fees or other expenses.

12. Baird states that, pursuant to the terms of the Offer, the Sale of Securities by an IRA to Baird resulted in an assignment of all of the IRA's rights, claims, and causes of action against an issuer or any third party arising in connection with or out of the client's purchase, holding or ownership of the Securities. This assignment did not include any rights, claims or other causes of action against Baird. Rather, such assignment was limited to rights, claims and causes of action against the issuers of the Securities and any third parties unrelated to Baird. This has been the case at all times with respect to the subject Securities from the date as of which retroactive relief has been requested. Baird states further that if the exercise of any of the foregoing rights, claims or causes of action results in Baird recovering from the issuer or any third party an aggregate amount that is more than the sum of (a) the purchase price paid for the Securities by Baird and (b) the income (interest or dividends, as applicable) due on the Securities from and after the date on which Baird purchased the Securities from the IRA, Baird will refund such excess amount promptly to the IRA (after deducting all reasonable expenses incurred in connection with the recovery).

13. In summary, Baird represents that the transactions satisfied the statutory criteria of section 4975(c)(2) of the Code because: (a) Each Sale was a one-time transaction for cash; (b) each IRA received an amount equal to the par value of the Securities, plus accrued but unpaid income (interest or dividends, as applicable), which was beneficial to the IRA due to the IRA's inability to sell the Securities at par because of continuing failed auctions; (c) no IRA paid any commission or other transaction expenses with respect to the Sale; (d) each IRA voluntarily entered into the Sale, as determined in the discretion of the IRA owner; and (e) Baird will promptly refund to the applicable Plan any amounts recovered from the issuer or any third party in connection with its exercise of any rights, claims or causes of action as a result of its ownership of the Securities, if such amounts are in excess of the sum of (i) the purchase price paid for the Securities by Baird and (ii) the income (interest or dividends, as applicable) due on the Securities from and after the date on which Baird purchased the Securities from the Plan, at the rate specified in the offering documents for the ARS or determined pursuant to a successful auction with respect to the Securities.

FOR FURTHER INFORMATION CONTACT: Mr. Gary H. Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

Security Benefit Mutual Holding Company (MHC) and Security Benefit Life Insurance Company (SBL, and Together With MHC, the Applicants), Located in Topeka, Kansas

[Application No. D–11621]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847 August 10, 1990).

Section I. Covered Transaction

If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code,[2] shall not apply, effective July 30, 2010, to the receipt of cash or policy credits (Policy Credits), by or on behalf of a policy owner of SBL that is an eligible member (Eligible Member), which is an employee benefit plan or retirement arrangement that is subject to section 406 of the Act and/or section 4975 of the Code (a Plan), other than a Plan maintained by MHC and/or its affiliates, in exchange for the extinguishment of such Eligible Member's membership interest in MHC, in accordance with the terms of a plan of demutualization and dissolution (the D&D Plan), adopted by MHC and implemented in accordance with Kansas Insurance Law.

This proposed exemption is subject to the general conditions set forth below in Section II.

Section II. General Conditions

(a) The D&D Plan was implemented in accordance with procedural and substantive safeguards that were imposed under the laws of the State of Kansas and was subject to review, approval, and supervision by the Kansas Commissioner of Insurance (the Commissioner).

(b) The Commissioner reviewed the terms that were provided to Eligible Members as part of such Commissioner's review of the D&D Plan, and the Commissioner approved the D&D Plan following a determination that such D&D Plan was fair and equitable to all Eligible Members.

(c) Each Eligible Member had an opportunity to comment on the D&D Plan at the Commissioner's public comment meeting or evidentiary hearing on the D&D Plan.

(d) Each Eligible Member had an opportunity to vote to approve the D&D Plan after full written disclosure was given to the Eligible Members by MHC.

(e) Pursuant to the D&D Plan, an Eligible Member generally received cash, except that an Eligible Member received Policy Credits, and not cash, to the extent that—

(1) Consideration was allocable to the Eligible Member based on ownership of a Tax-Qualified Contract; or

(2) SBL made an objective determination that payment of Consideration in the form of cash would be disadvantageous to such Eligible Member in respect of applicable income or other taxation provisions.

(f) Any determination made by SBL under Paragraphs (e)(1) or (e)(2) above was based upon objective criteria that was applied consistently to similarly situated Eligible Members.

[2] For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(g) Any act or determination undertaken by an Eligible Member that was a Plan with respect to attending and/or submitting comments for the Commissioner's public comment meeting and/or evidentiary hearing, attending MHC's special meeting to consider the D&D Plan, and/or voting on the D&D Plan, was made by one or more Plan fiduciaries that were independent of SBL and its affiliates, and neither SBL nor any of its affiliates provided investment advice within the meaning of 29 CFR 2510.3–21(c) or exercised investment discretion with respect to such act or determination.

(h) All Eligible Members that were Plans participated in the demutualization of MHC (the Demutualization) on the same basis as all other Eligible Members that were not Plans.

(i) No Eligible Member paid any brokerage commissions or fees in connection with the receipt of Policy Credits.

(j) All of SBL's policyholder obligations remained in force and were not affected by the D&D Plan.

(k) The terms of the Demutualization were at least as favorable to the Plans as the terms of an arm's length transaction between unrelated parties.

(l) Any Plan Eligible Member whose Consideration was placed in a trust, escrow account, or other similar arrangement (the Escrow Arrangement), pursuant to the D&D Plan, will receive a distribution of such Consideration from the Escrow Arrangement, and will not forfeit such Consideration.

(m) SBL maintains or causes to be maintained, for a period of (6) six years, the records necessary to enable the persons described in paragraph (n)(1) of this section to determine whether the applicable conditions of this exemption have been met. Such records are readily available to assure accessibility by the persons identified in paragraph (n)(1) of this section.

(n)(1) Notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (m) of this section are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of an Eligible Member that is a Plan or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any Eligible Member that is a Plan or any duly authorized employee representative of such employer; and

(D) Any participant or beneficiary of any Eligible Member that is a Plan, or any duly authorized representative of such participant or beneficiary.

(2) A prohibited transaction is not deemed to have occurred if, due to circumstances beyond the control of SBL, the records are lost or destroyed prior to the end of the six-year period, and no party in interest other than SBL is subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by sections 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (n)(1) of this section.

(3) None of the persons described in paragraphs (B)–(D) of section (n)(1) are authorized to examine the trade secrets of SBL or commercial or financial information which is privileged or confidential.

(4) Should SBL refuse to disclose information on the basis that such information is exempt from disclosure, SBL shall, by the close of the thirtieth (30th) day following the request, provide written notice advising that person of the reason for the refusal and that the Department may request such information.

Section III. Definitions

For purposes of this proposed exemption:

(a) The term "MHC" means Security Benefit Mutual Holding Company, and any affiliate of MHC, as defined below in Section III(b).

(b) An "affiliate" of a person includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with such entity (for purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual); and

(2) Any officer of, director of, or partner in such person.

(c) The "Adoption Date" refers to March 2, 2010, the date that MHC's Board of Directors adopted the D&D Plan.

(d) The term "Consideration" means the cash or Policy Credits receivable by an Eligible Member in exchange for the extinguishment of such Eligible Member's membership interest in MHC, in accordance with the terms of the D&D Plan.

(e) The "D&D Plan" means the plan of demutualization and dissolution adopted by MHC and implemented in accordance with Kansas Insurance Law, dated as of March 2, 2010.

(f) The term "Eligible Member" means a person, other than MHC or its subsidiaries, who, as reflected in the records of SBL or other relevant entities, is the owner of one or more Eligible Policies on the Adoption Date.

(g) The term "Eligible Policy" or "Eligible Policies" means a policy that, as reflected in the records of SBL or other relevant entities, is in force on the Adoption Date, unless the policy is excluded pursuant to the D&D Plan.

(h) The term "Policy Credit" means consideration to be paid in the form of an increase in cash value, account value, dividend accumulations or benefit payment, as appropriate, depending upon the policy.

(i) The term "SBL" means Security Benefit Life Insurance Company and any affiliate of SBL, as defined in Section III(b).

(j) The term "Tax-Qualified Contract" means an Eligible Policy in one of the following forms, that is held, other than through a trust, on the date that Consideration is distributed—

(1) An annuity contract that qualifies for the treatment described in section 403(b) of the Code;

(2) An individual retirement annuity within the meaning of section 408(b) of the Code;

(3) An individual annuity contract or an individual life insurance policy issued directly to a Plan participant pursuant to a Plan qualified under section 401(a) or section 403(a) of the Code;

(4) A group annuity contract issued to an employer, designed to fund benefits under a Plan sponsored by the employer that qualifies under section 401(a) or section 403(a) of the Code;

(5) An annuity contract issued in connection with a Plan established by a governmental entity that qualifies for the treatment described in section 457 of the Code; or

(6) Any other form of contract MHC determines must receive Policy Credits in order to retain the contract's tax-favored status.

Section IV. Effective Date

If granted, this proposed exemption will be effective as of July 30, 2010.

Summary of Facts and Representations

MHC and Affiliated Entities

1. MHC, which is no longer in existence, was the Topeka, Kansas-based, former common parent of a consolidated group of companies that included Security Benefit Corporation (SBC), which in turn was the parent corporation of a consolidated group of companies that included Security

Benefit Life Insurance Company (SBL).[3] MHC was formed in 1998 as a mutual holding company for SBL and its affiliates. At the time of MHC's formation, SBL converted from a mutual life insurance company to a stock life insurance company within a mutual holding company structure pursuant to a plan of conversion (the Prior Conversion). The Prior Conversion had the effect of separating policyholders' contract rights and membership interests under SBL's policies such that the contract rights under the policies remained with SBL and the membership interests transferred to MHC.

2. As a mutual holding company, MHC could not issue common or preferred stock. Instead, SBL policyholders, by reason of their ownership of SBL policies, became members of MHC (the Members) and had certain rights under Kansas law. These rights (Membership Interests) entitled the Members to vote on members of the Board of Directors of MHC and on extraordinary transactions and to receive assets in the event of the demutualization, dissolution or liquidation of MHC. The rights inherent in each Membership Interest were created by operation of Kansas law solely as a result of the policyholder's acquisition of the underlying SBL policy. Further, if an SBL policyholder surrendered his or her SBL policy, or if the contract terminated by the payment of benefits to the policy beneficiary, the policyholder's Membership Interest would terminate without payment of any consideration.

3. The Applicants explain that, as a mutual insurance holding company, MHC was not authorized to engage in the business of insurance. It was also not authorized to pay dividends or to make any other distributions or payments of income or profit, except as was directed or approved by the Commissioner or was provided by MHC's Articles of Incorporation in the event of MHC's liquidation or dissolution.

4. SBL, a direct wholly-owned subsidiary of SBC and an indirect wholly-owned subsidiary of MHC, is the largest Kansas-domiciled stock life insurance company, and is licensed to sell insurance products in every state except New York. Also based in Topeka, Kansas, SBL was founded in 1892 and became a mutual life insurance company in 1950, assuming its present name. SBL remained a mutual life insurance company until it converted to a stock company within a mutual holding company structure in 1998 in the Prior Conversion.

5. According to the Applicants, a major part of SBL's business involves the sale of (a) Annuity contracts that are held as part of tax-qualified and tax-sheltered retirement plans described in section 401(a), section 403(a), and section 403(b) of the Code, (b) annuities as part of individual retirement accounts or as individual retirement annuities described in section 408 of the Code and (c) annuity contracts held as part of plans described in section 457 of the Code. The Applicants represent that certain affiliates of MHC and SBL provide services to retirement plans, including SFR, which provides recordkeeping and related non-discretionary administrative services to retirement plan policyholders of SBL. The Applicants state that the SBL policyholders do not include any plans sponsored by MHC, SBL and/or any of their respective affiliates.

The Party in Interest Relationship/ Request for Exemptive Relief

6. The Applicants represent that neither MHC nor SBL is a "party in interest," as that term is defined in the Act, with respect to any Eligible Member which is an employee benefit plan or retirement arrangement that is subject to section 406 of the Act and/or section 4975 of the Code merely because SBL has issued an insurance policy to such Plan. However, according to the Applicants, affiliates of MHC and SBL provide a variety of services to Plans that are Eligible Members. The Applicants state that the provision of such services may cause MHC and/or SBL, due to their relationship with the service providers, to be parties in interest with respect to such Plans by reason of the derivative provisions of section 3(14) of the Act.

7. The Applicants note that, as a practical matter, it is not possible to identify all of the party in interest relationships that may exist between MHC and SBL and the Plans. Accordingly, the Applicants are seeking a broad exemption from the prohibited transaction restrictions of the Act in order to resolve inadvertent prohibited transactions that may occur in connection with implementation of the D&D Plan. As such, the Applicants have requested exemptive relief to cover the receipt of cash or Policy Credits by both trusteed and non-trusteed Plans upon the extinguishment of their existing Membership Interests in MHC, which may be viewed as a prohibited sale or exchange of property between such Plan and MHC and/or SBL in violation of section 406(a)(1)(A) of the Act and could also be construed as a transfer of plan assets to, or a use of plan assets by or for the benefit of, a party in interest in violation of section 406(a)(1)(D) of the Act. If granted, the exemption will be effective as of July 30, 2010.

The Decision To Demutualize

8. The Applicants state that, as of December 31, 2009, SBL's policyholder surplus, as reflected in its statutory financial statement, was approximately $427 million. Furthermore, SBL's financial strength rating from Standard & Poor's Ratings Services, a Standard & Poor's Financial Services, LLC business (S&P), as of February 26, 2010, was "BB+." The Applicants represent that SBL's capital and surplus position deteriorated significantly in 2008 and 2009 as a result of, among other things, realized and unrealized losses on collateralized debt obligations and other investments. According to the Applicants, when combined with the impact of lower equity markets on revenues and reserve requirements, these losses resulted in a decline of more than 50% in SBL's capital and surplus between the middle of 2008 and September 30, 2009.

9. In response to the deterioration of SBL's financial condition in 2008 and 2009, MHC's Board of Directors considered, and management pursued, a variety of strategic initiatives aimed at (a) Ensuring that obligations to policyholders would continue to be met, (b) raising significant amounts of new capital, (c) increasing liquidity and risk based capital at SBL, and (d) obtaining an investment grade financial strength rating from the rating agencies. Potential capital raising initiatives included, among other things, reinsurance transactions and other strategic combinations, the sale of various MHC subsidiaries and affiliates, and a merger or demutualization of MHC. MHC's Board of Directors also considered the viability of retaining MHC's current structure.

10. At the time, the Kansas Insurance Department had been closely monitoring SBL's financial condition and efforts to secure additional capital, in order to determine whether regulatory action was warranted or required. Based on the results of the strategic initiatives, and following discussions with the Kansas Insurance Department, MHC's Board of Directors determined that it would not be possible to secure the significant capital infusion needed by SBL to ensure that the

[3] MHC wholly owned SBC, which in turn was the common parent corporation of SBL, First Security Benefit Life Insurance and Annuity Company of New York, Security Financial Resources, Inc. SFR), Security Distributors, Inc., Rydex Holdings, LLC, Security Investors, LLC, Security Global Investors, LLC, and se2, Inc.

company would not become subject to regulatory action while maintaining the current mutual holding company structure.

11. On December 23, 2009, MHC and its direct wholly-owned subsidiary, SBC, entered into a non-binding letter agreement (the Letter Agreement) with Guggenheim Partners, LLC (Guggenheim), an unrelated party, contemplating the following plan: (a) An interim recapitalization of SBL; and (b) MHC's sale of SBC to an investor group led by Guggenheim (the Acquisition) and the concurrent Demutualization and dissolution (the Dissolution) of MHC. The Demutualization and Dissolution, together with the Acquisition, are cumulatively referred to herein as the "Transaction." On February 15, 2010, MHC, SBC and an investment vehicle for the investor group led by Guggenheim, Guggenheim SBC Holdings, LLC (the Investor), entered into a purchase and sale agreement (the Purchase and Sale Agreement) which superseded the Letter Agreement, pursuant to which (a) on February 25, 2010, SBC received $175 million from the Investor in the form of a loan in exchange for a secured note, and contributed the $175 million as capital to SBL (the Interim Recapitalization); (b) assuming that the Demutualization and Dissolution occurred as contemplated, the loan and all accrued interest thereon would be automatically converted into equity in SBC, and SBL would receive, through SBC, up to approximately $175 million in additional capital from the Investor at the closing of the Acquisition; (c) MHC would transfer all of SBC's issued and outstanding shares to the Investor; (d) Eligible Members would as a group, subject to any claims against MHC and certain conditions described herein, receive, in addition to increased capitalization of SBL, up to $20 million in cash or Policy Credits upon the extinguishment of their Membership Interests in MHC in the Demutualization and Dissolution; and (e) funds invested by the Investor would pay for the transaction expenses incurred by MHC, SBC and SBL. Thereafter, on or after the effective date of the Demutualization and Dissolution, MHC would dissolve.

12. The Kansas Insurance Department was actively monitoring the development of the Transaction, including the Letter Agreement, the Purchase and Sale Agreement and the D&D Plan. According to the Applicants, if MHC was unable to consummate the Transaction, MHC would be unable to ensure that the Kansas Insurance Department would not take regulatory action.

13. The Applicants note that MHC's Board of Directors believed that the Transaction would significantly improve SBL's financial condition. The Applicants explain that SBL's improved financial condition would allow SBL to mitigate current capital and regulatory concerns and permit SBL to operate with a stronger capital position, better prospects, higher financial strength ratings, and greater assurance that it will fulfill its obligations to its policyholders. In that regard, S&P improved its financial strength rating on SBL, first to "BB," credit watch positive (from credit watch negative), upon announcement of the Transaction, and then to "BB+," credit watch positive, upon completion of the Interim Recapitalization. S&P had further indicated that it could upgrade SBL to as high as "BBB+" upon closing of the Transaction.[4] In addition to strengthening the capital and surplus of SBL, the Applicants suggest that the cash or Policy Credits totaling up to $20 million in the aggregate, to be provided to Eligible Members upon the extinguishment of their otherwise illiquid Membership Interests, would enable Eligible Members to realize economic value from their Membership Interests that was not otherwise available to them.

14. The Applicants note that the Transaction proceeded on a more expedited basis than is typical of most demutualizations, because of SBL's precarious financial condition. According to the Applicants, MHC's Board of Directors determined that an expedited process was essential in order to avoid SBL becoming subject to regulatory action, thereby imperiling SBL's obligations to its policyholders. Furthermore, the Applicants state that the Board of Directors of MHC was concerned that, as time progressed, and SBL's financial situation worsened, it would be more difficult to effect the sale of SBL to a third party, such as Guggenheim.

Regulatory Supervision

15. Article 40 of Chapter 40 of the Kansas Insurance Code provides a procedural and substantive framework for the demutualization and dissolution of a mutual holding company.[5] Under Section 40–4002(a) of the Kansas Insurance Code, the board of directors of the insurer, by two-thirds majority, must (a) Adopt a resolution stating the reason why the demutualization will benefit the insurer and be in the best interests of its policyholders, and (b) approve a plan of demutualization. Pursuant to Section 40–4002(b) of the Kansas Insurance Code, a draft of the plan of demutualization may be submitted to the Commissioner for preliminary examination and comment prior to or after the adoption of the resolution. In addition, the Commissioner is permitted to retain experts in connection with its review at the expense of the insurer, pursuant to Section 40–4013 of the Kansas Insurance Code.

After the completion of the process of preliminary examination and comment and finalization of any revisions requested by the Commissioner, the plan of demutualization is submitted to the Commissioner for written approval. The plan of demutualization shall not become effective unless it is approved by the Commissioner pursuant to Section 40–4002(c) of the Kansas Insurance Code.

Among other requirements, the Commissioner's approval is subject to a finding that the plan of demutualization is fair and equitable to the policyholders, pursuant to Section 40–4004(a)(1) of the Kansas Insurance Code. This provision also requires the Commissioner to order a hearing on the plan of demutualization, conducted in accordance with the Kansas Administrative Procedure Act, for which the Commissioner will provide no less than twenty days written notice to the insurer and the policyholders (by publication or otherwise).

The plan of demutualization must be voted on by those policyholders who were policyholders of the mutual insurer on the day the plan of demutualization is initially approved by the board of directors of the mutual insurer, pursuant to Section 40–4002(d) and (g) of the Kansas Insurance Code. To be effective, the plan of demutualization must receive approval of two-thirds of those policyholders voting in person or by proxy at a meeting of the policyholders called for that purpose, pursuant to the bylaws of the insurer, except that if a majority of all the policyholders vote in person or by proxy, then approval by a majority of those voting shall constitute approval of the plan of demutualization, in accordance with Section 40–4002(d) of the Kansas Insurance Code.

[4] On Monday, August 2, 2010, three days after the closing of the Transaction, S&P improved its financial strength rating on SBL and its affiliate to "BBB+" from "BB+" and issued a positive outlook report.

[5] Sections 40–4001 and 40–4003a(c)(5) of the Kansas Insurance Code provide the Commissioner with the authority to apply this framework to the demutualization of a mutual holding company.

The meeting for approval of the plan of demutualization by the policyholders must be called by a majority of the board of directors, the chairperson of the board or the president, pursuant to Section 40–4005 of the Kansas Insurance Code. That provision also requires notice of the meeting to be accompanied by a copy of the plan of demutualization and such other information the Commissioner deems necessary to policyholder understanding, including a summary of the plan of demutualization in a form approved by the Commissioner.

16. Consistent with the requirements of the relevant portions of Articles 33 [6] and 40 of Chapter 40 of the Kansas Insurance Code, on March 2, 2010, MHC's Board of Directors unanimously (a) adopted a resolution approving the Demutualization and Dissolution of MHC and (b) approved and adopted the D&D Plan. The D&D Plan was submitted to the Commissioner for preliminary examination and comment in February 2010 and again in March 2010. On March 30, 2010, MHC's Board of Directors adopted a resolution approving and adopting the amended and restated D&D Plan, and they formally filed such plan with the Commissioner, for written approval, on March 31, 2010. In connection with her review of the D&D Plan, the Commissioner retained actuarial, financial, and legal advisors.

17. On March 31, 2010, at least 20 days in advance of the Public Comment Meeting to be held by the Commissioner, MHC provided each Eligible Member with a copy of the Security Benefit Member Information Booklet (MIB), describing in detail the transactions described herein. The Commissioner held the Public Comment Meeting on April 28, 2010, during which statements, questions, and comments were invited to be heard, but none were offered.

18. In addition to the D&D Plan, the Acquisition was subject to the approval of the Commissioner.[7] The Commissioner held an evidentiary hearing regarding the D&D Plan and the Transaction on May 5, 2010. At the hearing, the Commissioner incorporated all evidence, including exhibits submitted in support of the Transaction, into the record, and further announced that the record would remain open until May 11, 2010, to admit additional materials and statements. Subsequently, on May 18, 2010, based on its review of the record, the Commissioner issued an order approving the Transaction, subject to MHC's receipt of the required approval of its members to demutualize and dissolve.

19. A special meeting of the Members for approving the D&D Plan was called by the chairman of MHC's board of directors and took place on May 26, 2010. Each Member entitled to vote was entitled to only one vote regardless of the number of policies or amount of insurance and benefits held by or issued to the Member. According to the Applicants, there were approximately 190,784 Members eligible to vote on the D&D Plan.[8] According to the Applicants, of those members voting, approximately 90 percent voted in favor of the Plan. On July 30, 2010, the Transaction closed, and $165 million of capital was injected into SBL following an initial $175 million infusion on February 25, 2010.

20. The Applicants represent that any act or determination undertaken by an Eligible Member that was a Plan with respect to attending and/or submitting comments for the Commissioner's public comment meeting and/or evidentiary hearing, attending MHC's special meeting to consider the D&D Plan, and/or voting on the D&D Plan, was made by one or more Plan fiduciaries that were independent of SBL and its affiliates, and neither SBL nor any of its affiliates provided investment advice within the meaning of 29 CFR 2510.3–21(c) or exercised investment discretion with respect to such act or determination.

Distributions to Eligible Members

21. As noted above, and as outlined in the D&D Plan, the Investor made available $20 million for payment as Consideration to Eligible Members, provided, however, that this Consideration would be reduced by any claims against MHC in excess of $500,000 in the aggregate that were not otherwise paid or provided for, with the remainder paid as consideration to Eligible Members upon the extinguishment of their Membership Interests (such remainder, the Total Aggregate Consideration).[9] The cash portion of the Total Aggregate Consideration was distributed by check to Eligible Members entitled to receive cash payments, in accordance with the D&D Plan. In addition, pursuant to the D&D Plan, the Investor delivered the Policy Credit funding portion of the Total Aggregate Consideration to SBL, for crediting Policy Credits to Eligible Members entitled to be credited Policy Credits.[10]

22. The Applicants state that, pursuant to the D&D Plan, upon the extinguishment of their Membership Interests, Eligible Members had the opportunity to receive, in addition to the benefits of SBL's capital and surplus being strengthened, their share of the Total Aggregate Consideration. The Applicants represent that the Transaction did not diminish the benefits, values, guarantees and dividend eligibility of the Members' policies, nor did it change the premiums for such policies; however, the Transaction did extinguish the Membership Interests.

23. As described above, the D&D Plan provided Eligible Members whose Membership Interests were extinguished by the Transaction with Consideration in the form of cash or Policy Credits. The D&D Plan provides that, for this purpose, (a) "Eligible Member" means the owner of an Eligible Policy, (b) "Eligible Policy" generally means a policy that was in force as of the close of business on March 2, 2010, the date that the D&D Plan was initially adopted

[6] Article 33 of the Kansas Insurance Code governs insurance holding companies.

[7] Section 40–3304 of the Kansas Insurance Code provides that a domestic insurer, including any person controlling a domestic insurer, shall not be the target of an acquisition, take-over or merger unless the Commissioner approves such action following a hearing conducted in accordance with the Kansas Administrative Procedure Act.

[8] Members who held policies with SBL that were in force as of March 2, 2010, the date on which the D&D Plan was adopted, were eligible to vote on the D&D Plan.

[9] According to the Applicants, as provided by the D&D Plan, individuals having a claim of any kind were afforded an opportunity to file proof of such claim with the Kansas Insurance Department and MHC by May 4, 2010. As part of the Commissioner's approval of the D&D Plan, the Commissioner found the one claim submitted to be invalid. As a result, the Applicants state that the contemplated Total Aggregate Consideration will likely equal $20 million.

[10] "The proceeds of the demutualization will belong to the plan if they would be deemed to be owned by the plan under ordinary notions of property rights. See ERISA Advisory Opinion 92–02A, January 17, 1992 (assets of plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law). It is the view of the Department that, in the case of an employee welfare benefit plan with respect to which participants pay a portion of the premiums, the appropriate plan fiduciary must treat as plan assets the portion of the demutualization proceeds attributable to participant contributions. In determining what portion of the proceeds are attributable to participant contributions, the plan fiduciary should give appropriate consideration to those facts and circumstances that the fiduciary knows or should know are relevant to the determination, including the documents and instruments governing the plan and the proportion of total participant contributions to the total premiums paid over an appropriate time period. In the case of an employee pension benefit plan, or where any type of plan or trust is the policyholder, or where the policy is paid for out of trust assets, it is the view of the Department that all of the proceeds received by the policyholder in connection with a demutualization would constitute plan assets." See ERISA Advisory Opinion 2001–02A, February 15, 2001.

by MHC's Board of Directors, unless the policy is excluded pursuant to the terms of the D&D Plan, and (c) "Policy Credit" means Consideration to be paid in the form of an increase in cash value, account value, dividend accumulations or benefit payment, as appropriate, depending upon the policy.

24. Each Eligible Member was allocated only a fixed component of Consideration in an amount determined by dividing the Total Aggregate Consideration by the total number of Eligible Members. The Applicants note that no Eligible Member received any variable component of Consideration, and neither MHC nor any of its subsidiaries were Eligible Members with respect to any policy owned by any of them.

25. Pursuant to the D&D Plan, Consideration was generally paid to Eligible Members in cash; however, Consideration was paid by the crediting of Policy Credits, and not in cash, to each Eligible Member who owned an Eligible Policy that was in force and not in payout status on the date that the Consideration was distributed and was held, other than through a trust,[11] in one of the following forms of Tax-Qualified Contracts:

(a) An annuity contract that qualifies for the treatment described in section 403(b) of the Code;

(b) An individual retirement annuity within the meaning of section 408(b) of the Code;

(c) An individual annuity contract or an individual life insurance policy issued directly to a plan participant pursuant to a plan qualified under section 401(a) or section 403(a) of the Code;

(d) A group annuity contract issued to an employer, designed to fund benefits under a retirement plan sponsored by the employer that qualifies under section 401(a) or section 403(a) of the Code;

(e) An annuity contract issued in connection with a plan established by a governmental entity that qualifies for the treatment described in section 457 of the Code; or

(f) Any other form of contract MHC determined must receive Policy Credits in order to retain the contract's tax-favored status.[12]

26. In addition, Policy Credits were paid to an Eligible Member in the event that SBL determined that payment of Consideration in the form of cash would be disadvantageous to such Eligible Member in respect of applicable income or other taxation provisions. If an Eligible Member owned one or more Tax-Qualified Contracts and one or more other Eligible Policies, Consideration was credited to one of the Eligible Member's Tax-Qualified Contracts or Eligible Policies, as determined by SBL in accordance with operational rules established by SBL for allocating Consideration among one or more of such contracts. According to the Applicants, these rules were intended to be fixed rules that eliminate discretion in their application, and the overriding goal of the rules was to protect Eligible Members from adverse tax consequences.

27. The Applicants represent that, with regard to any determination made by SBL whether an Eligible Member would receive cash or Policy Credits, described above, the form of Consideration to be received by an Eligible Member was determined by SBL based on objective criteria, including the tax-qualification status of the Eligible Policy, whether the Eligible Policy was in payout status, and the number and type of Eligible Policies held by the Eligible Member. Furthermore, the Applicants state that, in order to ensure consistent application and the absence of any discretion in making these determinations, such criteria were set forth in written operating rules.

28. Under the D&D Plan, and except as described below, as soon as reasonably practicable and no more than 60 days following the effective date of the D&D Plan (*i.e.,* July 30, 2010), unless otherwise approved by the Commissioner, (a) SBL or, if applicable and with funds transferred by SBL, any company to which SBL reinsured or coinsured any Eligible Policy, credited Policy Credits to the Eligible Members that were entitled to be credited Policy Credits under the D&D Plan and (b) MHC, SBC, SBL or a bank or trust company (or such other entity) designated by MHC and that was reasonably acceptable to the Investor distributed cash, by check, net of any required withholdings, to the Eligible Members that were entitled to receive such cash. The Applicants state that no interest was payable on the Consideration and no Eligible Member paid any commissions or fees in connection with the receipt of the Consideration.

The Escrow Arrangement

29. The D&D Plan further provided that, if an exemption from the Department had not been granted prior to the effective date of the Transaction (*i.e.,* July 30, 2010), MHC and SBL would delay distribution of Consideration to Eligible Members that were Plans and place the Consideration in an escrow, trust, or similar arrangement (*i.e.,* the Escrow Arrangement)[13] until the earlier of (a) the date the exemption was granted in form and substance satisfactory to SBL (or, if later and applicable to the Eligible Member, the date that private letter rulings from the IRS related to the distribution of Policy Credits to Eligible Members holding Tax-Qualified Contracts (the IRS Rulings) were obtained in form and substance satisfactory to SBL),[14] (b) December 31, 2010, or (c) such later date as may be required by the Commissioner (*i.e.,* June 30, 2011, *see* Representation 34). The D&D Plan further provided that, once the exemption was granted in form and substance satisfactory to SBL, the Consideration held in the Escrow Arrangement would be distributed, without interest, to the Eligible

[11] According to the Applicants, the IRS takes the position that a mutual insurance company's payment of cash consideration to the holder of a tax-qualified retirement contract in connection with the company's demutualization could have adverse tax consequences for the holder, including income taxation on the proceeds, excise tax penalties, and potential disqualification of the contract from favorable tax treatment. However, the IRS has issued a number of private letter rulings in the context of prior demutualization transactions holding that policy credits can be used to compensate holders of tax-qualified retirement contracts for the extinguishment of their membership interests in a demutualization transaction without negatively affecting the tax-favored status of the contract. *See, e.g.,* PLR 200820009 (May 16, 2008); PLR 200240051 (October 4, 2002); PLR 200132033 August 13, 2001); PLR 200124001 (June 18, 2001); PLR 200011035 (March 20, 2000); PLR 9512021 (December 29, 1994); and PLR 9230033 (February 4, 1992) (involving conversions of mutual holding companies as well as mutual insurance companies). Furthermore, the Applicants explain, in situations in which a tax-qualified retirement contract is held in a section 401(a) qualified trust, the IRS considers the membership interest to be held in the trust, which may receive consideration other than policy credits without experiencing adverse tax consequences.

[12] However, cash was paid to an Eligible Member who held an Eligible Policy that was a supplementary contract or a settlement option issued pursuant to an Eligible Policy on or before the effective date of the D&D Plan and to effect the annuitization of an individual deferred annuity, an immediate annuity contract or a deferred annuity contract in the period following deferment of annuity payments, if SBL determined that such cash was not subject to excise tax and did not constitute a prohibited transaction under the Code or cause a disqualification of the policy, or a related plan, in respect of which the cash was issued.

[13] The Applicants represent that the Escrow Arrangement was established with Deutsche Bank Trust Company Americas, a subsidiary of Deutsche Bank AG. The Applicants further represent that SBL has no ownership affiliation or other material relationship to Deutsche Bank Trust Company Americas.

[14] The IRS Rulings were issued on December 20, 2010.

Members that were Plans unless those Eligible Members had been allocated Consideration that was subject to further delay associated with the IRS Rulings. SBC or its affiliates would bear all costs and expenses of maintaining the Escrow Arrangement.

30. According to the Applicants, if Eligible Members holding contracts subject to the Act (ERISA Contracts) or Tax-Qualified Contracts were paid Consideration without having received the exemption or IRS Rulings, adverse consequences could result, including the imposition of prohibited transaction excise taxes under section 4975 of the Code, unanticipated taxes on distributions (including additional taxes under section 72(t) of the Code, excise taxes and withholding penalties) and the potential disqualification of Eligible Members that were Plans. Thus, the Applicants contend that the Escrow Arrangement was necessary because the delivery of Consideration to Eligible Members was not made contingent upon the receipt of the exemption or the IRS Rulings. The Applicants explain that, because time was of the essence in closing the Transaction, MHC could not plan for every contingency, such as the receipt of the exemption and the IRS Rulings.

As noted above, MHC was cognizant of SBL's precarious financial situation and its need to secure a capital infusion resulting from the Acquisition. In addition, MHC was concerned that the Investor would abandon its plans to purchase SBC, and the Kansas Insurance Department would intervene to take regulatory action, if the Transaction was not consummated quickly. Consequently, the Transaction closed on July 30, 2010, and the Escrow Arrangement was utilized to avoid the potential adverse consequences flowing from the receipt of Consideration by Eligible Members holding ERISA Contracts or Tax-Qualified Contracts in advance of the receipt of the exemption or the IRS Rulings.

31. The Applicants further contend that no interest should be required to be paid on any form of Consideration held in the Escrow Arrangement, primarily because the amount of interest would be *de minimis* as to each such Eligible Member.[15] Moreover, the Applicants suggest that the costs associated with calculating and adding the interest to the Consideration would offset any benefit to be derived from the interest payment.[16]

32. The D&D Plan also provides, in Section 5.4, that, if the exemption is not granted in form and substance satisfactory to SBL on or before December 31, 2010 (or such later date as may be required by the Commissioner), the Consideration held in the Escrow Arrangement shall be released to the general account of SBL, and Eligible Members that are Plans and otherwise entitled to receive Consideration under the D&D Plan in respect of their Tax-Qualified Contracts or ERISA Contracts, as the case may be, will receive no Consideration in connection with the Transaction.

33. According to the Applicants, the December 31, 2010 deadline for receipt of the IRS Rulings or the exemption constitutes a "failsafe" mechanism, in that it is designed to protect Plans from potential adverse tax consequences or disqualification in the event that Consideration is paid to Eligible Members holding Tax-Qualified Contracts or ERISA Contracts without the requisite regulatory approvals. According to the Applicants, the benefit of receiving the Consideration would be small (approximately $100 per Eligible Member) in comparison to the risk of adverse tax consequences, plan disqualification, and other penalties, if MHC failed to secure the proper regulatory approvals for the Transaction. Furthermore, the Applicants claim that there was a probability that only the exemption or the IRS Rulings would be approved (but not the other), thereby creating a "catch-22" where Consideration could neither be paid to Eligible Members nor kept in the Escrow Arrangement indefinitely. Instead, the Applicants suggest that Eligible Members would be better served in having Consideration flow to SBL for the benefit of SBL's policyholders, generally.

34. Furthermore, the Applicants explain that, at the time that the D&D Plan was approved, MHC believed, based on past precedents, that the December 31, 2010 "failsafe" date would allow adequate time for full consideration of the applications by the IRS and the Department. They also contend that Members assented to the inclusion of the failsafe provisions in the D&D Plan when they approved the D&D Plan after full consideration of its terms, including having had the opportunity to review the MIB, to deliberate and vote on the D&D Plan, and to submit comments to the Commissioner through various formal processes. Furthermore, the Applicants note that the Commissioner approved of the December 31, 2010 deadline and failsafe provisions as fair and equitable and represented in writing to the Department that she would extend the deadline by at least six months if MHC had not secured the IRS Rulings or exemption by December 31, 2010.

35. The Department concurs with the Applicants that the increased complexity and administrative cost involved with paying interest on such Consideration, together with the small amount of Consideration allocable to each Eligible Member, outweigh the benefit in receiving nominal interest on such Consideration.

36. In addition, the Department understands that administrative impracticalities inherent in holding Consideration in the Escrow Arrangement for a period of time, prior to receipt of the exemption and the IRS Rulings, may have provided sufficient rationale for the failsafe provisions. However, the Department views the failsafe mechanism in the D&D Plan as a forfeiture of plan assets and as contrary to the protections afforded to plan assets and the parties who are entitled to such assets under the Act. Moreover, the Department believes that such failsafe mechanism, if employed, would fail to satisfy Section II(h) of the proposed exemption, which provides that Eligible Members that were Plans participated in the Demutualization on the same basis as other Eligible Members that were not Plans, and Section II(l) of the proposed exemption, which prohibits the forfeiture of Consideration. However, because the Commissioner has agreed to extend the December 31, 2010 deadline for an additional 6 months, the Department notes that it is likely that the exemption will be granted prior to such date.[17] Therefore, the forfeiture of the Consideration in the Escrow Arrangement and its associated prohibited transaction implications should not arise.

Merits of the Transaction

37. As previously discussed, the Applicants assert that the Transaction will significantly improve SBL's financial condition, which will allow SBL to mitigate current capital and regulatory concerns and permit SBL to operate with a stronger capital position,

[15] The Applicants state that the amount of Consideration allocable to each Eligible Member is approximately $100, and any interest on such amount would constitute cents on the dollar.

[16] The Applicants maintain that revised calculation requirements, additional tax reporting requirements, and allocation issues all could arise as a result of requiring the crediting of interest on Consideration held in escrow.

[17] As noted in footnote 13, the IRS Rulings were issued on December 20, 2010, prior to the occurrence of the December 31, 2010 deadline.

better prospects, higher financial strength ratings and greater assurance that it will fulfill its obligations to its policyholders. Therefore, according to the Applicants, SBL's policyholders, including those policyholders that are Plans, will derive a significant benefit from the Transaction.

38. Furthermore, the Applicants note that, as part of the Transaction and pursuant to the D&D Plan, Eligible Members, including Plans, also had the opportunity to receive Consideration in the form of cash or Policy Credits upon the extinguishment of such Eligible Members' Membership Interests. These Membership Interests, note the Applicants, were not transferable and had no value independent of the policies to which they were attributable. Therefore, the Applicants maintain, absent the Consideration payable under the D&D Plan, Eligible Members received no remuneration for their Membership Interests in the Demutualization.

Moreover, the Applicants declare that the D&D Plan will not diminish the benefits, values, guarantees and dividend eligibility of the Members' policies, nor will it change the premiums for such policies.

Summary

39. In summary, the Applicants represent that the Transaction satisfied or will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The D&D Plan was implemented in accordance with procedural and substantive safeguards that were imposed under the laws of the State of Kansas and was subject to review, approval, and supervision by the Commissioner.

(b) The Commissioner reviewed the terms that were provided to Eligible Members as part of such Commissioner's review of the D&D Plan, and the Commissioner approved the D&D Plan following a determination that such D&D Plan was fair and equitable to all Eligible Members.

(c) Each Eligible Member had an opportunity to comment on the D&D Plan at the Commissioner's public comment meeting or evidentiary hearing on the D&D Plan.

(d) Each Eligible Member had an opportunity to vote to approve the D&D Plan after full written disclosure was given to the Eligible Members by MHC.

(e) Pursuant to the D&D Plan, an Eligible Member generally received cash, except that an Eligible Member received Policy Credits, and not cash, to the extent that—

(1) Consideration was allocable to the Eligible Member based on ownership of a Tax-Qualified Contract; or

(2) SBL made an objective determination that payment of Consideration in the form of cash would be disadvantageous to such Eligible Member in respect of applicable income or other taxation provisions.

(f) Any determination made by SBL under Paragraphs (e)(1) or (e)(2) of Section II of the proposed exemption was based upon objective criteria that was applied consistently to similarly situated Eligible Members.

(g) Any act or determination undertaken by an Eligible Member that was a Plan with respect to attending and/or submitting comments for the Commissioner's public comment meeting and/or evidentiary hearing, attending MHC's special meeting to consider the D&D Plan, and/or voting on the D&D Plan, was made by one or more Plan fiduciaries that were independent of SBL and its affiliates, and neither SBL nor any of its affiliates provided investment advice within the meaning of 29 CFR 2510.3–21(c) or exercised investment discretion with respect to such act or determination.

(h) All Eligible Members that were Plans participated in the Demutualization on the same basis as all other Eligible Members that were not Plans.

(i) No Eligible Member paid any brokerage commissions or fees in connection with the receipt of Policy Credits.

(j) All of SBL's policyholder obligations remained in force and were not affected by the D&D Plan.

(k) The terms of the Demutualization were at least as favorable to the Plans as the terms of an arm's length transaction between unrelated parties.

(l) Any Plan Eligible Member whose Consideration was placed in the Escrow Arrangement, pursuant to the D&D Plan, will receive a distribution of such Consideration from the Escrow Arrangement and will not forfeit such Consideration.

(m) SBL complied with and will continue to comply with, the recordkeeping requirements provided herein to enable certain authorized persons to determine whether the conditions of the exemption have been met, for so long as such records are required to be maintained.

FOR FURTHER INFORMATION CONTACT: Warren Blinder of the Department, telephone (202) 693–8553. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 13th day of January 2011.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2011–974 Filed 1–18–11; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0049]

Proposed Extension of Existing Information Collection; Hoist Operators' Physical Fitness

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice of request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for 30 CFR 56.19057 and 57.19057 on hoist operators' physical fitness.

DATES: All comments must be received by midnight Eastern Standard Time on March 21, 2011.

ADDRESSES: Comments must be identified clearly with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA-Comments@dol.gov.*

(2) *Facsimile:* 202–693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Title 30 CFR 56.19057 and 57.19057 require the annual examination and certification of hoist operators' fitness by a qualified, licensed physician. The safety of all metal and nonmetal miners riding hoist conveyances is largely dependent on the attentiveness and physical capabilities of the hoist operator. Improper movements, overspeed, and overtravel of a hoisting conveyance can result in serious physical harm or death to all passengers. While operators of small mines are likely to have fewer hoists and hoist operators, Congress intended that the Federal Mine Safety and Health Act of 1977 (Mine Act) be enforced at all mining operations within its jurisdiction regardless of size and that information collection and record keeping requirements be consistent with efficient and effective enforcement of the Mine Act. Congress did recognize, however, that small operations may face problems in complying with some provisions of the Mine Act. Section 103(e) of the Mine Act directs the Secretary of Labor not to impose an unreasonable burden on small businesses when obtaining any information under the Mine Act. This information collection does not have a significant impact on a substantial number of small entities.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- 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 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.

A copy of the information collection request can be obtained by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This notice contains the request for an extension of the existing collection of information in 30 CFR 56.19057 and 57.19057—Hoist Operators' Physical Fitness. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0049.

Frequency: Annually.

Affected Public: Business or other for-profit.

Cost to Federal Government: none.

Total Burden Respondents: 70.

Total Number of Responses: 350.

Total Burden Hours: 12 hours.

Total Hour Burden Cost (operating/maintaining): $157,793.

Comments submitted in response to this notice will be summarized and 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: January 12, 2011.

Patricia W. Silvey,

Certifying Officer.

[FR Doc. 2011–952 Filed 1–18–11; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0048]

Proposed Extension of Existing Information Collection; Respirator Program Records

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice of request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the

Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program helps to assure 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 Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for Respiratory Protection Program Records under 30 CFR 56.5005 and 57.5005.

DATES: All comments must be postmarked or received by midnight Eastern Standard Time on March 21, 2011.

ADDRESSES: Comments must be identified clearly with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA-Comments@dol.gov.*

(2) *Facsimile:* 202–693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(a)(7) of the Federal Mine Safety and Health Act of 1977 mandates in part that mandatory standards prescribe the use of protective equipment where appropriate to protect miners against hazards. Where protective equipment or respirators are required because of exposure to harmful substances, MSHA must assure that such equipment offers adequate protection for workers. A written respiratory protection program that addresses such issues as selection, fitting, use, and maintenance of respirators is essential for ensuring that workers are properly and effectively using the equipment.

Title 30 CFR 56.5005 and 57.5005 require metal and nonmetal mine operators to institute a respiratory protection program governing selection, maintenance, training, fitting, supervision, cleaning, and use of respirators. The primary objective is to prevent atmospheric contamination, and thus, those occupational diseases caused by breathing air contaminated with harmful dusts, fumes, mists, gases, or vapors. Mine operators are required to control atmospheric contamination using feasible engineering control measures. When effective controls are not feasible, or while they are being implemented or installed, or during occasional entry into hazardous atmospheres to perform maintenance or investigations, miners are to use appropriate respirators in accordance with established procedures and an effective respiratory protection program.

Sections 56.5005 and 57.5005 incorporate by reference requirements of the American National Standards Institute's Practices for Respiratory Protection (ANSI Z88.2–1969). These incorporated requirements mandate that miners who must wear respirators be fit-tested to the respirators that they will use. Certain records are required to be kept in connection with respirators, including records of the date of fit-testing and issuance of the respirator, and a record of the fit-test results. The fit-testing records are essential for determining that the worker is wearing the appropriate respirator.

The mine operator uses the respiratory protection program procedures and records to issue appropriate respiratory protection to miners when feasible engineering and/or administrative controls do not reduce the exposure to permissible levels. Fit-testing records are used to assure that a respirator worn by an individual is the one for which that individual received a tight fit. MSHA uses the information to determine compliance with the standard.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- 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 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.

A copy of the information collection request can be obtained by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This notice contains the request for an extension of the existing collection of information in 30 CFR 56.5005 and 57.5005. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0048.

Frequency: On Occasion.

Affected Public: Business or other for-profit.

Cost to Federal Government: No cost to Federal Government.

Total Burden Respondents: 400.

Total Number of Responses: 7,200.

Total Burden Hours: 2,898 hours.

Total Hour Burden Cost (operating/maintaining): $173,098.

Comments submitted in response to this notice will be summarized and 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: January 12, 2011.

Patricia W. Silvey,

Certifying Officer.

[FR Doc. 2011–954 Filed 1–18–11; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0034]

Proposed Extension of Existing Information Collection; Records of Tests and of Examinations of Personnel Hoisting Equipment

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice of request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for Records and Tests of Personnel Hoisting Equipment, 30 CFR 56/57.19022 and 30 CFR 75/77.1432 (Initial measurement); 30 CFR 56/57.19023 and 30 CFR 75/77.1433 (Examinations); 30 CFR 56/57.19121 (Recordkeeping); 30 CFR 75.1400–2 (Hoists; tests of safety catches; records); 30 CFR 75.1400–4 and 77.1404 (Certifications and records of daily examinations); and 30 CFR 77.1906 (Hoists; daily inspection).

DATES: All comments must be postmarked and received by March 21, 2011.

ADDRESSES: Comments must clearly be identified with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA-Comments@dol.gov.*

(2) *Facsimile:* 202–693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813, authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners.

Under Title 30 of the Code of Federal Regulations (CFR), MSHA has requirements that address hoists and appurtenances, including wire rope, used for hoisting persons. The requirements address both metal and nonmetal surface and underground mines (30 CFR parts 56 and 57); and underground coal and surface work areas of underground coal mines (30 CFR parts 75 and 77).

Title 30 CFR 56/57.19022 and 30 CFR 75/77.1432 requires newly installed wire rope to be measured at least once in every third interval of the rope's active length to establish a baseline for subsequent semiannual measurements. A record of the measurements is required to be made and retained until the rope is retired from service.

Title 30 CFR 56/57.19023 and 30 CFR 75/77.1433 requires the wire rope to be visually examined at least every fourteen days for visible structural damage, corrosion, and improper lubrication or dressing. If the examination reveals weakening portions of the rope, the weakened portions must be monitored daily for further deterioration until retirement criteria require that the rope be removed from service. The person conducting the examination must certify that the examination was made and the record must be retained for one year.

Title 30 CFR 56/57.19121 requires the person conducting the inspection, test or examination of hoisting equipment certify that these activities have been done. Any unsafe conditions must be noted in a record and dated. All certifications and records must be retained for one year.

Title 30 CFR 75.1400–2 requires a record to be made of tests conducted on safety catches. Safety catches are the last means to safely stop a falling conveyance in the event of rope or equipment failure.

Title 30 CFR 75.1400–4 and 77.1404 require a record to be made of each daily examination. If any unsafe condition is found during the examination, the person conducting the examination must make a record of the condition. All certifications and records must be retained for one year.

Title 30 CFR 77.1906 requires a daily examination of hoists used for shaft sinking. If any unsafe condition is found during the examination, the person conducting the examination must make a record of the condition. All certifications and records must be retained for one year.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- 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 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.

A copy of the information collection request can be obtained by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs," and then selecting "FedReg.Docs." On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This notice contains a request for public comment on the extension of the existing collection of information in 30 CFR 56.19022, 56.19023, 56.19121, 57.19022, 57.19023, 57.19121, 75.1400–2, 75.1400–4, 75.1432, 75.1433, 77.1404, 77.1432, 77.1433 and 77.1906; Records of Tests and of Examinations of Personnel Hoisting Equipment. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0034.

Frequency: On occasion.

Affected Public: Business or other for-profit.

Cost to Federal Government: $0.00.

Total Burden Respondents: 286 (70 MNM + 216 Coal).

Total Number of Responses: 92,548 (20,188 MNM + 72,360 Coal).

Total Burden Hours: 7,726 hours.

Total Hour Burden Cost (operating/maintaining): $343,200.

Comments submitted in response to this notice will be summarized and 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: January 13, 2011.

Patricia W. Silvey,

Certifying Officer.

[FR Doc. 2011–972 Filed 1–18–11; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0097]

Proposed Extension of Existing Information Collection; Rock Burst Control Plan, Metal and Nonmetal Mines

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice of request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for 30 CFR 57.3461 Rock Bursts.

DATES: All comments must be received by midnight Eastern Standard Time on March 21, 2011.

ADDRESSES: Comments must clearly be identified with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA–Comments@dol.gov.*

(2) *Facsimile:* 202–693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- 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 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.

A copy of the information collection request can be obtained by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This notice contains the request for an extension of the existing collection of information in 30 CFR 57.3461 Rock Bursts. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0097.

Frequency: Two per year.

Affected Public: Business or other for-profit.

Cost to Federal Government: There is minimal cost to the Government as the records are reviewed during the course of inspections.

Total Burden Respondents: Two per year.

Total Number of Responses: Two per year.

Total Burden Hours: 24 hours.

Total Hour Burden Cost (operating/maintaining): $1,558.

Comments submitted in response to this notice will be summarized and 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: January 12, 2011.

Patricia W. Silvey,

Certifying Officer.

[FR Doc. 2011–953 Filed 1–18–11; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0010]

Fire Protection in Shipyard Employment Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend OMB approval of the information collection requirements specified in its Fire Protection in Shipyard Employment Standard (29 CFR 1915.501–1915.509).

DATES: Comments must be submitted (postmarked, sent, or received) by March 21, 2011.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2011–0010, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for the Information Collection Request (ICR) (OSHA–2011–0010). All comments, including any personal information you provide, are placed in the public docket without change and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the "Public Participation" heading in the section of this notice, titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The Standard specifies a number of collections of information (paperwork) requirements. In general, the Standard requires employers to develop a written fire safety plan and written statements or policies that contain information about fire watches and fire response duties and responsibilities. The Standard also requires the employer to obtain medical exams for certain workers and to develop training programs and to train employees exposed to fire hazards. Additionally, the Standard requires employers to create and maintain records to certify that employees have been made aware of the details of the fire safety plan and that employees have been trained as required by the Standard.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the Standard on Fire Protection in Shipyard Employment (29 CFR 1915.501–.509). The Agency is requesting that the burden hours remain the same at 4,635 hours. The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Fire Protection in Shipyard Employment Standard (29 CFR 1915.501–.509).

OMB Number: 1218–0248.

Affected Public: Business or other for-profits.

Number of Respondents: 317.

Frequency: On occasion; Quarterly; Annually.

Average Time per Response: Varies from 5 minutes (.08 hour) for an employer to post the fire safety plan or to place it in an area accessible to employees to 12 hours for firms to develop a written fire safety plan.

Estimated Total Burden Hours: 4,635.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2011–0010). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (*see* the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number, so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information, such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted

material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the Web site and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 4–2010 (75 FR 55355).

Signed at Washington, DC, on January 13, 2011.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2011–1020 Filed 1–18–11; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL SCIENCE FOUNDATION

National Science Board; Sunshine Act Meetings; Notice

The National Science Board's Committee on Programs and Plans and the Committee on Audit & Oversight, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a joint meeting held by teleconference for the transaction of National Science Board business and other matters specified, as follows:

DATE AND TIME: January 24, 2011, 2 p.m. to 3 p.m. EST.

SUBJECT MATTER: NSB Thresholds.

STATUS: Open.

LOCATION: This meeting will be held by teleconference at the National Science Board Office, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. A room will be available for the public to listen-in to this meeting held by teleconference. All visitors must contact the Board Office at least 24 hours prior to the meeting held by teleconference to arrange for a visitor's badge and to obtain the room number. Call 703–292–7000 or send an e-mail message to *nationalsciencebrd@nsf.gov* with your name and organizational affiliation to request the room number and your badge, which will be ready for pick-up at the visitor's desk the day of the meeting. All visitors must report to the NSF visitor desk located in the lobby at the 9th and N. Stuart Streets entrance to receive your visitor's badge on the day of the teleconference.

UPDATES AND POINT OF CONTACT: Please refer to the National Science Board Web site *http://www.nsf.gov/nsb* for additional information and schedule updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/*. Point of contact for this meeting is: Elizabeth Strickland, National Science Board Office, 4201 Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7000.

Daniel A. Lauretano,

Counsel to the National Science Board.

[FR Doc. 2011–1094 Filed 1–14–11; 11:15 am]

BILLING CODE 7555–01–P

POSTAL REGULATORY COMMISSION

[Docket No. MT2011–2; Order No. 647]

Market Test of Gift Cards

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-field Postal Service proposal to conduct a 2-year market test involving the sale of gift cards. This document describes the proposed test, addresses procedural aspects of the filing, and invites public comment.

DATES: *Comment deadline:* February 4, 2011; *reply comment deadline:* February 15, 2011.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 or *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION:

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I. Introduction

On January 5, 2011, the Postal Service filed a notice, pursuant to 39 U.S.C. 3641, announcing its intent to initiate a market test beginning on or about May 1, 2011, of an experimental competitive product, Gift Cards.[1] The market research test will provide customers the ability to purchase a card loaded with a specified sum of money which can be sent as a gift through the mail. *Id.* at 1.

II. Background

The Postal Service states that gift cards have become highly popular gifts in recent years. A recent survey found that gift cards are the most requested holiday gift. *Id.* at 2. Citing a nexus between the use of gift cards for gifting and the use of the mails for sending gift cards, the Postal Service asserts that selling gift cards at Postal Service retail locations will increase customer convenience and enhance Postal Service revenue by encouraging the use of the mail. *Id.*

Description and nature of market test. Pursuant to 39 U.S.C. 3641(c)(1)(B), the Postal Service provides a description of the nature and scope of the market test. Under the proposed market test, the Postal Service will test the sale of "open loop cards." These are cards branded by a Retail Electronic Payments Network (REPN) (*e.g.,* American Express, Discover, MasterCard, or Visa) and can be used by the gift card recipient at any merchant that accepts cards administered by that network. *Id.* The Postal Service will enter into an agreement with one or more issuing banks, REPNs or service providers. Cards will be sold either as standard cards by the supplier(s) or customized, co-branded cards with Postal Service imagery. *Id.* at 2. Open loop cards will be tested with fixed and variable amounts with minimum, incremental, and maximum amounts. To protect against fraud and money laundering, there will be limits on the value of cards purchased within certain timeframes. *Id.* at 3.

The Postal Service will operate only as a sales agent. *Id.* The card supplier will provide all customer support. *Id.* at 2.

The Postal Service may test closed loop cards (*i.e.,* cards specific to a particular merchant), but those plans have not yet been established. *Id.* at 3.

At first, cards will only be available at Postal Service retail windows. Cards will neither be available at Automated Postal Centers nor on the Internet at

[1] Notice of the United States Postal Service of Market Test of Experimental Product—Gift Cards, January 5, 2011 (Notice).

http://www.USPS.com. Cards will be activated upon purchase by a Postal Service retail associate and will be immediately available once activated. *Id.*

The test is planned for 2 years. *Id.* The product will be launched in May 2011 in 2,000 retail locations that currently sell greeting cards to take advantage of cross-selling opportunities with greeting cards. The test will expand to up to 3,000 additional locations (including locations without greeting cards) in October 2011, to capture holiday sales. *Id.* at 4.

Product. Initially, the Postal Service plans to sell gift cards in fixed amounts of $25 and $50 and cards in variable amounts with a minimum value of $26, a maximum value of $100, and any amount within that range. *Id.* at 3. Planned activation fees will be $3.95 for a fixed $25 card; $4.95 for a fixed $50 card; and $5.95 for a variable card. *Id.* at 4. A $500 daily maximum purchase per customer and a $3,000 weekly maximum purchase per customer are planned. *Id.* at 3.

Revenue to Postal Service. Revenue will be generated through an activation fee paid by customers at the time of purchase in addition to the value of the card. *Id.* The Postal Service will retain a negotiated percentage of the activation fee for open loop cards. The supplier would retain the remainder of the fee. *Id.* Different fee levels may be tested to determine the optimal fees. *Id.* Activation fees are not generally levied on closed loop cards. If closed loop cards are tested, the Postal Service may enter into a revenue sharing arrangement with the closed loop card supplier. *Id.* n.4.

The Postal Service indicates that the gift cards will comply with the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (Pub. L.111–24). *Id.* at 9. It further states that any fees that may be charged to card recipients, or to merchants who accept the gift cards, would be set by the card supplier(s) in compliance with applicable laws, including Public Law 111–24. The Postal Service will not receive any revenue from such fees. *Id.* at 4 n.3.

The annual revenues received by the Postal Service from the market test will not exceed $10 million (as adjusted for inflation) in any fiscal year. *Id.* at 5; *see also* 39 U.S.C. 3641(e). In FY 2010, the gross revenue from activation fees is expected to slightly exceed the inflation adjusted threshold in that fiscal year. *Id.* at 11. Although the Postal Service may have that revenue in its possession during the period, its share of revenue retained will be less than $10 million. The Postal Service argues this complies with the statute. Alternatively, the Postal Service requests an exemption from the statutory threshold of $10 million for FY 2012 because the three criteria for a section 3641(e)(2) exemption are met. *Id.* at 12.

Statutory authority. The Postal Service indicates that its market test to sell gift cards satisfies the criteria of 39 U.S.C. 3641, which impose certain conditions on experimental products. For example, gift cards satisfy the statutory definition of a "product." The Postal Service asserts that the product is significantly different from all products offered by the Postal Service within the meaning of section 3641(b)(1). *Id.* at 5. It has not sold gift cards or any equivalent product in the 2-year period preceding the start of this test. *Id.* at 8.

In addition, the Postal Service contends that the market test will not create an unfair or inappropriate competitive advantage for the Postal Service or any mailer, particularly small business concerns. *Id.* at 9; *see also* 39 U.S.C. 3641(b)(2). Gift cards are available from a variety of retail locations. *Id.* at 8. The Postal Service will market the gift cards in a manner similar to the way that other retail channels market gift cards. *Id.* at 9. The product introduction will have a very small impact on the market, not to exceed 0.5 percent of the open loop gift card market. *Id.* Also, the Postal Service would compete with larger retail chains whereas small businesses have a small part of the overall gift card market, thus resulting in minimal competition with small businesses. *Id.* at 9 n.8.

The Postal Service classifies the product as competitive. *Id.* at 5, 10; *see also* 39 U.S.C. 3641(b)(3). The gift card market is highly competitive. They may be purchased at a large variety of retail locations thus precluding the Postal Service from exercising any market power to charge excessive fees or to provide an inferior product. *Id.* at 10.

The Postal Service states that the duration of the market test will not exceed 24 months unless the Postal Service requests an extension from the Commission, terminates the program, or establishes the Gift Card as a permanent product. *Id.* at 10–11; *see also* section 3641(d)(1).

Definition of product. The Postal Service may conduct market tests of experimental products. A "product" is defined by 39 U.S.C. 102(6) as a "postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be, applied." An experimental product must therefore be consistent with the statutory definition of a "postal service."

The Postal Service asserts that the sale of gift cards is consistent with the statutory definition of a "postal service." A "postal service" is defined by 39 U.S.C. 102(5) as "the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto." The Postal Service notes the Commission has recognized that this definition includes the sale of products "that bear a close nexus to the mails, including products that allow mailers to connect with others on a personal level (greeting cards), and products that allow mailers to send cash equivalents (money orders)." *Id.* at 6.

The Postal Service claims that gift cards would support customers' mailing needs by providing convenient access to a product that is commonly used for sending gifts through the mail. *Id.*

The Postal Service states that gift cards are commonly sent with greeting cards. It further states that gift cards are very similar to money orders. *Id.* at 7. The Postal Service asserts that gift cards purchased from the Postal Service are likely to be mailed. *Id.* at 8. The Postal Service contends that the nexus between gift cards and mail exists regardless of whether the card is open loop, closed loop, or co-branded with Postal Service imagery and need not contain Postal Service intellectual property to be consistent with the statutory definition of "product." *Id.* Thus, the Postal Service concludes that gift cards that it may test are consistent with the definition of a postal service. *Id.* at 6.[2]

Data collection plan. The Notice also addresses the Postal Service's plan to collect data to understand the retail costs of selling the product, the value of types of cards, card packaging and card locations to postal consumers, and different price points. The Postal Service indicates that these data may be reported to the Commission upon request. *Id.* at 13.

III. Notice of Filing

The Commission establishes Docket No. MT2011–2 for consideration of matters raised by the Notice. Interested persons may submit comments on whether the Postal Service's filing in the captioned docket is consistent with the policies of 39 U.S.C. 3641. Comments

[2] The Postal Service notes that the Commission previously determined the Postal Service's sale of stored value cards is a nonpostal service, but points out that the ruling was based on the record in that proceeding and other factors. Order No. 154, Docket No. MC2008–1, Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, December 19, 2008, at 47–48.

are due no later than February 4, 2011. Reply comments are due not later than February 15, 2011. The filing can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Robert Sidman to serve as Public Representative in this docket.

IV. Ordering Paragraphs

It is ordered

1. The Commission establishes Docket No. MT2011–2 for consideration of the matters raised by the Notice.
2. Pursuant to 39 U.S.C. 505, Robert Sidman is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.
3. Comments by interested persons are due no later than February 4, 2011.
4. Reply comments are due no later than February 15, 2011.
5. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–969 Filed 1–18–11; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold an Open Meeting on January 20, 2011 at 10 a.m., in the Auditorium, Room L–002.

The subject matter of the Open Meeting will be:

Item 1: The Commission will consider whether to adopt new rules to implement Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to the use of representations and warranties in the market for asset-backed securities.

Item 2: The Commission will consider whether to adopt rules to implement Section 945 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires an issuer of asset-backed securities (ABS) to perform a review of the assets underlying the ABS and disclose information relating to the review.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: January 13, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–1114 Filed 1–14–11; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Release No. 34–63695; File No. SR–FINRA–2010–068

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify FINRA/Nasdaq Trade Reporting Securities Transaction Credit

January 11, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 30, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as "establishing or changing a due, fee or other charge" under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon receipt of this filing by 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

FINRA is proposing to amend FINRA Rule 7610A (Securities Transaction Credit) to modify credits provided to members that use the FINRA/Nasdaq Trade Reporting Facility ("FINRA/Nasdaq TRF").

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA 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. FINRA 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

Background

The FINRA/Nasdaq TRF is a facility of FINRA that is operated by The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). In connection with the establishment of the FINRA/Nasdaq TRF, FINRA and NASDAQ OMX entered into a limited liability company agreement (the "LLC Agreement"). Under the LLC Agreement, FINRA, the "SRO Member," has sole regulatory responsibility for the FINRA/Nasdaq TRF. NASDAQ OMX, the "Business Member," is primarily responsible for the management of the FINRA/Nasdaq TRF's business affairs, including establishing pricing for use of the FINRA/Nasdaq TRF, to the extent those affairs are not inconsistent with the regulatory and oversight functions of FINRA. Additionally, the Business Member is obligated to pay the cost of regulation and is entitled to the profits and losses, if any, derived from the operation of the FINRA/Nasdaq TRF.

The FINRA/Nasdaq TRF receives revenue for transactions reported to the three tapes [5] from the Consolidated Tape Association and Nasdaq Securities Information Processor (the "Tapes"). Pursuant to Rule 7610A, FINRA members are provided with a fractional share of this revenue based on their "Market Share."[6] Market Share is

[5] Market data is transmitted to three tapes based on the listing venue of the security: New York Stock Exchange securities ("Tape A"), American Stock Exchange and regional exchange securities ("Tape B"), and Nasdaq Stock Market securities ("Tape C"). Tape A and Tape B are generally referred to as the Consolidated Tape.

[6] Rule 7610A defines Market Share as a percentage calculated by dividing the total number of shares represented by trades reported by a FINRA member to the FINRA/Nasdaq TRF during a given calendar quarter by the total number of shares represented by all trades reported to the Consolidated Tape Association or the Nasdaq

calculated quarterly for each member based on the transactions attributed to them in each of the three Tapes. Rule 7610A provides four tiers of revenue share: 0%, 50%, 80% and 100%. Eligibility for a tier is based on the percentage of Market Share, and the percentage of Market Share required increases as the tiers of revenue share increase.

Proposed Credit Schedule

NASDAQ OMX, as the FINRA/Nasdaq TRF Business Member, has determined to amend the current Market Share percentages for revenue sharing eligibility applicable to Tapes A, B and C by increasing the current qualifying Market Share percentages for each tier and adding a new Revenue Share tier. In addition, NASDAQ OMX has determined to adjust the Revenue Share percentages under the credit schedule within each of the tiers.

Accordingly, FINRA is proposing to amend Rule 7610A to reflect the new credit schedule. The following table provides a comparison of the old Market Share tier structure with the proposed new structure:

	Previous tier break point	Revenue share (percent)	New tier break point	Revenue share
Tape A Tier 1	=>0.75%	100	=>2%	98%
Tape A Tier 2	<0.75%, =>0.25%	80	<2%, =>1%	95
Tape A Tier 3	<0.25%, =>0.10%	50	<1%, =>0.50%	75
Tape A Tier 4	<0.10%	0	<0.50%, =>0.10%	20
Tape A Tier 5	N/A	.....	<0.10%	0
Tape B Tier 1	=>0.75%	100	=>2%	98
Tape B Tier 2	<0.75%, =>0.25%	80	<2%, =>1%	90
Tape B Tier 3	<0.25%, =>0.10%	50	<1%, =>0.35%	70
Tape B Tier 4	<0.10%	0	<0.35%, =>0.10%	10
Tape B Tier 5	N/A	.....	<0.10%	0
Tape C Tier 1	=>0.75%	100	=>2%	98
Tape C Tier 2	<0.75%, =>0.25%	80	<2%, =>1%	95
Tape C Tier 3	<0.25%, =>0.10%	50	<1%, =>0.50%	75
Tape C Tier 4	<0.10%	0	<0.50%, =>0.10%	20
Tape C Tier 5	N/A	.....	<0.10%	0

NASDAQ OMX, as the Business Member, has advised FINRA that it believes that the increase in tier break point percentages coupled with the adjusted and new Revenue Share tiers will make the tiers more meaningful. In this regard, the Business Member has observed that the distribution of participants among the tiers is significantly weighted toward the top tiers under each of the Tapes. The Business Member believes that the proposed tier break points will result in a more even distribution of participants among the various tiers. The Business Member notes that all participants eligible for Revenue Share under the current credit schedule will continue to be eligible for Revenue Share under the proposed credit schedule, although at the adjusted Revenue Share percentages.

FINRA has filed the proposed rule change for immediate effectiveness. FINRA is proposing that the operative date of the proposed rule change will be January 3, 2011.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[7] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA believes that the amended credit schedule is fair and provides an equitable allocation of the credits provided to the FINRA/Nasdaq TRF in that it will apply uniformly to all FINRA members that use the FINRA/Nasdaq TRF.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and paragraph (f)(2) of Rule 19b–4 thereunder.[9] 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–FINRA–2010–068 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

Securities Information Processor, as applicable, during that quarter. Market Share is calculated separately for each tape.

[7] 15 U.S.C. 78*o*–3(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2010–068. 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 FINRA. 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–FINRA–2010–068 and should be submitted on or before February 9, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–949 Filed 1–18–11; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63706; File No. SR–CBOE–2011–004]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Fees Schedule and Circular Regarding Trading Permit Holder Application and Other Related Fees

January 12, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 3, 2011, the Chicago Board Options Exchange, Incorporated ("CBOE" 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 CBOE. 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

Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") proposes to amend its Fees Schedule and circular regarding Trading Permit Holder application and other related fees ("Trading Permit Fee Circular").The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal/*), 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, CBOE 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. CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[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

CBOE Rule 2.20 grants the Exchange the authority to, from time to time, fix the fees and charges payable by Trading Permit Holders. CBOE is proposing to amend its Fees Schedule and Trading Permit Fee Circular to (i) Amend the monthly fee for Market-Maker Trading Permits and establish a sliding scale for discounted Market-Maker Trading Permit Fees (subject to certain conditions); (ii) establish a VIX Tier Appointment; (iii) amend the monthly fee for Floor Broker Trading Permits and add an additional fee for Floor Brokers that conduct a certain level of activity in VIX; (iv) amend the monthly fee for Electronic Access Permits; (v) amend the monthly fees for bandwidth packets; (vi) increase the Inactive Nominee Status fee; (vii) increase the Fingerprint Processing Fee; and (viii) update the Fees Schedule to remove outdated language.

CBOE Rule 3.1 provides, among other things, that the Exchange may issue different types of Trading Permits and determine the fees for those Trading Permits. Specifically, under Rule 3.1(a)(iv), the Exchange may issue different types of Trading Permits that allow holders to trade one or more products authorized for trading on the Exchange and to act in one or more trading functions authorized by CBOE Rules. The Exchange currently has four types of Trading Permits: (i) Market-Maker Trading Permit; (ii) Floor Broker Trading Permit; (iii) Electronic Access Permit; and (iv) CBSX Trading Permit. Rule 3.1(a)(v) provides, in relevant part, that Trading Permits will be subject to such fees and charges as are established by the Exchange from time to time pursuant to CBOE Rule 2.20 and the Exchange Fees Schedule.

In June 2010, and immediately following demutualization, CBOE amended its Fees Schedule to establish Trading Permit, tier appointment and bandwidth packet fees.[3] The Fees Schedule established a monthly fee of $7,500 for a Market-Maker Trading Permit. At the time the Market-Maker Trading Permits were established, CBOE determined to discount the fees by 20% for the remainder of 2010. Thus, between July 2010 and December 2010, CBOE assessed a fee of $6,000 per month for a Market-Maker Trading

[3] *See* Securities Exchange Act Release No. 62386 (June 25, 2010), 75 FR 38566 (July 2, 2010) (SR–CBOE–2010–073) [sic].

Permit. CBOE is proposing to decrease the standard $7,500 monthly fee for a Market-Maker Trading Permit to $6,000, which is the same as the current level of this fee.

CBOE is also proposing to establish the following sliding scale for Market-Maker Trading Permits subject to the certain conditions:

	From	To	Amount per month per permit ($)
	1 permit	10 permits	6,000
Tier 1	11 permits	20 permits	4,800
Tier 2	21 or more permits		3,000

The sliding scale will be available for all Market-Maker Trading Permits, held by affiliated Trading Permit Holders and TPH organizations, that are used for appointments in any options classes other than SPX, VIX, OEX and XEO. Any Market-Maker Trading Permits used for these four classes, whether in whole or in part, are excluded from this sliding scale and will be priced at $6,000 per month. To qualify for the rates set forth in Tiers 1 and 2 in the sliding scale, the applicable Trading Permit Holder(s) and/or TPH organization(s) must commit to a specific tier that includes a minimum number of eligible Market-Maker Trading Permits for each calendar year. To participate in the program, a Market-Maker Trading Permit Holder must notify the Registration Services Department by January 25th of each year (or the preceding business day if the 25th is not a business day) of the tier of eligible Market-Maker Trading Permits committed to by the Market-Maker Trading Permit Holder for that calendar year. Market-Makers are not obligated to commit to either tier. However, the discounts will apply only to those that do commit to Tier 1 or Tier 2 for the calendar year (or remainder of the calendar year as described below). Trading Permit Holders that are not eligible for and/or that do not commit to Tier 1 or Tier 2 will continue to pay the standard rate for each Market-Maker Trading Permit, regardless of the total number of Market-Maker Trading Permits used.

If a Trading Permit Holder chooses to commit to either Tier 1 or Tier 2, that Trading Permit Holder will be assessed fees for at least the minimum number of permits in the commitment tier for the remainder of the calendar year.[4] Even if a Trading Permit Holder no longer maintains the minimum number of eligible Trading Permits in the committed tier, that Trading Permit Holder is still responsible for the minimum payment for that commitment tier for the remainder of the calendar year. For example, a Trading Permit Holder that commits to eleven eligible permits per month will be subject to a minimum monthly access fee of $64,800 (10 × $6,000 plus $4,800 = $64,800) for that calendar year. Any additional permits will increase the fee by the applicable amount (i.e., if the subject Trading Permit Holder also maintains an additional Trading Permit that is associated with an appointment in OEX, the monthly access fee will be $70,800).

Trading Permit Holders may also choose to commit to a higher tier of the sliding scale for the remainder of a calendar year, during a commitment year, if the Trading Permit Holder obtains enough eligible Market-Maker Trading Permits and provides written notification to the Registration Services Department by the 25th day of the month preceding the month in which the higher tier will be effective (or the preceding business day if the 25th is not a business day). For example, a Trading Permit Holder may provide written notice to commit to Tier 1 effective July 1 for the remainder of the calendar year as long as the Trading Permit Holder obtains enough eligible Trading Permits and provides written notice by June 25th that the Trading Permit Holder would like to participate in the sliding scale starting in July for the remainder of the calendar year. Even if that Trading Permit Holder subsequently falls below the minimum number of eligible Market-Maker Trading Permits (in the committed calendar year), for the committed tier, the Trading Permit Holder will remain responsible for paying at least the tier minimum for the remainder of the calendar year.

Trading Permit Holders will be responsible to pay for the minimum amount of eligible Market-Maker Trading Permits (based on the commitment tier) for the calendar year on a monthly basis unless the Trading Permit Holder entirely terminates as a Trading Permit Holder during the year. If a Trading Permit Holder combines, merges, or is acquired during the course of the calendar year, the surviving Trading Permit Holder will maintain responsibility for the committed number of eligible Market-Maker Trading Permits.

Section 6(b)(4) of the Securities Exchange Act of 1934[5] (the "Act") requires that: "the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities." The proposed sliding scale is available to all Trading Permit Holders that maintain eligible Market-Maker Trading Permits. In essence, CBOE is offering a discounted fee in return for a commitment for a designated period of time. Trading Permit Holders are not precluded from providing notice that they wish to participate in the sliding scale program throughout a calendar year as long as such notice is provided by the 25th day of the preceding month of effectiveness. CBOE is proposing to offer this sliding scale as a benefit to those Trading Permit Holders that commit in advance. There is no obligation to commit to either Tier 1 or Tier 2 of the sliding scale. Since Tier 2 requires a commitment of twenty-one or greater permits, CBOE believes that Market-Makers quoting all multiply listed classes may consider committing in advance to Tier 2. It requires approximately thirty Trading Permits for a Trading Permit Holder to obtain Market-Maker appointments in all multiply-listed classes at the Exchange.

CBOE Rule 8.3(e) provides that the Exchange may establish one or more types of tier appointments. In accordance with CBOE Rule 8.3(e), a tier appointment is an appointment to trade one or more options classes that must be held by a Market-Maker to be eligible to act as a Market-Maker in the options class or options classes subject to that appointment. CBOE currently maintains a tier appointment for Market-Maker

[4] A Trading Permit Holder may pay more than the tier minimum for monthly access fees if the Trading Permit Holder has additional Trading Permits that are not eligible for the sliding scale.

[5] 15 U.S.C. 78f(b)(4).

Trading Permit Holders trading in SPX. The current Fees Schedule provides that the SPX Tier Appointment fee will be assessed to any Market-Maker Trading Permit Holder that either (a) has an SPX Tier Appointment at any time during a calendar month; or (b) conducts any open outcry transactions in SPX at any time during a calendar month. CBOE is proposing to delete this language from the section entitled Assessment of Trading Permit and Bandwidth Packet Fees and move this language to Section 10(A)(ii) that describes the SPX Tier Appointment. In addition, in conjunction with a recent rule filing enabling the trading of certain series of options on the Hybrid trading platform even though that class generally trades on Hybrid 3.0,[6] CBOE is proposing to clarify the description of the SPX Tier Appointment in Section 10(A)(2) [sic] to clarify that the SPX Tier Appointment fee will also be assessed to a Market-Maker Trading Permit Holder that submits open outcry transactions in SPX or electronic or open outcry transactions in SPX Weeklys. SPX options trade on Hybrid 3.0 but CBOE has recently listed series of SPX Weeklys that are currently trading on Hybrid.

CBOE is now proposing to also establish a VIX Tier Appointment. Effective January 3, 2010, a Market-Maker Trading Permit Holder must obtain a VIX Tier Appointment to act as a Market-Maker in VIX. Further, consistent with the provisions of Rule 8.3(e), each VIX Tier Appointment may only be used with one designated Market-Maker Trading Permit. The Exchange is proposing that the initial fee for a VIX Tier Appointment be set at $1,000 per month.

VIX Tier Appointment fees are non-refundable and will be assessed through the integrated billing system during the first week of the following month. The VIX Tier Appointment fee will be assessed to any Market-Maker Trading Permit Holder, registered with the Exchange to conduct business on the Exchange as a Market-Maker, that either (a) has a VIX Tier Appointment at any time during a calendar month; or (b) conducts any transactions in VIX at any time during a calendar month. VIX Tier Appointments will be renewed automatically for the next month unless the Trading Permit Holder submits by the 25th day of the prior month (or the preceding business day if the 25th is not a business day) a written notification to cancel the VIX Tier Appointment effective at or prior to the end of the applicable month.

The Fees Schedule previously established a monthly fee of $2,000 for an Electronic Access Permit. At the time the Electronic Access Permits were implemented, CBOE determined to discount the fees by 20% for the remainder of 2010. Thus, between July 2010 and December 2010, CBOE assessed a fee of $1,600 per month for an Electronic Access Permit. CBOE is proposing to decrease the $2,000 monthly fee for an Electronic Access Permit to $1,600, which is the same as the current level of this fee.

In August 2010, CBOE amended its Fees Schedule and Trading Permit Fee Circular to establish a fee scale for the purchase of Order Entry Bandwidth Packets under which the cost of an Order Entry Bandwidth Packet would decline at certain break points as additional Order Entry Bandwidth Packets are purchased.[7] Specifically, the first through fifth Order Entry Bandwidth Packets obtained by a Trading Permit Holder cost $2,000 per packet per month, the sixth through eighth Order Entry Bandwidth Packets obtained by that Trading Permit Holder would cost $1,000 per packet per month, the ninth through thirteenth Order Entry Bandwidth Packets obtained by that Trading Permit Holder would cost $500 per packet per month, and the fourteenth and each additional Order Entry Bandwidth Packet obtained by that Trading Permit Holder would cost $250 per packet per month. CBOE also discounted these fees by 20% for the remainder of 2010. CBOE is now proposing to decrease the monthly fee scale for Order Entry Bandwidth Packets such that the first through fifth Order Entry Bandwidth Packets obtained by a Trading Permit Holder would cost $1,600 per packet per month, the sixth through eighth Order Entry Bandwidth Packets obtained by that Trading Permit Holder would cost $800 per packet per month, the ninth through thirteenth Order Entry Bandwidth Packets obtained by that Trading Permit Holder would cost $400 per packet per month, and the fourteenth and each additional Order Entry Bandwidth Packet obtained by that Trading Permit Holder would cost $200 per packet per month (which is the same as the current level of these fees).

CBOE also amended its Fees Schedule in August 2010 to allow Trading Permit Holders to obtain and assign to a particular Sponsored User of the Trading Permit Holder one or more Order Entry Bandwidth Packets.[8] In that event, the fees for the assigned bandwidth packet(s) would be assessed to the Trading Permit Holder and the bandwidth packet(s) could be utilized solely by the Sponsored User (and not by the Trading Permit Holder or any other Sponsored User).

Fees for Order Entry Bandwidth Packets assigned to a particular Sponsored User are also subject to a fee scale, similar to the fee scale in place for the Order Entry Bandwidth Packet assigned to a particular Trading Permit Holder. Specifically, the full fee scale for Order Entry Bandwidth Packets assigned by a Trading Permit Holder to a Sponsored User provides that the first through sixth Order Entry Bandwidth Packets assigned to the Sponsored User would cost $2,000 per packet per month, the seventh through ninth Order Entry Bandwidth Packets assigned to that Sponsored User would cost $1,000 per packet per month, the tenth through fourteenth Order Entry Bandwidth Packets assigned to that Sponsored User would cost $500 per packet per month, and the fifteenth and each additional Order Entry Bandwidth Packet assigned to that Sponsored User would cost $250 per packet per month. CBOE also discounted these fees by 20% for the remainder of 2010. CBOE is now proposing to decrease the monthly fee scale for Order Entry Bandwidth Packets assigned by a Trading Permit Holder to a particular Sponsored User such that the first through sixth Order Entry Bandwidth Packets assigned to the Sponsored User would cost $1,600 per packet per month, the seventh through ninth Order Entry Bandwidth Packets assigned to that Sponsored User would cost $800 per packet per month, the tenth through fourteenth Order Entry Bandwidth Packets assigned to that Sponsored User would cost $400 per packet per month, and the fifteenth and each additional Order Entry Bandwidth Packet assigned to that Sponsored User would cost $200 per packet per month (which is the same as the current level of these fees).

CBOE is also proposing to make two technical changes to Section 10 of the CBOE Fees Schedule. First, CBOE is proposing to modify the numbering of the section setting forth the Trading Permit and tier appointment fees and the accompanying descriptions to reflect the addition of the VIX Tier Appointment. In addition, CBOE is proposing to remove references throughout Section 10 of the Fees Schedule to Trading Permit, tier

[6] *See* Securities Exchange Act Release No. 63186 (October 27, 2010), 75 FR 67417 (November 2, 2010) (SR–CBOE–2010–095).

[7] *See* Securities Exchange Act Release No. 62704 (August 12, 2010), 75 FR 51132 (August 18, 2010) (SR–CBOE–2010–073).

[8] *Id.*

appointment and bandwidth packet fees regarding the assessment of these fees in 2010 as this language is outdated and no longer necessary.

CBOE is also proposing to make two changes to Section 11 of the CBOE Fees Schedule. First, CBOE is proposing to increase the Inactive Nominee Status fee from $750 to $900. This fee is payable quarterly by a TPH organization for each inactive nominee status that the TPH organization wishes to maintain. (e.g., a TPH organization firm desiring the ability to have three parking spaces within which to designate inactive nominees would pay this fee at the beginning of each quarter for each of the three parking spaces). In addition, CBOE is proposing to increase the Fingerprint Processing Fee from $50 to $60. This fee is assessed for employees of Trading Permit Holders and any other individual requesting the Exchange to process a fingerprint, electronically or otherwise, excluding fingerprint requirements for Individual Applicants, individuals applying for Renewal/Change of Status, and Associated Persons. CBOE is proposing to increase these fees to account for an increase in resources required to process inactive nominee information, fingerprints, and related requests. The Inactive Nominee Status Fee and the Fingerprint Processing Fee have not been increased in three years.[9]

In addition to the proposed changes to the Fees Schedule described above, CBOE is proposing to revise its regulatory circular that sets forth the existing Trading Permit Holder application and other related fees. The Exchange proposes to revise this circular to incorporate the changes to Sections 10 and 11 of the CBOE Fees Schedule that are described above, as well as to clarify the description of the Fingerprint Processing Fee to provide that only those associated persons that are subject to the Associated Person Application [sic] Fee are not subject to the Fingerprint Processing Fee. The proposed changes to the circular are included as Exhibit 2 to the Form 19b–4.

2. Statutory Basis

The proposed rule change will treat similarly situated Trading Permit Holders in the same manner. Specifically, CBOE shall assess the same base Trading Permit, tier appointment and bandwidth packet fees to all Trading Permit Holders based on the type of tier appointment requested and type and number of Trading Permit(s) and bandwidth packet(s) requested. All Trading Permit Holders may elect to receive a discounted price if the Trading Permit Holder commits in advance to a minimum number of eligible Market-Maker Trading Permits for a calendar year. Trading Permit Holders that do not wish to commit in advance to a minimum number of eligible Trading Permits for a calendar year will be subject to the standard rate for each Market-Maker Trading Permit. Further, CBOE shall assess the Fingerprint Processing Fee and Inactive Nominee Status Fee in the same manner to all Trading Permit Holders. For the reasons stated in the purpose section, CBOE is also proposing to add a VIX Tier Appointment and assess a $1,000 monthly fee to any Floor Broker Trading Permit Holder (a) that executes more than 20,000 VIX contracts during the month and (b) whose aggregate VIX executed contracts during the month comprise more than 30% of the Floor Broker Trading Permit Holder's exchange-wide total executed contracts. Accordingly, the Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(4) of the Act [11] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among persons using its facilities for the reasons described above.

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 that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and subparagraph (f)(2) of Rule 19b–4 [13] thereunder. 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–CBOE–2011–004 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–2011–004. 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–2011–004 and should be submitted on or before February 9, 2011.

[9] *See* Securities Exchange Act Release No. 57191 (January 24, 2008), 73 FR 5611 (January 30, 2008) (SR–CBOE–2007–150).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–955 Filed 1–18–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63705; File No. SR–NASDAQ–2011–006]

Self-Regulatory Organizations; NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Fees for the NASDAQ Options Market

January 12, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 6, 2011, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify Rule 7050 governing pricing for NASDAQ members using the NASDAQ Options Market ("NOM"), NASDAQ's facility for executing and routing standardized equity and index options.

The text of the proposed rule change is set forth below. Proposed new text is italicized and deleted text is in brackets.

* * * * *

7050. NASDAQ Options Market

The following charges shall apply to the use of the order execution and routing services of the NASDAQ Options Market for all securities.

(1)—(3) No Change.

(4) Fees for routing contracts to markets other than the NASDAQ Options Market shall be assessed as provided below. The current fees and a historical record of applicable fees shall be posted on the NasdaqTrader.com Web site.

Exchange	Customer	Firm	MM	Professional
BATS	$0.36	$0.55	$0.55	$0.36
BOX	0.06	0.55	0.55	0.06
CBOE	0.06	0.55	0.55	0.26
CBOE orders greater than 99 contracts in NDX, MNX ETFs, ETNs & HOLDRs	0.24	0.55	0.55	0.26
ISE	0.06	0.55	0.55	0.24
ISE Select Symbols* [of 100 or more contracts]	0.[26]*18*	0.55	0.55	0.3[1]*4*
NYSE Arca Penny Pilot	0.50	0.55	0.55	0.50
NYSE Arca Non Penny Pilot	0.06	0.55	0.55	0.06
NYSE AMEX	0.06	0.55	0.55	0.26
PHLX (for all options other than PHLX Select Symbols)	0.06	0.55	0.55	0.26
PHLX Select Symbols**	0.30	0.55	0.55	0.46
C2	0.21	0.55	0.55	0.46

* These fees are applicable to orders routed to ISE that are subject to Rebates and Fees for Adding and Removing Liquidity in Select Symbols. See ISE's Schedule of Fees for the complete list of symbols that are subject to these fees.

** These fees are applicable to orders routed to PHLX that are subject to Rebates and Fees for Adding and Removing Liquidity in Select Symbols. See PHLX's Fee Schedule for the complete list of symbols that are subject to these fees.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is proposing to modify Rule 7050 governing the fees assessed for options orders entered into NOM but routed to and executed on away markets ("Routing Fees"). Specifically, the Exchange is proposing to amend its current Routing Fees that are currently assessed on orders routed to the International Securities Exchange LLC ("ISE") in Select Symbols [3] for orders of 100 or more contracts. ISE recently amended its fees and the amendments proposed herein reflect the proposed ISE amendments.[4]

The Exchange proposes to assess Customers a fee of $0.18 per contract and Professionals a fee of $0.34 per contract for orders routed to ISE in Select Symbols. The Routing Fees currently assessed on Firms and Market Makers will remain unchanged. Currently, the Exchange assesses the following fees to route to ISE in Select Symbols of 100 or more contracts: $.26 per contract for Customers, $0.55 per contract for Firms [5] and Market Makers [6] and $0.31 per contract for Professionals.

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Select Symbols refer to the symbols which are subject to ISE's Rebates and Fees for Adding and Removing Liquidity in Select Symbols in ISE's Schedule of Fees.

[4] *See* SR–ISE–2010–120.

[5] Firm is an order that clears as "Firm" with the Options Clearing Corporation ("OCC"). This fee of $0.55 is a fixed routing fee for routing orders for the account(s) of Firms.

[6] This fee of $0.55 is a fixed routing fee for routing orders for the account(s) of Market Makers. The Exchange notes that some other options exchanges include Market Maker transaction and clearing fees as "broker-dealer" fees.

All other orders that are routed to ISE, including orders that are less than 100 contracts, are assessed the rates labeled "ISE".

The Exchange also proposes to amend the title of the Routing Fees in ISE Select Symbols to state "ISE Select Symbols" rather than "ISE Select Symbols of 100 or more contracts" to reflect the recent amendments to ISE's fees which eliminate the fee differential between priority customers with 100 or more contracts and priority customers with less than 100 contracts.[7] All other orders that are routed to ISE, which are not in the Select Symbols, would be assessed the rates labeled "ISE".

NASDAQ Options Services LLC ("NOS"), a member of the Exchange, is the Exchange's exclusive order router. Each time NOS routes to away markets NOS is charged a $0.06 clearing fee and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which are passed through to the Exchange. Each destination market's transaction charge varies for each transaction incurred by the Exchange. The Exchange is proposing this amendment in order to recoup clearing and transaction charges incurred by the Exchange when orders are routed to ISE in the ISE Select Symbols.

2. Statutory Basis

NASDAQ believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,[8] in general, and with Section 6(b)(4) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls. The Exchange believes that these fees are reasonable because the Exchange is seeking to recoup costs that it incurs when routing orders to ISE in Select Symbols on behalf of its members. The Exchange believes that the proposed fee amendments are equitable because these amendments mirror recent proposed amendments to ISE's Schedule of Fees and are being uniformly applied to the Exchange's members.

NASDAQ is one of nine options markets in the national market system for standardized options. Joining NASDAQ and electing to trade options is entirely voluntary. Under these circumstances, NASDAQ's fees must be competitive and low in order for NASDAQ to attract order flow, execute orders, and grow as a market. NASDAQ thus believes that its fees are fair and reasonable and consistent with the Exchange Act.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[10] and paragraph (f)(2) of Rule 19b–4[11] thereunder. 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–NASDAQ–2011–006 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–NASDAQ–2011–006. 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–NASDAQ–2011–006 and should be submitted on or before February 9, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–950 Filed 1–18–11; 8:45 am]

BILLING CODE 8011–01–P

[7] *See* SR–ISE–2010–120.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice to Rescind a Notice of Intent to Prepare a Supplemental Environmental Impact Statement: State Route 374 From State Route 149 West of River Road to State Route 76 in Clarksville, Montgomery County, TN

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice to rescind a Notice of Intent to Prepare a Supplemental Environmental Impact Statement (EIS).

SUMMARY: The FHWA is issuing this notice to advise the public that the Notice of Intent published on April 21, 2010, at 75 FR 20879, to prepare a Supplemental EIS for the extension of SR 374 from SR 149 west of River Road to SR 76 in Clarksville, Montgomery County, Tennessee, is being rescinded.

FOR FURTHER INFORMATION CONTACT: Mr. Charles J. O'Neill, Planning and Program Management Team Leader, FHWA—Tennessee Division Office, 404 BNA Drive-Suite 508 Nashville, TN 37217. Phone: (615) 781–5770.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Tennessee Department of Transportation, is rescinding the Notice to prepare a Supplemental EIS on a Proposal to extend SR 374 in Clarksville, Montgomery County, Tennessee. A Draft EIS for the extension of SR 374 from SR 13 to SR 76 in Clarksville was approved in March 2000. A Supplemental EIS was being prepared to bring the original EIS into compliance with current environmental laws and regulations. After initiating the Supplemental EIS, it was determined that the proposed project's potential impacts are not expected to be substantial; therefore, preparation of an EIS is not warranted. An Environmental Assessment (EA) documenting the potential social, economic, and environmental effects of the proposed project will be prepared in accordance with the National Environmental Policy Act (NEPA) and applicable environmental laws and regulations. The EA will evaluate the potential effects of the No Build Alternative and the Build Alternative, which is based on Alternative C from the original EIS.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning the proposed action should be directed to the FHWA contact person identified above at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this proposed program.)

Charles J. O'Neill,

Planning and Program Management Team Leader, Nashville, TN.

[FR Doc. 2011–978 Filed 1–18–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Office of the Secretary

Federal Railroad Administration

Federal Transit Administration

Maritime Administration

[Docket No. FHWA–2010–0154]

Notice of Funding Availability for Applications for Credit Assistance Under the Transportation Infrastructure Finance and Innovation Act (TIFIA) Program

AGENCY: Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), Maritime Administration (MARAD), Office of the Secretary of Transportation (OST), U.S. Department of Transportation (DOT).

ACTION: Notice of funding availability.

SUMMARY: The DOT's TIFIA Joint Program Office (JPO) announces the availability of funding to support new applications for credit assistance. Under TIFIA, the DOT provides secured (direct) loans, lines of credit, and loan guarantees to public and private applicants for eligible surface transportation projects of regional or national significance. Projects must meet statutorily specified criteria to be selected for credit assistance.

Because demand for the TIFIA program can exceed budgetary resources, the DOT is utilizing periodic fixed-date solicitations that will establish a competitive group of projects to be evaluated against the program objectives. This notice outlines the process that applicants must follow.

DATES: For consideration, Letters of Interest must be submitted electronically via e-mail by 4:30 p.m. EST on February 18, 2011, using the revised form on the TIFIA Web site: *http://www.fhwa.dot.gov/ipd/tifia/guidance_applications/index.htm.* Applicants that have previously submitted Letters of Interest must resubmit an updated letter as outlined below.

The application due date will be established after consultation between the TIFIA JPO and the applicant.

ADDRESSES: Submit all Letters of Interest to the attention of Mr. Duane Callender at: *TIFIACredit@dot.gov.* Submitters should receive a confirmation e-mail, but are advised to request a return receipt to confirm transmission. Only Letters of Interest received via e-mail, as provided above, shall be deemed properly filed.

FOR FURTHER INFORMATION CONTACT: For further information regarding this notice please contact Duane Callender via e-mail at *TIFIACredit@dot.gov* or via telephone at 202–366–9644. A TDD is available at 202–366–7687. Substantial information, including the TIFIA Program Guide and application materials, can be obtained from the TIFIA Web site: *http://www.fhwa.dot.gov/ipd/tifia/.*

SUPPLEMENTARY INFORMATION:

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I. Background

The Transportation Equity Act for the 21st Century (TEA–21), Public Law 105–178, 112 Stat. 107, 241, (as amended by sections 1601–02 of Pub. L. 109–59) established the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA), authorizing the DOT to provide credit assistance in the form of secured (direct) loans, lines of credit, and loan guarantees to public and private applicants for eligible surface transportation projects. The TIFIA regulations (49 CFR part 80) provide specific guidance on the program requirements.[1] On January 5, 2001, at 65 FR 2827, the Secretary of Transportation (Secretary) delegated to the FHWA the authority to act as the Executive Agent for the TIFIA program (49 CFR 1.48(b)(6)). The TIFIA JPO, an organizational unit in the FHWA Office of Innovative Program Delivery, has responsibility for coordinating program implementation.

II. Eligible Projects

Highway, passenger rail, transit, bridge, intermodal projects, and intelligent transportation systems may receive credit assistance under TIFIA. Additionally, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144) enacted in 2005 expanded eligibility to private rail facilities providing public benefit to

[1] The TIFIA regulations have not been updated to reflect changes enacted in Public Law 109–59, SAFETEA–LU. Where the statute and the regulation conflict, the statute takes precedence. See the TIFIA Program Guide for updated program information.

highway users and surface transportation infrastructure modifications necessary to facilitate direct intermodal transfer and access into and out of a port terminal. See the revised definition of "project" in 23 U.S.C. 601(a)(8) and Chapter 3 of the TIFIA Program Guide for a description of eligible projects *(http://www.fhwa.dot.gov/ipd/tifia/guidance_applications/index.htm).*

III. Types of Credit Assistance

The DOT may provide credit assistance in the form of secured (direct) loans, lines of credit, and loan guarantees. These types of credit assistance are defined in 23 U.S.C. 601 and 49 CFR 80.3. Subject to certain conditions, the TIFIA credit facility can hold a subordinate lien on pledged revenues. The maximum amount of TIFIA credit assistance to a project is 33 percent of eligible project costs.

IV. Threshold Requirements

Projects seeking TIFIA assistance must meet certain statutory threshold requirements. Generally, the minimum size for TIFIA projects is $50 million of eligible project costs; however, the minimum size for TIFIA projects principally involving the installation of an intelligent transportation system is $15 million. Each project seeking TIFIA assistance must apply to the DOT, and must satisfy the applicable State and local transportation planning requirements. Each application must identify a dedicated revenue source to repay the TIFIA loan, and each private applicant must receive public approval for its project as demonstrated by satisfaction of the applicable planning and programming requirements. These eligibility requirements are detailed in 23 U.S.C. 602(a) and Chapter 3 of the TIFIA Program Guide *(http://www.fhwa.dot.gov/ipd/tifia/guidance_applications/index.htm).*

V. Rating Opinions

The senior debt obligations for each project receiving TIFIA credit assistance must obtain an investment grade rating from at least one nationally recognized credit rating agency, as defined in 23 U.S.C. 601(a)(10) and 49 CFR 80.3. If the TIFIA credit instrument is proposed as the senior debt, then it must receive the investment grade rating.

To demonstrate this potential, each application must include a preliminary rating opinion letter from a credit rating agency that addresses the creditworthiness of the senior debt obligations funding the project (*i.e.,* debt obligations which have a lien senior to that of the TIFIA credit instrument on the pledged security) and the default risk of the TIFIA credit instrument. The preliminary rating opinion letter must be based on the financing structure proposed by the applicant and must also conclude that there is a reasonable probability for the senior debt obligations to receive an investment grade rating. A project that does not demonstrate the potential for its senior obligations to receive an investment grade rating will not be considered for TIFIA credit assistance.

Letters of Interest submitted pursuant to this notice do not need to include the preliminary rating opinion letter. Only those invited to submit applications will be required to obtain the preliminary rating opinion letter.

Each project selected for TIFIA credit assistance must obtain an investment grade rating on its senior debt obligations (which may be the TIFIA credit facility) and a revised opinion on the default risk of the TIFIA credit instrument before the FHWA will execute a credit agreement and disburse funds. More detailed information about these TIFIA credit opinions and ratings may be found in the Program Guide on the TIFIA Web site at *http://www.fhwa.dot.gov/ipd/tifia/guidance_applications/index.htm.*

VI. Letters of Interest and Applications

Because the demand for credit assistance can exceed budgetary resources, the DOT is utilizing periodic fixed-date solicitations that will establish a competitive group of projects to be evaluated against the TIFIA program objectives.

Applicants seeking TIFIA credit assistance must submit a Letter of Interest describing the project fundamentals and addressing the TIFIA selection criteria. For consideration in this funding cycle, Letters of Interest must be submitted by 4:30 p.m. EST via e-mail at: *TIFIACredit@dot.gov* on February 18, 2011, using the revised form on the TIFIA Web site: *http://www.fhwa.dot.gov/ipd/tifia/guidance_applications/index.htm.* Applicants that have previously submitted Letters of Interest must resubmit an updated letter using the revised form. For the purpose of completing its evaluation, the TIFIA JPO staff may contact an applicant regarding specific information in the Letter of Interest.

A public agency that seeks access to TIFIA on behalf of multiple competitors for a project concession must submit the project's Letter of Interest. Although the public agency would not become the TIFIA borrower, nor even have yet identified the TIFIA applicant, it must provide information sufficient for the DOT to evaluate the project against the TIFIA program objectives. The DOT will not consider Letters of Interest from entities that have not obtained rights to develop the project.

After concluding its review of the Letters of Interest, the DOT will invite complete applications (including the preliminary rating opinion letter and detailed plan of finance) for the highest-rated projects according to the selection criteria detailed in Section VIII below. The application due date will be established after consultation between the TIFIA JPO and the applicant.

An invitation to apply for credit assistance does not guarantee the DOT's approval, which will remain subject to evaluation based on TIFIA's statutory credit requirements and established standards in addition to the successful negotiation of all terms and conditions.

VII. Fees

There is no fee to submit a Letter of Interest. Unless otherwise indicated in a subsequent notice published in the **Federal Register**, each invited applicant must submit, concurrent with its application, a non-refundable fee of $50,000, an amount based on historical costs incurred by the TIFIA JPO for financial advisory services to help evaluate TIFIA applications. The FHWA no longer accepts paper checks. Payments should be made via Automated Clearing House, at *https://www.pay.gov/paygov/forms/formInstance.html?agencyFormId=18446839*. For successful applicants, this fee will be credited toward final payment of a credit processing fee (also referred to as a transaction fee), to be assessed at financial close, to reimburse the TIFIA JPO for actual financial and legal costs.

For projects that enter credit negotiations, the DOT will require the borrower to pay at closing or within a specified period following closing, upon invoicing by the TIFIA JPO, an amount equal to the actual costs incurred by the TIFIA JPO in procuring the assistance of outside financial advisors and legal counsel through execution of the credit agreement(s) and satisfaction of all funding requirements of those agreements. In the event a final credit agreement is not executed, the borrower is still required to reimburse the DOT for the costs incurred. Typically, the amount of this credit processing fee has ranged from $200,000 to $300,000, although it has been greater for projects that require complex financial structures and extended negotiations.

The TIFIA JPO charges each borrower an annual fee for loan servicing

activities associated with each TIFIA credit instrument. The current fee, adjusted annually per the Consumer Price Index, is $11,500 per year.

Finally, the TIFIA credit agreements will allow the TIFIA JPO to charge, as incurred, a monitoring fee equal to its costs of outside advisory services required to assist the TIFIA JPO in modifying or enforcing the agreement.

Applicants may not include any of the fees described above—or any expenses associated with the application process (such as charges associated with obtaining the required preliminary rating opinion letter)—among eligible project costs for the purpose of calculating the maximum 33 percent credit amount.

VIII. Selection Criteria

The eight TIFIA selection criteria are described in statute at 23 U.S.C. 602(b) and assigned relative weights via regulation at 49 CFR 80.15. The criteria are restated below with (where appropriate) language indicating how the DOT will interpret them. The DOT will give priority to projects that have a significant impact on desirable long-term outcomes for the Nation, a metropolitan area, or a region.

Listed in order of relative weight, the TIFIA selection criteria are as follows:

(i) The extent to which the project is nationally or regionally significant, in terms of generating economic benefits, supporting international commerce, or otherwise enhancing the national transportation system. This includes consideration of livability: Providing transportation options that are linked with housing and commercial development to improve the economic opportunities and quality of life for people in communities across the U.S.; economic competitiveness: Contributing to the economic competitiveness of the U.S. by improving the long-term efficiency and reliability in the movement of people and goods; and safety: Improving the safety of U.S. transportation facilities and systems and the communities and populations they impact. Relative weight: 20 percent.

(ii) The extent to which TIFIA assistance would foster innovative public-private partnerships and attract private debt or equity investment. Relative weight: 20 percent.

(iii) The extent to which the project helps maintain or protect the environment. This includes sustainability: Improving energy efficiency, reducing dependence on oil, reducing greenhouse gas emissions, and reducing other transportation-related impacts on ecosystems; and the state of good repair: Improving the condition of existing transportation facilities and systems, with particular emphasis on projects that minimize lifecycle costs and use environmentally sustainable practices and materials. Relative weight: 20 Percent.

(iv) The creditworthiness of the project, including a determination by the Secretary of Transportation that any financing for the project has appropriate security features to ensure repayment. Relative weight: 12.5 Percent.

(v) The likelihood that TIFIA assistance would enable the project to proceed at an earlier date than the project would otherwise be able to proceed. Relative weight: 12.5 Percent.

(vi) The extent to which the project uses new technologies, including intelligent transportation systems, to enhance the efficiency of the project. Relative weight: 5 Percent.

(vii) The amount of budget authority required to fund the Federal credit instrument made available under TIFIA. Relative weight: 5 Percent.

(viii) The extent to which TIFIA assistance would reduce the contribution of Federal grant assistance to the project. Relative weight: 5 Percent.

Note that, when evaluating the Letters of Interest, the information needed to address criterion (iv), creditworthiness, and criterion (vii), budget authority, is unlikely to be available in sufficient detail. Therefore, the DOT will not employ these two criteria when reviewing the Letters of Interest. However, DOT will consider these criteria when reviewing project applications.

IX. Program Funding

The SAFETEA–LU authorized $122 million annually from the Highway Trust Fund for fiscal years 2005–2009 in TIFIA budget authority to pay the subsidy cost of credit assistance. As of the publication date of this notice, extensions of the surface transportation reauthorization act have been enacted continuing highway programs that were authorized through fiscal year 2009, and the expectation is that Congress will reauthorize an equivalent amount of budget authority for the TIFIA program in the future Any budget authority not obligated in the fiscal year for which it is authorized remains available for obligation in subsequent years. The TIFIA budget authority is subject to an annual obligation limitation that may be established in appropriations law. Like all funds subject to the annual Federal-aid obligation ceiling, the amount of TIFIA budget authority available in a given year may be less than the amount authorized for that fiscal year.

Consistent with the Federal Credit Reform Act of 1990 and the requirements of the Office of Management and Budget, the subsidy cost of a loan is affected by recovery assumptions, allowance for defaults, the borrower's interest rate, and fees. The factors that most heavily influence the subsidy cost of a TIFIA loan fall into the recoveries category (for example, the repayment pledge and whether the debt is senior or subordinate) and the allowance for defaults category (including the credit rating on the debt and the degree of back-loading). The borrower's interest rate will also affect the subsidy cost of the TIFIA loan. The final subsidy cost estimate is expressed as a percentage of the principal amount of the credit assistance.

Authority: 23 U.S.C. 601–609; 49 CFR 1.48(b)(6); 23 CFR Part 180; 49 CFR Part 80; 49 CFR Part 261; 49 CFR Part 640.

Issued on: January 12, 2011.

Victor M. Mendez,

Federal Highway Administrator.

[FR Doc. 2011–933 Filed 1–18–11; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Value Pricing Pilot Program Participation, Fiscal Years 2010 and 2011

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of extension of deadline.

SUMMARY: The FHWA is extending the deadline for formal grant applications for the Value Pricing Pilot (VPP) program, which was published on October 19, 2010, at 75 FR 64397. The original deadline for formal grant applications was January 18, 2011. This notice extends the deadline by 15 calendar days to February 2, 2011.

DATES: Formal grant applications must be submitted no later than 5 p.m., Eastern, on February 2, 2011.

Application Submission: Grant applications may be submitted through *http://www.grants.gov.* Applications for tolling authority only should be submitted through an expression of interest at the following Web site: *http://ops.fhwa.dot.gov/tolling_pricing/participation.htm.*

FOR FURTHER INFORMATION CONTACT: For questions about this notice or for general questions related to the VPP program, please contact Ms. Angela Jacobs, FHWA Office of Operations, at (202) 366–0076, *angela.jacobs@dot.gov.*

For technical questions related to the development of pricing projects involving tolls, please also contact Ms. Angela Jacobs, or contact Mr. Patrick DeCorla-Souza, FHWA Office of Innovative Program Delivery, at (202) 366–4076, *patrick.decorla-souza@dot.gov.* For technical questions related to the development of pricing projects not involving tolls, please contact Mr. Allen Greenberg, FHWA Office of Operations, at (202) 366–2425, *allen.greenberg@dot.gov.* For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, at (202) 366–4928, michael.harkins@dot.gov.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register's** home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

Background

On October 19, 2010, at 75 FR 64397, the FHWA published in the **Federal Register** a notice inviting States, along with their local government partners and other public authorities, to apply to participate in the Value Pricing Pilot program and presenting guidelines for program applications for fiscal years 2010 and 2011. The original deadline for formal grant applications was January 18, 2011. This notice extends the deadline by 15 calendar days to February 2, 2011. Program application requirements and further application guidance can be found in the October 19, 2010, notice.

Authority: 23 U.S.C. 315; sec. 1216(a), Pub. L. 105–178, 112 Stat. 107; Pub. L. 109–59; 117 Stat. 1144.

Issued on: January 13, 2011.

Victor M. Mendez,

Administrator.

[FR Doc. 2011–1066 Filed 1–18–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 12, 2011.

The Department of Treasury is planning to submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11020, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before March 21, 2011 to be assured of consideration.

HR Connect

OMB Number: 1505–0224.

Type of Review: Renewal.

Title: New Issue Bond Program and Temporary Credit and Liquidity Program.

Description: Authorized under section 304(g) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1719(g)) and Section 306(l) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1455(l), as amended by the Housing and Economic Recovery Act (HERA) of 2008 (Pub. L. 110–289; approved July 30, 2008) the Department of the Treasury (Treasury) is implementing two programs under the HFA (Housing Finance Agency) Initiative. The statute provides the Secretary authority to purchase securities and obligations of Fannie Mae and Freddie Mac (the GSEs) as he determines necessary to stabilize the financial markets, prevent disruptions in the availability of mortgage finance, and to protect the taxpayer. On December 4, 2009, the Secretary made the appropriate determination to authorize the two programs of the HFA Initiative: the New Issue Bond Program (NIBP) and the Temporary Credit and Liquidity Program (TCLP). Under the NIBP, Treasury has purchased securities from the GSEs backed by mortgage revenue bonds issued by participating state and local HFAs. Under the TCLP, Treasury has purchased a participation interest from the GSEs in temporary credit and liquidity facilities provided to participating HFAs as a liquidity backstop on their variable-rate debt. In order to properly manage the two programs of the initiative, continue to protect the taxpayer, and assure compliance with the Programs' provisions, Treasury is instituting a series of data collection requirements to be completed by participating HFAs and furnished to Treasury through the GSEs.

Respondents: Businesses or other for-profit institutions, and not-for-profit institutions.

Estimated Total Reporting Burden: 26,170 hours.

Agency Contact: Theo Polan, (202) 622–8085, Room 2054MT, 1500 Pennsylvania Avenue, Washington, DC 20220.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. 2011–992 Filed 1–18–11; 8:45 am]

BILLING CODE 4810–25–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth a number of issues for comment, some of which are set forth together with the proposed amendments; some of which are set forth independent of any proposed amendment; and one of which (regarding retroactive application of proposed amendments) is set forth in the **SUPPLEMENTARY INFORMATION** portion of this notice.

The proposed amendments and issues for comment in this notice are as follows: (1) A proposed amendment on drug trafficking, including (A) a proposal to repromulgate as a permanent amendment the emergency, temporary amendment in response to the Fair Sentencing Act of 2010, Public Law 111–220, regarding offenses involving crack cocaine and regarding certain aggravating and mitigating circumstances in drug trafficking cases, and (B) a proposed change to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to implement the directive in section 4 of the Secure and Responsible Drug Disposal Act of 2010, Public Law 111–273, and related issues for comment on drug trafficking; (2) a proposed amendment on firearms, including

proposed changes to § 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) regarding certain cases involving small arms and ammunition crossing the border and related issues for comment, including whether revisions to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and related guidelines may be appropriate to address concerns about firearms crossing the border and straw purchasers; (3) a proposed amendment to Appendix A (Statutory Index) in response to the Dodd-Frank Wall Street Reform and Protection Act, Public Law 111–203, and issues for comment regarding the directives in section 1079A of that Act; (4) a proposed amendment to § 2B1.1 (Theft, Property Destruction, and Fraud) to implement the directive in section 10606 of the Patient Protection and Affordable Care Act, Public Law 111–148, and a related issue for comment; (5) a proposed amendment on supervised release, including a proposed change to § 5D1.1 (Imposition of a Term of Supervised Release) on cases in which the court is required by the guidelines to impose supervised release and a proposed change to § 5D1.2 (Term of Supervised Release) on the minimum lengths required by that guideline for a term of supervised release, and related issues for comment; (6) a proposed amendment to § 2L1.2 (Unlawfully Entering or Remaining in the United States) that would provide a limitation on the use of convictions under § 2L1.2(b)(1)(A) and (B) in certain circumstances; (7) a proposed amendment to § 2J1.1 (Contempt) that would address a circuit conflict on the applicability of a specific enhancement in a case involving the willful failure to pay court-ordered child support; (8) a proposed amendment in response to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues, including proposed changes to the policy statement at § 6B1.2 (Standards for Acceptance of Plea Agreements) in light of *United States* v. *Booker,* 543 U.S. 220 (2005), and proposed changes to Appendix A (Statutory Index) to address certain criminal provisions in the Coast Guard Authorization Act of 2010, Public Law 111–281; and (9) a proposed amendment in response to certain technical issues that have arisen in the guidelines.

DATES: (1) Written Public Comment.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 21, 2011.

(2) Public Hearing.—The Commission plans to hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding the public hearing, including requirements for testifying and providing written testimony, as well as the location, time, and scope of the hearing, will be provided by the Commission on its Web site at *http://www.ussc.gov.*

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for Federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (c) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in § 1B1.10(c) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The background commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(c). To the extent practicable, public comment should address each of these factors.

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's Web site at *http://www.ussc.gov.*

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure, Rule 4.4.

Patti B. Saris,

Chair.

1. Drugs

Synopsis of Proposed Amendment: In October 2010, the Commission promulgated an emergency, temporary amendment to implement the emergency directive in section 8 of the Fair Sentencing Act of 2010, Public Law 111–220 (the "Fair Sentencing Act"). *See* Appendix C, Amendment 748 (effective November 1, 2010). The emergency amendment made a number of substantive changes to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), including changes to the Drug Quantity Table for offenses involving cocaine base ("crack" cocaine), new enhancements to account for certain aggravating factors, and new reductions to account for certain mitigating factors. The emergency amendment also made revisions to five other guidelines: §§ 2D1.14 (Narco-Terrorism), 2D2.1 (Unlawful Possession; Attempt or Conspiracy), 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to

Certain Crimes), 3B1.4 (Using a Minor To Commit a Crime), and 3C1.1 (Obstructing or Impeding the Administration of Justice). The proposed amendment re-promulgates these guidelines without change.

In addition to re-promulgating the emergency amendment, the proposed amendment further amends the Commentary to § 2D1.1 in response to the Secure and Responsible Drug Disposal Act of 2010, Public Law 111–273 (the "Drug Disposal Act"). Section 3 of the Drug Disposal Act amended 21 U.S.C. 822 to authorize certain persons in possession of controlled substances (*e.g.,* ultimate users and long-term care facilities) to deliver the controlled substances for the purpose of disposal. Section 4 of the Drug Disposal Act contained a directive to the Commission to "review and, if appropriate, amend" the guidelines to ensure that the guidelines provide "an appropriate penalty increase of up to 2 offense levels above the sentence otherwise applicable in Part D of the Guidelines Manual if a person is convicted of a drug offense resulting from the authorization of that person to receive scheduled substances from an ultimate user or long-term care facility as set forth in the amendments made by section 3." The proposed amendment responds to the directive by amending Application Note 8 to § 2D1.1 to provide that an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility.

The proposed amendment concludes with a series of issues for comment arising out of the Commission's continued work on the guidelines applicable to drug trafficking, including issues for comment on—

(1) Whether the Commission should make any changes to the Fair Sentencing Act emergency amendment in re-promulgating it as a permanent amendment;

(2) Whether the permanent amendment or any part thereof should be included in subsection (c) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants;

(3) What changes, if any, should be made to the guidelines applicable to drug trafficking; and

(4) What changes, if any, should be made to § 3B1.1 (Aggravating Role) and § 3B1.2 (Mitigating Role) as they apply to drug trafficking cases.

Proposed Amendment

Sections 2D1.1, 2D1.14, 2D2.1, 2K2.4, 3B1.4, and 3C1.1, as amended by Amendment 748 (*see* Supplement to the 2010 Guidelines Manual (effective November 1, 2010); *see also* 75 FR 66188 (October 27, 2010)), are repromulgated without change.

In addition, the Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 8 in the first paragraph by adding at the end the following:

"An adjustment under § 3B1.3 also applies in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. *See* 21 U.S.C. 822(g).".

Issues for Comment

1. *Re-Promulgation of the Fair Sentencing Act.* The Fair Sentencing Act of 2010 reduced statutory penalties for cocaine base ("crack" cocaine) offenses, eliminated the mandatory minimum sentence for simple possession of crack cocaine, and directed the Commission to review and amend the sentencing guidelines to account for specified aggravating and mitigating circumstances in certain drug cases.

Section 8 of the Act required the Commission to promulgate, under emergency authority, the amendments provided for in the Act and such conforming amendments as the Commission determined necessary to achieve consistency with other guideline provisions and applicable law. The Commission was required to promulgate the amendment as soon as practicable, and in any event not later than 90 days after enactment of the Act. The Commission promulgated the temporary, emergency amendment required by the Act and established an effective date of November 1, 2010, for the amendment. *See* Appendix C, Amendment 748 (effective November 1, 2010). The temporary, emergency amendment will expire not later than November 1, 2011. *See* section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note); 28 U.S.C. 994(p).

The Commission is continuing work on the issues raised by the Act during the regular amendment cycle ending May 1, 2011, with a view to re-promulgating the temporary amendment as a permanent amendment (in its original form, or with revisions) under 28 U.S.C. 994(p). The Commission seeks comment on whether the Commission should make any changes to the emergency amendment in re-promulgating it as a permanent amendment. If so, what changes should the Commission make?

In particular, the Commission seeks comment on whether the penalty structure in the Drug Quantity Table for crack cocaine should continue to be set so that the statutory mandatory minimum penalties correspond to base offense levels 26 and 32. When the Commission re-promulgates the temporary amendment as a permanent amendment, should the Commission amend the Drug Quantity Table for crack cocaine so that base offense levels 24 and 30, rather than 26 and 32, correspond to the Act's new mandatory minimum penalties?

2. *Possible Retroactivity of Permanent Amendment or Any Part Thereof.* The proposed permanent amendment would reduce the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses. *See* 28 U.S.C. 994(u) ("If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."). The Commission seeks comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), the proposed permanent amendment or any part thereof should be included in subsection (c) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants.

In particular, the proposed permanent amendment would change the Drug Quantity Table in § 2D1.1 and also make additional mitigating changes (*e.g.,* a "minimal role cap" in § 2D1.1(a)(5), a downward adjustment for certain defendants with "minimal" role in § 2D1.1(b)(15), and a deletion of the cross reference in § 2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under § 2D1.1) as well as certain proposed enhancements (*e.g.,* enhancements for violence in § 2D1.1(b)(2), for bribery in § 2D1.1(b)(11), for maintaining a drug premises in § 2D1.1(b)(12), and for certain defendants with an aggravating role in § 2D1.1(b)(14)). Should the Commission provide that only parts of the proposed permanent amendment may be applied retroactively? For example, should the Commission provide that only the changes to the Drug Quantity Table may be applied retroactively, or that those changes and

the other mitigating changes may be applied retroactively? Alternatively, should the Commission provide that the entire proposed permanent amendment may be applied retroactively, including the proposed enhancements (provided that the amended guideline range resulting from the proposed permanent amendment is not greater than the original term of imprisonment imposed)?

If the Commission does provide that the proposed permanent amendment or any part thereof may be applied retroactively to previously sentenced defendants, should the Commission provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced? For example, should the Commission limit retroactivity only to a particular category or categories of defendants, such as (A) Defendants who were sentenced within the guideline range, (B) defendants who were sentenced within the guideline range or who received a departure under Chapter Five, Part K, (C) defendants in a particular criminal history category or categories (*e.g.,* defendants in Criminal History Category I), (D) defendants sentenced before *United States* v. *Booker,* 543 U.S. 220 (2005), (E) defendants sentenced before *Kimbrough* v. *United States,* 552 U.S. 85, 110 (2007) ("it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case"), or (F) defendants sentenced before *Spears* v. *United States,* 555 U.S. 261, 129 S.Ct. 840, 844 (2009) ("we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines")?

If the Commission were to provide that the proposed amendment or any part thereof may be applied retroactively to previously sentenced defendants, what conforming changes, if any, should the Commission make to § 1B1.10?

3. *Whether Additional Revisions to the Drug Trafficking Guidelines May Be Appropriate.* The Commission requests comment on whether any additional revisions should be made to the guidelines applicable to drug trafficking cases. The complexity and scope of such an undertaking is such that it may not be completed this year (*i.e.,* during the amendment cycle ending May 1, 2011), but the Commission is requesting comment regarding what revisions, if any, to § 2D1.1 and related guidelines may be appropriate this year.

Drug Quantity Table. The penalty structure of the Drug Quantity Table is based on the penalty structure of Federal drug laws, which generally establish three tiers of penalties for manufacturing and trafficking in controlled substances, each based on the amount of controlled substances involved. *See* 21 U.S.C. 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3). For smaller quantities, the statutory maximum term of imprisonment is 20 years, and there is no statutory minimum term of imprisonment. If the amount of the controlled substance reaches a statutorily specified quantity, however, the statutory maximum term increases to 40 years, and a statutory minimum term of 5 years applies. If the amount of the controlled substance reaches ten times that specified quantity, the statutory maximum term is life, and a statutory minimum term of 10 years applies.

The Commission has generally incorporated these statutory mandatory minimum sentences into the Drug Quantity Table and extrapolated upward and downward to set guideline sentencing ranges for all drug quantities. *See* § 2D1.1, comment. (backg'd.) ("The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking."). The drug quantity thresholds in the Drug Quantity Table have generally been set so as to provide base offense levels corresponding to guideline ranges that are slightly above the statutory mandatory minimum penalties. Thus, the quantity that triggers a statutory 5-year mandatory minimum term of imprisonment is the quantity that triggers a base offense level of 26, and the quantity that triggers a statutory 10-year mandatory minimum term of imprisonment is the quantity that triggers a base offense level of 32. *See* § 2D1.1, comment. (backg'd.) ("The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; *e.g.,* level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months."). The Commission has stated that "[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities." *See* United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995) at 148.

The "Safety Valve". In 1994 Congress enacted the "safety valve," which applies to certain first-time, non-violent drug defendants and allows the court, without any government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant "has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan". *See* 18 U.S.C. 3553(f). This statutory provision is incorporated into the guidelines at USSG § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). In addition, § 2D1.1(b)(16) provides a 2-level reduction if the defendant meets the "safety valve" criteria, regardless of whether a mandatory minimum penalty applies in the case.

The Commission seeks comment on what changes, if any, should be made to the guidelines applicable to drug trafficking cases. In particular, the Commission seeks comment on whether the Commission should consider changing how the base offense levels in the Drug Quantity Table incorporate the statutory mandatory minimum penalties and, if so, how? For example, should the Commission amend the Drug Quantity Table so that base offense levels 24 and 30, rather than 26 and 32, correspond with the statutory mandatory minimum penalties? As mentioned above, such an undertaking may not be completed this year (*i.e.,* during the amendment cycle ending May 1, 2011).

The Commission is also requesting comment regarding what revisions, if any, to § 2D1.1 and related guidelines may be appropriate this year. For example, should the Commission consider—

A. A 2-level downward adjustment in drug trafficking cases if there are no aggravating circumstances involved in the case, *e.g.,* none of the alternative base offense levels for death or serious bodily injury in § 2D1.1(a)(1)–(4) apply, none of the enhancements in § 2D1.1(b) apply, and none of the upward adjustments in Chapter Three apply?

B. expanding the 2-level downward adjustment in subsection (b)(16)—which applies to defendants who meet the "safety valve" criteria—so that it applies to defendants who have more than 1 criminal history point but otherwise meet all other "safety valve" criteria, or providing a similar downward adjustment to drug trafficking defendants who truthfully provide to

the Government all information and evidence the defendant has concerning the offense?

If the Commission were to make changes to the guidelines applicable to drug trafficking cases, what conforming changes, if any, should the Commission make to other provisions of the *Guidelines Manual*?

4. *Role Adjustments.* The Fair Sentencing Act of 2010 contained several directives to the Commission to amend the guidelines to provide increased emphasis on the defendant's role in the offense. *See* Fair Sentencing Act of 2010 §§ 6 ("Increased Emphasis on Defendant's Role and Certain Aggravating Factors"), 7 ("Increased Emphasis on Defendant's Role and Certain Mitigating Factors"). The proposed permanent amendment implements these directives by adding several provisions to § 2D1.1, including a new sentence in subsection (a)(5) (a maximum base offense level for certain defendants with a minimal role) and new specific offense characteristics at subsections (b)(14) (an enhancement for certain defendants with an aggravating role) and (15) (a downward adjustment for certain defendants with a minimal role).

In light of these directives and the Commission's continued work on the guidelines applicable to drug trafficking, the Commission requests comment on what changes, if any, should be made to § 3B1.1 (Aggravating Role) and § 3B1.2 (Mitigating Role) as they apply to drug trafficking cases.

Mitigating Role

The text of § 3B1.2 has remained unchanged from the original *Guidelines Manual* in 1987; the guideline continues to provide a downward adjustment based on the defendant's role in the offense: 4 levels if the defendant was a "minimal" participant in any criminal activity, 2 levels if the defendant was a "minor" participant in such activity, and 3 levels in cases falling in between.

The Commentary to § 3B1.2 clarifies when and to whom the guideline applies. While the Commission has amended and reorganized the Commentary several times since 1987 with regard to certain types of cases, many elements of the commentary remain the same, including the following:

To be eligible for an adjustment, the defendant must "play[] a part in committing the offense that makes him substantially less culpable than the average participant." *See* § 3B1.2, Application Note 3(A).

The 4-level "minimal" role adjustment applies if the defendant is "plainly among the least culpable of those involved in the conduct of a group." *See* § 3B1.2, Application Note 4.

The 2-level "minor" role adjustment applies if the defendant "is less culpable than most other participants" but his or her conduct "could not be described as minimal." *See* § 3B1.2, Application Note 5.

The determination whether to apply a 4-, 3-, or 2-level adjustment is "heavily dependent upon the facts of the particular case." *See* § 3B1.2, Application Note 3(C).

In 2001, the Commission amended the Commentary to clarify that a defendant who is held accountable under § 1B1.3 (Relevant Conduct) only for the amount of drugs the defendant personally handled is not automatically precluded from receiving an adjustment under § 3B1.2. *See* USSG App. C, Amendment 635 (effective November 1, 2001). The Commission also made a number of other revisions to the commentary to clarify guideline application. *Id.* In making these changes, the Commission deleted a portion of the Commentary that had stated that a "downward adjustment for a minimal participant * * * would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." *Id.*

The Commission has received public comment stating that there are differences from district to district with regard to the application of § 3B1.2 in drug trafficking cases. In addition, the Commission has observed that, in drug trafficking cases, there are differences from district to district both on the rates of application of § 3B1.2 and the relative rates of application of the 4-, 3-, and 2-level adjustments.

Aggravating Role

As with the mitigating role guideline, the text of the aggravating role guideline, § 3B1.1, has remained unchanged from the original *Guidelines Manual* in 1987. The guideline continues to provide an upward adjustment based on the defendant's role in the offense: 4 levels if the defendant was an "organizer or leader" in a criminal activity that involved five or more participants or was otherwise extensive, 3 levels if the defendant was a "manager or supervisor (but not an organizer or leader)" of such a criminal activity, and 2 levels if the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described above.

The Commentary to § 3B1.1 defines the term "participant", *see* § 3B1.1, Application Note 1; provides guidance on assessing whether the criminal history is "otherwise extensive", *see* § 3B1.1, Application Note 3; and provides guidance on distinguishing a leadership role from one of mere supervision, *see* § 3B1.1, Application Note 4.

Among other things, the Commission is seeking to determine whether there are application issues regarding § 3B1.1 warranting a Commission response.

Request for Comment

What changes, if any, should the Commission make to §§ 3B1.1 and 3B1.2 as they apply to drug trafficking cases? For example, should the Commission provide more specific guidance on when a defendant in a drug trafficking case should receive an upward adjustment for aggravating role or a downward adjustment for mitigating role and on which level of adjustment should apply? If so, what should that specific guidance be?

2. Firearms

Synopsis of Proposed Amendment: This proposed amendment amends the guideline for international weapons trafficking, § 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). As described more fully below, the proposed amendment provides higher penalties for certain cases involving small arms crossing the border and more guidance on cases involving ammunition crossing the border.

In addition to proposing these revisions to cross-border offenses under § 2M5.2, the Commission is conducting a more comprehensive review of firearms offenses to determine whether changes to the primary firearms guideline, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), may also be appropriate to address concerns about firearms crossing the border. The complexity and scope of the review is such that it likely could not be completed this year (*i.e.,* during the amendment cycle ending May 1, 2011), but the Commission is considering what revisions, if any, to § 2K2.1 and related guidelines may be appropriate this year. This proposed amendment concludes with issues for comment on what revisions, if any, to § 2K2.1 and related guidelines may be appropriate this year.

Cases Involving Cross-Border Trafficking in Small Arms or Ammunition

First, the proposed amendment amends § 2M5.2 to narrow the scope of the alternative base offense level of 14. This raises penalties for certain cases involving cross-border trafficking of small arms, because certain defendants who currently receive the alternative base offense level of 14 would instead receive the higher alternative base offense level of 26. The base offense level of 14 currently applies "if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns) and the number of weapons did not exceed ten." *See* § 2M5.2(a)(1), (2). The proposed amendment would reduce the threshold number of small arms in subsection (a)(2) from ten to [two]–[five] and require that all such small arms be possessed solely for personal use.

The proposed amendment also amends § 2M5.2 to address cases in which the defendant possesses ammunition, either in an ammunition-only case or in a case involving ammunition and small arms. There appear to be disparities in how § 2M5.2 is being applied in these cases. Under the proposed amendment, a defendant with ammunition would receive the alternative base offense level of 14 if the ammunition consisted of not more than [200]–[500] rounds of ammunition for small arms and was possessed solely for personal use.

In addition, the proposed amendment provides factors for the court to consider in determining whether the small arms were possessed solely for personal use; these factors are similar to the factors used in § 2K2.1 in determining whether the downward adjustment at § 2K2.1(b)(2) for "lawful sporting purposes or collection" applies. *See* § 2K2.1, comment. (n.6).

References in Appendix A (Statutory Index)

Finally, the proposed amendment amends Appendix A (Statutory Index) to address certain offenses.

First, it amends Appendix A (Statutory Index) to expand the number of guidelines to which offenses under 50 U.S.C. 1705 are referenced. Section 1705 makes it unlawful to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*). Any person who willfully commits, willfully attempts or conspires to commit, or aids or abets in the commission of such an unlawful act may be imprisoned for not more than 20 years. *See* 50 U.S.C. 1705(c). Appendix A (Statutory Index) currently contains two separate entries: The criminal offense, 50 U.S.C. 1705, is referenced to § 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose), while another statute that contains no criminal offense, 50 U.S.C. 1701, is referenced to § 2M5.3 as well as to §§ 2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). The proposed amendment revises the entry for 50 U.S.C. 1705 to include all three guidelines, §§ 2M5.1, 2M5.2, and 2M5.3, and deletes as unnecessary the entry for 50 U.S.C. 1701. Conforming changes are made to the Statutory Provisions part of the commentary to each of §§ 2M5.1, 2M5.2, and 2M5.3.

Second, the proposed amendment addresses a new offense created by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Public Law 111–195. Section 103 of that Act (22 U.S.C. 8512) makes it unlawful to import into the United States certain goods or services of Iranian origin, or export to Iran certain goods, services, or technology, and provides that the penalties under 50 U.S.C. 1705 apply to a violation. The proposed amendment amends Appendix A (Statutory Index) to reference the new offense at 22 U.S.C. 8512 to §§ 2M5.1, 2M5.2, and 2M5.3.

Proposed Amendment

The Commentary to § 2M5.1 captioned "Statutory Provisions" is amended by inserting "50 U.S.C. 1705;" after "2332d;".

Section 2M5.2(a)(2) is amended by inserting "(A)" before "non-fully"; and by striking "ten" and inserting "[two]–[five], (B) ammunition for such small arms, and the number of rounds did not exceed [200]–[500], or (C) both, and all such small arms and ammunition were possessed solely for personal use".

The Commentary to § 2M5.2 captioned "Statutory Provisions" is amended by inserting "; 50 U.S.C. 1705" after "2780".

The Commentary to § 2M5.2 captioned "Application Notes" is amended by redesignating Note 2 as Note 3; and by inserting after Note 1 the following:

"2. For purposes of subsection (a)(2), whether small arms and ammunition were 'possessed solely for personal use' is determined by the surrounding circumstances. Relevant surrounding circumstances include the amount and type of small arms and ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (*e.g.,* prior convictions for offenses involving firearms), the intended destination, and the extent to which possession was restricted by local law.".

The Commentary to § 2M5.3 captioned "Statutory Provisions" is amended by striking "§ 1701,".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 22 U.S.C. 4221 the following:

"22 U.S.C. 8512 2M5.1, 2M5.2, 2M5.3";

by striking the line referenced to 50 U.S.C. 1701;

and in the line referenced to 50 U.S.C. 1705 by inserting "2M5.1, 2M5.2," before "2M5.3".

Issue for Comment

1. The Commission is conducting a review of firearms offenses to determine whether changes to the primary firearms guideline, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) may be appropriate to address concerns about firearms crossing the border. Firearms that cross the border may be purchased away from the border by a so-called "straw purchaser", then delivered to a firearms trafficker and brought across the border. Concerns have been raised that § 2K2.1 and § 2M5.2 do not comprehensively address these activities and, in particular, that § 2K2.1 does not adequately address (1) offenses involving firearms crossing the border and (2) offenses committed by "straw purchasers". The complexity and scope of the review is such that it likely could not be completed this year (*i.e.,* during the amendment cycle ending May 1, 2011), but the Commission is considering what revisions, if any, to § 2K2.1 and related guidelines may be appropriate this year.

Firearms Crossing the Border

The crossing of an international border is not currently used as a factor in determining the offense level in § 2K2.1. Instead, the crossing of a border is accounted for in the guidelines in § 2M5.2, the guideline to which arms export offenses are referenced. Should the crossing of a border be incorporated as a factor in § 2K2.1? If so, how? Are there aggravating or mitigating factors in

cases involving firearms crossing a border that the Commission should take into account in the guidelines? If so, what are the factors, and how should the Commission amend the guidelines to take them into account?

In particular, should the Commission amend § 2K2.1 to incorporate the crossing of a border as the basis for a new alternative base offense level, a new enhancement, a new upward departure provision, or a new cross-reference (*e.g.,* to § 2M5.2), or some combination of these? What should the amount of such a new alternative base offense level or enhancement be?

One approach would be to provide a new enhancement in § 2K2.1, such as the following:

(#) If the defendant possessed any firearm or ammunition while crossing or attempting to cross the border or otherwise departing or attempting to depart the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States, increase by [2]–[5] levels.

Should the Commission consider such an enhancement?

Another approach would be to amend one or more of the existing provisions in § 2K2.1 to provide higher penalties for cases involving the crossing of a border. In particular, § 2K2.1 has a 4-level enhancement at subsection (b)(5) that applies if the defendant engaged in the trafficking of firearms, and a 4-level enhancement (and minimum offense level of 18) at subsection (b)(6) that applies if the defendant used or possessed any firearm or ammunition in connection with another felony offense, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense. Should the Commission revise subsection (b)(5) or (b)(6), or both, to account for cases in which firearms cross the border? For example, should the Commission amend the commentary to § 2K2.1 to specify that subsection (b)(5) always applies in a case involving one or more firearms crossing the border (*e.g.,* a case in which the defendant transported a firearm across the border or transferred a firearm to another individual with knowledge or reason to believe that the firearm would be transported across the border)? Should the Commission amend subsection (b)(6) to raise the minimum offense level from 18 to 20?

If the Commission were to provide a new provision in § 2K2.1 to account for firearms crossing the border, how should that provision interact with the specific offense characteristics in subsections (b)(5) and (b)(6)? In particular, should all these provisions be cumulative, or should they interact in some other way?

If the Commission were to make any such changes to § 2K2.1, what conforming changes, if any, should the Commission make elsewhere in § 2K2.1? What changes, if any, should the Commission make to related guidelines—in particular, to § 2K1.3 and § 2M5.2—to maintain proportionality?

Straw Purchasers

Defendants who operate as straw purchasers may be convicted under any of several different statutes. One such statute is 18 U.S.C. 922(d), which makes it unlawful to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that the person meets any of nine statutory criteria. *See* 18 U.S.C. 922(d)(1)–(9). *See also* 18 U.S.C. 922(g), (n) (making it unlawful for a person meeting any of the same nine criteria to transport, possess, or receive a firearm or ammunition). Such a person is referred to in the guidelines as a "prohibited person". *See* § 2K2.1, comment. (n.3) (defining "prohibited person" as "any person described in 18 U.S.C. 922(g) or 922(n)"). The nine criteria that make a person a "prohibited person" can be summarized as whether the person is a (1) felon, (2) fugitive, (3) substance abuser, (4) mental defective, (5) illegal alien, (6) person dishonorably discharged from the Armed Forces, (7) person who has renounced U.S. citizenship, (8) person under a restraining order not to engage in domestic violence, or (9) person convicted of a misdemeanor crime of domestic violence. *See* 18 U.S.C. 922(d), (g), (n). A person convicted under section 922(d) is subject to imprisonment for not more than 10 years. *See* 18 U.S.C. 924(a)(2).

A second statute used for straw purchasers is 18 U.S.C. 922(a)(6), which makes it unlawful, in connection with the acquisition of or attempted acquisition of any firearm or ammunition from a licensed dealer, to knowingly make any false statement intended or likely to deceive the dealer with respect to the lawfulness of the transaction. A person convicted under section 922(a)(6) is subject to imprisonment for not more than 10 years. *See* 18 U.S.C. 924(a)(2).

A third statute used for straw purchasers is 18 U.S.C. 924(a)(1)(A), which makes it unlawful to knowingly make any false statement with respect to information required to be kept by a firearms licensee or information required in applying for a firearms license. A person convicted under section 924(a)(1)(A) is subject to imprisonment for not more than 5 years. *See* 18 U.S.C. 924(a)(1).

All three of these statutes used for straw purchasers are referenced to § 2K2.1. The guideline assigns a base offense level of 14 to cases involving prohibited persons, whether the defendant (A) *is* a prohibited person or (B) is convicted under section 922(d) of transferring *to* a prohibited person. *See* § 2K2.1(a)(6)(A), (B). The guideline assigns a base offense level of 12 for most offenses, including convictions under sections 922(a)(6) and 924(a)(1)(A). *See* § 2K2.1(a)(7). Higher base offense levels may apply based on the type of firearm involved or the defendant's criminal history.

Are the guidelines adequate as they apply to straw purchasers? If not, what changes would be appropriate? Are there aggravating or mitigating factors in cases involving straw purchasers that the Commission should take into account in the guidelines? If so, what are the factors, and how should the Commission amend the guidelines to take them into account?

Should the Commission provide higher penalties for cases involving straw purchasers? In particular, should the Commission raise by 2 levels the alternative base offense levels applicable to defendants convicted of 18 U.S.C. 922(a)(6), 922(d), and 924(a)(1)(A)? Under such an approach, the alternative base offense level in § 2K2.1(a)(6) would be raised from 14 to 16 (for cases in which the defendant *is* a prohibited person as well as cases in which the defendant is convicted under section 922(d) of transferring *to* a prohibited person). Also, a new alternative base offense level of 14 would be established for defendants convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A).

As described above, a defendant convicted under section 922(d) receives a higher base offense level (14 vs. 12) than a defendant convicted under section 922(a)(6) or 924(a)(1)(A). How, if at all, should the Commission revise § 2K2.1 to address a case in which a defendant convicted under section 922(a)(6) or 924(a)(1)(A) has engaged in the same conduct as a defendant convicted under section 922(d)? One approach would be to provide a new enhancement in § 2K2.1, such as the following:

(#) If the defendant is convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and the defendant sold or otherwise disposed of any firearm or ammunition

to any person knowing or having reasonable cause to believe that the person was a prohibited person, increase by 2 levels.

Should the Commission consider such an enhancement?

If the Commission were to make any such changes to § 2K2.1, what conforming changes, if any, should the Commission make elsewhere in § 2K2.1? What changes, if any, should the Commission make to related guidelines—in particular, to § 2K1.3 and § 2M5.2—to maintain proportionality?

§ 2M5.2

In addition to the changes in the proposed amendment, are there any other aggravating or mitigating factors in cases involving firearms trafficking that the Commission should take into account in § 2M5.2? If so, what are the factors, and how should the Commission amend § 2M5.2 to take them into account? In particular, should the Commission consider establishing in § 2M5.2 a specific offense characteristic similar to the specific offense characteristic in § 2K2.1(b)(6), which provides a 4-level enhancement if the defendant used or possessed any firearm or ammunition in connection with another felony offense, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense?

3. Dodd-Frank Act

Synopsis of Proposed Amendment: The Dodd-Frank Wall Street Reform and Protection Act, Public Law 111–203 (the "Act"), contains two directives to the Commission and created certain new offenses.

The proposed amendment responds to the directives in Part A and the new offenses in Part B, as follows:

(A) Directives

Issue for Comment

1. The Act contained two directives to the Commission, one on securities fraud, the other on bank fraud and other frauds relating to financial institutions. Each directive requires the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to the offenses covered by the directive and consider whether the guidelines appropriately account for the potential and actual harm to the public and the financial markets from those offenses. Each directive also requires the Commission to ensure that the guidelines reflect (i) the serious nature of the offenses, (ii) the need for deterrence, punishment, and prevention, and (iii) the effectiveness of incarceration in furthering those objectives.

A. Directive on Securities Fraud

Section 1079A(a)(1)(A) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to "persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses."

Section 1079A(a)(1)(B) of the Act provides that, in promulgating any such amendment, the Commission shall—

(i) Ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect—

(I) The serious nature of the offenses described in subparagraph (A);

(II) The need for an effective deterrent and appropriate punishment to prevent the offenses; and

(III) The effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);

(ii) Consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;

(iii) Ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(iv) Make any necessary conforming changes to guidelines; and

(v) Ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

B. Directive on Bank Frauds, Mortgage Frauds, and Other Frauds Relating to Financial Institutions

Section 1079A(a)(2)(A) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to "persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions."

Section 1079A(a)(2)(B) of the Act provides that, in promulgating any such amendment, the Commission shall—

(i) Ensure that the guidelines and policy statements reflect—

(I) The serious nature of the offenses described in subparagraph (A);

(II) The need for an effective deterrent and appropriate punishment to prevent the offenses; and

(III) The effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);

(ii) Consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;

(iii) Ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(iv) Make any necessary conforming changes to guidelines; and

(v) Ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

C. Prior Commission Work

In conducting the reviews required by the directives, the Commission is also studying its prior work in these areas. In 2001, for example, after a multi-year review of economic crimes, the Commission promulgated its "Economic Crime Package," a six-part amendment to the guidelines applicable to economic crimes. *See* USSG App. C, Amendment 617 (effective November 1, 2001). Among other things, the Economic Crime Package consolidated the theft and fraud guidelines into a single guideline, § 2B1.1 (Theft, Property Destruction, and Fraud); provided a 2-level enhancement for offenses involving 10 to 49 victims and a 4-level enhancement for offenses involving 50 or more victims; revised the definition of "loss"; and revised and expanded the loss table to account for higher loss amounts and "provide substantial increases in penalties for moderate and higher loss amounts." *See id.* (Reason for Amendment).

In 2003, the Commission implemented directives relating to fraud offenses, obstruction of justice offenses, and other economic crimes in the Sarbanes-Oxley Act of 2002, Public Law 107–204. The directives required the Commission to promulgate, under emergency amendment authority, amendments addressing fraud offenses committed by officers and directors of publicly traded companies; fraud offenses that endanger the solvency or financial security of a substantial number of victims; fraud offenses that

involve significantly greater than 50 victims; and obstruction of justice offenses that involve destruction of evidence. The Commission first promulgated a temporary, emergency amendment and then an expanded, permanent amendment. *See* USSG App. C, Amendments 647 (effective January 25, 2003) and 653 (effective November 1, 2003). Among other things, the Commission provided a higher alternative base offense level of level 7 if the defendant was convicted of an offense referenced to § 2B1.1 and the offense carried a statutory maximum term of imprisonment of 20 years or more; expanded the loss table to add enhancements of 28 and 30 levels for losses of more than $200 million and $400 million, respectively; added the reduction in value of equity securities or other corporate assets as a factor to be considered in determining loss; expanded the victims table to include a 6-level enhancement for offenses involving 250 or more victims; expanded the specific offense characteristic on financially endangering a financial institution to also apply when the offense financially endangered either a substantial number of victims or an organization that is publicly traded or has more than 1,000 employees; and added a 4-level enhancement if the offense involved a violation of securities law or commodities law and the defendant was in certain specified positions of heightened responsibility (*e.g.,* a corporate officer or director; a registered broker or dealer; an investment adviser; an officer of director of a futures commission merchant; a commodities trading advisor; a commodity pool operator). *See id.*

In reviewing the guidelines and offenses covered by the directives, the Commission has observed that cases sentenced under § 2B1.1 involving relatively large loss amounts calculated under the loss table in subsection (b)(1) have a relatively high rate of non-government-sponsored, below-range sentences. The Commission also has received public comment and reviewed judicial opinions suggesting that a more comprehensive review of § 2B1.1 may be appropriate.

D. Possible Multi-Year Review

In light of this information, the Commission is considering conducting a more comprehensive review of § 2B1.1 and related guidelines, not only of the specific offense characteristics referred to in the directives (§ 2B1.1(b)(14) and (17)), but also of certain other aspects of the guidelines (*e.g.,* the loss table and the definition of loss; the victims table and the definition of victim; and the interactions between these tables and definitions). Given the complexity and scope of such a review, the Commission anticipates that such a review could not be completed in the amendment cycle ending May 1, 2011.

E. Response to Directives

Given that such a review likely could not be completed this year (*i.e.,* during the amendment cycle ending May 1, 2011), should the Commission respond to the directives this year? If so, what, if any, specific changes to the guidelines should be made this year to respond to the directives in the Act?

1. Directive on Securities Fraud

The Commission requests comment regarding whether the *Guidelines Manual* provides penalties for these offenses that appropriately account for the potential and actual harm to the public and the financial markets from these offenses and, if not, what changes to the *Guidelines Manual* would be appropriate to respond to the directive in section 1079A(a)(1) of the Act.

Securities fraud is prosecuted under 18 U.S.C. 1348 (Securities and commodities fraud), which makes it unlawful to knowingly execute, or attempt to execute, a scheme or artifice (1) to defraud any person in connection with a security or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of a security. The statutory maximum term of imprisonment for an offense under section 1348 is 25 years. Offenses under section 1348 are referenced in Appendix A (Statutory Index) to § 2B1.1.

Securities fraud is also prosecuted under 18 U.S.C. 1350 (Failure of corporate officers to certify financial reports), violations of the provisions of law referred to in 15 U.S.C. 78c(a)(47), and violations of the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to those provisions of law. *See* § 2B1.1, comment. (n.14(A)). In addition, there are cases in which the defendant committed a securities law violation but is prosecuted under a general fraud statute. In general, these offenses are likewise referenced to § 2B1.1.

Some of the more pertinent provisions in § 2B1.1 addressing these offenses are as follows:

(1) Section 2B1.1(a)(1) provides an alternative base offense level of 7 (rather than 6) if the offense of conviction has a statutory maximum term of imprisonment of 20 years or more.

(2) Section 2B1.1(b)(1) provides an enhancement of up to 30 levels based on the amount of loss.

(3) Section 2B1.1(b)(2) provides an enhancement of up to 6 levels if the offense involved 10 or more victims or was committed through mass-marketing.

(4) Section 2B1.1(b)(14) provides an enhancement of either (A) 2 levels, if the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions, or (B) 4 levels, if the offense (i) substantially jeopardized the safety and soundness of a financial institution, (ii) substantially endangered the solvency or financial security of an organization that (I) was a publicly traded company or (II) had 1,000 or more employees, or (iii) substantially endangered the solvency or financial security of 100 or more victims. Subsection (b)(14)(C) provides that the cumulative adjustments from (b)(2) and (b)(14)(B) shall not exceed 8 levels, except as provided in subdivision (D). Subdivision (D) provides a minimum offense level of level 24, if either (A) or (B) applies.

(5) Section 2B1.1(b)(17) provides an enhancement of 4 levels if the offense involved a violation of securities law and the defendant was an officer or director of a publicly traded company, a registered broker or dealer (or person associated with a broker or dealer), or an investment adviser (or person associated with an investment adviser). Similarly, this enhancement also applies if the offense involved a violation of commodities law and the defendant was an officer or director of a futures commission merchant or an introducing broker, a commodities trading advisor, or a commodity pool operator. A conviction under a securities law or commodities law is not required for subsection (b)(17) to apply. *See* § 2B1.1, comment. (n.14(B)).

Are offenses relating to securities fraud adequately addressed by these provisions? If not, how should the Commission amend the *Guidelines Manual* to account for "the potential and actual harm to the public and the financial markets" from these offenses? Should the Commission increase the amount, or the scope, of the alternative base offense level, the enhancements, or the minimum offense level, or any combination of those? If so, what should the new amount or scope of such provisions be?

Should the Commission amend the Commentary to the *Guidelines Manual* to provide new departure provisions, or revise the scope of existing departure provisions, applicable to such offenses? For example, should the Commission specify that an upward departure would

be warranted in a case involving securities fraud or any similar offense, if the disruption to a financial market is so substantial as to have a debilitating impact on that market?

Similarly, should the Commission amend the Commentary to the *Guidelines Manual* to provide additional guidance for such offenses? For example, Application Note 12 to § 2B1.1 lists factors to be considered in determining whether to apply the enhancement in subsection (b)(14) for jeopardizing a financial institution or organization. Currently, the court is directed to consider whether the financial institution or organization suffered one or more listed harms as a result of the offense, such as becoming insolvent. Should the Commission direct the court to consider any other factors, such as whether one of the listed harms was likely to result from the offense but did not result from the offense because of Federal Government intervention?

2. Directive on Bank Frauds, Mortgage Frauds, and Other Frauds Relating to Financial Institutions

The Commission requests comment regarding whether the *Guidelines Manual* provides penalties for these offenses that appropriately account for the potential and actual harm to the public and the financial markets from these offenses and ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions and, if not, what changes to the *Guidelines Manual* would be appropriate to respond to section 1079A(a)(2) of the Act.

The most specific statute on bank fraud is 18 U.S.C. 1344 (Bank fraud), which makes it unlawful to knowingly execute a scheme or artifice (1) to defraud a financial institution or (2) to obtain any of the property of a financial institution by means of false or fraudulent pretenses, representations, or promises. The statutory maximum term of imprisonment for an offense under section 1344 is 30 years. Offenses under section 1344 are referenced in Appendix A (Statutory Index) to § 2B1.1. Other statutes relating to financial institution fraud or mortgage fraud include 18 U.S.C. 215, 656, 657, 1005, 1006, 1010, 1014, 1029, and 1033.

Some of the more pertinent provisions in § 2B1.1 addressing these offenses are as follows:

(1) Section 2B1.1(a)(1) provides an alternative base offense level of 7 (rather than 6) if the offense of conviction has a statutory maximum term of imprisonment of 20 years or more.

(2) Section 2B1.1(b)(1) provides an enhancement of up to 30 levels based on the amount of loss.

(3) Section 2B1.1(b)(2) provides an enhancement of up to 6 levels if the offense involved 10 or more victims or was committed through mass-marketing.

(4) Section 2B1.1(b)(14) provides an enhancement of either (A) 2 levels, if the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions, or (B) 4 levels, if the offense (i) substantially jeopardized the safety and soundness of a financial institution, (ii) substantially endangered the solvency or financial security of an organization that (I) was a publicly traded company or (II) had 1,000 or more employees, or (iii) substantially endangered the solvency or financial security of 100 or more victims. Subsection (b)(14)(C) provides that the cumulative adjustments from (b)(2) and (b)(14)(B) shall not exceed 8 levels, except as provided in subdivision (D). Subdivision (D) provides a minimum offense level of level 24, if either (A) or (B) applies.

Are bank frauds, mortgage frauds, and other frauds relating to financial institutions adequately addressed by these provisions? If not, how should the Commission amend the *Guidelines Manual* to account for "the potential and actual harm to the public and the financial markets" from these offenses and "ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions"? Should the Commission increase the amount, or the scope, of the alternative base offense level, the enhancements, or the minimum offense level, or any combination of those? If so, what should the new amount or scope of such provisions be?

Should the Commission amend the Commentary to the *Guidelines Manual* to provide new departure provisions, or revise the scope of existing departure provisions, applicable to such offenses? For example, should the Commission specify that an upward departure would be warranted in a case involving financial institution fraud, fraud related to federally related mortgage loans, or any similar offense, if the disruption to a financial market is so substantial as to have a debilitating impact on that market?

Similarly, should the Commission amend the Commentary to the *Guidelines Manual* to provide additional guidance for such offenses? For example, Application Note 12 to § 2B1.1 lists factors to be considered in determining whether to apply the enhancement in subsection (b)(14) for jeopardizing a financial institution or organization. Currently, the court is directed to consider whether the financial institution or organization suffered one or more listed harms as a result of the offense, such as becoming insolvent. Should the Commission direct the court to consider any other factors, such as whether one of the listed harms was likely to result from the offense but did not result from the offense because of Federal government intervention?

(B) New Offenses

Synopsis of Proposed Amendment: This part of the proposed amendment responds to certain new offenses created by the Act.

First, the proposed amendment responds to the new offense at 12 U.S.C. 5382. Under authority granted by the Act, the Secretary of the Treasury may make a "systemic risk determination" regarding a financial company and, if the company fails the determination, may commence the orderly liquidation of the company by appointing the Federal Deposit Insurance Corporation as receiver. *See* sections 202–203 of the Act. Before making the appointment, the Secretary must either obtain the consent of the company or petition under seal for district court approval. The Act makes it a crime, classified to 12 U.S.C. 5382, to recklessly disclose such a determination or the pendency of court proceedings on such a petition. A person who violates 12 U.S.C. 5382 is subject to imprisonment for not more than 5 years. The proposed amendment references this new offense to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

Second, the proposed amendment responds to the new offense at 15 U.S.C. 78jjj(d). The Act makes it a crime, classified to 15 U.S.C. 78jjj(d), for a person to falsely represent that he or she is a member of the Security Investor Protection Corporation or that any person or account is protected or eligible for protection under the Security Investor Protection Act. *See* section 929V of the Act. A person who violates section 78jjj(d) is subject to imprisonment for not more than 5 years. Section 78jjj also contains two other offenses, at subsections (c)(1) and (c)(2), that are not currently referenced in Appendix A (Statutory Index). The proposed amendment references all these offenses under section 78jjj to § 2B1.1 (Theft, Property Destruction, and Fraud).

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting after the line referenced to 12 U.S.C. 4641 the following:

"12 U.S.C. 5382 2H3.1"; and by inserting after the line referenced to 15 U.S.C. 78u(c) the following:

"15 U.S.C. 78jjj(c)(1),(2) 2B1.1
15 U.S.C. 78jjj(d) 2B1.1".

4. Patient Protection Act

Synopsis of Proposed Amendment: This proposed amendment responds to the Patient Protection and Affordable Care Act, Public Law 111–148 (the "Act"), which contained a directive to the Commission and created a new offense.

First, the proposed amendment responds to section 10606(a)(2) of the Act, which directs the Commission to—

(A) Review the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses;

(B) Amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs to provide that the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss by the defendant; and

(C) Amend the Federal Sentencing Guidelines to provide—

(i) A 2-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $1,000,000 and less than $7,000,000;

(ii) A 3-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $7,000,000 and less than $20,000,000;

(iii) A 4-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $20,000,000; and

(iv) If appropriate, otherwise amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs.

Section 10606(a)(3) of the Act requires the Commission, in implementing this directive, to—

(A) Ensure that the Federal Sentencing Guidelines and policy statements—

(i) Reflect the serious harms associated with health care fraud and the need for aggressive and appropriate law enforcement action to prevent such fraud; and

(ii) Provide increased penalties for persons convicted of health care fraud offenses in appropriate circumstances;

(B) Consult with individuals or groups representing health care fraud victims, law enforcement officials, the health care industry, and the Federal judiciary as part of the review described in paragraph (2);

(C) Ensure reasonable consistency with other relevant directives and with other guidelines under the Federal Sentencing Guidelines;

(D) Account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the Federal Sentencing Guidelines, as in effect on the date of enactment of this Act, provide sentencing enhancements;

(E) Make any necessary conforming changes to the Federal Sentencing Guidelines; and

(F) Ensure that the Federal Sentencing Guidelines adequately meet the purposes of sentencing.

The proposed amendment implements the directive by adding two provisions to § 2B1.1 (Theft, Property Destruction, and Fraud), both of which apply to cases in which "the defendant was convicted of a Federal health care offense involving a Government health care program".

The first provision is a tiered enhancement that applies in such cases if the loss is more than $1,000,000. The enhancement would be inserted at subsection (b)(8) of § 2B1.1 and would provide 2 levels if the loss was more than $1,000,000, 3 levels if the loss is more than $7,000,000, and 4 levels if the loss is more than $20,000,000. This tiered enhancement implements paragraph (2)(C) of the directive. To "ensure reasonable consistency" with the guidelines, as required by section 10606(a)(3)(C) of the Act, the tiers of the enhancement apply to loss amounts "more than" than the dollar amounts specified in the directive, rather than to loss amounts "not less than" the dollar amounts specified in the directive. The consistent practice in the *Guidelines Manual* is to apply enhancements to loss amounts "more than" dollar amounts. That practice is followed in § 2B1.1, both in the loss table in subsection (b)(1) and in the enhancement in subsection (b)(14)(A). It is also followed by each of the guidelines that utilize the loss table in § 2B1.1(b)(1), as well as by other guidelines with enhancements based on dollar amounts. *See, e.g.,* §§ 2B2.1(b)(2), 2B3.1(b)(7), 2B3.2(b)(2), 2B4.1(b)(2), 2R1.1(b)(2), 2S1.3(b)(2), 2T1.1(b)(1), 2T3.1(a), 2T4.1 (Tax Table).

The second provision is a new special rule in Application Note 3(F) for determining intended loss in a case in which the defendant is convicted of a Federal health care offense involving a Government health care program. This new special rule implements paragraph (2)(B) of the directive.

In addition, the proposed amendment specifies that "Federal health care offense" has the same meaning as in 18 U.S.C. 24 and provides two options for defining "Government health care program":

Option 1 provides a list of programs consistent with section 1501 of the Act, which lists the "Government sponsored programs" that provide health care coverage satisfying the individual mandate established by the Act. *See* 26 U.S.C. 5000A(f)(1)(A), as established by section 1501 of the Act.

Option 2 provides a definition consistent with section 1128B of the Social Security Act (42 U.S.C. 1320a–7b), which defines "Federal health care program" to mean (1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5, United States Code); or (2) any State health care program, as defined in 42 U.S.C. 1320a–7(h).

An issue for comment is also included on whether a different definition of "Government health care program" should be used.

Second, the proposed amendment responds to section 6601 of the Act, which established a new offense at 29 U.S.C. 1149 for making a false statement in connection with the marketing or sale of a multiple employer welfare arrangement under the Employee Retirement Income Security Act. A person who commits this new offense is subject to a term of imprisonment of not more than 10 years. The proposed amendment references this new offense in Appendix A (Statutory Index) to § 2B1.1.

Proposed Amendment

Section 2B1.1(b) is amended by redesignating subdivisions (8) through (17) as subdivisions (9) through (18); by inserting after subdivision (7) the following:

"(8) If the defendant was convicted of a Federal health care offense involving a Government health care program and the loss under subsection (b)(1) was (A)

more than $1,000,000, increase by 2 levels; (B) more than $7,000,000, increase by 3 levels; or (C) more than $20,000,000, increase by 4 levels.";

and in subdivision (15)(C), as redesignated by this amendment, by striking "(14)" and inserting "(15)".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Equity securities'" the following:

"'Federal health care offense' has the meaning given that term in 18 U.S.C. 24.";

and inserting after the paragraph that begins "'Foreign instrumentality'" the following:

[Option 1:

"'Government health care program' means (A) the Medicare program under part A of title XVIII of the Social Security Act, (B) the Medicaid program under title XIX of the Social Security Act, (C) the CHIP program under title XXI of the Social Security Act, (D) the TRICARE for Life program, (E) the veteran's health care program under chapter 17 of title 38, United States Code, or (F) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers).".]

[Option 2:

"'Government health care program' means (A) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5, United States Code); or (B) any State health care program, as defined in 42 U.S.C. 1320a–7(h).".]

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 3(F) by adding at the end the following:

"(viii) *Federal Health Care Offenses Involving Government Health Care Programs.*—In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.,* is evidence sufficient to establish the amount of the intended loss, if not rebutted.";

in Note 7 by striking "(8)" and inserting "(9)" each place it appears;

in Note 8 by striking "(9)" and inserting "(10)" each place it appears;

in Note 9 by striking "(10)" and inserting "(11)" each place it appears;

in Note 10 by striking "(12)" and inserting "(13)" in both places;

in Note 11 by striking "(14)" and inserting "(15)" in both places;

in Note 12 by striking "(14)" and inserting "(15)" each place it appears;

in Note 13 by striking "(16)" and inserting "(17)" each place it appears; and by striking "(14)" and inserting "(15)" in both places;

in Note 14 by striking "(b)(17)" and inserting "(b)(18)" each place it appears;

and in Note 19 by striking "(16)" and inserting "(17)"; and by striking "(11)" and inserting "(12)".

The Commentary to § 2B1.1 captioned "Background" is amended by inserting after the paragraph that begins "Subsection (b)(6)" the following:

"Subsection (b)(8) implements the directive to the Commission in section 10606 of Public Law 111–148.";

in the paragraph that begins "Subsection (b)(8)(D)" by striking "(8)" and inserting "(9)";

in the paragraph that begins "Subsection (b)(9)" by striking "(9)" and inserting "(10)";

in the paragraph that begins "Subsections (b)(10)(A)(i)" by striking "(10)" and inserting "(11)";

in the paragraph that begins "Subsection (b)(10)(C)" by striking "(10)" and inserting "(11)";

in the paragraph that begins "Subsection (b)(11)" by striking "(11)" and inserting "(12)";

in the paragraph that begins "Subsection (b)(13)(B)" by striking "(13)" and inserting "(14)";

in the paragraph that begins "Subsection (b)(14)(A)" by striking "(14)" and inserting "(15)";

in the paragraph that begins "Subsection (b)(14)(B)(i)" by striking "(14)" and inserting "(15)";

in the paragraph that begins "Subsection (b)(15)" by striking "(15)" and inserting "(16)";

and in the paragraph that begins "Subsection (b)(16)" by striking "(16)" and inserting "(17)" in both places.

Appendix (Statutory Index) is amended in the line referenced to 29 U.S.C. 1131 by inserting "(a)" after "1131";

and by inserting after the line referenced to 29 U.S.C. 1141 the following:

"29 U.S.C. 1149 2B1.1".

Issue for Comment:

1. The proposed amendment provides two options for defining the term "Government health care program". Which, if any, of these options should the Commission use? If the Commission were to use one of these options, should the Commission add other specific programs or categories of programs to the definition and, if so, what programs or categories of programs? For example, are there other Federal or State programs that should be included? Alternatively, should private health care programs also be included?

5. Supervised Release

Synopsis of Proposed Amendment: The proposed amendment would make revisions to the supervised release guidelines, § 5D1.1 (Imposition of a Term of Supervised Release) and § 5D1.2 (Term of Supervised Release). Section 5D1.1 directs the court to order a term of supervised release when a sentence of imprisonment of more than one year is imposed, or when required by statute. For cases in which the court decides to impose a term of supervised release, § 5D1.2 provides both a minimum and a maximum length of the term. Specifically, § 5D1.2 requires a minimum of three years and a maximum of five years, if a Class A or B felony; a minimum of two years and a maximum of three years, if a Class C or D felony; and a term of precisely one year, if a Class E felony or Class A misdemeanor.

The Commission is considering whether revisions to the supervised release guidelines would help courts and probation offices focus limited supervision resources on offenders who need supervision. *See, e.g., Johnson* v. *United States,* 529 U.S. 694, 709 (2000) ("Prisoners may, of course, vary in the degree of help needed for successful reintegration. Supervised release [has given] district courts the freedom to provide postrelease supervision for those, and only those, who needed it. * * * Congress aimed * * * to use the district court's discretionary judgment to allocate supervision to those releasees who needed it most."); S. Rep. No. 98–225, p. 125 ("[P]robation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it."). The Commission's recent report, *Federal Offenders Sentenced to Supervised Release* (July 2010), found that supervised release is imposed in almost every case, including in more than 99 percent of cases where the guidelines require imposition of a term of supervised release but there is no statutory requirement to do so. When supervised release is imposed, the length of the term is within the ranges provided by § 5D1.2 in over 94 percent of cases. *Id.* at 52, 57.

The Commission is also reviewing the imposition of supervised release on non-citizens, who represent a significant

percentage of the overall population of Federal offenders. *See 2009 Sourcebook of Federal Sentencing Statistics* 19 (Table 9, showing 44.7% of Federal offenders in fiscal year 2009 were non-citizens). Supervised release is imposed in more than 91 percent of cases in which the defendant is a non-citizen. *See Federal Offenders Sentenced to Supervised Release* at 60. However, a "vast number of non-citizens convicted of crimes" are "now virtually inevitable" to be deported, *Padilla* v. *Kentucky,* 130 S. Ct. 1473, 1478 (2010), and likely would face prosecution for a new offense if they were to return illegally to the United States.

Section 5D1.1

The proposed amendment provides two options for revising § 5D1.1 that would reduce the number of cases in which the court is required by the guidelines to impose supervised release:

Under Option 1A, the court would be required to order a term of supervised release when a sentence of imprisonment of 15 months or more is imposed, or when required by statute. An issue for comment is also included on whether the Commission should instead set this threshold at a higher number of months of imprisonment.

Under Option 1B, the court would be required to order a term of supervised release only when required by statute.

The proposed amendment would also add a provision to § 5D1.1 indicating that for certain deportable aliens, the court ordinarily should not impose a term of supervised release unless required by statute.

Section 5D1.2

The proposed amendment provides two options for revising § 5D1.2 that would lower or eliminate the minimum lengths required by that guideline for a term of supervised release:

Under Option 2A, the minimum term for a Class A, B, C, or D felony would be one year, and the guidelines would impose no minimum term for a Class E felony or a Class A misdemeanor.

Under Option 2B, the guidelines would impose no minimum term for any felony or misdemeanor.

Both Options 2A and 2B would preserve § 5D1.2(b) and (c), which apply to cases in which the length of the term of supervised release is governed by specific statutory provisions. While the proposed amendment would affect only the minimum terms, an issue for comment is included on whether the maximum terms should also be lowered.

In addition, the proposed amendment inserts commentary into §§ 5D1.1 and 5D1.2 to provide guidance on what a court should consider in deciding whether to order a term of supervised release and, if so, how long such a term should be. Finally, the proposed amendment makes technical and conforming changes to §§ 5D1.1 and 5D1.2 to reflect requirements imposed by the supervised release statute, 18 U.S.C. 3583.

Proposed Amendment

[Option 1A:

Section 5D1.1(a) is amended by inserting "when required by statute (*see* 18 U.S.C. 3583(a)) or, except as provided in subsection (c)," after "follow imprisonment"; by striking "more than one year is imposed, or when required by statute" and inserting "15 months or more is imposed".

Section 5D1.1(b) is amended by adding at the end the following: "*See* 18 U.S.C. 3583(a).".

Section 5D1.1 is amended by adding at the end the following:

"(c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment and likely will not be permitted to return to the United States in a legal manner.".

The Commentary to § 5D1.1 captioned "Application Notes" is amended in Note 1 by inserting "*Application of Subsection (a).*—" before "Under subsection (a)"; by striking "more than one year" and inserting "15 months or more"; by striking "it determines" and all that follows through "by statute." and inserting the following:

"supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.";

in Note 2 by inserting "*Application of Subsection (b).*—" before "Under subsection (b)"; by striking "of one year or less for any of the reasons set forth in Application Note 1" and inserting "in any other case, after considering the factors set forth in Note 3".

The Commentary to § 5D1.1 captioned "Application Notes" is amended by adding at the end the following:

"3. *Factors to Be Considered.*—

(A) *Statutory Factors.*—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:

(i) The nature and circumstances of the offense and the history and characteristics of the defendant;

(ii) The need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(iii) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(iv) The need to provide restitution to any victims of the offense.

See 18 U.S.C. 3583(c).

(B) *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in subparagraph (A)(i), above). Research indicates that, on average, the lower the criminal history category a defendant has, the greater the likelihood that the defendant will successfully complete supervision without revocation. Therefore, in general, the more serious the defendant's criminal history, the greater the need for supervised release.

(C) *Substance Abuse.*—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is 'highly recommended' that a term of supervised release also be imposed. *See* § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

4. *Guideline Ranges in Zones B and C.*—In a case in which the applicable guideline range is in Zone B or C of the Sentencing Table, a term of supervised release with a condition that substitutes community confinement or home detention may be imposed to satisfy part of the minimum term of imprisonment. *See* § 5C1.1(c)(2), (d)(2).

5. *Application of Subsection (c).*—In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution.]".

[Option 1B:

Section 5D1.1(a) is amended by striking "when a sentence of imprisonment of more than one year is imposed, or"; and by adding at the end the following: "*See* 18 U.S.C. 3583(a).".

Section 5D1.1(b) is amended by adding at the end the following: "*See* 18 U.S.C. 3583(a).".

The Commentary to § 5D1.1 captioned "Application Notes" is amended by striking Notes 1 and 2 and inserting the following:

"1. *Application of Subsection (a).*—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a term of supervised release is required by a specific statute.

2. *Application of Subsection (b).*—Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.";

and by adding at the end the following:

"3. *Factors to Be Considered.*—

(A) *Statutory Factors.*—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:

(i) The nature and circumstances of the offense and the history and characteristics of the defendant;

(ii) The need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(iii) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(iv) The need to provide restitution to any victims of the offense.

See 18 U.S.C. 3583(c).

(B) *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in subparagraph (A)(i), above). Research indicates that, on average, the lower the criminal history category a defendant has, the greater the likelihood that the defendant will successfully complete supervision without revocation. Therefore, in general, the more serious the defendant's criminal history, the greater the need for supervised release.

(C) *Substance Abuse.*—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is 'highly recommended' that a term of supervised release also be imposed. *See* § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

(D) *Certain Deportable Aliens.*—The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment and likely will not be permitted to return to the United States in a legal manner. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution.

4. *Guideline Ranges in Zones B and C.*—In a case in which the applicable guideline range is in Zone B or C of the Sentencing Table, a term of supervised release with a condition that substitutes community confinement or home detention may be imposed to satisfy part of the minimum term of imprisonment. *See* § 5C1.1(c)(2), (d)(2).]".

[Option 2A:

Section 5D1.2(a) is amended in subdivision (1) by striking "three years" and inserting "[one] year"; and by adding at the end the following: "*See* 18 U.S.C. 3583(b)(1).".

Section 5D1.2(a) is amended in subdivision (2) by striking "two years" and inserting "[one] year"; and by adding at the end the following: "*See* 18 U.S.C. 3583(b)(2).".]

[Option 2B:

Section 5D1.2(a) is amended in subdivision (1) by striking "At least three years but not" and inserting "Not"; and by adding at the end the following: "*See* 18 U.S.C. 3583(b)(1).".

Section 5D1.2(a) is amended in subdivision (2) by striking "At least two years but not" and inserting "Not"; and by adding at the end the following: "*See* 18 U.S.C. 3583(b)(2).".]

Section 5D1.2(a) is amended in subdivision (3) by striking "One" and inserting "Not more than one"; and by adding at the end the following: "*See* 18 U.S.C. 3583(b)(3).".

Section 5D1.2(b) is amended by striking "subdivisions" and inserting "subsections"; by striking "not less than" and all that follows through "offense is"; and by striking subdivisions (1) and (2) and inserting the following:

"(1) Any term of years or life, if the offense is any offense listed in 18 U.S.C. 2332b(g)(5)(B), *see* 18 U.S.C. 3583(j); or

(2) any term of years not less than 5 or life, if the offense is any offense under section 1201 involving a minor victim, or any offense under 18 U.S.C. 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, *see* 18 U.S.C. 3583(k).".

The Commentary to § 5D1.2 captioned "Application Notes" is amended in Note 3 by striking "or the guidelines".

The Commentary to § 5D1.2 captioned "Application Notes" is amended by adding at the end the following:

"4. *Factors Considered.*—The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term. *See* 18 U.S.C. 3583(c); Application Note 3 to § 5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes for imposing supervised release on the defendant. Research indicates that the majority of defendants who violate a condition of supervised release do so during the first year of the term of supervised release.

5. *Early Termination and Extension.*—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.".

Issues for Comment

1. The proposed amendment to § 5D1.1 contains an Option 1A under which the court would be required to order a term of supervised release when a sentence of imprisonment of 15 months or more is imposed, or when required by statute. A possible basis for setting this threshold at 15 months (rather than 12 months, as the guideline currently provides) is to reflect the Commission's recent amendment to the Sentencing Table in Chapter Five, Part A. *See* Appendix C, Amendment 738 (effective November 1, 2010). Before that amendment, a defendant in Zone D of the Sentencing Table was required to be sentenced to at least 12 months imprisonment; the amendment changed that threshold to 15 months imprisonment.

Should the Commission instead set this threshold at a number of months of imprisonment higher than 15 months, such as 24 months or 36 months? If so, what would be the basis for doing so?

2. The proposed amendment to § 5D1.2 would either reduce or eliminate the minimum terms of supervised release required by the guidelines, but would not affect the maximum terms of supervised release required by the guidelines or by statute. If the defendant was convicted of a Class A or B felony, the maximum term of supervised release is five years; for a Class C or D felony, three years; and for a Class E felony or a Class A misdemeanor, one year. *See* § 5D1.2(a)(1), (2), (3).

Should the Commission lower the maximum terms of supervised release required by these provisions? If so, what lower maximum terms of supervised release should the Commission provide? What would be the basis for doing so?

6. Illegal Reentry

Synopsis of Proposed Amendment: Section 2L1.2 (Unlawfully Entering or Remaining in the United States) contains a specific offense characteristic at subsection (b)(1) under which a defendant receives an enhancement if the defendant previously was deported, or unlawfully remained in the United States, after a conviction. The amount of the enhancement may be 16 levels, 12 levels, 8 levels, or 4 levels, depending on the nature of the underlying offense. This proposed amendment would amend § 2L1.2 to provide a limitation on the use of convictions under subsections (b)(1)(A) and (B). Specifically, such a conviction would receive the 16- or 12-level enhancement, as applicable, if the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), and 8 levels if it does not. Conforming changes to the Commentary are also made.

The proposed amendment responds to case law and comments received regarding the enhancement in § 2L1.2(b)(1) when a defendant's predicate offense would not qualify for criminal history points under Chapter Four. *Compare United States* v. *Amezcua-Vasquez,* 567 F.3d 1050, 1055 (9th Cir. 2009) (defendant had two convictions that were 25 years old; court stated that the 16-level enhancement in § 2L1.2(b)(1)(A) "addresses the seriousness of the offense" but "does not * * * justify increasing a defendant's sentence *by the same magnitude* irrespective of the age of the prior conviction at the time of reentry" [emphasis in original]); *with United States* v. *Chavez-Suarez,* 597 F.3d 1137, 1139 (10th Cir. 2010) (defendant had a conviction that was 11 years old; court discussed *Amezcua-Vasquez* but was "not convinced that this conviction was so stale" as to require the sentencing court to vary downward from the 16-level enhancement).

The guidelines account for the age of a prior conviction in Chapter Four, which specifies when a conviction is too old to receive criminal history points. *See* § 4A1.2(e). The guidelines contain several conviction-based enhancements that depend on whether the conviction receives criminal history points. *See, e.g.,* § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), comment. (n.9); § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), comment. (n.10); § 4B1.2 (Definitions of Terms Used in Section 4B1.1), comment. (n.3). The proposed amendment would reduce the 16- and 12-level enhancement when the prior conviction is too old to qualify for criminal history points, but would not entirely eliminate the enhancement. *See, e.g., Amezcua-Vasquez,* 567 F.3d at 1055 (acknowledging that it is "reasonable to take some account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country"). *See also id.* at 1055 (in certain cases in which the prior conviction is "stale", an enhancement may be appropriate to address the "seriousness" of the prior conviction but need not be of the "same magnitude"); *Chavez-Suarez,* 597 F.3d at 1139 (same).

Proposed Amendment

Section 2L1.2(b)(1)(A) is amended by inserting "if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points" after "16 levels".

Section 2L1.2(b)(1)(B) is amended by inserting "if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points" after "12 levels".

The Commentary to 2L1.2 captioned "Application Notes" is amended in Note 1 by adding at the end the following:

"(C) *Prior Convictions.*—In determining the amount of an enhancement under subsection (b)(1), note that the amounts in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while the amounts in subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.

A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points under Chapter Four.".

The Commentary to 2L1.2 captioned "Application Notes" is amended striking Note 6 and redesignating Notes 7 and 8 as Notes 6 and 7.

7. Child Support

Synopsis of Proposed Amendment: This proposed amendment addresses a circuit conflict on whether a defendant convicted of an offense involving the willful failure to pay court-ordered child support (*e.g.,* a violation of 18 U.S.C. 228) and sentenced under § 2B1.1 (Theft, Property Destruction, and Fraud) receives the specific offense characteristic in § 2B1.1(b)(8)(C).

Offenses under section 228 are referenced in Appendix A (Statutory Index) to § 2J1.1 (Contempt), which directs the court to apply § 2X5.1 (Other Offenses), which directs the court to apply the most analogous offense guideline. The commentary to § 2J1.1 provides that, in a case involving a violation of section 228, the most analogous offense guideline is § 2B1.1. *See* § 2J1.1, comment. (n.2).

The specific offense characteristic in § 2B1.1(b)(8)(C) applies if the offense involved "a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines". It provides an enhancement of 2 levels and a minimum offense level of level 10.

Some circuits have disagreed over whether it is impermissible double counting to apply § 2B1.1(b)(8)(C) in a case involving a violation of section 228. The Second and Eleventh Circuits have held that applying § 2B1.1(b)(8)(C) in a section 228 case is permissible, because the failure to pay the child support and the violation of the order are distinct harms. *See United States* v. *Maloney,* 406 F.3d 149, 153–54 (2d Cir. 2005); *United States* v. *Phillips,* 363 F.3d 1167, 1169 (11th Cir. 2004). However, the Seventh Circuit has held that applying § 2B1.1(b)(8)(C) in a section 228 case is impermissible double counting. *See United States* v. *Bell,* 598 F.3d 366 (7th Cir. 2010) ("to apply both the cross-reference for § 228 and the enhancement for violation of a court or administrative order is impermissible double counting").

The proposed amendment resolves the conflict by amending the commentary to § 2J1.1. Two bracketed options are provided. The first option

specifies that, in a case involving a violation of section 228, apply § 2B1.1(b)(8)(C); the second option specifies that, in such a case, do not apply § 2B1.1(b)(8)(C).

Proposed Amendment

The Commentary to § 2J1.1 captioned "Application Notes" is amended in Note 2 by inserting "In such a case, [apply][do not apply] § 2B1.1(b)(8)(C) (pertaining to a violation of a prior, specific judicial order)." after "failed to pay.".

8. Miscellaneous

Synopsis of Proposed Amendment: This proposed multi-part amendment responds to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.

Part A of the proposed amendment updates the policy statement at § 6B1.2 (Standards for Acceptance of Plea Agreements) in light of *United States* v. *Booker,* 543 U.S. 220 (2005), and the Federal Judiciary Administrative Improvements Act of 2010, Public Law 111–174 (enacted May 27, 2010). The proposed amendment amends § 6B1.2 to provide standards for acceptance of plea agreements when the sentence is outside the applicable guideline range. The proposed amendment also responds to the Federal Judiciary Administrative Improvements Act of 2010, which amended 18 U.S.C. 3553(c)(2) to require that the reasons for a sentence be set forth in the statement of reasons form (rather than in the judgment and commitment order). The proposed amendment amends both § 6B1.2 and § 5K2.0(e) to reflect this statutory change.

Part B of the proposed amendment responds to the Coast Guard Authorization Act of 2010, Public Law 111–281 (enacted October 15, 2010), which provided statutory sentencing enhancements for certain offenses under 18 U.S.C. 2237 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information) and created a new criminal offense at 33 U.S.C. 3851.

The proposed amendment addresses the section 2237 offenses by expanding the range of guidelines to which certain section 2237 offenses are referenced. Section 2237 makes it unlawful for—

The operator of a vessel to knowingly fail to obey a law enforcement order to heave to, *see* 18 U.S.C. 2237(a)(1);

a person on board a vessel to forcibly interfere with a law enforcement boarding or other law enforcement action, or to resist arrest, *see* 18 U.S.C. 2237(a)(2)(A); or

a person on board a vessel to provide materially false information to a law enforcement officer during a boarding regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew, *see* 18 U.S.C. 2237(a)(2)(B).

All three of these offenses are punishable by not more than 5 years of imprisonment. The first two are referenced in Appendix A (Statutory Index) to § 2A2.4 (Obstructing or Impeding Officers); the third is referenced to § 2B1.1 (Theft, Property Destruction, and Fraud). However, the Coast Guard Authorization Act of 2010 provided statutory sentencing enhancements that apply to persons convicted under either of the first two offenses under section 2237 (*i.e.,* the two offenses referenced to § 2A2.4; the sentencing enhancements do not apply to the offense referenced to § 2B1.1). The proposed amendment addresses these new statutory sentencing enhancements by referencing them in Appendix A (Statutory Index) to Chapter Two offense guidelines most analogous to the conduct forming the basis for the statutory sentencing enhancements.

Finally, the proposed amendment addresses the new criminal offense at 33 U.S.C. 3851, which makes it a felony, punishable by not more than six years imprisonment, to sell or distribute an organotin or to sell, distribute, make, use, or apply an anti-fouling system (*e.g.,* paint) containing an organotin. The proposed amendment references this new offense to §§ 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) and 2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification).

Proposed Amendment

(A) Plea Agreements and Statement of Reasons

Section 6B1.2(b)(2) is amended by striking "departs from" and inserting "is outside"; by striking "specifically set forth" and all that follows through "order" and inserting "set forth with specificity in the statement of reasons form".

Section 6B1.2(c)(2) is amended by striking "departs from" and inserting "is outside"; by striking "specifically set forth" and all that follows through "order" and inserting "set forth with specificity in the statement of reasons form".

The Commentary to § 6B1.2 is amended in the second paragraph by striking "departs from" and inserting "is outside"; by striking "(*i.e.,* that such departure" and all that follows through "order" and inserting "and those reasons are set forth with specificity in the statement of reasons form. *See* 18 U.S.C. § 3553(c)".

Section 5K2.0(e) is amended by striking "written judgment and commitment order" and inserting "statement of reasons form".

The Commentary to § 5K2.0 captioned "Application Notes" is amended in Note 3(C) in the second paragraph by striking "written judgment and commitment order" and inserting "statement of reasons form"; and in Note 5 by striking "written judgment and commitment order" and inserting "statement of reasons form".

(B) Coast Guard Authorization Act

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2237(a)(2)(B) the following:

"18 U.S.C. 2237(b)(2)(B)(i) [2A1.1], [2A1.2], 2A1.3, 2A1.4
18 U.S.C. 2237(b)(2)(B)(ii)(I) 2A2.1, 2A2.2
18 U.S.C. 2237(b)(2)(B)(ii)(II) 2A4.1
18 U.S.C. 2237(b)(2)(B)(ii)(III) 2A3.1
18 U.S.C. 2237(b)(3) 2A2.2
18 U.S.C. 2237(b)(4) 2A2.1, 2A2.2, [2G1.1], 2G1.3, 2G2.1, 2H4.1, 2L1.1";

and by inserting after the line referenced to "33 U.S.C. 1908" the following: "33 U.S.C. 3851 2Q1.2, 2Q1.3".

9. Technical

Synopsis of Proposed Amendment: This proposed amendment makes various technical and conforming changes to the guidelines.

First, the proposed amendment makes certain technical and conforming changes in connection with the amendments that the Commission submitted to Congress on April 29, 2010. *See* 75 FR 27388 (May 14, 2010); USSG App. C, Amendments 738–746. Those changes are as follows:

(1) Amendment 744 made changes to the organizational guidelines in Chapter Eight, including a change that consolidated subsections (b) and (c) of § 8D1.4 (Recommended Conditions of Probation—Organizations) into a single subsection (b). To reflect this consolidation, § 8B2.1(a) is changed so that it refers to the correct subsection of § 8D1.4.

(2) Amendment 745 expanded the scope of § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) to cover

not only cultural heritage resources, but also paleontological resources. To reflect this expanded scope, a conforming change is made to § 2Q2.1(c)(1).

Second, the proposed amendment makes technical changes to § 3C1.1 (Obstructing or Impeding the Administration of Justice), § 4A1.2(k)(2), and § 4B1.1(b) to promote stylistic consistency in how subdivisions are designated.

Finally, the proposed amendment makes a series of changes throughout the *Guidelines Manual* to provide full and accurate references to the titles of Chapter Three, Part C (Obstruction and Related Adjustments) and § 3C1.1 (Obstructing or Impeding the Administration of Justice).

Proposed Amendment

Chapter Two is amended in the introductory commentary by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to § 2J1.2 captioned "Application Notes" is amended in Note 2(A) by inserting "and Related Adjustments" after "(Obstruction"; and in Note 3 by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to § 2J1.3 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction"; and in Note 3 by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to § 2J1.6 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction"; and in Note 4 by striking "Obstruction of Justice" and inserting "Obstructing or Impeding the Administration of Justice".

The Commentary to § 2J1.9 captioned "Application Notes" is amended in Note 1 by inserting "and Related Adjustments" after "(Obstruction"; and in Note 2 by inserting "and Related Adjustments" after "(Obstruction".

Section 2Q2.1(c)(1) is amended by inserting "or paleontological resource" after "heritage resource"; and by inserting "or Paleontological Resources" after "Heritage Resources" in both places.

Section 3C1.1 is amended by striking "(A)" and inserting "(1)"; by striking "(B)" and inserting "(2)"; by striking "(i)" and inserting "(A)"; and by striking "(ii)" and inserting "(B)".

Section 4A1.2(k)(2) is amended by striking "(i)" and inserting "(A)"; by striking "(ii)" and inserting "(B)"; and by striking "(iii)" and inserting "(C)".

Section 4B1.1(b) is amended by redesignating (A) through (G) as (1) through (7).

The Commentary to § 5E1.2 captioned "Application Notes" is amended in Note 6 by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to § 8A1.2 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction".

Section 8B2.1(a) is amended by striking "(c)" and inserting "(b)".

The Commentary to § 8C2.3 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction".

[FR Doc. 2011–994 Filed 1–18–11; 8:45 am]

BILLING CODE 2210–40–P

DEPARTMENT OF VETERANS AFFAIRS

West Los Angeles VA Medical Center Veterans Programs Enhancement Act of 1998; Draft Master Plan

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: This **Federal Register** Notice announces an opportunity for public comment on the West Los Angeles (WLA) Department of Veterans Affairs (VA) Medical Center Veterans Programs Enhancement Act of 1998 (VPEA) Draft Master Plan (hereinafter referred to as the "Draft Master Plan." The purpose of this plan is to satisfy the legislative mandate of the Veterans Programs Enhancement Act of 1998 regarding "a master plan for the use of the lands * * * over the next 25 and over the next 50 years."

DATES: Written comments on the Draft Master Plan must be received on or before February 19, 2011.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* or by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to "Notice: Draft Master Plan." All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Call (202) 461–4902 for an appointment.

SUPPLEMENTARY INFORMATION: The mission of the VA's Veterans Health Administration (VHA) is to honor America's veterans by providing exceptional health care that improves their health and well-being. VHA implements VA's medical care, research, and education programs. The WLA campus is part of the larger VA Greater Los Angeles (GLA) Healthcare System, serving Veterans in Los Angeles, Ventura, Santa Barbara, San Luis Obispo and Kern Counties, California. The WLA campus provides a variety of medical services including inpatient and outpatient care, rehabilitation, residential care, and long-term care services. In addition, it serves as a center for medical research and education.

The WLA campus is 387 acres in the heart of Los Angeles. There are 104 buildings across the campus of which 39 are designated as historic, 12 are considered to be exceptionally high risk for a seismic event, and a number are vacant or closed. Currently, the WLA campus has 21 land use agreements, varying in length and contractual authority, with partners to deliver a variety of services to veterans and the community. This does not include several non-recurring filming and single-day event agreements.

The purpose of the Draft Master Plan is to satisfy the legislative mandate of the Veterans Programs Enhancement Act of 1998 regarding "a master plan for the use of the lands * * * over the next 25 years and over the next 50 years." This Draft Master Plan is a land use plan that guides the physical development of the campus to support its mission of patient care, teaching, and research. The plan reflects legislative restrictions on the property and discusses developmental goals and design objectives for the campus.

The Draft Master Plan summarizes the work of previous planning studies to address future development for the portions of the land for which there is no current plan and is based on the Capital Asset Realignment for Enhanced Services (CARES) process. CARES delivered a comprehensive assessment of the campus; however, it did not deliver recommendations on land for which there is no current plan or produce a Master Plan, as needed to satisfy the legislative mandate.

The VPEA Master Plan considers on-campus services that may evolve in the future with the changing demographics of the Veteran population. It discusses current land uses, facilities, and programs in the context of the CARES approved capital plan. In addition, it outlines recommended actions for how to plan for the limited, unallocated land, and facilities in support of VA's mission.

In keeping with VA's goals to reach as many veterans as possible and to ensure that those veterans receive the services

that they need the most, we have decided to make the Draft Master Plan available at *http://www.losangeles.va.gov/* upon publication of this notice and invite members of the public or other interested parties to review the Draft Master Plan and to comment on it.

After the public comment period for this notice has closed, VA will make any necessary adjustments to the Draft Master Plan and publish a second notice responding to those comments.

Approved: January 13, 2011.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2011–1032 Filed 1–18–11; 8:45 am]

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Part II

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Parts 571 and 585
Federal Motor Vehicle Safety Standards, Ejection Mitigation; Phase-In Reporting Requirements; Incorporation by Reference; Final Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 571 and 585

[Docket No. NHTSA–2011–0004]

RIN 2127–AK23

Federal Motor Vehicle Safety Standards, Ejection Mitigation; Phase-In Reporting Requirements; Incorporation by Reference

AGENCY: National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule establishes a new Federal Motor Vehicle Safety Standard No. 226, "Ejection Mitigation," to reduce the partial and complete ejection of vehicle occupants through side windows in crashes, particularly rollover crashes. The standard applies to the side windows next to the first three rows of seats, and to a portion of the cargo area behind the first or second rows, in motor vehicles with a gross vehicle weight rating (GVWR) of 4,536 kilogram (kg) or less (10,000 pounds (lb) or less). To assess compliance, the agency is adopting a test in which an impactor is propelled from inside a test vehicle toward the windows. The ejection mitigation safety system is required to prevent the impactor from moving more than a specified distance beyond the plane of a window. To ensure that the systems cover the entire opening of each window for the duration of a rollover, each side window will be impacted at up to four locations around its perimeter at two time intervals following deployment.

The agency anticipates that manufacturers will meet the standard by modifying existing side impact air bag curtains, and possibly supplementing them with advanced glazing. The curtains will be made larger so that they cover more of the window opening, made more robust to remain inflated longer, and made to deploy in both side impacts and in rollovers. In addition, after deployment the curtains will be tethered near the base of the vehicle's pillars or otherwise designed to keep the impactor within the boundaries established by the performance test. This final rule adopts a phase-in of the new requirements, starting September 1, 2013.

This final rule advances NHTSA's initiatives in rollover safety and also responds to Section 10301 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). That section directs NHTSA to initiate and complete rulemaking to reduce complete and partial ejections of vehicle occupants from outboard seating positions, considering various ejection mitigation systems.

DATES: *Effective date:* The date on which this final rule amends the Code of Federal Regulations (CFR) is March 1, 2011. The incorporation by reference of certain publications listed in the standard is approved by the Director of the Federal Register as of March 1, 2011.

Petitions for reconsideration: If you wish to petition for reconsideration of this rule, your petition must be received by March 7, 2011.

Compliance dates: This final rule adopts a phase-in of the new requirements. The phase-in begins on September 1, 2013. By September 1, 2017, all vehicles must meet the standard, with the exception of altered vehicles and vehicles produced in more than one stage, which are provided more time to meet the requirements. Manufacturers can earn credits toward meeting the applicable phase-in percentages by producing compliant vehicles ahead of schedule, beginning March 1, 2011 and ending at the conclusion of the phase-in.

ADDRESSES: If you wish to petition for reconsideration of this rule, you should refer in your petition to the docket number of this document and submit your petition to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590.

The petition will be placed in the docket. Anyone is able to search the electronic form of all documents 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).

For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and follow the online instructions for accessing the docket. You may also visit DOT's Docket Management Facility, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001 for on-line access to the docket.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may contact Mr. Louis Molino, NHTSA Office of Crashworthiness Standards, telephone 202–366–1740, fax 202–493–2739. For legal issues, you may contact Ms. Deirdre Fujita, NHTSA Office of Chief Counsel, telephone 202–366–2992, fax 202–366–3820.

You may send mail to these officials at the National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590.

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I. Executive Summary

This final rule establishes a new Federal Motor Vehicle Safety Standard (FMVSS) No. 226, "Ejection Mitigation," to reduce the partial and complete ejection of vehicle occupants through side windows in crashes, particularly rollover crashes. Countermeasures installed to meet this rule will also reduce the number of complete and partial ejections of occupants in side impacts. This final rule responds to section 10301 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users," (SAFETEA–LU), Public Law 109–59 (Aug. 10, 2005; 119 Stat. 1144), which requires the Secretary of Transportation to issue an ejection mitigation final rule reducing complete and partial ejections of occupants from outboard seating positions.

Addressing vehicle rollovers is one of NHTSA's highest safety priorities. In 2002, NHTSA conducted an in-depth review of rollovers and associated deaths and injuries and assessed how this agency and the Federal Highway Administration (FHWA) could most effectively improve safety in this area.[1] The agency formulated strategies involving improving vehicle performance and occupant behavior, and with the FHWA taking the lead, improving roadway designs. Vehicle performance strategies included crash avoidance and crashworthiness programs, and included four wide-ranging initiatives to address the rollover safety problem: prevent crashes, prevent rollovers, prevent ejections, and protect occupants who remain within the vehicle after a crash. Projects aimed at protecting occupants remaining in the vehicle during a rollover included improved roof crush resistance and research on whether seat belts could be made more effective in rollovers.

A major undertaking implementing the first two initiatives was completed in 2007 when NHTSA adopted a new FMVSS No. 126 (49 CFR 571.126), "Electronic Stability Control Systems," to require electronic stability control (ESC) systems on passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating (GVWR) of 4,536 kg (10,000 lb) or less (72 FR 17236, April 6, 2007, Docket NHTSA–2007–27662). ESC systems use automatic computer-controlled braking of the individual wheels of a vehicle to assist the driver in maintaining control in critical driving situations in which the vehicle is beginning to lose directional stability at the rear wheels (spin out) or directional control at the front wheels (plow out). Because most loss-of-control crashes culminate in the vehicle's leaving the roadway—an event that significantly increases the probability of a rollover—preventing single-vehicle loss-of-control crashes is the most effective way to reduce deaths resulting from rollover crashes.[2] The agency estimates that when all vehicles (other than motorcycles) under 4,536 kg GVWR have ESC systems, the number of deaths each year resulting from rollover crashes would be reduced by 4,200 to 5,500. From 2001 to 2007, there were more than 10,000 deaths in light vehicle rollover crashes. Rollover deaths have decreased slightly in 2008 (9,043) and 2009 (8,267), as have fatalities in all crash types.

While ESC systems will avoid many of the roadway departures that lead to rollover, vehicle rollovers will continue to occur.[3] Once a rollover occurs, vehicle crashworthiness characteristics play a crucial role in protecting the occupants. According to agency data, occupants have a much better chance of surviving a crash if they are not ejected from their vehicles.

Concurrent with the agency's work on ESC, NHTSA began work on the third initiative on rollover safety, pursuing the feasibility of installing crashworthiness safety systems to mitigate occupant ejections through side windows in rollovers ("ejection mitigation"). Major strides on this third initiative were realized in 2007 when the agency published a final rule that incorporated a dynamic pole test into FMVSS No. 214, "Side impact protection" (49 CFR 571.214) ("Phase 1 FMVSS No. 214 rulemaking").[4] The pole test, applying to motor vehicles with a GVWR of 4,536 kg or less, requires vehicle manufacturers to provide side impact protection for a wide range of occupant sizes and over a broad range of seating positions. To meet the pole test, manufacturers are installing new technologies capable of improving head and thorax protection in side crashes, i.e., side curtain air bags and torso air bags.

Today's final rule launches a new phase in occupant protection and ejection mitigation. It builds on and

[1] The assessment was carried out by one of four Integrated Project Teams (IPTs) formed within NHTSA, whose recommendations culminated in the agency's priority plan, "NHTSA Vehicle Safety Rulemaking and Supporting Research: 2003–2006" (68 FR 43972; July 18, 2003) *http://www.nhtsa.dot.gov/cars/rules/rulings/PriorityPlan/FinalVeh/Index.html.* The IPT Report on Rollover was published in June 2003 (68 FR 36534, Docket 14622).

[2] NHTSA estimates that the installation of ESC will reduce single-vehicle crashes of passenger cars by 34 percent and single vehicle crashes of sport utility vehicles (SUVs) by 59 percent. NHTSA further estimates that ESC has the potential to prevent 71 percent of the passenger car rollovers and 84 percent of the SUV rollovers that would otherwise occur in single-vehicle crashes. NHTSA estimates that ESC would save 5,300 to 9,600 lives and prevent 156,000 to 238,000 injuries in all types of crashes annually once all light vehicles on the road are equipped with ESC systems.

[3] NHTSA has developed a Final Regulatory Impact Analysis (FRIA) for this final rule that discusses issues relating to the target population and the potential costs, benefits and other impacts of this regulatory action. The FRIA is available in the docket for this final rule and may be obtained by downloading it or by contacting the Docket Management facility at the address provided at the beginning of this document.

[4] 72 FR 51908; September 11, 2007, Docket No. NHTSA–29134; response to petitions for reconsideration, 73 FR 32473, June 9, 2008, Docket No. NHTSA–2008–0104, 75 FR 12123, March 15, 2010, Docket No. NHTSA–2010–0032. On August 10, 2005, the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users," (SAFETEA–LU), Public Law 109–59 (Aug. 10, 2005; 119 Stat. 1144) was enacted, to authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes. Section 10302(a) of SAFETEA–LU directed the Secretary to complete the FMVSS No. 214 rulemaking by July 1, 2008. The September 11, 2007 final rule completed the rulemaking specified in section 10302(a). NHTSA estimates that the September 11, 2007 final rule will save 311 lives annually.

improves existing technology while achieving cost efficiency and does so expeditiously. This final rule enhances the side curtain air bag systems installed pursuant to the FMVSS No. 214 side impact rulemaking. Side curtain air bags [5] will be made larger to cover more of the window opening, more robust to remain inflated longer, enhanced to deploy in side impacts and in rollovers, and made not only to cushion but also made sufficiently strong to keep an occupant from being fully or partially ejected through a side window. The side curtain air bags required by this rule will be designed to retain the occupant regardless of whether the occupant had his or her window glazing up, down, or partially open, and even when the glazing is destroyed during the rollover crash.

The NPRM upon which this final rule is based was published on December 2, 2009 (74 FR 63180, Docket No. NHTSA–2009–0183). Materials underlying the development of this rule have been placed in that docket and in a research and development docket created in 2006 (Docket No. NHTSA–2006–26467).

Rollover crashes can be complex and unpredictable. At this time there is no conventional rollover scenario or test representative of real-world rollover crashes that can be used in a dynamic test to the agency's satisfaction to evaluate the performance of ejection mitigation countermeasures. Yet, this final rule achieves ejection mitigation benefits notwithstanding the absence of a dynamic procedure. Agency research has found that full coverage of the side windows is a key element to mitigating ejection. This standard adopts a component test that assures there is full coverage of the side window to diminish the potential risk of the windows as ejection portals and that assesses ejection mitigation safety systems for as long in the crash event as the risk of ejection reasonably exists.

The test uses a guided impactor to assess the ability of the countermeasure (*e.g.,* a curtain system) to mitigate ejections in different types of rollover and side impact crashes involving different occupant kinematics. The test has been carefully designed to represent occupant to vehicle interactions in a dynamic rollover event. The impact mass is based on the mass imposed by a 50th percentile male's head and upper torso on the window opening during an occupant ejection. The mass of the impactor, 18 kilograms (kg) (40 lb), is propelled at points around the window's perimeter with sufficient kinetic energy to assure that the ejection mitigation countermeasure is able to protect a far-reaching range of occupants in real world crashes.

In the test, the countermeasure must retain the linear travel of the impactor such that the impactor must not travel 100 millimeters (mm) beyond the location of the inside surface of the vehicle glazing. This displacement limit serves to control the size of any gaps forming between the countermeasure (*e.g.,* the ejection mitigation side curtain air bag) and the window opening, thus reducing the potential for both partial and complete ejection of an occupant.

To evaluate the performance of the curtain to fully cover potential ejection routes, the impactor will typically target four specific locations per side window adjacent to the first three rows of the vehicle. Impacting four targets around the perimeter of the opening assures that the window will be covered by the countermeasure (curtain), while imposing a reasonable test burden. Small windows will be tested with fewer targets.

Computer modeling has shown that ejections can occur early and late in the rollover event. In the standard's test procedure, the ejection mitigation side countermeasure will be tested at two impact speeds and at two different points in time, to ensure that the protective system will retain the occupant from the relatively early through the late stages of a rollover.

The times at which the impacts will occur are data-driven and related to our goal of containment of occupants both early and late in rollovers. Crash data show that slightly less than half of all fatal complete ejections occurred in crashes with 5 or fewer quarter-turns. Film analysis of vehicles that rolled 5 or fewer quarter-turns in staged rollover tests indicates that it took about 1.5 seconds for the vehicles to roll once completely. A vehicle rolling 11 quarter-turns had a maximum roll time of 5.5 seconds. Data from the National Automotive Sampling System (NASS) Crashworthiness Data System (CDS) show that rollovers with eleven or fewer quarter-turns account for about 98 percent of rollovers with fatal complete ejection.[6] The standard replicates these crash dynamics with the two impacts of the headform. The first impact will be at 20 kilometers per hour (km/h) (12.4 miles per hour (mph)), 1.5 seconds after deployment of the curtain. The second impact will be at 16 km/h (9.9 mph), 6 seconds after deployment of the curtain. The 20 km/h and 16 km/h tests replicate the forces that an occupant can impart to the curtain during the rollover event as well as during side impacts.

Under today's final rule, vehicle manufacturers must provide information to NHTSA upon request that describes the conditions under which ejection mitigation air bags will deploy. There is no presently demonstrated need for us to specify in the standard the conditions dictating when the sensors should deploy; field data indicate that rollover sensors are overwhelmingly deploying effectively in the real world. We will keep monitoring field data to determine whether future regulatory action is needed in this area.

This chapter in occupant protection will achieve tremendous benefits at reasonable costs. We estimate that this rule will save 373 lives and prevent 476 serious injuries per year (see Table 1 below). The cost of this final rule is approximately $31 per vehicle (see Table 2). The cost per equivalent life saved is estimated to be $1.4 million (3 percent discount rate)–$1.7 million (7 percent discount rate) (see Table 3 below). Annualized costs and benefits are provided in Table 4.

TABLE 1—ESTIMATED BENEFITS

Fatalities	373
Serious Injuries	476

TABLE 2—ESTIMATED COSTS*

[2009 economics]

Per Vehicle	$31.
Total Fleet (16.5 million vehicles).	$507 Million

* The system costs are based on vehicles that are equipped with an FMVSS No. 214 curtain system. According to vehicle manufacturers' projections made in 2006, 98.7 percent of Model Year (MY) 2011 vehicles will be equipped with curtain bags and 55 percent of vehicles with curtain bags will be equipped with a rollover sensor.

TABLE 3—COST PER EQUIVALENT LIFE SAVED

3% Discount rate	7% Discount rate
$1.4M	$1.7M

[5] In this document, this countermeasure is referred to as an "ejection mitigation side curtain air bag," "side curtain air bag," "air bag curtain," "rollover curtain," or simply "curtain." This countermeasure is designed to deploy in a rollover crash. The same side curtain air bag meeting FMVSS No. 226 can be used to meet the ejection mitigation requirements of FMVSS No. 214 with the addition of a rollover sensing system to deploy the side curtain air bag in a rollover.

[6] This is based on 2000–2009 NASS data. The 1988—2005 NASS data reported in the NPRM showed that 93 percent of rollovers with fatal complete ejections had 11 or fewer quarter-turns.

TABLE 4—ANNUALIZED COSTS AND BENEFITS

[In millions of $2009 dollars]

	Annual costs	Annualized benefits	Net benefits
3% Discount Rate	$507M	$2,279M	$1,773
7% Discount Rate	507M	1,814M	1,307

Accompanying today's final rule is a Final Regulatory Impact Analysis (FRIA) analyzing the costs, benefits, and other impacts of this final rule, and a technical report the agency has prepared that presents a detailed analysis of engineering studies, and other information supporting the final rule. Both documents have been placed in the docket for this final rule. The documents can be obtained by contacting the docket by the means specified at the beginning of this document or by downloading them at www.regulations.gov.

II. Safety Need

Rollover crashes are a significant and a particularly deadly safety problem. As a crash type, rollovers are second only to frontal crashes as a source of fatalities in light vehicles. Data from the last 10 years of Fatal Analysis Reporting System (FARS) files (2000–2009[7]) indicate that frontal crash fatalities have averaged about 11,600 per year, while rollover fatalities have averaged 10,037 per year. In 2009, 35 percent of all fatalities were in light vehicle rollover crashes. The last 10 years of data from the National Automotive Sampling System (NASS) General Estimates System (GES) indicate that an occupant in a rollover is 14 times more likely to be killed than an occupant in a frontal crash.[8]

Ejection is a major cause of death and injury in rollover crashes. According to 2000–2009 FARS data, on average 47 percent of the occupants killed in rollovers were completely ejected from their vehicle. During this time period, there were 358 fully ejected occupants killed for every 1,000 fully ejected occupants in rollover crashes, as compared to 14 of every 1,000 occupants not fully ejected occupants killed.[9] A double-pair comparison from the last ten years of FARS data show that avoiding complete ejection is associated with a 64 percent decrease in the risk of death.[10]

The majority of rollover crashes involve the vehicle rolling over two quarter-turns or less. However, the distribution of ejected occupants who are seriously injured (maximum abbreviated injury scale (MAIS) 3+) or killed is skewed towards rollovers with a higher number of quarter-turns. According to NASS Crashworthiness Data System (CDS) data of occupants exposed to a rollover crash from 2000 to 2009, half of all fatal complete ejections occurred in crashes with six or more quarter-turns.

Most occupants are ejected through side windows. In developing the target population estimates for this final rule we found that annualized injury data from 1997 to 2008 NASS CDS and fatality counts adjusted to the annual average from FARS for these same years[11] indicate that ejection through side windows is the greatest contributor to the ejection problem.[12] There were 16,272 MAIS 1–2 injuries, 5,209 MAIS 3–5 injuries, and 6,412 fatalities resulting from ejections through the side windows adjacent to the first three rows.

Table 5 below shows the MAIS 1–2, MAIS 3–5, and fatality distribution of ejected occupants by 11 potential ejection routes.[13] The "Not Glazing" category captures ejected occupants that did not eject through a glazing area or the roof (perhaps a door or an area of vehicle structure that was torn away during the crash). Roof ejections have been separated into "Roof Panel or Glazing" and "Roof Other." The former groups sunroofs, t-tops and targa-tops into a single category, whether made of glazing or having a sheet metal skin. The latter combines convertibles, modified roofs, camper tops and removable roofs. No distinction could be made as to whether these roof structures were open or closed prior to ejection.

TABLE 5—OCCUPANT INJURY AND FATALITY COUNTS BY EJECTION ROUTE IN ALL CRASH TYPES

[Annualized 1997–2008 NASS and FARS]

Ejection route	MAIS 1–2	MAIS 3–5	Fatal
Windshield	1,517	1,400	1,078
First-Row Windows	14,293	4,980	5,589
Second-Row Windows	1,700	641	796

[7] These data are updated from the 1998 to 2007 FARS data reported in the NPRM.

[8] The relative risk of fatality for each crash type can be assessed by dividing the number of fatalities in each crash type by the frequency of the crash type. The frequency of particular crash types is determined by police traffic crash reports (PARs).

[9] The data combines partially-ejected and un-ejected occupants together, because partial ejection is sometimes difficult to determine and the PAR-generated FARS data may not be an accurate representation of partially-ejected occupant fatalities.

[10] "Incremental Risk of Injury and Fatality Associated with Complete Ejection," NHTSA, 2010 (see the docket for this final rule).

[11] The target population estimate for the NPRM used 1997 to 2005 FARS data. The estimate for this final rule is based on an additional three years of data.

[12] In our data analysis for the NPRM to determine ejection routes, we assumed that an ejection route coding of "rear" in NASS CDS meant a second row window and that "other" glazing meant third and higher row side window ejections. The assumption was based on the coding of seat position in NASS. Since then, we have determined that an occupant coded as ejected through a "rear" window did not necessarily go through the second row window. Similarly, the coding of "other" glazing was determined not necessarily to mean third and higher row. Thus, for this final rule, for cases coded as ejected through "rear" or "other" glazing, we assume that the ejection was through a second row window in the following circumstances: the occupant was seated in the first two rows of a vehicle, or the vehicle was a convertible, two-door sedan, or four-door sedan (i.e., these are vehicles without a third row or cargo area). If an occupant was coded as seated in the third or higher row and was coded as ejected through a rear window or "other" glazing, we used the NASS Case Query System to undertake a hard copy review. We determined ejection routes in this manner for 41 unweighted rear window cases and 17 unweighted "other" glazing cases. A hard copy review of the "other" glazing cases showed that 9 were known 3rd row side window ejections, but five cases were miscoded. Four were actually backlight ejections and one was a sunroof ejection. The known 3rd row ejections were recoded as "Row 3 Window" ejections.

[13] All crash types are included, but the counts are restricted to ejected occupants who were injured.

TABLE 5—OCCUPANT INJURY AND FATALITY COUNTS BY EJECTION ROUTE IN ALL CRASH TYPES—Continued

[Annualized 1997–2008 NASS and FARS]

Ejection route	MAIS 1–2	MAIS 3–5	Fatal
Third-Row Windows	279	88	27
Fourth-Row Windows	0	0	39
Fifth-Row Window	0	0	7
Cargo Area Rear of Row 2	342	17	52
Backlight	1,621	1,364	495
Roof Panel or Glazing	1,000	367	324
Roof Other	420	105	81
Multiple Windows	0	19	0
Not Glazing	2,848	2,207	1,814
Subtotals:			
Rows 1–3	16,272	5,709	6,412
4th, 5th Row and Cargo	342	17	98
Total	24,020	11,188	10,302

Table 6, below, provides the percentage of the total at each injury level. The injuries and fatalities resulting from ejections through the first three rows of windows constitute 68 percent of MAIS 1–2 injuries, 51 percent of MAIS 3–5 injuries, and 62 percent of all ejected fatalities.

TABLE 6—OCCUPANT INJURY AND FATALITY PERCENTAGES BY EJECTION ROUTE IN ALL CRASH TYPES

[Annualized 1997–2008 NASS and FARS]

Ejection route	MAIS 1–2	MAIS 3–5	Fatal
Windshield	6.3%	12.5%	10.5%
First-Row Windows	59.5%	44.5%	54.2%
Second-Row Windows	7.1%	5.7%	7.7%
Third-Row Windows	1.2%	0.8%	0.3%
Fourth-Row Windows	0.0%	0.0%	0.4%
Fifth-Row Window	0.0%	0.0%	0.1%
Cargo Area Rear of Row 2	1.4%	0.2%	0.5%
Backlight	6.8%	12.2%	4.8%
Roof Panel or Glazing	4.2%	3.3%	3.1%
Roof Other	1.7%	0.9%	0.8%
Multiple Windows	0.0%	0.2%	0.0%
Not Glazing	11.9%	19.7%	17.6%
Subtotals:			
Rows 1–3	67.7%	51.0%	62.2%
4th, 5th Row and Cargo	1.4%	0.2%	1.0%
Total	100.0%	100.0%	100.0%

Since the countermeasure covering side window openings will be made more effective in preventing ejections, this rulemaking will also reduce the number of complete and partial ejections of occupants in side impacts. These benefits go beyond those achieved in the rulemaking adopting an oblique pole test into FMVSS No. 214 (Phase 1 FMVSS No. 214 rulemaking) because a side air bag installed to meet FMVSS No. 214 is not necessarily wide or robust enough to effectively contain occupants in certain side impacts. In fact, NHTSA found that FMVSS No. 214's requirements could be met by a seat-mounted head/torso side air bag or a side head protection curtain air bag together with a seat-mounted or door-mounted torso bag. Further, FMVSS No. 214's pole test does not apply to rear seats. In short, FMVSS No. 214 does not require the large curtain needed for full coverage of side window openings.

Accordingly, this ejection mitigation safety standard will reduce the number of partial and complete ejections of occupants in side impacts. The Phase 1 FMVSS No. 214 rulemaking included reduction of partial ejections of adults (age 13+ years) through side windows in side impacts, but did not include complete ejections. The Phase 1 side impact rulemaking also did not include any impact where a rollover was the first event. In addition, benefits were only assumed in the Phase 1 FMVSS No. 214 rulemaking for side impact crashes with a change in velocity (ΔV) between 19.2 and 40.2 km/h (12 to 25 mph) and impact directions from 2 to 3 o'clock and 9 to 10 o'clock. The side curtain air bags used to meet FMVSS No. 226's ejection mitigation requirements will directly prevent many ejection-induced injuries and fatalities in side impacts that could not be saved by a side air bag that minimally complies with FMVSS No. 214.

Target Population

In general, the target population for this ejection mitigation final rule is composed of occupants injured or killed by ejection from the first three rows of side windows in vehicles to which the standard applies. Later in the preamble, we discuss some slight adjustments made concerning occupants ejected through cargo area window openings.

The target population does not include occupants ejected in all crash types, but rather is restricted to ejections that occur in crashes involving rollovers and some types of planar only side impacts. The limitation on side impacts, change in velocity (ΔV), and certain occupants in those side impacts is necessary to not count benefits anticipated by FMVSS No. 214.

Tables 7–9 provide the counts and/or percentages of the injured and killed side window (rows 1–3) ejected occupants by the window row they were ejected through. These data are restricted to rollover crashes and side impacts in the relevant ΔV range (target population type crashes).

Tables 7 and 8 show the ejection degree and restraint condition for occupants in the first three rows of target population type crashes. Among the side windows, the first row windows provide the ejection route for most of the injured and killed occupants. The greatest number of fatally ejected occupants (3,837) went through the first row window. This represents 88 percent of all side window ejected fatalities. Similarly, 3,979 (89 percent) MAIS 3–5 and 10,017 (87 percent) MAIS 1–2 injured occupants went through the row 1 windows. Within each row, the greatest number of fatal and MAIS 3–5 occupants were completely ejected and unbelted. There were 2,623 fatally injured (59 percent) and 2,269 MAIS 3–5 injured (50 percent) occupants who were unbelted and completely ejected through the row 1 windows.

TABLE 7—DISTRIBUTION OF FIRST 3 ROWS OF SIDE WINDOW EJECTED OCCUPANTS BY EJECTION ROW AND INJURY LEVEL BY EJECTION DEGREE AND BELT USE, IN TARGET POPULATION TYPE CRASHES

[Annualized 1997–2008 NASS and FARS]

Ejection degree	Belted	Row 1			Row 2			Row 3		
		MAIS 1–2	MAIS 3–5	Fatal	MAIS 1–2	MAIS 3–5	Fatal	MAIS 1–2	MAIS 3–5	Fatal
Complete	Yes	95	29	54	139	78	5	0	8	0
Complete	No	3,501	2,269	2,623	782	309	421	95	54	23
Partial	Yes	4,345	1,097	484	43	32	38	109	0	0
Partial	No	2,076	584	675	103	80	123	4	0	0
Total		10,017	3,979	3,837	1,067	499	587	207	62	23

TABLE 8—DISTRIBUTION OF FIRST 3 ROWS OF SIDE WINDOW EJECTED OCCUPANTS BY EJECTION ROW AND INJURY LEVEL BY EJECTION DEGREE AND BELT USE, AS A PERCENTAGE OF TOTALS AT EACH INJURY LEVEL, IN TARGET POPULATION TYPE CRASHES

Ejection degree	Belted	Row 1			Row 2			Row 3		
		MAIS 1–2	MAIS 3–5	Fatal	MAIS 1–2	MAIS 3–5	Fatal	MAIS 1–2	MAIS 3–5	Fatal
Complete	Yes	1%	1%	1%	1%	2%	0%	0%	0%	0%
Complete	No	31%	50%	59%	7%	7%	9%	1%	1%	1%
Partial	Yes	38%	24%	11%	0%	1%	1%	1%	0%	0%
Partial	No	18%	13%	15%	1%	2%	3%	0%	0%	0%
Total		87%	89%	88%	86%	9%	11%	13%	2%	1%

Table 9 shows the ejection degree and vehicle type for occupants in the first three rows of target population type crashes. The greatest numbers of fatalities result from occupants completely ejected from passenger cars. These account for 28 percent of the total fatalities.

Combining partial and complete ejections, cars account for 43 percent of fatalities and 42 percent of MAIS 3 to 5 injuries. Pickup trucks and sport utility vehicles (SUVs) combined account for 50 percent of fatalities and 54 percent of MAIS 3 to 5 injuries. Since the early 1990s, the SUV segment has provided an increasing proportion of rollover fatalities. SUVs represented approximately 16 percent of fatalities in 1997, and nearly 27 percent in 2008. Vans comprise 7 percent of the fatalities and 4 percent of the MAIS 3–5 ejections.

TABLE 9—DISTRIBUTION OF FATALITIES AND INJURIES OF FIRST 3 ROWS SIDE WINDOW EJECTED OCCUPANTS BY VEHICLE TYPE

[Annualized 1997—2008 NASS and FARS]

	Vehicle	MAIS 1–2	MAIS 3–5	Fatal	MAIS 1–2	MAIS 3–5	Fatal
Complete Ejections	Car	1,158	928	1,239	10%	20%	28%
	PU	1,236	812	793	11%	18%	18%
	SUV	1,881	858	907	17%	19%	20%
	Van	324	147	188	3%	3%	4%
	Other	12	2	0	0%	0%	0%
	Subtotal	4,612	2,747	3,127	41%	61%	70%

TABLE 9—DISTRIBUTION OF FATALITIES AND INJURIES OF FIRST 3 ROWS SIDE WINDOW EJECTED OCCUPANTS BY VEHICLE TYPE—Continued

[Annualized 1997—2008 NASS and FARS]

	Vehicle	MAIS 1–2	MAIS 3–5	Fatal	MAIS 1–2	MAIS 3–5	Fatal
Partial Ejections	Car	1,429	971	660	13%	21%	15%
	PU	2,515	375	190	22%	8%	4%
	SUV	1,590	402	350	14%	9%	8%
	Van	1,133	44	103	10%	1%	2%
	Other	13	0	17	0%	0%	0%
	Subtotal	6,680	1,793	1,320	59%	39%	30%
Total Ejections	Car	2,588	1,899	1,899	23%	42%	43%
	PU	3,750	1,187	983	33%	26%	22%
	SUV	3,471	1,260	1,257	31%	28%	28%
	Van	1,457	192	291	13%	4%	7%
	Other	25	2	17	0%	0%	0%
	Total	11,292	4,540	4,447	100%	100%	100%

In summary, for the most part, the target population for this ejection mitigation final rule is composed of occupants injured or killed in an ejection from the first three rows of side windows in vehicles to which the standard applies. The target population does not include the population addressed by the Phase 1 FMVSS No. 214 rulemaking, and does not include persons benefited by the installation of ESC systems in vehicles. (We assume that all model year 2011 vehicles and thereafter will be equipped with ESC, see FMVSS No. 126.) As adjusted for ESC, the target population for this ejection mitigation rulemaking is reduced to 1,392 fatalities, 1,410 MAIS 3–5 injuries and 4,217 MAIS 1–2 injuries. This target population constitutes 23 percent of fatally-injured occupants ejected through a side window, 27 percent of MAIS 3–5 injured, and 23 percent of MAIS 1–2 injured side window-ejected occupants.[14]

III. Congressional Mandate

This final rule responds to section 10301 of SAFETEA–LU, which requires the Secretary of Transportation to issue an ejection mitigation final rule reducing complete and partial ejections of occupants from outboard seating positions. Section 10301 amended Subchapter II of chapter 301 (49 U.S.C. Chapter 301, National Traffic and Motor Vehicle Safety Act) ("Vehicle Safety Act") to add section 30128. Section 10301, paragraph (a), directs the Secretary to initiate rulemaking proceedings, for the purpose of establishing rules or standards that will reduce vehicle rollover crashes and mitigate deaths and injuries associated with such crashes for motor vehicles with a GVWR of not more than 10,000 pounds. Paragraph (c) directs the Secretary to initiate a rulemaking proceeding to establish performance standards to reduce complete and partial ejections of vehicle occupants from outboard seating positions and that, in formulating the standards, the Secretary shall consider various ejection mitigation systems.[15]

NHTSA's final rule fulfills the statutory mandate of section 10301 of SAFETEA–LU to issue an ejection mitigation final rule reducing complete and partial ejections of occupants from outboard seating positions. We have considered various ejection mitigation systems, including advanced glazing,[16] and have made appropriate decisions based on that analysis. At the time of its implementation this final rule will reduce fatality ejected occupants by about one third[17] and completes a decisive stage in the agency's rollover crashworthiness program.

A few glazing manufacturers, a glazing manufacturers' association, and two consumer groups expressed a view in their comments to the NPRM that the rulemaking will fall short of the statutory mandate unless the final rule ensured that windows will not allow any openings larger than two inches to form during a rollover event (as a consequence, such a requirement would encourage the use of advanced glazing). These commenters also believed that SAFETEA–LU directed NHTSA to address ejections through sun roofs, moon roofs,[18] and rear windows in this standard. We address these comments in detail in later sections of this preamble.

With regard to the general assertion that this rulemaking does not meet SAFETEA–LU, we cannot agree. As part and parcel of good governance, all safety standards must be reasonable and appropriate. In addition, in adding section 30128 to the Vehicle Safety Act, SAFETEA–LU specifically requires us to issue an ejection mitigation final rule in accordance with the criteria of that Act. The Vehicle Safety Act requires each motor vehicle safety standard to be practicable, meet the need for motor vehicle safety, and be stated in objective terms. (49 U.S.C. 30111(a).) We must also consider whether the standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed. (49 U.S.C. 30111(b)(3).)

This final rule requires protective barriers at side windows, the ejection

[14] When discussing the target population in this preamble, we will typically mean the pre-ESC adjusted values. We will specifically state when we are referring to an ESC-adjusted target population.

[15] Paragraph (c) states that the Secretary shall issue a final rule under this paragraph by October 1, 2009. Paragraph (e) states that if the Secretary determines that the subject final rule deadline cannot be met, the Secretary shall notify and provide explanation to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce of the delay. On September 24, 2009, the Secretary notified Congress that the final rule will be delayed until January 31, 2011.

[16] One type of advanced glazing systems, usually referred to as laminated glazing, has a multi-layer construction typically with three primary layers. There is usually a plastic laminate bonded between two pieces of glass. Advanced glazing was considered in the 1990s to have potential for use in ejection mitigation.

[17] This fatality reduction does not double-count benefits from ESC and the recent FMVSS No. 214 upgrade.

[18] For this document, we refer to movable and fixed roof panels made of glazing as "moon roofs" and movable panels having a sheet metal exterior as "sun roofs." We refer to both as roof portals.

portals through which 62 percent of occupants are fatally ejected in all crash types. We did not adopt the suggestions in the comments of the glazing manufacturers that could have bolstered increased use of advanced glazing in side windows because we did not find a safety need supporting the approaches. For back windows (backlight) and roof portals, we found that not enough was known to appropriately evaluate the costs, benefits and practicability of the requirements, at this time, including the lack of a viable test procedure. (Fatal ejections through the back light and roof portals account for 4.8 and 3.9 percent of fatal ejections in all crash types.) An appropriate test procedure that would assess ejection potential through portals on the vehicle's roof is also unknown.

In formulating this final rule, NHTSA considered various ejection mitigation systems in accordance with section 10301 of SAFETEA–LU. We sought to adopt performance measures that were design-neutral and performance-oriented so as to provide substantial flexibility to vehicle manufacturers in developing or enhancing ejection mitigation countermeasures that meet the requirements of the standard. To illustrate, the headform test procedure was originally developed in the advanced glazing research program and can be used to assess the performance of many different types of countermeasures at the side windows. The final rule recognizes the beneficial effect advanced glazing can have and permits the use of fixed glazing to achieve the performance criteria specified in the standard. At the same time, however, NHTSA determined after considering real-world field data on advanced glazing that movable advanced glazing alone would not be a satisfactory ejection mitigation countermeasure for side window openings, given that 31 percent of front seat ejections are through windows that were partially or fully rolled down, and given that it is not unusual for advanced glazing to be heavily damaged and rendered ineffective in a rollover crash. Accordingly, the standard does not permit use of movable glazing alone to meet the requirements of the standard. Movable glazing may be used in the high speed test, but it must be used in conjunction with a deployable safety system that will mitigate ejection throughout the stages of a rollover event, such as an ejection mitigation side curtain air bag.

In directing us to consider various ejection mitigation systems, there is indication that Congress envisioned us focusing on ejections through side windows. At the time of enactment of SAFETEA–LU, Congress was aware of the agency's past work on advanced side glazing and of our ejection mitigation research program. Congress was aware that side curtain air bags were showing strong potential as an ejection mitigation countermeasure and that we had redirected research and rulemaking efforts from advanced side glazing to developing performance-based test procedures for an ejection mitigation standard.[19]

In addition, in the legislative history on section 10301, section 7251 of the Senate bill which the Conference committee adopted (Conference Report of the Committee of Conference on H.R. 3, Report 109–203, 109th Congress, 1st Session) directed the Secretary to include consideration of "advanced *side* glazing, *side* air curtains, and *side* impact air bags" (emphases added) in establishing the standard. We believe that Congress wanted us to take into account the knowledge gained from our past work on side ejections in formulating this standard, which we have, building on our knowledge gained from the advanced side glazing and rollover crashworthiness programs.

It would take a longer time than the timeframe allowed by SAFETEA–LU to address fatal ejections through the back light and roof portals. In contrast to the side window research program, which started in the early 1990s, the agency had no research and development foundation upon which requirements for the back light and roof portal could be based. Much is unknown regarding a test procedure, effectiveness of current designs, method of anchoring advanced glazing to the backlight frame and roof portal, and possible other countermeasures and their costs. The agency believed that Congress intended us to build on the knowledge already attained and issue this final rule addressing side window ejections, which account for 62 percent of all fatal occupant ejections in all crashes, as quickly as possible, rather than delay this final rule to venture into areas that account for 8.7 percent of those fatal ejections.

In sum, we developed this final rule to meet the criteria of section 10301 of SAFETEA–LU and the Vehicle Safety Act, making sure that it is a performance standard that reduces complete and partial ejections from outboard seating positions and that it is reasonable, practicable, and appropriate, that it meets the need for safety and is stated in objective terms. Further, ensuring that the final rule is consistent with Executive Order 12866, we have adopted requirements that not only maximize the benefits of a cost-effective approach to ejection mitigation, but do so with an approach that saves over 370 lives. This final rule wholly implements the instructions of our statutory and administrative directives.

IV. Summary of the NPRM

NHTSA issued a proposal for a new FMVSS No. 226 and proposed the standard apply to passenger cars, multipurpose passenger vehicles, trucks and buses with a GVWR of 4,536 kg or less. We proposed that the side windows next to the first three rows of seats be subject to performance requirements requiring the vehicle to have an ejection mitigation countermeasure that would prevent an 18 kg (40 lb) headform from moving more than 100 mm (4 inches) beyond the zero displacement plane of each window when the window is impacted. Each side window would be impacted at up to four locations around its perimeter at two energy levels and time intervals following deployment. The first impact was proposed to be at 24 km/h, 1.5 seconds after deployment of the ejection mitigation side curtain air bag, assuming there was one present ("24 km/h-1.5 second test"), and the second impact was proposed to be at 16 km/h, at 6 seconds after deployment ("16 km/h-6 second test"). The NPRM proposed to allow windows of advanced glazing to be in position during the test, but pre-broken, using a prescribed method, to reproduce the state of glazing in an actual rollover crash.

The NPRM discussed proposals for: (a) The impactor dimensions and mass; (b) the displacement limit; (c) impactor speed and time of impact; and (d) target locations. We also discussed: (e) glazing issues; (f) test procedure tolerances; (g) test device characteristics; and other issues, such as a requirement for a readiness indicator.

The NPRM did not specifically require a rollover sensor to deploy the curtains or attributes that the sensor must meet; manufacturers currently provide sensors with their ejection mitigation curtains and NHTSA believed they will continue to provide a sensor enabling deployment regardless of an express requirement to do so. With regard to applicability, the agency tentatively decided in the NPRM not to exclude convertibles but requested comments on this issue and on the applicability of the standard to other

[19] "Ejection Mitigation Using Advanced Glazing, Final Report," NHTSA, August 2001, Docket 1782–22. See also, NHTSA's termination of an advance notice of proposed rulemaking on advanced glazing (67 FR 41365, June 18, 2002), *infra*.

types of vehicles, *e.g.,* police vehicles with security partitions.

Except for limited line and multistage manufacturers, the proposed lead time was the first September 1 three years from the date of publication of a final rule. The requirements were proposed to be phased in over a four-year period, with 20 percent of each manufacturer's vehicles manufactured during the first production year required to meet the standard, 40 percent manufactured during the second year required to meet the standard, 75 percent of vehicles manufactured during the third year required to meet the standard, and all vehicles (without use of advanced credits) manufactured on or after the fourth year required to meet the standard. It was proposed that limited line and multistage manufacturers would not have to achieve full compliance until one year after the phase-in is completed.

Accompanying the NPRM was a Preliminary Regulatory Impact Analysis (PRIA) analyzing the potential impacts of the proposed ejection mitigation requirements, and a technical analysis prepared by the agency that presented a detailed analysis of engineering studies, and other information supporting the NPRM ("Technical Analysis in Support of a Notice of Proposed Rulemaking Ejection Mitigation"). Both documents were placed in the docket for the NPRM (Docket No. NHTSA–2009–0183).

V. Summary of the Comments

NHTSA received 35 comments on the NPRM. Comments were received from motor vehicle manufacturers through their associations and individually, from air bag and glazing equipment suppliers (also through their associations and individually), and from consumer and insurance groups, and individuals.

The Alliance of Automobile Manufacturers (Alliance) [20] stated that it was generally supportive of many aspects of the NPRM, such as the use of a linear headform impactor for evaluating rollover deployed side curtains and the decision not to specify a protocol for testing rollover sensors. However, the commenter disagreed with the proposed performance requirements, believing that they are overly stringent and may unnecessarily force the development of air bag systems that could have adverse unintended consequences. The commenter stated that seat belt use is the most effective countermeasure for ejection mitigation. The Alliance stated its belief that there should be only one test at 16 km/h and at 3.4 seconds, with an excursion limit of 150 mm measured from a plane tangent to the exterior of the vehicle. The Alliance also stated its belief that the standard should not apply to convertibles and to vehicles with partitions, for practicability reasons. Further, the commenter asked for an additional year of lead time, and that vehicles with a GVWR greater than 2,722 kg (6,000 lb) should have a compliance date that is one year after the 100 percent phase-in date for completed vehicles with a GVWR of 2,722 kg or less. The Alliance also had technical comments on specific aspects of the test procedure.

The Alliance's member companies commenting on the NPRM reiterated the views of the Alliance, with some expounding on the following matters of particular interest to them. General Motors (GM) stated that the Alliance's suggested compliance date and phase-in schedule could be met assuming that NHTSA adopts the modifications of the test procedure identified by the Alliance and excludes convertibles and vehicles with partitions. Ford commented that side glazing retention in real-world rollover crashes is random and unpredictable and expressed the belief that FMVSS No. 226 should be focused on rollover-activated side curtain technology because these devices are designed to deploy regardless of side glazing status in a rollover (*e.g.,* retained, up, down or partially open) or construction of the glazing. Mercedes raised concerns about the difficulties larger vans such as the Sprinter would have in meeting the requirements and asked for additional lead time for vehicles over 8,500 lb GVWR. Porsche discussed the long lifecycles for its sports cars and asked that manufacturers be allowed to use credits earned for early compliance through the end of the 100 percent phase-in year. Various manufacturers expressed technical views or had questions about specific aspects of the test procedure.

The Association of International Automobile Manufacturers Technical Affairs Committee [21] (AIAM) stated that it "supports the agency's basic approach in the proposed ejection mitigation standard" but is "concerned that there may be unintended consequences if test criteria establish unnecessary high levels of energy for the test impactor." AIAM said that high test impact speeds could require the use of stiffer side curtain air bags or advanced glazing of increased rigidity to meet the specified displacement limit. "Such consequences may increase the risk of head/neck injuries." AIAM urged the agency to consider whether the impactor energy specifications may be reduced to a level equivalent to 180 Nm (corresponding to a 16 km/h test). The commenter believed that convertibles should be excluded from the standard for practicability reasons and also suggested that certain classes of vehicle could be excluded from the high speed requirement due to vehicle characteristics that can dissipate the energy of occupants in rollovers, such as vehicles having high "belt-lines" (*e.g.,* sports cars that seat the occupants low relative to the window openings). AIAM asked for an additional year of lead time prior to the start of the phase-in period and asked that advanced credits be allowed to meet the 100 percent stage of the phase-in. AIAM also commented on specific aspects of the test procedure and supported GM's suggested procedure for measuring impactor displacement from a plane tangent to the vehicle's exterior.

AIAM members commenting on the NPRM generally reiterated AIAM's views, with some separately raising issues of individual concern. Honda stated its belief that with an energy level of 200 joules (J), occupant ejection mitigation can be balanced with occupant protection without unintended adverse consequences to occupant protection. The commenter suggested the test procedure consist of one test at 17 km/h with a 3.0 second time delay. Honda agreed with the proposed 100 mm displacement limit, but suggested that displacement along a line normal to the actual window at the center of each target impact point should not exceed 100 mm. Nissan suggested the agency adopt a 20 km/h test instead of the proposed 24 km/h test. In their individual comments, various vehicle manufacturers asked for clarification of or changes to particular aspects of the proposed test procedure.

Organizations representing specialized manufacturers commented on the NPRM. Vehicle Services Consulting, Inc. (VSC) [22] supported the

[20] The Alliance member companies are BMW Group, Chrysler Group, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, and Volkswagen (VW).

[21] AIAM Technical Affairs Committee members are American Honda Motor Company (Honda), American Suzuki Motor Corp., Aston Martin Lagonda of North America, Ferrari North America, Hyundai Motor America (Hyundai), Isuzu Motor America, Kia Motors America, Maserati North America, Nissan North America, Peugeot Motors of America, Subaru of America, ADVICS North America, Delphi Corporation, Denso International America, and Robert Bosch Corporation.

[22] VSC states: "Vehicle Services Consulting, Inc. assists numerous small volume vehicle manufacturers with US certification-related matters."

NPRM, but asked that convertibles be excluded from the standard. VSC also asked for clarification of regulatory text applying to small volume manufacturers. The National Truck Equipment Association (NTEA) [23] requested that NHTSA exclude from the ejection mitigation standard work trucks built in two or more stages, particularly those with partitions, and vehicles with alterations to the floor height.

Air bag supplier groups commented in favor of the NPRM. Takata Corporation, a manufacturer of air bags and other motor vehicle equipment, stated that it supports NHTSA's goal to establish a new FMVSS to reduce the partial and complete ejection of occupants in rollover crashes.[24] However, Takata expressed concern about the effectiveness of applying the ejection mitigation standard to convertibles at this time. TRW, a manufacturer of vehicle safety systems, and the Automotive Occupant Restraints Council (AORC) [25] supported the agency's proposal in general, but suggested that all windows should be tested down or removed regardless of whether the glazing is laminated since motorists occasionally drive with their windows open. TRW and AORC also expressed concern about applying the ejection mitigation requirements to convertibles. Each of these commenters had detailed feedback on and suggestions for improving the proposed test procedures.

Glazing manufacturers and suppliers commenting on the NPRM generally supported the objectives and overall structure of the proposed standard, but a number had the view that the agency fell short of the congressional mandate of section 10301 of SAFETEA–LU, in that roof glazing and backlight areas were not being regulated by the new standard. Many of these groups also desired a reduction in the performance limit, some by 50 percent (i.e., a displacement limit of 50 mm). Many of the groups commented that all windows should be tested in the up (closed) position and several objected to the pre-test breaking procedure for glazing as being excessive and suggested changes to it, such as eliminating the specification to pre-break the interior surface of the glazing. Many of these glazing supplier groups requested a shorter lead time and phase-in period.

Consumer groups Public Citizen (PC) and Advocates for Highway and Auto Safety (Advocates) commented on the NPRM. PC stated that the NPRM is flawed because it does not address occupant ejections through the roof and because the cost-benefit analysis is "devised with the same misleading approach to determining a target population that NHTSA has used in other rollover rulemakings." PC suggested NHTSA establish a performance requirement that would encourage the dual use of laminated glazing and side curtain air bags, but stated that NHTSA should not permit laminated glazing in vehicles not equipped with side curtain air bags. PC suggested that the phase-in schedule should begin and end one model year earlier than proposed. The commenter also was critical that "the agency has not taken a comprehensive, whole vehicle approach to reducing fatalities in rollover crashes."

Advocates stated its belief that NHTSA interpreted SAFETEA–LU too narrowly by addressing occupant ejection only through side windows and not through side doors, tailgates, windshields, backlights, or sun roofs. Advocates suggested that roofs can be strengthened and occupant ejection reduced through the use of advanced glazing and that NHTSA should promote pre-crash automated window closure to ensure that vehicles with advanced glazing would be in the windows-up position. Advocates supported "mandatory anti-ejection countermeasures to be applied at all designated seating positions, not just for outboard occupants in the first, second, and third rows," including all occupant positions in the rear seats of 15-passenger vans. Advocates believed that the 100 mm proposed displacement limit should be 50 mm and that areas outside of the target zones should be tested. The commenter was concerned about the proposed time intervals for the impactor tests [26] and desired performance requirements for rollover air curtain sensors. The commenter believed that manufacturers would only need a two-year lead time and a three-year phase-in period to meet the proposed requirements.

The Insurance Institute for Highway Safety (IIHS) said it supported the NPRM because the commenter believed that the rulemaking is likely to result in all passenger vehicles being equipped with side curtain air bags that deploy in rollover crashes. However, IIHS stated that the proposed 100 mm excursion limit may be overly restrictive. IIHS also stated that the agency should provide an incentive to manufacturers to equip vehicles with laminated side glazing.

Several individuals responded in general support of the NPRM and with several suggestions. National Forensic Engineers, Inc. supported the use of laminated glazing in side windows to supplement side curtain air bags. Stephen Batzer and Mariusz Ziejewski, and Byron Bloch, stated that the standard should apply to vehicles above 4,536 kg, to daylight openings adjacent to every designated seating position and to the windshield, sunroof and backlight, and supported the use of laminated glazing. Batzer and Ziejewski believed that a 10 mph impact would be sufficient. Bloch urged the agency to evaluate ejection mitigation through a dynamic full vehicle rollover test.

VI. How the Final Rule Differs From the NPRM

The more important changes from the NPRM are listed in this section and explained in detail later in this preamble. Changes more minor in significance (*e.g.,* changes that clarify test procedures) are not listed below but are discussed in the appropriate sections of this preamble.

i. The high speed impact test, performed at 1.5 seconds after ejection mitigation side curtain air bag deployment, will have an impact velocity of 20 km/h instead of 24 km/h. After evaluating the comments to the NPRM, the agency reanalyzed the test data upon which the impact speed proposed in the NPRM was based, analyzed the new testing conducted since the NPRM, and considered all submitted information. Based on this analysis, we agree to decrease the impact test speed to 20 km/h, as suggested by Nissan in its comment, which results in 278 joules (J) of impact energy. This energy value is well supported and more representative of the energy the ejection countermeasure will typically be exposed to in the field, particularly in rollovers. All target locations in each window opening will be subject to the high speed test, performed at 1.5 seconds after ejection mitigation side curtain air bag deployment ("20 km/h-1.5 second test"), and to the low speed 16 km/h test

[23] NTEA describes itself as a "trade association representing distributors and manufacturers of multi-stage produced, work related trucks, truck bodies and equipment."

[24] Takata also submitted information to NHTSA's ejection mitigation research docket (NHTSA–2006–26467) indicating that meeting the proposed performance requirements in non-convertibles would be practicable.

[25] AORC describes itself as a non-profit organization whose mission is to promote automotive safety through education and technology. Its membership consists of safety system manufacturers and their suppliers.

[26] Advocates was concerned that "no sustained inflation is tested between the 1.5 and 6 second tests, when excursion could exceed the 4 inch maximum required by the proposed standard."

performed 6 seconds after deployment ("16 km/h-6 second test").

ii. If necessary, the headform and targets will be rotated by 90 degrees to a horizontal orientation if this results in more impact locations than the vertical orientation (to a maximum of four target locations). For long narrow windows, popular in many late model vehicles, very limited target coverage of the opening is achieved if the target is kept in the vertical orientation. It did not make sense to exclude windows from being subject to full ejection mitigation protection simply because the headform could not fit when oriented vertically.

iii. The standard does not permit the use of movable advanced glazing as the sole means of meeting the displacement limit of the standard. In addition, the 16 km/h-6 second test must be performed without the use of advanced glazing for movable windows. Field data indicates that even when initially up, movable advanced glazing may be destroyed and made ineffective as a countermeasure beyond the initial phase of a rollover. Therefore, the final rule will require that if a vehicle has movable advanced glazing as part of the ejection countermeasure, the 16 km/h-6 second test will be performed with the glazing retracted or removed from the window opening. This approach will assure a reasonable level of safety when side glazing is rolled down or when the severity of the rollover damages or destroys the effectiveness of the glazing, and still encourages the use of advanced glazing as a countermeasure to supplement the vehicle's performance in meeting the 20 km/h-1.5 second test.

iv. The window opening for cargo areas behind the 1st and 2nd row will be impacted. If there is a side window opening in a cargo area behind the 1st row of a single row vehicle or behind the 2nd row of a two-row vehicle, this final rule will extend coverage to those cargo areas behind the 1st and 2nd rows of vehicles. The area of side window openings in a cargo area will be bounded by a transverse plane 1,400 mm behind the seating reference point (SgRP) of the rearmost seat in the 1st row of a single row vehicle or behind the SgRP of the rearmost seat in the 2nd row of a two-row vehicle. Field data found that cargo area ejections behind a 2nd row were similar in frequency to 3rd row ejections. Such cargo area coverage is cost effective and is not any more challenging than 3rd row coverage.

v. Minor changes were made in the definition of and procedure for determining the window opening. The final rule increases the lateral distance defining the window opening from 50 to 100 mm. We have examined interior trim components, such as panels covering the vehicle pillars and found that relevant surfaces can be more than 50 mm from the inside of the window glazing and that these trim components can be difficult to remove.

vi. The final rule slightly modifies the glazing pre-breaking procedure by using a 75 mm offset pattern. (We disagree with the comments that stated the pre-breaking procedure should be deleted or should be restricted to four points on the glazing. We believe the pre-breaking procedure is necessary to recreate the damage that will likely occur in the field.)

vii. Convertibles are excluded from this standard. Also excluded are law enforcement vehicles, correctional institution vehicles, taxis and limousines with a fixed security partition separating the 1st and 2nd or 2nd and 3rd rows, if the vehicle is a multistage or altered vehicle.

viii. The final rule has a 2-year lead time period, with 25 percent of each manufacturer's vehicles manufactured during the first production year required to meet the standard, 50 percent manufactured during the second year required to meet the standard, 75 percent of vehicles manufactured during the third year required to meet the standard, and 100 percent of vehicles manufactured on or after the fourth year required to meet the standard. The final rule allows manufacturers to use advanced credits to meet the phase-in percentages, including advanced credits in the last year (100 percent year) of the phase-in schedule.

ix. Characteristics of the guided linear impactor with the 18 kg headform and the associated propulsion mechanism were refined to assure sufficient repeatability and reproducibility of the test. The impactor used in research tests was originally constructed in the advanced glazing program of the 1990s. We have reduced the maximum allowable dynamic coefficient of friction of the test device by a factor of 5, from 1.29 (old impactor) to 0.25 (new impactor). The device has been made less flexible along its shaft and thus better able to maintain its orientation as it interacts with ejection countermeasures.

VII. Foundations for This Rulemaking

This section discusses knowledge and insights we gained from past research on ejection mitigation safety systems which underlie many of the decisions we made in forming this final rule.

a. Advanced Glazing

In formulating this final rule, NHTSA considered various ejection mitigation systems in accordance with section 10301 of SAFETEA–LU. One of the considered systems was advanced side glazing. In the 1990s, NHTSA closely studied advanced glazing as a potential ejection mitigation countermeasure [27] but terminated an advance notice of proposed rulemaking on advanced glazing in 2002 (67 FR 41365, June 18, 2002). The termination was based on our observation that advanced glazing produced higher neck shear loads and neck moments than impacts into tempered [28] side glazing. In addition, the estimated incremental cost for installing ejection mitigation glazing in front side windows ranged from over $800 million to over $1.3 billion, based on light vehicle annual sales of 17 million units in the 2005–2006 timeframe. Also, because side curtain air bags were showing potential as an ejection mitigation countermeasure, NHTSA decided to redirect its research and rulemaking efforts toward developing performance-based test procedures for an ejection mitigation standard.[29]

Elements from the advanced glazing program underlie a substantial part of today's final rule. The headform and the test procedure were originally developed in the advanced glazing research program.

Further, as with all of the FMVSSs, we drafted this final rule to be performance-oriented, to provide manufacturers wide flexibility and opportunity for design innovation in developing countermeasures that could be used for ejection mitigation. We anticipate that manufacturers will install ejection mitigation side curtain air bags in response to this rulemaking, taking advantage of the side impact curtains already in vehicles. Nonetheless, this final rule provides a role for advanced glazing as a complement to ejection mitigation curtain systems.

[27] Ejection mitigation glazing systems have a multi-layer construction with three primary layers. There is usually a plastic laminate bonded between two pieces of glass.

[28] Tempered glass is made from a single piece of specially treated sheet, plate, or float glass possessing mechanical strength substantially higher than annealed glass. When broken at any point, the entire piece breaks into small pieces that have relatively dull edges as compared to those of broken pieces of annealed glass. (*See* FMVSS No. 205, "Glazing Materials," incorporating by reference standard ANSI/SAE Z26.1–1996.)

[29] "Ejection Mitigation Using Advanced Glazing, Final Report," NHTSA, August 2001, Docket No. NHTSA–1996–1782–22.

NHTSA tested several vehicles' ejection mitigation side curtain air bags both with and without advanced glazing to the 18 kg impactor performance test adopted by this final rule. In the tests, the glazing was pre-broken to simulate the likely condition of the glazing in a rollover. Tests of vehicles with advanced glazing resulted in a 51 mm average reduction in impactor displacement across target locations.[30] That is, optimum (least) displacement of the headform resulted from use of both an ejection mitigation window curtain and advanced glazing. To encourage manufacturers to enhance ejection mitigation curtains with advanced glazing, the final rule allows windows of advanced glazing to be in-position for the 20 km/h-1.5 second test, although pre-broken to reproduce the state of glazing in an actual rollover crash. This approach encourages advanced glazing as a countermeasure to supplement the vehicle's performance in meeting the 20 km/h-1.5 second test.[31]

b. Full Window Opening Coverage Is Key

We considered the findings of several NHTSA research programs on rollover crashworthiness protection in developing this final rule.

A cornerstone program started with the development of a dynamic rollover fixture (DRF) that could be used to produce full-dummy ejection kinematics in an open window condition, where the peak roll rate ranged between 330 to 360 degrees/second. The DRF was used to assess the potential effectiveness of ejection mitigation countermeasures in a rollover.[32] These countermeasures included several designs of inflatable curtain air bags, advanced glazing, and combinations of curtains and advanced glazing. The results of the assessment showed that not all ejection mitigation air bag curtains work the same way. We found that full window opening coverage was key to the effectiveness of the curtain in preventing ejection.

1. Tests with 50th Percentile Adult Male and 5th Percentile Adult Female Test Dummies

In the first research program, experimental roof rail-mounted inflatable devices developed by Simula Automotive Safety Devices (Simula) and by TRW were evaluated on the DRF, along with an advanced side glazing system.[33] In the tests, unrestrained 50th percentile male and 5th percentile female Hybrid III dummies, instrumented with 6 axis upper neck load cells and tri-axial accelerometers in the head, were separately placed in the buck.[34] The DRF rotation resulted in a centripetal acceleration of the dummy that caused the dummy to move outwards towards the side door/window. In baseline tests of the unrestrained dummies in the DRF with an open side window and no countermeasure, the dummies were fully ejected. The ability of the countermeasure to restrain the dummies could then be assessed and compared to that baseline test.

In the tests of the experimental inflatable devices, the air bags were pre-deployed and their inflation pressure was maintained throughout the test by the use of an air reservoir tank mounted on the platform.[35] In the tests, the dummy's upper body loaded the inflatable device, which limited the dummy's vertical movement toward the roof and caused the pelvis to load the side door throughout the roll, rather than to ride up the door. The inflatable devices contained the torso, head, and neck of the dummy, so complete ejection did not occur. However, both devices did allow partial ejection of the dummy's shoulder and arm below the bags, between the inflatable devices and the vehicle door.

In the test of the advanced side glazing (laminated with door/window frame modifications around the entire periphery to provide edge capture), the glazing contained the dummies entirely inside the test buck. The glazing was not pre-broken before the testing. There was some flexing of the window frame when the dummies loaded the glazing, and the 50th percentile male dummy's shoulder shattered the glass when the dummy was located behind the steering wheel.

In the test of the combined systems, the dummies remained entirely inside the buck. Although the dummy's shoulder and arm escaped under the inflatable devices, the advanced glazing prevented the partial ejection seen in tests of the inflatable devices alone.

In these tests, the ejection mitigation systems did not show a high potential for producing head and neck injury. However, head and neck loading were higher than the open window condition. The highest load with respect to the Injury Assessment Reference Values (IARVs) was 82 percent for the neck compression for the 5th percentile female tested with the Simula/laminate combination. The highest injury response for the 50th percentile male dummy was 59 percent for the neck compression with the TRW system alone. All HIC_{36}[36] responses were extremely low and ranged from 8 to 90, with the maximum occurring in an open window test. Lateral shear and bending moment of the neck were also measured, although there are no established IARVs. The maximum lateral neck shear loads were 950 N (50th percentile male tested with TRW

[30] See the technical analysis prepared by the agency in support of the NPRM, placed in the docket for the NPRM (NHTSA–2009–0183–007). "Technical Analysis in Support of a Notice of Proposed Rulemaking for Ejection Mitigation." Among other matters, the report discusses the results of NHTSA's impactor testing of OEM and prototype side window ejection mitigation systems.

[31] Yet, after reviewing comments to the NPRM and other information, we have decided not to permit movable glazing to supplement the primary ejection mitigation system in the 16 km/h-6 second test. This is because field data indicate that even when initially up, movable advanced glazing may be destroyed and rendered ineffective as an effective countermeasure beyond the initial phase of a rollover. In addition, 30 percent of occupants are ejected through windows that are partially or fully open prior to the crash.

[32] NHTSA developed the DRF to produce full-dummy ejection kinematics in a less costly manner than full-scale testing. The DRF models a lateral rollover crash of approximately one vehicle revolution. The DRF rotates approximately one revolution and comes to rest through the application of a pneumatic braking system on one end of the pivot axle. It does not simulate lateral vehicle accelerations often encountered in a rollover crash prior to initiation of the rollover event. The DRF has a test buck fabricated from a Chevrolet CK pickup cab. The cab is longitudinally divided down the center from the firewall to the B-pillar. The left (driver) side is rigidly attached to the test platform. The Chevrolet CK was chosen so that the advanced glazing systems developed in the previous ejection mitigation research could be evaluated in this program. A seat back and cushion were made from Teflon material, to minimize the shear forces on the dummy buttocks for more desired loading on the window area by the dummy's head and upper torso.

[33] "Status of NHTSA's Ejection Mitigation Research Program," Willke *et al.,* 18th International Technical Conference on the Enhanced Safety of Vehicles, paper number 342, June 2003.

[34] Two dummy positions were used. The first was behind the steering wheel. The second position was more inward, toward the pivot axle, which generated higher contact velocities. Film analysis was used to measure the dummy's relative head and shoulder contact velocity with the side window plane from these two seating positions. (For the final rule, we digitized the films and reanalyzed the impact speeds using data from state-of-the-art software. The resulting impacts speeds were lower than those reported in the NPRM. The analysis will be discussed later in this document.) From the first position behind the steering wheel, the shoulder impact speeds were 7.0 km/h (4.3 mph) for the 5th percentile female dummy and 9.0 km/h (5.6 mph) for the 50th male. From the second (inboard) position, the velocities were 15.5 km/h (9.6 mph) for the 5th female dummy and 15.8 km/h (9.8 mph) for the 50th male.

[35] Since these were experimental systems, they were not deployed through pyrotechnic or in-vehicle compressed gas, as might be the case with production designs. The air pressure supplied by the laboratory reservoir kept the systems fully inflated over the test period.

[36] HIC_{36} is the Head Injury Criterion computed over a 36 msec duration. HIC_{36} = 1,000 represents an onset of concussion and brain injury.

system) and 1020 N (5th percentile female tested with laminate only).

2. Tests With 6-Year-Old Child Test Dummy Showed a Risk of Ejection Through Openings Not Fully Covered

The second research program involved a series of tests on the DRF using an unrestrained Hybrid III 6-year-old dummy. In previous tests with the 50th percentile adult male and 5th percentile adult female dummies, a gap formed between the inflatable devices and the window sill (bottom of the window opening), which allowed partial ejection of those adult dummies. The second program investigated whether the gap allowed ejection of the 6-year-old child dummy.[37]

In baseline testing with an open side window without activation of an ejection mitigation countermeasure, the child dummy was fully ejected. In tests of the two inflatable systems tested in the first program (at the time of the second research program, the inflatable device formerly developed by Simula was then developed by Zodiac Automotive US (Zodiac)), the inflatable devices prevented full ejection of the 6-year-old child dummy in upright-seated positions (no booster seat was used). However, dummy loading on the systems produced gaps that did allow an arm and/or hand to pass through in some tests. Moreover, in a series of tests with the dummy lying in a prone position (the dummy was placed on its back at the height of the bottom of the window opening), representing a near worst-case ejection condition, the dummy was completely ejected at positions near the bottom of the inflatable devices (above the sill) with the TRW curtain, while the Zodiac system contained the dummy inside the test buck in all testing. Adding pre-broken advanced glazing with the TRW system managed to contain the dummy inside the test buck in all tests.[38]

3. Differences in Design Between the Two Inflatable Systems

The two prototype inflatable devices tested had fundamentally different designs. The Zodiac/Simula prototype system used an inflatable tubular structure (ITS)[39] tethered near the base of the A and B-pillars that deployed a woven material over the window opening. (The Zodiac system differed from the originally-tested Simula design in that it had more window coverage. This was achieved by placing the ITS tether locations lower on the pillars and adding additional woven material.) The TRW prototype was more akin to a typical air bag curtain and was fixed to the A- and B-pillar at its end points and along the roof rail, but not tethered. The ITS differed from conventional air bags in that it was not vented.

We believe that the better performance of the Zodiac prototype system compared to that of TRW, in the DRF testing described above and in impactor test results provided later in this preamble, was due to the greater window coverage by the Zodiac prototype along the entire sill and A-pillar.

4. Insights

The DRF research provided the following insights into ejection mitigation curtains:

- Inflatable devices prevented ejection of test dummies in simulated rollover tests, but design differences accounted for differences in performance;
- Gaps in the inflatable device's coverage of the window opening at the sill and A-pillar allowed partial ejection of adult dummies and full ejection of a 6-year-old child dummy;
- Adding pre-broken advanced glazing to an air bag system enhanced the ability of the system to contain the dummy; and,
- To optimize ejection mitigation potential, a performance test should ensure that the countermeasure has full coverage of the window opening.

c. Comparable Performance in Simulated Rollovers and Component-Level Impact Tests

Because full-vehicle rollover crash tests can have an undesired amount of variability in vehicle and occupant kinematics, in the advanced glazing program NHTSA developed a component-level impact test for assessing excursion and the risk of ejection. We use the component-level test in this final rule for ejection mitigation.

The test involves use of a guided linear impactor designed to replicate the loading of a 50th percentile male occupant's head and shoulder during ejection situations. The impactor[40] is described later in this preamble. There are many possible ways of delivering the impactor to the target location on the ejection mitigation countermeasure. The ejection mitigation test device[41] used by the agency in the advanced glazing program and for the research used to develop the NPRM ("old impactor") has a propulsion mechanism[42] with a pneumatic piston that pushes the shaft component of the impactor. The old impactor shaft slides along a plastic (polyethylene) bearing. The impactor has an 18 kg mass.

The component-level test identified four impact locations to evaluate a countermeasure's window coverage and retention capability. Two of the positions were located at the extreme corners of the window/frame and were located such that a 25 mm gap existed between the outermost perimeter of the headform and window frame. A third position was near the transition between the upper window frame edge and A-pillar edge. The fourth position was at the longitudinal midpoint between the third position and the position at the upper extreme corner of the window/door frame, such that the lowest edge of the headform was 25 mm above the surface of the door at the bottom of the window opening.

At each impact location, different impact speeds and different time delays between air bag deployment and impact were used. To simulate ejection early in a rollover event and in a side impact, the air bags were impacted 1.5 seconds after air bag deployment, at 20 and 24 km/h. To simulate ejection late in a rollover event, the air bags were impacted after a delay of 6 seconds at an impact speed of 16 km/h.

Findings

The two inflatable systems tested in the above-described research programs (the inflatable devices developed by Zodiac and by TRW) were installed on a Chevrolet CK pickup cab and subjected to the component-level impact test. The air bag systems were evaluated for allowable excursion (impactor displacement) beyond the side window plane. The tests also assessed the degree to which the component-level test was able to replicate the findings of the DRF tests.

The component-level tests mimicked the DRF tests by revealing the same deficiencies in the side curtain air bags that were highlighted in the dynamic test. On the other hand, the Zodiac

[37] "NHTSA's Crashworthiness Rollover Research Program," Summers, S., *et al.,* 19th International Technical Conference on the Enhanced Safety of Vehicles, paper number 05–0279, 2005.

[38] *Id.*

[39] ITS systems were originally introduced by BMW as a side impact countermeasure.

[40] The "ejection impactor" is the moving mass that strikes the ejection mitigation countermeasure. It consists of an ejection headform attached to a shaft.

[41] The ejection mitigation test device consists of an ejection impactor and ejection propulsion mechanism.

[42] The "ejection propulsion mechanism" is the component that propels the ejection impactor and constrains it to move along its axis or shaft.

system [43] did not allow the impactor to go beyond the plane of the window in the 16 km/h and 20 km/h tests. The air bag allowed only 12 and 19 mm of excursion beyond the window plane in the 24 km/h tests.

In the 24 km/h tests of the TRW system, the curtain was not able to stop the impactor before the limits of travel were reached (about 180 mm beyond the plane for the vehicle window for that test setup) at the position at the extreme forward corner of the window sill. This is the position at which the TRW prototype system allowed excessive excursion of the test dummies in the DRF dynamic tests. In the DRF tests, the 6-year-old dummy was completely ejected through that window area even when the prone dummy was aimed at the position at the other extreme corner of the window. In other tests, the TRW prototype system was able to stop the impactor before the impactor reached its physical stops.

d. Advantages of a Component Test Over a Full Vehicle Dynamic Test

NHTSA determined that the component test not only distinguishes between acceptable and unacceptable performance in side curtain air bags, but has advantages over a full vehicle dynamic test. The acceptable (or poor) performance in the laboratory test correlated to the acceptable (or poor) performance in the dynamic test. The component test was able to reveal deficiencies in window coverage of ejection mitigation curtains that resulted in partial or full ejections in dynamic conditions. Incorporating the component test into an ejection mitigation standard ensures that ejection mitigation countermeasures provide sufficient coverage of the window opening for as long in the crash event as the risk of ejection exists, which is a key component contributing to the efficacy of the system.

As noted earlier, rollover crash tests can have an undesirable amount of variability in vehicle and occupant kinematics. In contrast, the repeatability of the component test has been shown to be good.[44] Moreover, there are many types of rollover crashes, and within each crash type the vehicle speed and other parameters can vary widely. A curb trip can be a very fast event with a relatively high lateral acceleration. Soil and gravel trips have lower lateral accelerations than a curb trip and lower initial roll rates. Fall-over rollovers are the longest duration events, and it can be difficult to distinguish between rollover and non-rollover events. Viano and Parenteau [45] correlated eight different tests to six rollover definitions from NASS–CDS.[46] Their analysis indicated that the types of rollovers occurring in the real-world varied significantly. Soil trip rollovers accounted for more than 47 percent of the rollovers in the field, while less than 1 percent of real-world rollovers were represented by the FMVSS No. 208 Dolly test ("208 Dolly test").

Occupant kinematics will also vary with these crash types, resulting in different probabilities of occupant contact on certain areas of the side window opening with differing impact energies. A single full vehicle rollover test could narrowly focus on only certain types of rollover crashes occurring in the field.[47] Assuming it is at all possible to comprehensively assess ejection mitigation countermeasures through full vehicle dynamic testing, multiple crash scenarios would have to be involved.

Such a suite of tests imposes test burdens and costs that could be avoided by a component test, such as that adopted today. We also note that a comprehensive suite of full-vehicle dynamic tests would involve many more years of research, which would delay this rulemaking action and the implementation of life-saving curtain air bag technologies. Such a delay is unwarranted and undesirable since the component test will be an effective means of determining the acceptability of ejection countermeasures.

VIII. Availability of Side Curtain Air Bags

The availability of vehicles that offer inflatable side curtains that deploy in a rollover has increased since they first became available in 2002. In the middle of the 2002 model year (MY), Ford introduced the first generation of side curtain air bags that were designed to deploy in the event of a rollover crash. The rollover air bag curtain system, marketed as a "Safety Canopy," was introduced as an option on the Ford Explorer and Mercury Mountaineer.[48] For the 2007 MY, rollover sensors were available on approximately 95 models, with 75 of these models being sport utility vehicles. The system was standard equipment on 62 vehicles (65 percent) and optional on 33 vehicles (35 percent).

Annually, as part of NHTSA's New Car Assessment Program (NCAP), the agency sends a questionnaire to manufacturers requesting information about the availability of certain safety systems on their vehicles.[49] Since 2008, NHTSA has asked manufacturers for voluntary responses regarding whether their available side impact curtains will deploy in a rollover crash. The voluntary responses were in the affirmative for 39 percent of MY 2008 make models and for 43 percent of MY 2010 make models.

IX. Existing Curtains

Aside from the presence of a rollover sensor, there are two important design differences between air bag curtains designed for rollover ejection mitigation and air bag curtains designed only for side impact protection. The first difference is longer inflation duration. Rollover crashes with multiple full vehicle rotations can last many seconds. Ford has stated that its Safety Canopy stays inflated for 6 seconds,[50] while GM stated that its side curtain air bags designed for rollover protection maintain 80 percent inflation pressure for 5 seconds.[51] Honda stated that the side curtains on the 2005 and later Honda Odyssey stay fully inflated for 3 seconds.[52] In contrast, side impact air bag curtains designed for occupant protection in side crashes, generally stay inflated for less than 0.1 seconds.

The second important air bag curtain design difference between rollover and side impact protection is the size or coverage of the air bag curtain. One of the most obvious trends in newer vehicles is the increasing area of coverage for rollover curtains. Referring to earlier generations of curtains, Ford has stated that its rollover protection air bags covered between 66 and 80 percent

[43] Testing was restricted to the extreme corners of the window due to limited availability of this system.

[44] "NHTSA's Crashworthiness Rollover Research Program," *supra.*

[45] Viano D, Parenteau C. Rollover Crash Sensing and Safety Overview. SAE 2004–01–0342.

[46] "Technical Analysis in Support of a Notice of Proposed Rulemaking for Ejection Mitigation," *supra.*

[47] The agency has in the past performed dolly type dynamic testing. The agency has not performed enough repeat tests of the same vehicles to draw any conclusions about the repeatability of these tests to determine occupant containment. However, regardless of the level of repeatability of dummy kinematics, it still only represents a part of the kinematics that would occur in the field.

[48] *http://media.ford.com/article_display.cfm?article_id=6447* (Last accessed October 8, 2010.)

[49] The total number of make/models represented in the survey is about 500. Slight model variations are represented as different models and corporate twins are not combined.

[50] Ibid.

[51] "Who Benefits From Side and Head Airbags?" (*http://www.edmunds.com/ownership/safety/articles/105563/article.html*). (Last accessed October 5, 2010.)

[52] *http://www.autodeadline.com/detail?source=Honda&mid=HON20040831726 78&mime=ASC.* (Last accessed October 5, 2010.)

of the first two rows of windows, and that it was expanding the designs so they cover all three rows in all models.[53] GM stated that its curtains designed for rollover protection are larger than non-rollover curtains.[54]

a. Existing Curtains Tested to Proposed Requirements

The agency presented data in the NPRM from testing of eight MY 2003 through MY 2006 vehicles. Since the date of publication of the NPRM, the agency tested 16 vehicle models to the proposed ejection mitigation requirements. Data from these tests supplement the data from tests of eight MY 2003 through MY 2006 vehicles discussed in the NPRM and are discussed in this section. Most of the testing of the 16 vehicle models was with the old impactor used in the NPRM tests. Tests from three vehicles were performed with a new test device ("new impactor"). To date we have performed nearly 700 impacts.

Figure 1 shows the target location key for the test results. In the data, the C1–C4 targets follow the same positioning as the B1–B4 targets. In a few instances, the A2 and A3 targets were eliminated because they were too close and a target (A5) was placed back in the window because the centers of remaining targets A1 and A4 were more than 360 mm apart.

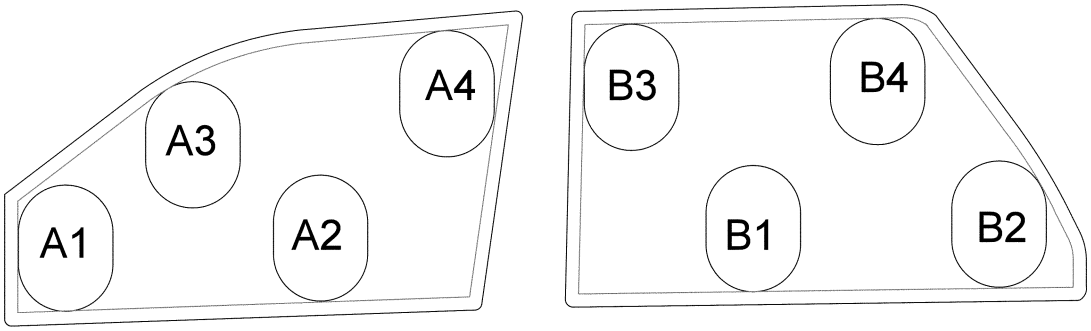


Figure 1 – Target Location Determined by Proposed Method

General Results

The results of the agency testing are given in Tables 10 through 18, below. The results are given in columns, by target location and are in units of millimeters. (The technical report accompanying this document has the data color-coded. Values exceeding the proposed 100 mm limit of impactor displacement are in red or the darkest shading. Results from 80 to 100 mm of displacement are purple or medium shading. Results which are less than 80 mm are in green or the lightest shading.) Some cells contain the average from several tests under the same/similar conditions; these results are bolded. In some tests there was so little resistance to the impactor that it continued past the countermeasure to the point where the internal limit of the impact prevented any additional displacement. In these cases, the numerical value of displacement has no meaning so the cell is denoted as "To Stops."

On occasion, target locations were not tested at 24 km/h because the 20 km/h results indicated displacements in excess of 100 mm at that location. These cells are denoted by "(20 km/h)" and we assume the 24 km/h impact would also have exceeded 100 mm. Similarly, some target locations were not tested at 20 km/h, but the cells contain "(24 km/h)" indicating a value below 80 mm of displacement in the 24 km/h test and we assume the 20 km/h impact would have resulted in a displacement less than 80 mm.

As detailed later, some vehicles were tested with pre-broken advanced laminated (designated as "w/lam." next to the vehicle name). Various breaking methods were used. For simplicity in presenting the data, we have averaged the results for various breaking methods, except for the method of breaking the laminated in four places (designated as "4 hole" next to the vehicle name). Also, a few tests were performed with the headliner in place (designated as "w/liner" next to the vehicle name). "N/O" refers to whether the test was conducted with the old "O" or new "N" impactor.

Across all vehicles, as was the case with our previous analysis of test data in the NPRM, target A1 remains the most challenging impact location and A4 the least challenging for the 1st row. This is consistent for all three impactor speeds and time delays. For the 2nd row, B1 and B2 are the most challenging. The available data do not present a clear trend for the 3rd row.

The two best performing vehicles were the MY 2007 Mazda CX9 and the MY 2008 Toyota Highlander. We will discuss the performance of these vehicles in more detail in several of the sections below.

TABLE 10—FRONT ROW WINDOW, 24 KM/H IMPACT, 1.5 SECOND DELAY

Vehicle	N/O*	Pos. A1	Pos. A2	Pos. A3	Pos. A4
03 Navigator	O	No Data	(20 km/h)	(20 km/h)	−21
03 Navigator w/lam	O	No Data	35	No Data	No Data
04 Volvo XC90	O	(20 km/h)	193	130	18
04 Volvo w/lam	O	(20 km/h)	44	118	15
05 Chevy Trailblazer	O	138	168	159	No Data
05 Chevy Trailblazer w/lam	O	No Data	No Data	(20 km/h)	No Data
05 Chevy Trail. w/lam. (4 hole)	O	No Data	89	No data	No Data

[53] Ibid.

[54] Who Benefits From Side and Head Airbags?" (*http://www.edmunds.com/ownership/safety/articles/105563/article.html*), supra.

TABLE 10—FRONT ROW WINDOW, 24 KM/H IMPACT, 1.5 SECOND DELAY—Continued

Vehicle	N/O*	Pos. A1	Pos. A2	Pos. A3	Pos. A4
05 Honda Odyssey	O	No data	107	119	No data
05 Infinity FX35	O	128	101	99	55
05 Nissan Pathfinder	O	(20 km/h)	167	(20 km/h)	79
05 Toyota Highlander	O	(20 km/h)	137	142	116
06 Dodge Durango	O	174	156	(20 km/h)	54
06 Dodge Durango w/lam	O	No Data	101	No data	No Data
06 Dodge Dur. w/lam. (4 hole)	O	(20 km/h)	95	(20 km/h)	No Data
06 Mercury Monterey	O	To Stops	208	No data	32
06 Toyota Land Cruiser	O	229	No data	(20 km/h)	62
06 Volvo C70	O	(20 km/h)	No Target	No Target	No Target
07 Chevy Silverado	O	177	(20 km/h)	183	−1
07 Chevy Tahoe	O	To Stops	168	125	−25
07 Chevy Tahoe w/lam	O	113	100	124	No data
07 Chevy Tahoe w/lam. (4 hole)	O	No data	99	109	No data
07 Ford 500	O	(20 km/h)	160		38
07 Ford Edge	O	146	17	86	−9
07 Ford Edge	N	175	No data	155	No data
07 Ford Expedition	O	(20 km/h)	(20 km/h)	(20 km/h)	21
07 Jeep Commander	O	(20 km/h)	(20 km/h)	(20 km/h)	−62
07 Jeep Commander w/lam	O	No data	No data	148	No data
07 Mazda CX9	O	96	9	87	2
07 Mazda CX9	N	112	No data	90	No data
07 Saturn Vue	O	(20 km/h)	(20 km/h)	(20 km/h)	65
08 Dodge Caravan	O	136	84	(20 km/h)	−61
08 Ford Taurus X	O	146	73	99	−38
08 Subaru Tribeca	O	(20 km/h)	146		74
08 Toyota Highlander	O	64	41	54	12
08 Toyota Highlander	N	102	No data	77	No data
08 Toyota High. w/liner	N	90	No data	70	No data
09 Chevy Equinox	O	(20 km/h)	101	(20 km/h)	30
Average	.....	135	104	114	21
Standard Deviation	.....	42.1	55.8	33.7	45.9

TABLE 11—FRONT ROW WINDOW, 20 KM/H IMPACT, 1.5 SECOND DELAY

Vehicle	N/O*	Pos. A1	Pos. A2	Pos. A3	Pos. A4
03 Navigator	O	No Data	191	To Stops	−37
03 Navigator w/lam	O	No Data	6	No Data	No Data
04 Volvo XC90	O	163	96	119	−3
04 Volvo w/lam	O	127	27	97	(24 km/h)
05 Chevy Trailblazer	O	112	121	127	No Data
05 Chevy Trailblazer w/lam	O	86	80	109	No Data
05 Chevy Trail. w/lam. (4 hole)	O	No Data	62	98	No Data
05 Honda Odyssey	O	No data	96	57	−45
05 Infinity FX35	O	106	60	73	30
05 Nissan Pathfinder	O	192	138	248	60
05 Toyota Highlander	O	168	137	115	76
06 Dodge Durango	O	160	140	180	18
06 Dodge Dur. w/lam. (4 hole)	O	106	71	150	No Data
06 Mercury Monterey	O	185	199	No data	−10
06 Toyota Land Cruiser	O	174	No data	256	31
06 Volvo C70	O	200	No Target	No Target	No Target
07 Chevy Silverado	O	142	187	130	(24 km/h)
07 Chevy Tahoe	O	104	110	87	(24 km/h)
07 Chevy Tahoe w/lam	O	102	No data	No data	No data
07 Ford 500	O	192	113		(24 km/h)
07 Ford Edge	O	129	(24 km/h)	No data	(24 km/h)
07 Ford Edge	N	148	No data	67	No data
07 Ford Expedition	O	151	To Stops	137	(24 km/h)
07 Jeep Commander	O	To Stops	175	155	(24 km/h)
07 Jeep Commander w/lam	O	No data	No data	73	No data
07 Mazda CX9	N	76	No data	67	No data
07 Saturn Vue	O	To Stops	130	191	28
08 Dodge Caravan	O	112	No data	162	(24 km/h)

TABLE 11—FRONT ROW WINDOW, 20 KM/H IMPACT, 1.5 SECOND DELAY—Continued

Vehicle	N/O*	Pos. A1	Pos. A2	Pos. A3	Pos. A4
08 Ford Taurus X	O	110	No data	No data	(24 km/h)
08 Subaru Tribeca	O	180	106		(24 km/h)
09 Chevy Equinox	O	149	No data	200	(24 km/h)
Average		140	112	132	15
Standard Deviation		36.5	55.7	56.7	39.0

TABLE 12—FRONT ROW WINDOW, 16 KM/H IMPACT, 6 SECOND DELAY

Vehicle	N/O*	Pos. A1	Pos. A2	Pos. A3	Pos. A4
03 Navigator	O	To Stops	74	To Stops	−30
03 Navigator w/lam	O	157	−36	137	No Data
04 Volvo XC90	O	161	73	78	−22
04 Volvo w/lam	O	96	26	59	No Data
05 Chevy Trailblazer	O	121	192	124	No Data
05 Chevy Trailblazer w/lam	O	No Data	102	No Data	No Data
05 Chevy Trail. w/lam. (4 hole)	O	No Data	92	No Data	No Data
05 Honda Odyssey	O	No Data	69	77	−54
05 Infinity FX35	O	88	22	40	9
05 Nissan Pathfinder	O	117	104	195	43
05 Toyota Highlander	O	205	210	152	69
06 Dodge Durango	O	138	135	167	13
06 Dodge Durango w/lam	O	No Data	No Data	142	No Data
06 Dodge Dur. w/lam. (4 hole)	O	97	58	145	No Data
06 Mercury Monterey	O	222	183	No Data	35
06 Toyota Land Cruiser	O	146	207	229	16
06 Volvo C70	O	135	No Target	No Target	No Target
07 Chevy Silverado	O	145	244	115	−7
07 Chevy Tahoe	O	42	6	10	−136
07 Ford 500	O	151	58		−16
07 Ford 500 w/lam	O	96	No Data	No Data	No Data
07 Ford Edge	O	103	−42	7	−56
07 Ford Edge	N	123	No Data	33	No Data
07 Ford Expedition	O	141	205	109	3
07 Jeep Commander	O	255	144	136	−89
07 Jeep Commander w/lam	O	No Data	56	62	No Data
07 Jeep Commander w/lam. (4 hole)	O	No Data	50	60	No Data
07 Mazda CX9	O	54	−38	44	−53
07 Mazda CX9	N	67	No Data	31	No Data
07 Saturn Vue	O	184	180	186	72
08 Dodge Caravan	O	85	−39	121	−141
08 Ford Taurus X	O	104	−13	39	−88
08 Subaru Tribeca	O	122	77		−1
08 Toyota Highlander	O	36	0	54	−62
08 Toyota Highlander	N	119	No Data	52	No Data
09 Chevy Equinox	O	125	25	178	−46
Average		125	82	99	−25
Standard Deviation		50.1	87.2	61.1	58.1

TABLE 13—SECOND ROW WINDOW, 24 KM/H IMPACT, 1.5 SECOND DELAY

Vehicle	N/O*	Pos. B1	Pos. B2	Pos. B3	Pos. B4
03 Ford Navigator	O	To Stops	No data	No data	40
04 Volvo XC90	O	(20 km/h)	No data	No data	69
04 Volvo XC90 w/lam	O	92	No data	No data	62
05 Chevy Trailblazer	O	122	No data	No data	35
05 Honda Odyssey	O	152	193	71	80
05 Infinity FX35	O	148	No data	No data	47
05 Nissan Pathfinder	O	167	No data	No data	133
05 Toyota Highlander	O	152	No data	No data	154
06 Dodge Durango	O	86	82	76	91
06 Mercury Monterey	O	171	193	72	78
06 Toyota Land Cruiser	O	159	157	75	No Target
07 Chevy Silverado	O	153	(20 km/h)	78	117

TABLE 13—SECOND ROW WINDOW, 24 KM/H IMPACT, 1.5 SECOND DELAY—Continued

Vehicle	N/O*	Pos. B1	Pos. B2	Pos. B3	Pos. B4
07 Chevy Tahoe	O	(20 km/h)	161	24	74
07 Chevy Tahoe w/lam	O	No data	48	No data	No data
07 Ford 500	O	184	50	102	157
07 Ford 500 w/lam	O	91	No data	No data	111
07 Ford 500 w/lam. (4 hole)	O	No data	No data	No data	99
07 Ford Edge	O	39	21	−22	27
07 Ford Edge	N	51	33	No data	26
07 Ford Expedition	O	164	55	66	75
07 Jeep Commander	O	140	(20 km/h)	64	No data
07 Mazda CX9	O	36	2	51	9
07 Mazda CX9	N	22	No data	44	No data
07 Saturn Vue	O	No Target	144	66	No Target
08 Dodge Caravan	O	59	27	−16	−7
08 Ford Taurus X	O	45	34	22	31
08 Subaru Tribeca	O	133	85	80	111
08 Toyota Highlander	O	106	110	55	109
08 Toyota Highlander	N	125	144	No data	133
08 Toyota High. w/liner	N	133	138	No data	77
09 Chevy Equinox	O	72	22	39	45
Average	.....	112	89	53	76
Standard Deviation	.....	49.2	63.0	32.7	44.0

TABLE 14—SECOND ROW WINDOW, 20 KM/H IMPACT, 1.5 SECOND DELAY

Vehicle	N/O*	Pos. B1	Pos. B2	Pos. B3	Pos. B4
03 Ford Navigator	O	To Stops	No data	No data	−14
04 Volvo XC90	O	183	No data	No data	(24 km/h)
04 Volvo XC90 w/lam	O	94	No data	No data	(24 km/h)
05 Chevy Trailblazer	O	68	No data	No data	8
05 Honda Odyssey	O	134	84	42	34
05 Infinity FX35	O	90	No data	No data	21
05 Nissan Pathfinder	O	143	No data	No data	111
05 Toyota Highlander	O	110	No data	No data	106
06 Mercury Monterey	O	155	52	42	51
06 Toyota Land Cruiser	O	127	128	53	No Target
07 Chevy Silverado	O	114	232	(24 km/h)	101
07 Chevy Tahoe	O	249	No data	(24 km/h)	(24 km/h)
07 Ford 500	O	152	No data	89	128
07 Ford Expedition	O	146	23	(24 km/h)	(24 km/h)
07 Jeep Commander	O	122	107	(24 km/h)	No data
07 Saturn Vue	O	No Target	111	40	No Target
08 Subaru Tribeca	O	105	No data	(24 km/h)	No data
08 Toyota Highlander	O	No data	67	(24 km/h)	88
08 Toyota Highlander	N	92	89	No data	110
Average	.....	130	99	53	64
Standard Deviation	.....	43.4	59.3	20.7	49.9

TABLE 15—SECOND ROW WINDOW, 16 KM/H IMPACT, 6 SECOND DELAY

Vehicle	N/O*	Pos. B1	Pos. B2	Pos. B3	Pos. B4
03 Ford Navigator	O	126	No data	No data	−27
04 Volvo XC90	O	189	No data	No data	29
04 Volvo XC90 w/lam	O	63	No data	No data	9
05 Chevy Trailblazer	O	127	No data	No data	47
05 Honda Odyssey	O	121	28	12	55
05 Infinity FX35	O	64	No data	No data	20
05 Nissan Pathfinder	O	111	No data	No data	78
05 Toyota Highlander	O	143	No data	No data	110
06 Dodge Durango	O	36	18	3	71
06 Mercury Monterey	O	223	142	54	54
06 Toyota Land Cruiser	O	107	113	49	No Target
07 Chevy Silverado	O	124	194	53	63
07 Chevy Tahoe	O	120	−83	−21	15
07 Chevy Tahoe w/lam	O	66	No data	No data	No data
07 Chevy Tahoe w/lam. (4 hole)	O	58	No data	No data	No data
07 Ford 500	O	133	−3	56	94
07 Ford 500 w/lam	O	64	No data	No data	No data
07 Ford Edge	O	−16	−40	−76	−25

TABLE 15—SECOND ROW WINDOW, 16 KM/H IMPACT, 6 SECOND DELAY—Continued

Vehicle	N/O*	Pos. B1	Pos. B2	Pos. B3	Pos. B4
07 Ford Expedition	O	89	159	22	34
07 Jeep Commander	O	107	99	27	57
07 Mazda CX9	O	−15	−58	5	−35
07 Saturn Vue	O	No data	138	26	No data
08 Dodge Caravan	O	−58	−29	−55	−56
08 Ford Taurus X	O	−17	−19	−13	−40
08 Subaru Tribeca	O	76	19	28	20
08 Toyota Highlander	O	49	59	32	57
08 Toyota Highlander	N	87	105	No data	93
09 Chevy Equinox	O	15	−51	1	−14
Average		81	44	12	31
Standard Deviation		63.9	84.5	37.2	46.8

TABLE 16—THIRD ROW WINDOW, 24 KM/H IMPACT, 1.5 SECOND DELAY

Vehicle	N/O*	Pos. C1	Pos. C2	Pos. C3	Pos. C4
05 Honda Odyssey	O	No data	(20 km/h)	No data	175
06 Mercury Monterey	O	188	(20 km/h)	119	No data
06 Toyota Land Cruiser	O	NC	NC	180	NC
07 Chevrolet Tahoe	O	91	No Target	194	No Target
07 Chevrolet Tahoe w/lam	O	No Data	106	141	No Data
07 Ford Expedition	O	(20 km/h)	No data	81	186
07 Jeep Commander	O	229	155	120	102
08 Dodge Caravan	O	−42	112	35	−41
08 Ford Taurus X	O	No Target	To Stops	48	No Target
08 Toyota Highlander	O	−42	42	92	No data
08 Toyota Highlander	N	No data	No data	110	No data
08 Toyota Highlander w/liner	N	No data	No data	42	No data
Average		85	104	106	106
Standard Deviation		126.1	46.6	53.1	104.5

TABLE 17—THIRD ROW WINDOW, 20 KM/H IMPACT, 1.5 SECOND DELAY

Vehicle	N/O*	Pos. C1	Pos. C2	Pos. C3	Pos. C4
05 Honda Odyssey	O	No data	To Stops	58	122
06 Dodge Durango	O	No data	To Stops	66	No data
06 Mercury Monterey	O	147	212	75	No data
06 Toyota Land Cruiser	O	NC	NC	128	NC
07 Chevrolet Tahoe	O	58	No Target	No data	No Target
07 Ford Expedition	O	241	No data	No data	51
07 Jeep Commander	O	No data	115	102	No data
08 Ford Taurus X	O	No Target	86	(24 km/h)	No Target
08 Toyota Highlander	N	No data	No data	88	No data
Average		149	138	86	86
Standard Deviation		91.5	66.0	25.8	50.6

TABLE 18—THIRD ROW WINDOW, 16 KM/H IMPACT, 6 SECOND DELAY

Vehicle	N/O*	Pos. C1	Pos. C2	Pos. C3	Pos. C4
05 Honda Odyssey	O	To Stops	To Stops	44	80.
06 Dodge Durango	O	No Data	No Data	52	No Data.
06 Mercury Monterey	O	186	204	142	225.
06 Toyota Land Cruiser	O	NC	NC	98	NC.
07 Chevrolet Tahoe	O	30	No Target	64	No Target.
07 Chevrolet Tahoe w/lam	O	No Data	57	66	No Data.
07 Ford Expedition	O	233	No Data	49	34.
07 Jeep Commander	O	170	104	92	56.
08 Dodge Caravan	O	−91	34	−42	−113.
08 Ford Taurus X	O	No Target	60	7	No Target.
08 Toyota Highlander	O	No Data	−23	37	No Data.
Average		106	73	55	56.
Standard Deviation		133.4	76.5	48.2	120.6.

Trends in Performance of Ejection Mitigation Systems by MY Using Old Impactor

Based on the vehicles the agency tested, there appears to be a trend toward improved performance as each model year passes. This is demonstrated by increased coverage of the window opening in the more recent MY vehicles tested and the ability of the countermeasure to restrain displacement of the impactor. While it is difficult to quantify this trend, the trend is shown graphically below by plots of displacement values by model year for the 1st row (Figure 2) and 2nd Row (Figure 3). These graphs are restricted to the 24 km/h-1.5 second test using the old impactor and exclude any testing with advanced glazing.

Note: Not shown in the figure are data from older vehicles which often had no curtain coverage at a particular target. If there was no curtain coverage, we did not test the target since the 100 mm displacement limit would have been exceeded. Although these vehicles are not shown on the graph, their improved curtain coverage in recent MY vehicles is indicative of improved performance over time.

Since the graphs span multiple vehicles, there is scatter in the data. Nonetheless, when a trend line is plotted through the data for each impact location it shows decreasing displacement for newer models.

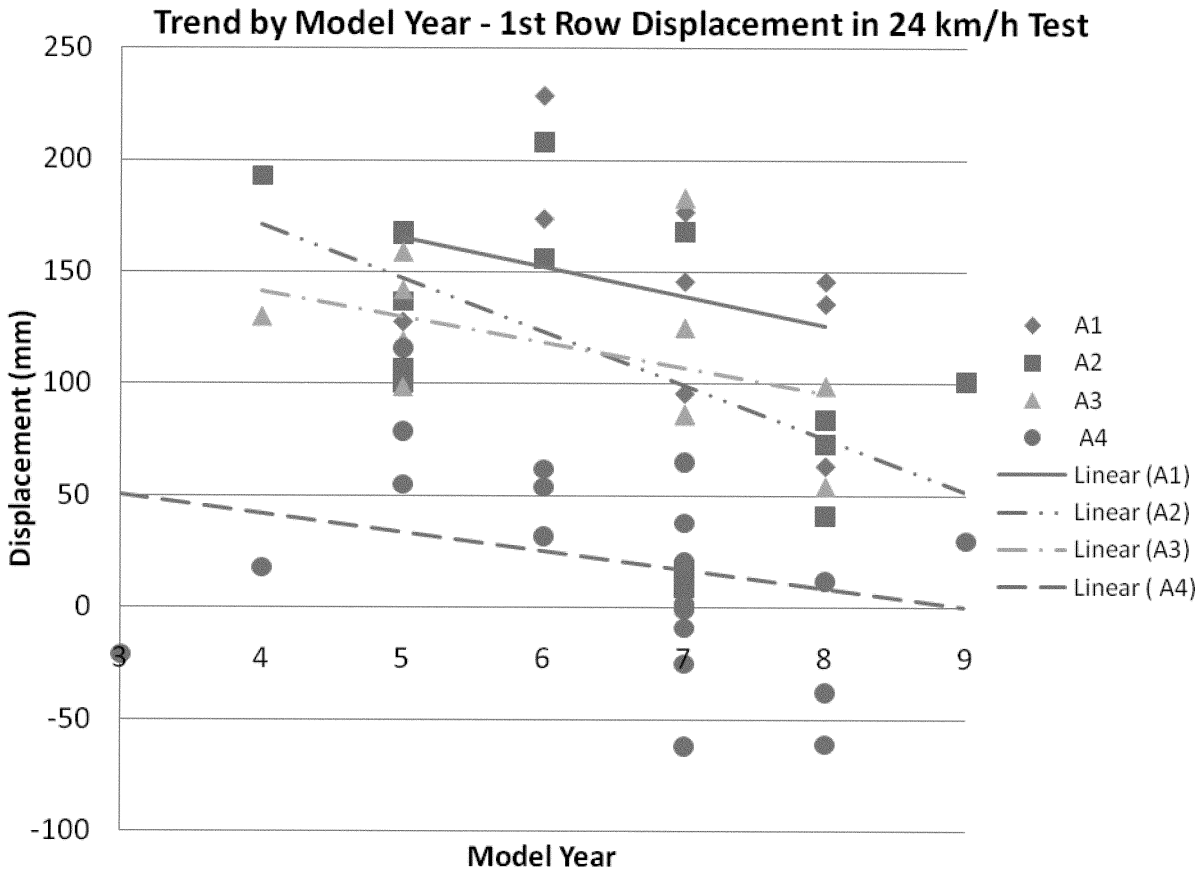


Figure 2

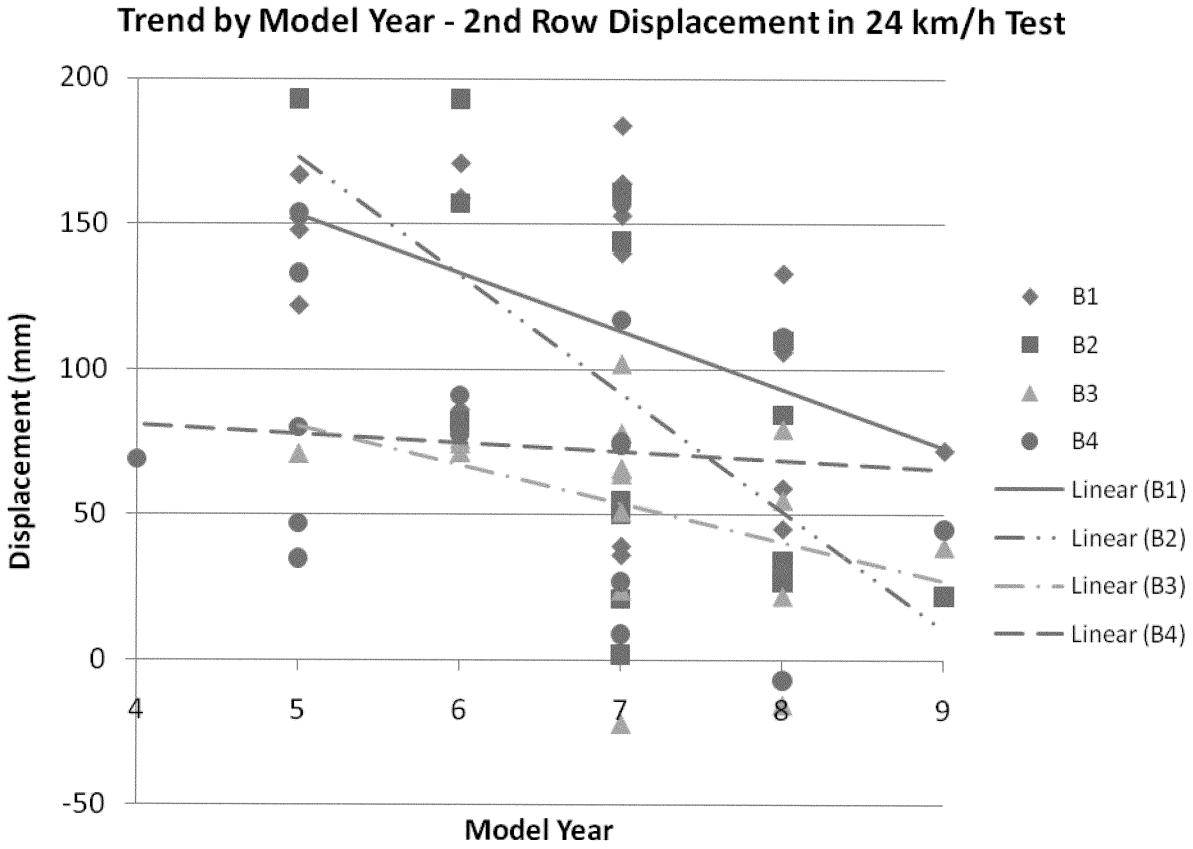


Figure 3

One comparison to note for illustration purposes is the improved performance of the MY 2008 Highlander in comparison to the MY 2005 Highlander. Table 19 shows the change in displacement values for the two model years of the Highlander at each target location and across impact speeds. The largest change in displacement value was for the 16 km/h tests at targets A1 and A2 (169 mm and 210 mm, respectively). On an average basis, the MY 2008 Highlander had 103 mm less displacement across all tested target locations, for a 76 percent overall reduction. This is illustrative of the improved performance of later MY vehicles. We believe that the MY 2008 Highlander had increased coverage of the ejection mitigation curtain and increased size of the inflated chambers which helped to restrain the impactor.

TABLE 19—OLD IMPACTOR, ABSOLUTE AND PERCENTAGE CHANGE IN DISPLACEMENT (MM) BETWEEN MY2005 AND MY2008 TOYOTA HIGHLANDER

Test vel.	A1	A2	A3	A4	B1	B4
24	.....	−96	−88	−104	−46	−45
16	−169	−210	−98	−131	−94	−53
Average (mm)	−103					
24	.....	−70%	−62%	−90%	−30%	−29%
16	−82%	−100%	−64%	−190%	−66%	−48%
Average (%)	−76%					

Comparing Results of Tests With Old and New Impactors

Several vehicles (the MY2008 CX9, Edge and Highlander) were tested using both the old and new impactor.

Table 20 shows the difference in displacements measured at target locations where both impactors were used.[55] Not surprisingly, these data generally indicate that the new impactor tends to result in greater displacement (positive difference); we believe this is due to lower dynamic friction. Yet, the old impactor displacement exceeded the new impactor (negative difference) at several targets as well.

The CX9 was the only vehicle that was impacted multiple times at the same targets by both the old and new

[55] In some cases average values were used to calculate the differences.

impactor. A student's t-test was performed to determine if the difference in the results were significant.[56] Table 21 shows the displacement values and statistics for targets A1 and A3. The difference in displacement was statistically significant ($p \leq 0.05$) for the A1 target, but not the A3 target.

TABLE 20—CHANGE IN DISPLACEMENT BETWEEN OLD AND NEW IMPACT TEST DEVICE

Vehicle	Test vel. (km/h)	A1	A3	B1	B2	B3	B4	C3
08 Ford Edge	24	29.0	69.0	12.0	12.0		−1.0	
08 Mazda CX9	24	15.5	3.0	−14.0	0.0	−7.0	0.0	
08 Toyota Highlander	24	38.5	23.0	19.0	34.0		24.0	18.0
08 Ford Edge	20	18.5						
08 Toyota Highlander	20				22.0		22.0	
08 Ford Edge	16	19.5	26.0					
08 Mazda CX9	16	13.0	−13.0					
08 Toyota Highlander	16	83.0	−2.0	38.0	46.0		36.0	
	Average	31.0	17.7	13.8	28.5	−7.0	20.3	18.0
Average All		21.6						

TABLE 21—IMPACTOR COMPARISON FOR MAZDA CX9

Test Vel. (km/h)	A1		A3	
	Old	New	Old	New
24	94	110	84	90
	98	113	89	89
Average	96.0	111.5	86.5	89.5
Std.	2.8	2.1	3.5	0.7
P–Value	0.013		0.180	

Despite the differences in test results, the test results from the old impactor provided useful data to assess the relative performance of ejection mitigation countermeasures. The results from the impactor are useful when analyzing data obtained from the old impactor alone, to compare vehicles to each other or to previous model year vehicles, or compare data from impact points on a vehicle.

Research Testing With New Impactor

As part of our analysis of the data, we evaluated data from only the new impactor to avoid confounding the comparison of data by impactor differences. Table 22 shows the change in displacement between the 24 km/h-1.5 second, 20 km/h-1.5 second and 16 km/h-6 second tests at various target locations for the MY 2007 Edge, MY 2007 CX9 and MY 2008 Highlander. The 24 km/h-1.5 second test always had greater displacement than the 20 km/h-1.5 second test. On average this difference was 38.3 mm when averaged over all vehicles and target locations. This is an expected result because the only difference is the impact speed.

TABLE 22—NEW IMPACTOR, CHANGE IN DISPLACEMENT (MM) BETWEEN 24 KM/H 1.5 SECOND, 20 KM/H 1.5 SECOND AND 16 KM/H 6 SECOND TESTS

Vehicle	Test comparison	A1	A3	B1	B2	B4	C3
07 Ford Edge	24–20	28	88				
07 Mazda CX9	24–20	36	23				
08 Toyota Highlander	24–20			33	55	23	22
07 Ford Edge	24–16	53	122				
07 Mazda CX9	24–16	45	59				
08 Toyota Highlander	24–16	−17	25	38	39	40	
07 Ford Edge	20–16	25	34				
07 Mazda CX9	20–16	9	36				
08 Toyota Highlander	20–16			5	−16	17	
Average All—24–20		38.3					
Average All—24–16		44.7					
Average All—20–16		15.7					

[56] The one sided t-test was performed assuming equal variance to determine if the new test device had produced larger displacement values compared to the old device.

There were only two vehicles/target locations that had more than one impact at multiple test speeds. Although this is extremely limited data, they allow a t-test to be performed.[57] The results are given in Table 23. The results indicate that the 16 km/h-1.5 second impact had statistically significant less displacement than both the higher speed tests at target A1.

TABLE 23—NEW IMPACTOR, COMPARISON OF TARGET A1 DISPLACEMENT AS A FUNCTION OF IMPACT VELOCITY

Vehicle	CX9		Edge	
Test Type	16 km/h–6 sec.	24 km/h–1.5 sec.	16 km/h–6 sec.	20 km/h–1.5 sec.
	75 59	110 113	126 119	152 143
Average	67.0	111.5	122.5	147.5
Std.	11.3	2.1	4.9	6.4
P–Value	0.016		0.024	

b. Field Performance

The agency evaluated available crash data to better understand the field performance of the current fleet equipped with side curtain air bags. A focus of this evaluation was the performance of the rollover sensors and their ability to detect the rollover event and activate deployment of the side curtain air bags. We also sought to understand the occupant containment provided by the vehicle system. Several sources of available data were reviewed. These included detailed analysis on a limited number of rollover crashes by NHTSA's Special Crash Investigation (SCI) division, case reviews of NASS CDS cases from the target population of the final rule, and data from a new Rollover Data Special Study project. Detailed reviews of some of these cases can be found in the technical report accompanying this final rule.

SCI Cases Presented in the NPRM

The following seven SCI cases were discussed in the NPRM. The agency's SCI division analyzed seven real-world rollover crashes of Ford vehicles where the subject vehicles contained a rollover sensor and side curtain air bags. (Ford had agreed to notify SCI of the crashes.) The subject vehicles were Ford Expeditions, a Ford Explorer, a Mercury Mountaineer, and a Volvo XC90. Table 24 gives details about each case.

In each case, the rollover sensor deployed the side curtain air bag. Of the seven cases, there were a total of 19 occupants, 15 of whom were properly restrained. All were in lap/shoulder belts, except one child in a rear facing child restraint system (CRS). A single crash (DS04–016) had all of the unrestrained occupants, serious injuries, fatalities and ejections in this set of cases. Two of the four unrestrained occupants were fully ejected from the vehicle, resulting in one fatal and one serious injury. The fatality was a 4-month-old infant, seated in the middle of the 2nd row. The ejection route was not determined. The seriously injured occupant was an adult in the left 3rd row, ejected through the uncovered right side 3rd row window. One non-ejected, restrained occupant received a fatal cervical fracture resulting from roof contact and another was seriously injured. The injuries to the remaining occupants were "none" to "minor."

[57] The one sided t-test was performed assuming equal variance to determine if the 24 km/h impact produced larger displacement values compared to the 20 km/h impact.

TABLE 24—FORD SCI ROLLOVER CASES (PRESENTED IN THE NPRM)

Case	Make	Model	MY	Occupants			¼ Rot.	Deploy		
				Row 1	Row 2	Row 3		Angle	Time (ms)	Rate (deg/s)
CA02–059	Mercury	Mount.	2002	1R	1R		1	17		17 to 25
CA04–010	Ford	Expl.	2003	1R			1	43	20	75
IN–02–010	Ford	Exped.	2003	1R			2	45	146	111
2004–003–04009	Ford	Exped.	2003	1R	2R		5	Yes	Unknown	Unknown
DS04–016	Ford	Exped.	2003	2R	2R, 2NR†.	1R, 2NR†.	5	Yes	Unknown	Unknown
DS04017	Ford	Exped.	2004	1R			12	Yes	Unknown	Unknown
2003–079–057	Volvo	XC90	2003	1R	1R		6	Yes	Unknown	Unknown

R = Restrained, NR = Not Restrained.
† One NR 2nd and 3rd row occupant ejected (total of 2 ejected).

Rollover Data Special Study (RODSS)

RODSS is a new source of rollover crash data that began in April 2007. NHTSA initiated RODSS as a pilot project to obtain additional field data for rollover crashes not covered by other agency databases. Cases were identified through the FARS database. NASS CDS and SCI cases were excluded from consideration because detailed information from those crashes would be available from those databases. However, remote SCIs were performed on selected cases.[58] The technical report for this final rule includes a discussion of the RODSS study conducted for this final rule.

RODSS is not a random sample and is not intended to be statistically representative of all rollover crashes nationally. Also, the sample size is small and becomes even smaller when separating the data into subcategories. Accordingly, observations based on the RODSS data about the relationship of side curtains and ejection are inherently limited.

To become part of the RODSS sample, the vehicle had to be exposed to a rollover crash and have a side curtain air bag and/or electronic stability control (ESC)/rollover stability control (RSC). The curtain air bag did not have to be deployable in a rollover, i.e., the curtain air bag could be an FMVSS No. 214 side impact air curtain without a rollover sensor, but some vehicles did have a rollover sensor.

The study first reviewed a total of 328 crashes occurring in 2005 through 2008. Of these 328 case vehicles, 315 were coded as exposed to a lateral rollover. Of these 315 case vehicles, 115 were believed to be equipped with side curtain air bags. Of these 115 case vehicles, 21 were believed to have a rollover sensor (rollover curtain). Of these 21 case vehicles, 18 had their curtains deploy during the rollover and 3 did not. These three cases of non-deployment are of interest relative to sensor performance and will be discussed in more detail later, along with a non-deployment SCI case.

Curtain deployment coding was tied to the driver or passenger, i.e., if there was someone seated on the side of the vehicle where the curtain deployed, it was coded as deployed for that occupant. There were 120 side curtain air bags deployed adjacent to occupants of the vehicles (58 drivers and 62 passengers). Limiting RODSS occupant selection to those in vehicles exposed to a lateral rollover, and those who had a known ejection status, then separating by known curtain deployment, results in Table 25, below. This table shows 119 occupants (57 drivers and 62 passengers) who were exposed to a curtain deployment and 496 (244 drivers and 252 passengers), who were not.

TABLE 25—RODSS DRIVER AND PASSENGER IN LATERAL ROLLOVERS WITH KNOWN EJECTION STATUS BY KNOWN CURTAIN DEPLOYMENT

Curtain deployment	Drivers	Passengers	All occupants
Yes	57	62	119
No	244	252	496
Total	301	314	615

General Observations From RODSS About Ejection Rates Relative to Curtain Air Bags

Again, any observations made based on the RODSS data about the relationship of side curtains and ejection must be prefaced by the fact that RODSS is not a random sample and is not intended to be statistically representative of all rollover crashes nationally.

The data from the 615 occupants in Table 25 form the basis of a comparison on ejection status versus curtain air bag deployment found in Tables 26 and 27. The "curtain deployed" group is made up of vehicles that had a rollover sensor and vehicles that did not (the latter vehicles may have had a side impact sensor only). The "curtain not deployed" group is made up of vehicles equipped or not equipped with a curtain, i.e., one possible reason for the curtain not deploying is that it did not exist.

We studied the data to see if side curtains had an effect in mitigating rollover ejections. We were aware that care should be taken in drawing conclusions from these results. Most of the curtain-equipped vehicles exposed to lateral rollovers had only FMVSS No. 214 side impact curtains (94 vehicles), rather than rollover curtains (21 vehicles). It is possible that if a side impact curtain deployed during the crash, the crash might be different than a crash where a side impact curtain did not deploy. An important difference when examining ejection data is rollover severity as quantified by number of quarter-turns. To help determine if there was an obvious bias in the data, we examined the difference between the quarter-turns in the rollover crashes where the side impact curtains deployed and the number of quarter turns in the rollover crashes where they did not deploy.

RODSS data indicate that deployment of any curtain (even a side impact curtain) has a positive effect on reducing the rate of side window ejection. Table 26 shows that 10.9 percent [13/119] of all occupants adjacent to a curtain air bag deployment were ejected through the side windows, in comparison to 27.6 percent [137/496] of those occupants who were not adjacent to a curtain deployment.

Restricting the data to occupants protected by a curtain deployed by a rollover sensor, 5.3 percent [2/38] were ejected. The cases involving the two occupants who were ejected, even though the rollover curtain deployed, are discussed in a later section.

[58] A remote SCI is one where, for a variety of reasons, the investigator is not able to physically examine the crash location and vehicles. The investigation is done through the use of police accident reports, scene diagrams and photographs.

Table 26 – RODSS Ejection Status of All Occupants by Curtain Deployment.

Curtain Deployment		Rollover Sensor		Ejection Status					
				Not	Other Area		Side Window		
				Ejected	Count	Rate	Injured	Fatal	Rate
Yes	119	Yes	38	29	7	18.4%	0	2*	5.3%
		No	81	52	18	22.2%	1	10	13.6%
		Total	119	81	25	21.0%	1	12	10.9%
		Curtain Equipped							
No	496	Yes	80	40	14	17.5%	4	22	32.5%
		No	416	252	53	12.7%	23	88	26.7%
		Total	496	292	67	13.5%	27	110	27.6%

*These two fatal ejections occurred despite deployment of the rollover curtain.

Table 27 examines the subset of occupants from Table 26 who were unbelted. Table 27 shows that 22.7 percent [10/44] of unbelted occupants in vehicles with curtain air bag deployment were ejected through the side windows, in comparison to 51.9 percent [108/208] of those unbelted occupants in vehicles where the curtain did not deploy. Rollover severity (as represented by number of quarter-turns) does not seem to account for the difference in the ejection rates for these two unbelted groups.

When the data are restricted to only unbelted occupants protected by rollover curtains, 10.0 percent [1/10] were ejected through the side window, as compared to 26.5 percent [9/34] of unbelted occupants protected by side impact curtains. We note that two unbelted occupants were not ejected in vehicles with deployed rollover curtains.

Table 27 – RODSS Ejection Status of Unbelted Occupants by Curtain Deployment.

Curtain Deployment		Rollover Sensor		Ejection Status					
				Not	Other Area		Side Window		
				Ejected	Count	Rate	Injured	Fatal	Rate
Yes	44	Yes	10	2*	7	70.0%	0	1	10.0%
		No	34	8	17	50.0%	1	8	26.5%
		Total	44	10	24	54.5%	1	9	22.7%
		Curtain Equipped							
No	208	Yes	41	8	11	26.8%	4	18	53.7%
		No	167	39	42	25.1%	23	63	51.5%
		Total	208	47	53	25.5%	27	81	51.9%

Cases Where Occupants Were Ejected Through Rollover Curtain-Equipped Windows

We examined SCI rollover crashes, NASS CDS cases from the target population of the final rule and data from the RODSS project and found six case vehicles where occupants were ejected through the side window opening that a rollover deployed curtain presumably covered. These cases are listed in Table 28, along with the number of quarter turns, occupant seating position, belt use, occupant age, degree of ejection, ejection route, and level of injury.

The average number of quarter-turns was 5.5. These six crashes involved nine occupants, six of whom were partially or completely ejected through a protected side window. Four occupants were partially ejected and two were completely ejected. All six were front seat occupants, although one was ejected through a second row window. Four of the ejected occupants were killed in the crash. One fatal partial ejection was ejected through a window protected by both a curtain and a laminated window. Four of these cases involved curtain damage. In two, the A-pillar tether detached. It is not possible to know if these instances of curtain damage occurred during the rollover or post-crash due to extrication.

TABLE 28—RODSS, NASS CDS AND SCI CASES WITH OCCUPANTS WHO WERE EJECTED THROUGH SIDE WINDOWS PROTECTED BY ROLLOVER CURTAINS

Case ID	Year/Make/Model	1/4 Turns	Curt. depl.	Seat pos.	Belt use	Age	Eject.	Route	Injury/ MAIS
RODSS									
7238*	06 Ford Explorer	6	Yes	11	No	84y	Comp.	Row 1 L	Fatal.
8289*	03 Lincoln Aviator‡	8+	Yes	11	Yes	62y	Part	Row 1 L	Fatal.
8289*	03 Lincoln Aviator‡	8+	Yes	12	Yes	28y	No	NA	Serious.
8289*	03 Lincoln Aviator	8+	Yes	23	Yes	65y	No	NA	Moderate.
NASS CDS									
2003–04–048*	02 Ford Explorer	4	Yes	11	Yes	54y	No	NA	1.
2003–04–048	02 Ford Explorer	4	Yes	13	Yes	49y	Part	Row 1 R	1.
2006–79–089	04 Lexus RX330	1	Yes	11	No	27y	Part	Row 2 L	Fatal.
2008–03–108	08 Honda Pilot	6	Yes	11	No	48y	Part	Row 1 L	3.
2008–12–159	05 Mercury Mont	8	Yes	11	No	23y	Comp.	Row 1 L	Fatal.

*These are also SCI cases.[59]
‡These seating positions had laminated glazing adjacent to them.

Non-Deployed Rollover Curtains in Rollover Crashes

We examined SCI rollover crashes, NASS CDS cases from the target population of the final rule and data from the RODSS project to find if the rollover sensors deployed the rollover side air curtains in a rollover. In general, field data indicate that rollover sensors have been recognizing a rollover and deploying rollover curtains in rollover crashes.

We found five case vehicles where the vehicle was apparently equipped with a side curtain air bag that was supposed to be deployed by a rollover sensor and the curtains did not deploy in the rollover event (*see* Table 29). There were two completely ejected occupants and one partial ejected occupant in these crashes. The results of these ejections were 3 fatalities. All of these ejections were through side windows except one where the front passenger door was dislodged from the vehicle and provided the ejection route for the unbelted driver.

Consistent among these non-deployment cases is that the rollover was preceded by a significant frontal impact. Four of the five non-deployment cases had a significant frontal impact that preceded the rollover. The MY 2006 Ford Explorer in RODSS case 6121 had a right front corner impact with a large tree prior to the rollover. The MY 2003 Lincoln Aviator in RODSS case 7242 had an offset frontal impact with an oncoming vehicle prior to the rollover. The MY 2006 Cadillac SRX in SCI case DS07009 impacted a large tree prior to the rollover. The EDR data from this case indicated that the tree impact had a longitudinal and lateral ΔV of -38.9 mph and -10.2 mph, respectively. The EDR also indicated that the rollover sensor status was "invalid" and the curtain deployment was not commanded. The MY 2009 Dodge Journey had a narrow offset frontal impact with another vehicle, which the crash investigator stated disrupted the power supply from the battery. The frontal air bags deployed in the above four crashes. (There is some doubt as to whether RODSS case 6121 (SCI CA9062) was definitely equipped with a rollover sensor, since the system was an option on this vehicle. Ultimately, no definitive determination was made.) For the cases involving initial frontal impacts, these impacts may have destroyed the vehicle battery and thus eliminated the primary power source for deploying the rollover curtain.

In RODSS case 5032 (SCI CA9061), it appears the sensor may not have been able to make a determination that a rollover occurred. However, in studying the details of this case, the vehicle's kinematics were very complex and may have included some motion not typical of a lateral rollover.

TABLE 29—RODSS AND SCI ROLLOVER CASES WHERE THE ROLLOVER CURTAIN DID NOT DEPLOY

Case ID	Year/Make/Model	Quarter turns	Curt. depl.	Seat pos.	Belt use	Age	Eject.	Route	Injury/ MAIS
RODSS									
5032*	04 Lincoln Aviator‡	3	No	11	No	68y	Comp.	Row 2 R	Fatal.
6121*	06 Ford Explorer	4	No	11	No	23y	Comp.	Door (13)	Fatal.
7242*	03 Lincoln Aviator‡	3	No	11	Yes	28y	No	NA	Serious.
7242*	03 Lincoln Aviator‡	3	No	13	Yes	26y	No	NA	Serious.
7242*	03 Lincoln Aviator	3	No	21	CRS	3y	No	NA	Serious.
7242*	03 Lincoln Aviator	3	No	23	Yes	7y	No	NA	Serious.
SCI									
DS07009	06 Cadillac SRX	4	No	11	No	81y	Part	Row 1 L	Fatal.
DS09071	09 Dodge Journey	4	No	11	Yes	63y	No	NA	2.
DS09071	09 Dodge Journey	4	No	13	Yes	60y	No	NA	1.

*These are also SCI cases.[60]
‡These seating positions had laminated glazing adjacent to them.

[59] Both RODSS cases were made into SCI remote investigations to facilitate documentation of photographs and other crash details. The SCI case numbers are CA09069 (RODSS 7238) and CA10006 (RODSS 8289).

X. Response to Comments and Agency Decisions

Laboratory and field data indicate that window curtains covering side windows can substantially reduce ejections in rollovers. NHTSA issued the NPRM to require that the side windows next to the first three rows of seats be subject to performance requirements that ensure the vehicle has an ejection mitigation countermeasure that would prevent an 18 kg headform from moving more than 100 mm beyond the zero displacement plane of each window when the window is impacted.

The NPRM proposed requirements for: (a) The impactor dimensions and mass; (b) the displacement limit; (c) impactor time and speed of impact; (d) target locations, and (e) testing the targets. We also discussed: (f) glazing issues; (g) test procedure tolerances; (h) test device characteristics; and (i) a proposal for a telltale requirement. The NPRM did not specifically require a rollover sensor. A 3-year lead time and 4-year phase-in was proposed, along with allowance of advanced credits to meet phase-in requirements. Costs, benefits, and other impacts were discussed in a PRIA accompanying the NPRM.

a. Impactor Dimensions and Mass

1. NPRM

The component test involves use of a guided linear impactor that is designed to replicate the loading of a 50th percentile male occupant's head and upper torso during ejection situations. The portion of the impactor that strikes the countermeasure is a featureless headform that was originally designed for the upper interior head protection research program (FMVSS No. 201).[61] It averages the dimensional and inertial characteristics of the frontal and lateral regions of the head into a single headform. The NPRM specified that the headform is covered with an approximately 10 mm thick dummy skin material whose outer surface dimensions are given in Figure 4, below. The Technical Analysis report accompanying the NPRM discusses other dimensional attributes of the headform, such as the curvature of the outer surface.

There are many possible ways of delivering the impactor to the target location on the ejection mitigation countermeasure. Both the old and new impactors used in agency research propel the shaft component of the impactor with a pneumatic piston. The shaft of the old impactor slides along a plastic (polyethylene) bearing. The new impactor uses curved roller bearings for part of the shaft support, which reduces the energy loss due to friction. The impactor has an 18 kg mass.[62]

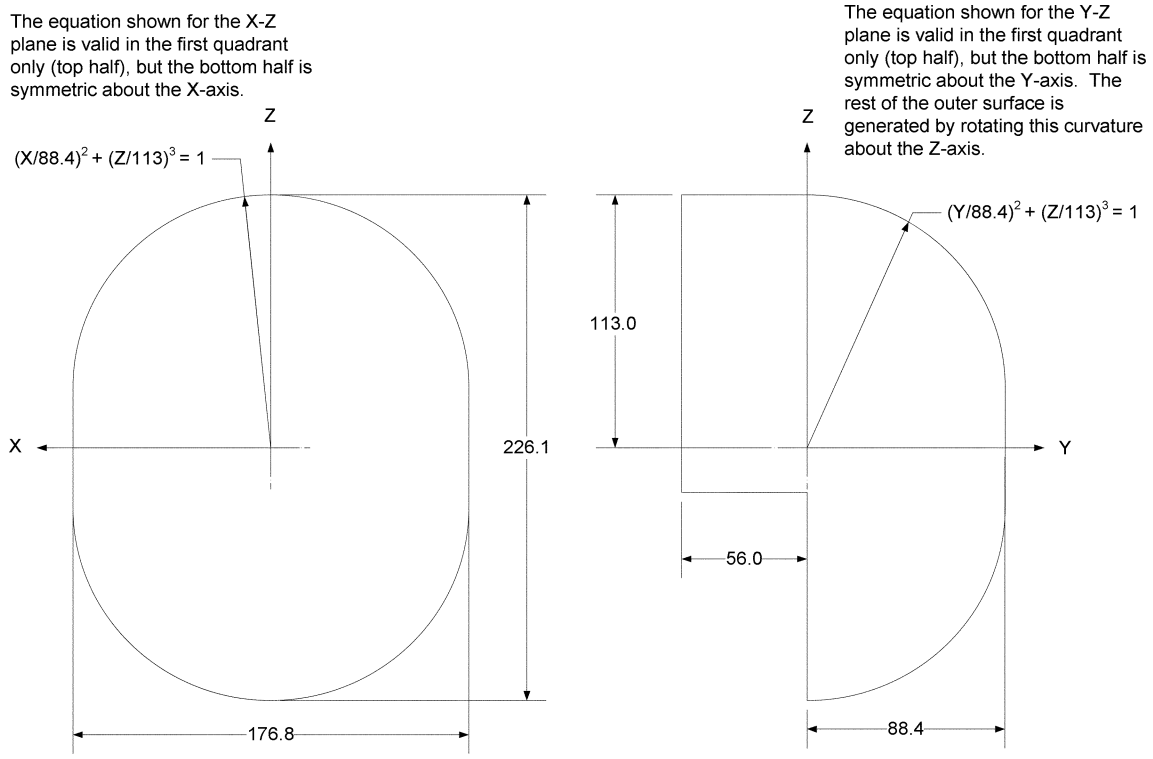


Figure 4 – Front and side view of headform outer surface (right) with dimensions given in millimeters

[60] These three RODSS cases were made into SCI remote investigations to facilitate documentation of photographs and other crash details. The SCI case numbers are RODSS 5032 (CA09061), RODSS 6121 (CA9062) and RODSS 7242 (CA9063).

[61] "Ejection Mitigation Using Advanced Glazings: A Status Report," November 1995, Docket NHTSA–1996–1782–3; "Ejection Mitigation Using Advanced Glazings: Status Report II," August 1999, Docket NHTSA–1996–1782–21; "Ejection Mitigation Using Advanced Glazings: Final Report," August 2001, Docket NHTSA–1996–1782–22.

[62] Since the performance criterion for this ejection mitigation standard is a linear displacement measure (a linear displacement measure would correlate to the actual gap through which an occupant can be ejected), a linear impactor is a suitable tool to dynamically measure displacement. The impactor can be placed inside the vehicle for testing the ejection mitigation curtains and glazing covering window openings.

The mass of the guided impactor was developed through pendulum tests, side impact sled tests, and modeling conducted to determine the mass imposed on the window opening by a 50th percentile adult male's upper torso and head during an occupant ejection ("effective mass").[63] Briefly, the pendulum impact tests were conducted on a BioSID anthropomorphic test device (50th percentile adult male) to measure effective mass of the head, shoulder, and upper torso. The BioSID was chosen because it was originally configured for side impact, unlike the Hybrid III dummy, and has a shoulder which the Side Impact Dummy (49 CFR 572, subpart F) used for FMVSS No. 214, "Side impact protection," does not have. A linear impact pendulum weighing 23.4 kg was used to strike the head and shoulder of the dummy laterally (perpendicular to the midsagittal plane) using two impact speeds (9.7 and 12.9 km/h) and four impact surfaces. In addition to the rigid impactor face, three types of padding were added to the impactor face to increase the contact time and replicate advanced glazing impacts.

Effective mass was calculated by dividing the force time history calculated from the pendulum accelerometers by the acceleration time history from the dummy sensors. In general, higher speed impacts and impacts with softer surfaces generated higher effective mass. Based on these pendulum tests, a range for the effective mass of the head and upper torso was estimated to be 16 to 27 kg.

In the sled tests, we used a side impact sled buck with a load plate representing a door and two load plates representing the glazing to measure shoulder and head impacts with three different stiffness foams. The purpose of these tests was to determine the effect lower body loading would have on the combined head and upper torso effective mass. Two impact conditions were simulated, one condition was described as being representative of a rollover event and the second was described as being representative of a side impact event.

In the rollover condition, the impact speed was intended to be 16.1 km/h (10 mph) and the dummy was positioned leaning towards the door such that the head and torso would contact the simulated glazing at the same time. This leaning position was intended to be more representative of an occupant's attitude in a rollover. For the test designed to be more representative of a side impact condition, the dummy was seated upright and the impact speed was intended to be 24.1 km/h (15 mph).

In the preamble of the NPRM, we described the agency's analysis of these tests as follows. As was done for the pendulum data, the effective mass was calculated by dividing the force time history calculated from the pendulum accelerometers by the acceleration time history from the dummy sensors. Using this method, the effective mass of the head and upper torso calculated for the 16.1 km/h impact condition showed a quick rise to about 18 kg by about 5 ms, followed by an increase to about 40 kg at about 30 ms. The effective mass for the 24.1 km/h impact condition showed an initial artificially high value or spike prior to 5 ms because of a lag between the force measured in the load plates and the acceleration measured at the upper spine. This spike was also seen in some pendulum shoulder impacts. The effective mass settled to about 9 kg at about 10 ms, with a slow rise to about 18 to 20 kg at about 25 to 30 ms. Looking at the results, we deferred to the 18 kg effective mass since the test condition more closely represented a rollover. In addition, the 18 kg value was within the range of the pendulum impactor results discussed above, which showed an effective mass range between 16 and 27 kg.

For this final rule, we have reanalyzed these sled tests primarily for the purpose of determining impact energy, which we address in detail later in this preamble.[64] However, this analysis also generated estimates of the effective mass of the dummies in these tests. For the 24.1 km/h test, three methods (represented by equations 2–4, *infra*) gave a range of the combined head and shoulder effective mass of 12.2 to 13.1 kg. We believe that a reasonable estimate is 13 kg. The analysis for the 16.1 km/h test is more complex due to the time dependent dummy orientation. After making estimates of the impact energy using a simple sprung mass model, we back calculated the effective mass assuming the impact energy is equal to the kinetic energy prior to impact (represented by equation 3, *infra*). We also used the sled velocity as a surrogate for relative dummy speed and calculated effective mass directly by using an equation 4, *infra*. From these calculations we estimated a combined head and shoulder effective mass of 22 kg.

In the NPRM preamble, we reported that the agency also performed a computer modeling analysis of an 18 kg impactor and 50th percentile Hybrid III dummy impacting simulated glazing (foam). The comparison found that the total energy transferred by the 18 kg impactor was within the range of the total energy transferred by the entire dummy. For a 16.1 km/h dummy model impact with the foam, the effective mass that came in contact with the foam was between 12.5 kg and 27 kg.

We noted in the NPRM that the 18 kg proposed mass is consistent with that used by General Motors (GM) in 16.2 km/h (10 mph) tests of ejection mitigation curtains.[65] GM based this value on test results from 52 full-vehicle rollover tests that estimated the effective mass of occupant contact with the first row side window area. A more detailed analysis of this study can be found later in this preamble.

The estimated effective mass for most belted tests was about 5 kg and all were less than 10 kg. The majority of belted tests had effective masses which were a combination of both the near and far side occupants. The effective mass for the unbelted occupants ranged from 5 to 85 kg.

In summary, the proposed impactor mass was based on the determination of an effective mass calculated through both pendulum and sled test impacts and modeling. These methods resulted in a large range of effective mass values. In the end, we deferred to the 18 kg equivalent mass seen during the sled test that was intended to be more representative of a rollover event, which was also the equivalent mass calculated from pendulum impact into the dummy shoulder. For this final rule we have reanalyzed the sled tests and estimated a range of effective mass from approximately 13 to 22 kg. Thus, the 18 kg effective mass is still considered to be a reasonable representation of an occupant's head and a portion of the torso. An effective mass more representative of just the head would be substantially smaller, and an equivalent mass accounting for more torso and lower body mass would be substantially more. The 18 kg mass is well within the GM estimates from vehicle rollover tests, and is consistent with the impactor that GM uses to evaluate side curtains.

[63] "Technical Analysis in Support of a Notice of Proposed Rulemaking for Ejection Mitigation," *supra.*

[64] The video from these tests and the data from the dummies, load wall and sled can be accessed from the NHTSA Biomechanics Database at *http://www-nrd.nhtsa.dot.gov/database/aspx/biodb/querytesttable.aspx.* The test numbers are 10282 through 10287. Tests reanalyzed in detail were 10282 (24 km/h test) and 10285 (16.1 km/h test).

[65] O'Brian-Mitchell, Bridget M., Lange, Robert C., "Ejection Mitigation in Rollover Events—Component Test Development," SAE 2007–01–0374.

2. Comments

There was general support from the vehicle manufacturers and suppliers for using a linear impactor and performance metric based on the displacement of that impactor in a compliance test. There were only a few comments on the impactor dimensions and mass. These few comments were in favor of the proposed mass. While VW and others had comments on the impact energy imparted by the mass, which is an issue which will be addressed in a later section below, VW stated that "the 18 kg mass for the impactor is well established * * *" The Alliance referenced the fact that the GM test procedure for ejection mitigation uses an 18 kg linear impactor in stating that "[t]he Alliance supports the use of the 18 kg headform proposed in the NPRM."

Some parties commented on the design of the headform. Takata stated that simulated animations have shown relative movement of head skull and headform, and that "the incomplete fixation of the head skull is influencing the displacement behavior of the head form [sic]." Takata suggested enlarging the head skull fixation in the lower portion, by adding a skull cap or enlarging the chin area in the rear for example. Similarly, TRW said that it found that the headform skin can become dislodged from the skull during testing and suggested using a backplate of smaller size on the headform to better clamp the headform skin flange to the skull. TRW also said that the headform skin can become displaced from the lower (chin) area of the skull.

AORC recommended that NHTSA adopt specifications for the skin stiffness, skin friction coefficient, and skull surface finish, to address the headform skin partially dislocating on the headform as a result of friction between the countermeasure and the headform.

TRW suggested changes to the preparation of the headform for testing. It stated that frictional attributes of the headform skin affect the manner in which the headform interacts with the rollover curtain, so talc, chalk, or other coatings could affect test results. TRW suggested that the standard specify that "no coatings shall be applied to the headform skin during testing" and asked, as did AORC, that the standard specify that prior to the test, the headform skin must be cleaned (TRW suggested cleaning the headform with isopropyl alcohol). TRW suggested changes to the headform drawing package to address: The outer surface finish requirements of the skull; the thickness tolerance and durometer hardness of the skin; inner/outer surface finish and tolerance requirements of the skin material type and material properties corridor for the skin; the definition of frictional characteristics of the skin, including the performance corridor; and test procedure and measurement technique for frictional characteristics of skin.

3. Agency Response

We are adopting an 18 kg headform substantially similar to the device described in the NPRM.

We are declining Takata's and TRW's requests to add a skull cap or modify the backplate of the headform. The modification is unnecessary as the new headform has not exhibited the problem these commenters describe. Further, the effect of the modification on actual test results has not been quantified by the commenters. Using modeling, Takata estimated about a 3 mm increase in displacement between the proposed headform and one with the suggested modification, but it is not clear this modeling is representative of an actual impact test.

NHTSA is not inherently opposed to improvements in the headform design to possibly allow for a longer period of head skin use before it needs to be replaced. However, it has not been shown that there is a need to improve the headform at this time. If improvements are feasible and the effect of changing the headform on ejection mitigation countermeasure performance can be better assessed, we are open to considering fine-tuning adjustments to the headform at a future date.

With respect to TRW's comments about the additions and revisions to the drawing package, the NPRM's drawing package already included specifications for the skin material type, thickness and durometer. It also included a specification for preparing the outer surface finish of the skull. TRW did not provide any reason to change these specifications, so they will remain as proposed in the final rule.

We deny TRW's other requests that we specify the inner/outer skin surface finish, skin frictional characteristics, friction performance corridor and friction measurement technique. We do not believe there is a need for these specifications. NHTSA has not before found a need to specify skin surface finish and frictional characteristics for test dummy skin. The commenter provided no justification as to why the material properties provided were insufficient or how the requested parameters would improve the objectivity of the standard.

We are denying the request to place a requirement in the regulatory text to clean the headform skin with isopropyl alcohol as per FMVSS No. 201, "Occupant Protection in Interior Impact." The commenters provide no data showing the necessity of such provision. FMVSS No. 201 has no requirement that the free motion headform be cleaned with alcohol prior to the testing. There is no FMVSS that specifies in the regulatory text that the dummy skin should be cleaned prior to vehicle testing.

b. Measurement Plane and Displacement Limit (100 mm)

1. NPRM

We proposed that the linear travel of the impactor headform must be limited to 100 mm from the inside of the tested vehicle's glazing as measured with the glazing in an unbroken state. The 100 mm boundary would be first determined with the original glazing "in position" (up) and unbroken. Then, for the test, the original glazing would be in position but pre-broken if it were advanced glazing; or down or removed altogether if it were tempered glazing. It was proposed that advanced glazing would be in position but pre-broken for both the 1.5 second test and the 6-second test.

The NPRM included a window-breaking procedure that damages but does not destroy advanced glazing, while it will obliterate tempered glazing. It was proposed that vehicle manufacturers may remove or completely retract tempered glazing since it would be destroyed in the pre-breaking procedure and would have no effect on the ejection mitigation results. When tested with the original glazing in position but pre-broken or with the glazing removed, the linear travel of the impactor headform must not exceed the 100 mm limit. If a side curtain air bag is present, and we anticipate that most, if not all, vehicles will have an ejection mitigation curtain, the curtain would be deployed.

In the test, the ejection mitigation countermeasure must prevent the headform from exceeding the 100 mm limit. The principle underlying the 100 mm displacement limit is to ensure that the countermeasure does not allow gaps or openings to form through which occupants can be partially or fully ejected. In the research tests, targets that had displacements of less than 100 mm did not allow ejections in dynamic testing.

In research tests, the TRW and Zodiac prototype ejection mitigation countermeasures were tested on a CK

pickup to the proposed impactor test procedure.[66] The TRW prototype had no coverage at position A1 (front window forward lower position). These systems were later tested on the DRF with the 50th percentile male, 5th percentile female and 6-year-old dummies in upright seating positions, and a prone 6-year-old dummy aimed at approximately the target positions A1 and A2 (front window rear lower position). When tested on the DRF, the arms of the upright dummies flailed out of the window opening up to the shoulder at the sill (A1 and A2) and the prone 6-year-old dummy was completely ejected at A1.

We recognize that dummy ejection did not occur all the time at targets that had displacements of over 100 mm. When tested with pre-broken laminated glazing, at position A1, the TRW system had 181 mm of displacement at the 24 km/h (1.5 second delay) test and 104 mm of displacement in the 20 km/h (1.5 second delay) test, but did not eject either the prone or seated dummies in DRF tests. Nonetheless, the component and DRF testing indicated that there was an increased likelihood that an opening could be formed between the curtain and the window opening through which an occupant could be ejected if the displacement were over 100 mm in the headform test. In addition, a 100-mm limit would also help guard against the countermeasure being overly pliable or elastic so as to allow excessive excursion of an occupant's head and shoulders outside of the confines of the vehicle even in the absence of a gap.[67]

NHTSA also noted in the NPRM that a 100-mm performance limit is used in several regulations relating to occupant retention. In FMVSS No. 217, "Bus emergency exits and window retention and release," (49 CFR 571.217), bus manufacturers are required to ensure that each piece of glazing and each piece of window frame be retained by its surrounding structure in a manner that prevents the formation of any opening large enough to admit the passage of a 100-mm diameter sphere under a specified force. The purpose of the requirement is to minimize the likelihood of occupants being thrown from the vehicle. This value is also used in FMVSS No. 206, "Door locks and door retention components," (49 CFR 571.206, as amended 69 FR 75020), to mitigate occupant ejection through unintentional door openings in a crash. In FMVSS No. 206, the door is loaded with 18,000 N of force and the space between the interior of the door and the exterior of the door frame must be less than 100 mm.

In addition, NHTSA also considered that a value of approximately 100 mm is used by the International Code Council (ICC) in developing building codes used to construct residential and commercial buildings.[68] The ICC 2006 International Building Code and 2006 International Residential Code require guards to be placed around areas such as open-sided walking areas, stairs, ramps, balconies and landings. The guards must not allow passage of a sphere, 4 inches (102 mm) in diameter, up to a height of 34 inches (864 mm). The ICC explains in the Commentary accompanying the Codes that the 4-inch spacing was chosen after considering information showing that the 4-inch opening will prevent nearly all children 1 year in age or older from falling through the guard.

The NPRM noted that GM has developed a test procedure that uses a 100 mm displacement limit but in GM's procedure, the zero displacement plane is a plane tangent to the exterior of the side of the vehicle at the target location.[69] [70] Displacement is measured perpendicular to this excursion plane. Thus, the allowable GM displacement is approximately 100/cos(θ) mm, with θ being the angle with the vertical of the exterior plane, if other aspects of the test were identical to those of the NPRM. If θ were 20 degrees, the GM limit would be approximately 106 mm. The GM method also results in a slightly different allowable final displacement position than the proposed method because of the separation between the flat excursion plane and the inside surface of the window at the target location.

2. Comments

There was general support for the use of a linear impactor as opposed to some other impacting device and performance metric based on the displacement of that impactor.[71] However, many commenters had opinions about the 100 mm performance limit and how the displacement should be measured. In general, the net effect of the vehicle manufacturers' requests was to increase the allowable displacement, while that of the glazing manufacturers and consumer groups was to reduce it.

Both the Alliance and AIAM suggested that the final rule measure displacement from an initial reference point other than the point of contact of the headform with the glazing. Both requested that a method similar to that used by GM be used. This measurement method defines a line tangent to the side of the vehicle at the window opening. (We note that although the Alliance calls the longitudinal plane that passes through this line the excursion plane, see Figure 5, extracted from the Alliance comments, there would likely be a unique excursion plane at every target location due to the curvature of the vehicle sides.)

Under the Alliance method, the headform contact with the excursion plane for that target location defines the point of zero displacement. The Alliance explained this zero plane by stating that "the risk of injury is more closely tied to the amount of occupant excursion from the outside of the vehicle's structure as opposed to the side glass." The AIAM stated that its procedure "takes into account the shape of the vehicle body near the side windows and the contribution the body makes in providing additional space before the occupant contacts the ground."

The Alliance and AIAM methods differ after the zero excursion plane is determined. For the Alliance, the maximum excursion plane is defined by translating the excursion plane 150 mm laterally. The point of contact of the headform with the maximum excursion plane provides the limit on displacement. The Alliance justifies its request for a 150 mm excursion limit by stating "that the impactor mass and impact energy are based on the 50th male." Therefore, it believes that "a 150 mm excursion limit based on the diameter of a 50th percentile male head (Hybrid III—153 mm, WorldSID = 159 mm, Featureless = 177 mm) is more appropriate." The Alliance and Volvo commented that excursion should not be based on the size of a child's head and impact energy of an adult male. For the AIAM, the maximum excursion plane is defined by translating the

[66] There were only some slight variations in target locations.

[67] The agency further notes that an advantage to the displacement limit is that the linear displacement of the headform can be measured in a practicable and relatively straightforward manner, unlike a real-time dynamic measurement of a gap during an impact.

[68] The ICC is a nonprofit membership association that works on developing a single set of comprehensive and coordinated national model construction codes. *http://www.iccsafe.org/news/about/*.

[69] O'Brian-Mitchell, Bridget M., Lange, Robert C., "Ejection Mitigation in Rollover Events—Component Test Development," SAE 2007–01–0374.

[70] GM explained that its justification for the 100 mm displacement limit is that it represents half the height of the 50th percentile male Hybrid III head.

[71] This is aside from commenters who want the agency to use a completely different test method, i.e., full vehicle dynamic rollover.

excursion plane by 100 mm along a line normal to the excursion plane, rather than 150 mm laterally.

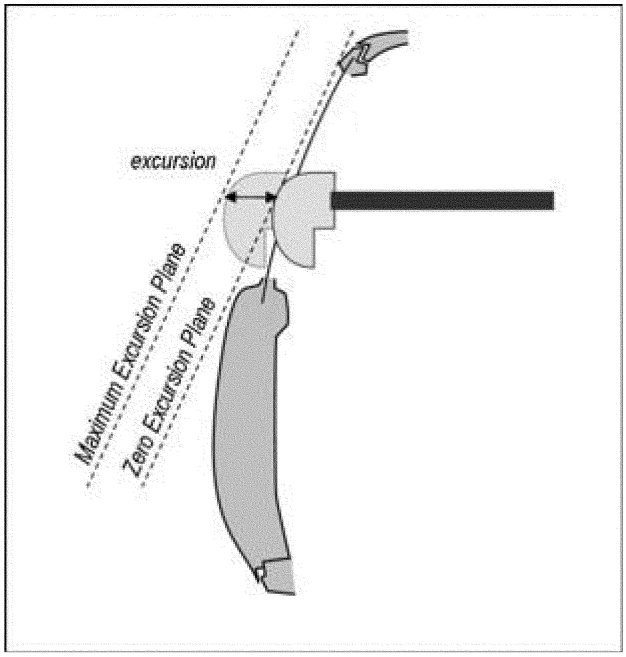


Figure 5 - Alliance Displacement Measurement Method.

Honda agreed with the 100 mm displacement limit in the NPRM because it believes it to be appropriate to account for the size of a child's head. It also agreed that the horizontal measurement of the impactor displacement was appropriate because of its "feasibility and measurement accuracy." However, Honda concluded "that the proposed procedure * * * doesn't accurately simulate the degree of ejection toward the outside of the vehicle."

Honda suggested that the measured displacement should begin at the same location as proposed in the NPRM, i.e., the point of contact of the headform with the inside surface of the glazing. However, Honda suggested drawing a line normal to the glazing at the target center.[72] The window cross-section in the lateral plane is then projected 100 mm along the normal line. The headform is then translated laterally and horizontally until it contacts the projected window cross-section, which provides the limit of displacement.

TRW agreed with the measurement method and excursion limit of 100 mm, with one caveat. The commenter noted that "during an impact test, there can be considerable deflection of the door/window frame, door structure, door hinges, etc." TRW stated that "[s]ince the objective of the Standard is to limit headform displacement to no more than 100mm beyond the zero displacement plane, movement of the plane due to the door system deflection should be considered during the test."

IIHS suggested that the 100 mm displacement limit might be unnecessarily small. It stated that "[s]electing this value based on its use in other safety standards with very different test conditions or in building codes for guardrails on balconies and stairs may be unreasonable." IIHS indicated that the 12 vehicles tested by NHTSA, as reported in the NPRM, would have failed to comply with the 100 mm displacement limit, yet "the crash performance of these vehicles has not been assessed to demonstrate a need for improved ejection mitigation systems." IIHS also stated that the potential negative effects of requiring air bags to be stiffer to meet a 100 mm displacement requirement are unknown.

In general, glazing suppliers recommended that the final rule use the passage of a 40 mm sphere to assess any gaps in the countermeasures. They suggested we use industry standards published by the Society of Automotive Engineers (SAE), SAE J2568, "Intrusion Resistance of Safety Glazing Systems for Road Vehicles," or by the British Standards Institution (BSI), BSI AU 209, "Vehicle Security," which provide glazing intrusion resistance requirements from external impact (as opposed to ejection mitigation). These industry standards specify that after testing there must not be separation within the glazing or between the glazing and vehicle body that would allow for passage of a 40 mm diameter sphere. The EPGAA stated that it is necessary to "specify a maximum opening after impact in addition to an excursion limit to adequately address the remaining gaps leading to partial ejections." It goes on to state that "NHTSA currently requires gap quantification limitation for windshields to resist occupant ejection in FMVSS [No.] 205, which mandates compliance with ANSI/SAE Z26.1 where glazing tears are measured and limited after impact." In contrast, Batzer and Ziejewski indicated that the 100 mm displacement appeared appropriate.

[72] Honda's diagram in its comment shows a line projected from the point of contact with the window, rather than the target center. (The target or target outline was defined in the NPRM as the x-z plane projection of the ejection headform face. The center of the target outline would be the target center.) We assume the graphic represents the intent of Honda's comment. The line emanates from the point of glazing contact with the headform. Honda also stated that the line projected from the point of contact is normal (perpendicular) to the window. However, most side windows curve out of the longitudinal vehicle plane and any normal to the window would not be contained in a lateral plane. Thus, we have assumed that only the component of the normal line in the lateral plane is of interest, i.e., only the line normal to the lateral cross-section of the glazing.

Advocates suggested that the proposed displacement limit be reduced by 50 percent, to 50 mm. It stated that a 100 mm displacement limit "allows enough excursion to permit serious injuries and deaths outside the vehicles. The 4-inch limit also devalues the major contribution that advanced glazing can make to reduce the chances of occupant ejections, including excessive occupant excursion outside side windows."

3. Agency Response

NHTSA does not agree with the requested changes to the displacement measurement method from the vehicle manufacturers and TRW, which would all effectively increase the allowable displacement. We also disagree with the additional post-impact gap measurement suggested by the glazing suppliers. We also do not concur with the requests of some commenters to increase the displacement limit, and of some to reduce it. We believe that the 100 mm limit strikes the appropriate balance between stringency and practicability. We address the issue of stringency and practicability further in a later section on the time delay of the impacts and impactor velocity.

Suggested Methods Would Increase the Displacement Limit

We do not believe that the methods suggested by the commenters provide a better method of measuring the performance of the ejection countermeasure. No data was presented to support why the suggested methods are preferable to the method proposed in the NPRM.

In the NPRM and the technical analysis supporting the NPRM, the agency estimated that the GM measurement method allowed about 6 percent more displacement than the proposed method of measurement. Below we analyze the displacement measurement methods requested by the commenters and compare the associated performance limits of the respective methods to the performance limit discussed in the NPRM. For this comparison, we used a graphical representation of a two dimensional lateral cross-section of the headform contact with the side window. For convenience, we used an approximation of the headform profile rather than the exact cubic equation prescribed in the NPRM. The vehicle cross-section included the window as well as the structure in its vicinity.

Figure 6 shows how the 100 mm displacement put forward in the NPRM is measured from the contact point of the headform at the A2 target point with the side window glazing. In this example, the lateral cross-section A–A of the glazing is represented by a 15 degree arc segment having a 201 cm radius, with the base of the arc oriented approximately 7 degrees from the vertical.

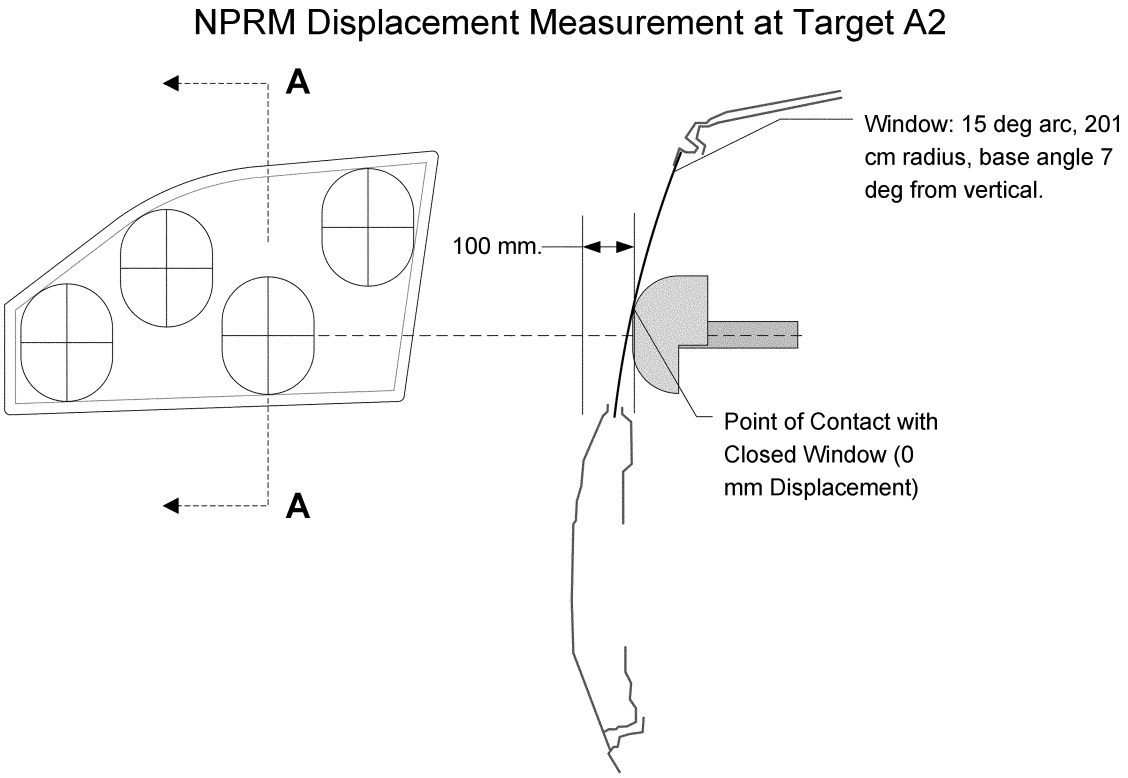


Figure 6 – NPRM Displacement Measurement at Target A2

Figure 7 shows the displacement measurement methods that Honda and the Alliance recommended in their comments. In the Honda method, the lateral cross-section of the glazing is projected 100 mm along the normal line at the point of contact of the headform. Using the Honda method, the headform's horizontal displacement at the A2 target is 101 mm from the NPRM zero displacement point. The Alliance-recommended measurement method defines a line tangent to the side of the vehicle at the window opening as the zero excursion plane. The maximum excursion plane is defined by translating the excursion plane 150 mm laterally. Using the Alliance method, the headform's horizontal displacement at the A2 target is 161 mm from the NPRM zero displacement point. This 161 mm value is the sum of the 11 mm distance between the contact point with the window and the excursion plane (Δ excursion plane) and the 150 mm

additional displacement to the maximum excursion plane.[73]

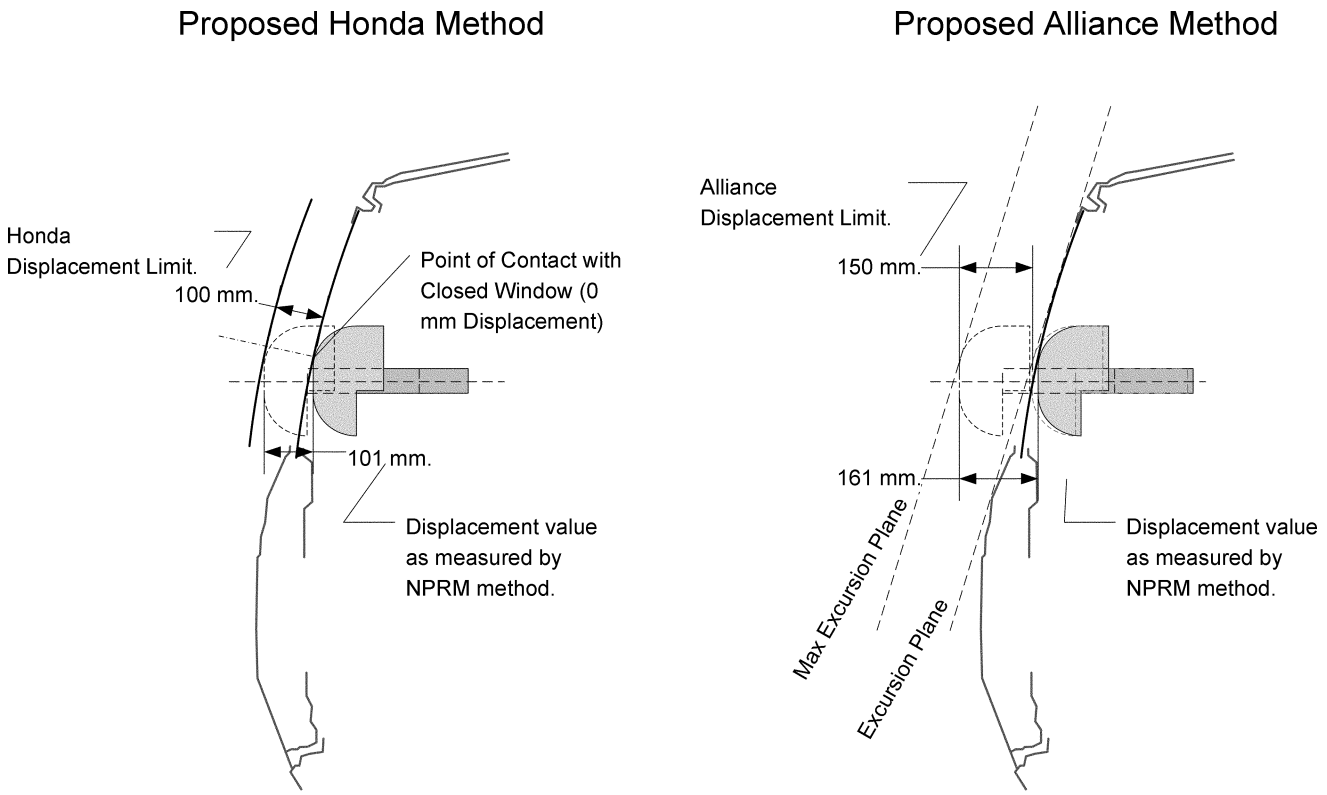


Figure 7 – Suggested Honda and Alliance Methods at Target A2

AIAM also recommended a displacement measurement method similar to the Alliance method in that an excursion plane is located tangent to the side of the vehicle window opening. However, the maximum excursion plane is defined by translating the excursion plane by 100 mm along a line normal to the excursion plane rather than 150 mm laterally.

Because of the similarities between the Alliance and AIAM methods, once the angle of the excursion plane is known, a simple mathematical relationship can be used to calculate the AIAM displacement limit with respect to the NPRM measurement method from the limit determined by the Alliance method. From Figure 7 we see that the excursion angle is 17 degrees from the vertical. Thus, the horizontal translation of the AIAM maximum excursion plane is 105 mm = 100/cos(17 deg.). The total AIAM displacement allowance from the headform when in contact with the window plane is the sum of the Δ Excursion Plane (11 mm) plus the horizontal translation of the excursion plane (105 mm), resulting in a value of 116 mm at target A2.

The displacement measurement methods suggested by Honda, the Alliance, and AIAM are all more sensitive to the particular target location, the curvature and angle of the window, as well as the profile of the vehicle structure around the window opening, than the NPRM method. Figure 8 shows the NPRM displacement measurement at target A4 for a side window having twice the base angle (13 degrees) as the previous example. The window curvature remains the same. Figure 9 shows a graphical determination of displacement measurements for Honda (109 mm) and the Alliance (156 mm) at A4. Using the mathematical transformation described above, we calculate the AIAM value (114 mm).

[73] In doing this analysis, we have assumed that the point of contact with the glazing is along the centerline of the headform. If we did not, the difference between the NPRM method and the Alliance and AIAM proposals would be even greater.

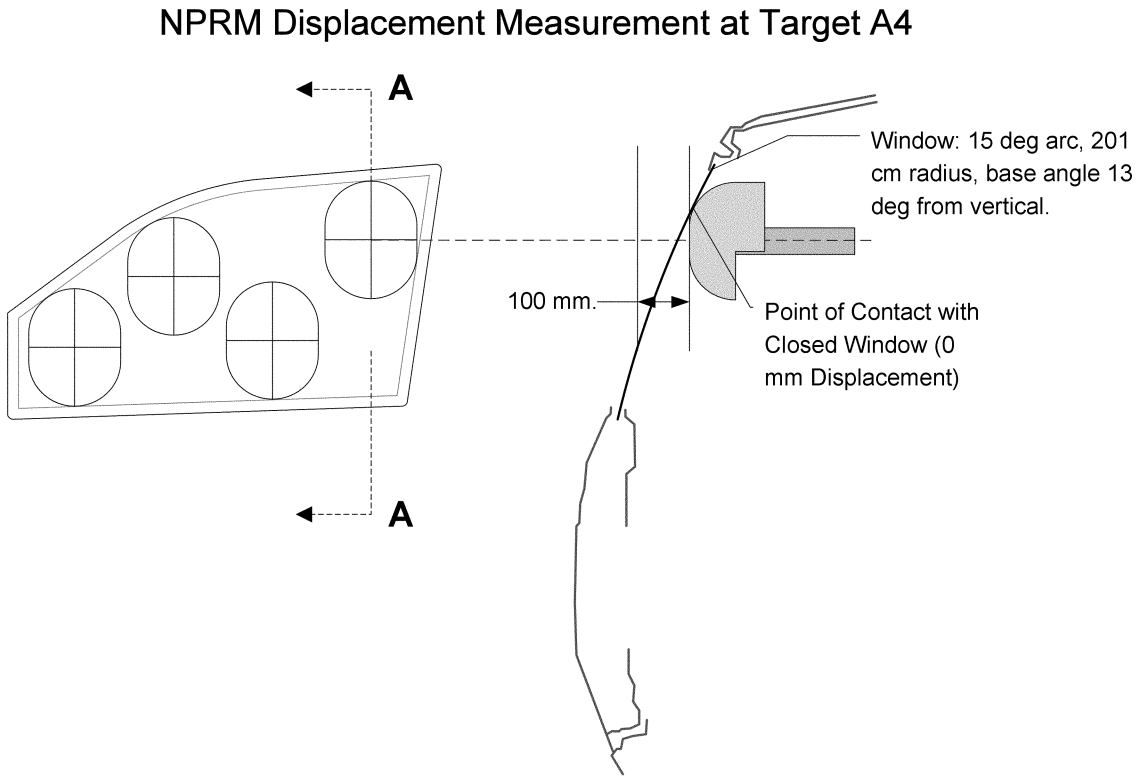


Figure 8 – NPRM Displacement Measurement at Target A4

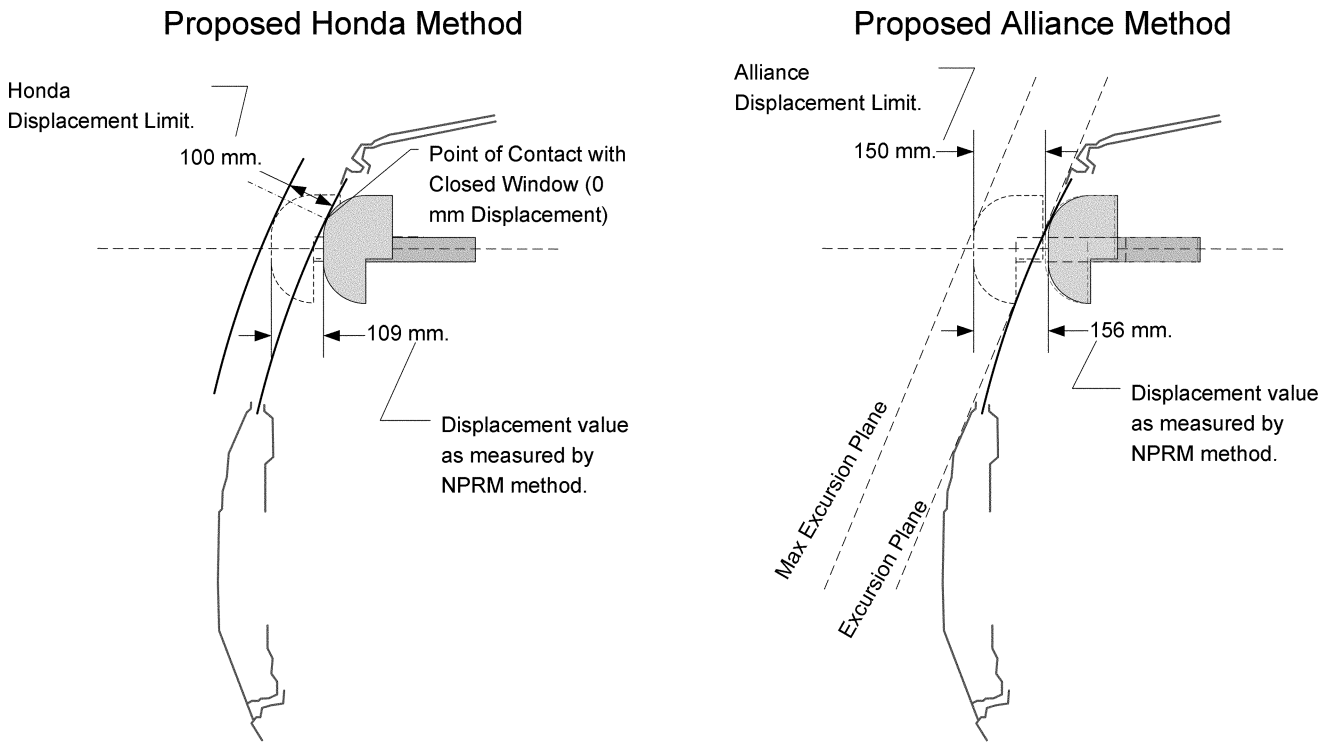
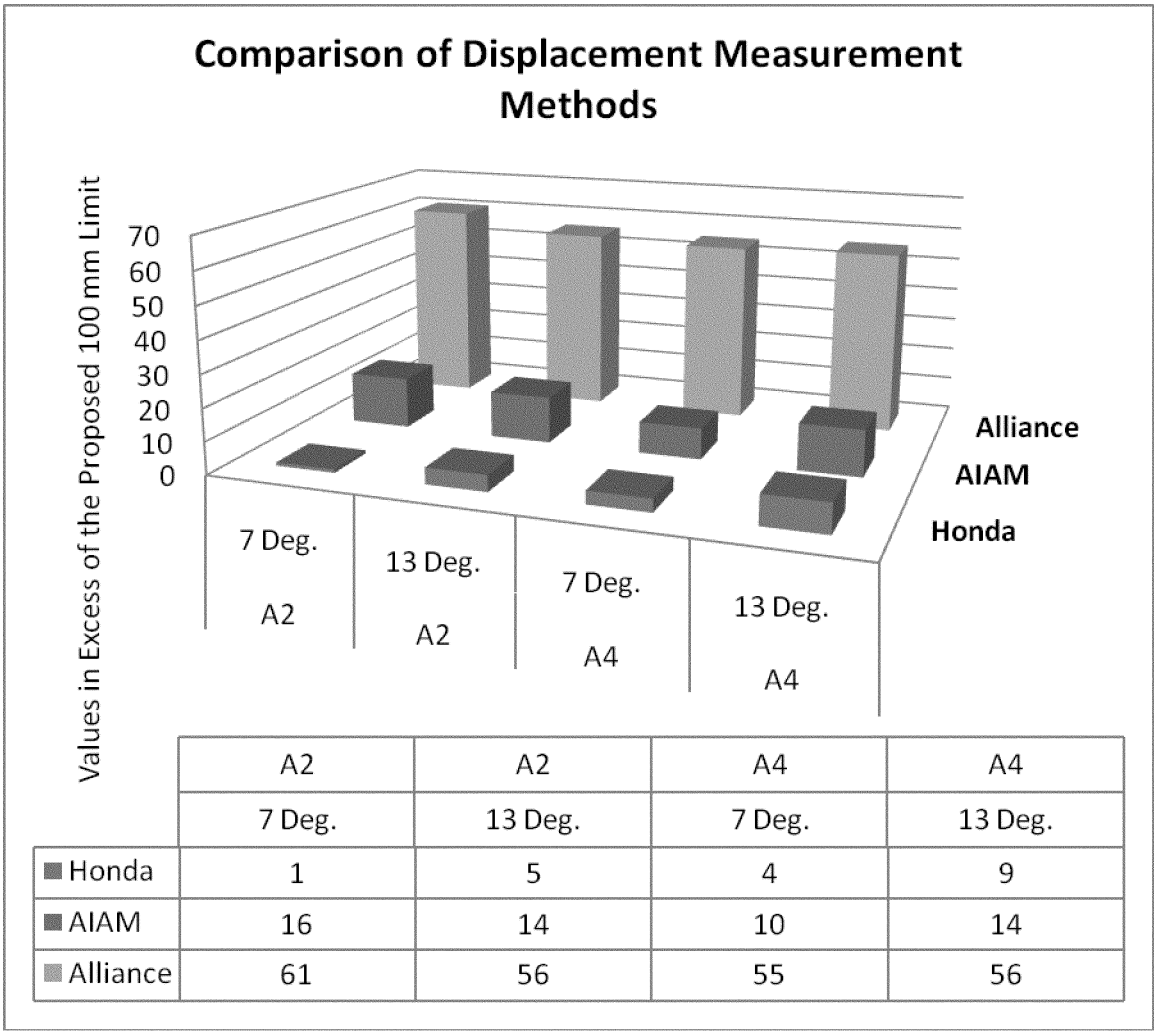


Figure 9 - Suggested Honda and Alliance Methods at Target A4

The same exercise was performed for target position A2 with a 13 degree window and for target position A4 with a 7 degree window. Figure 10 shows the displacement limits calculated for the three commenters' methods at target positions A2 and A4 with a 7 and 13 degree window, subtracted from the 100 mm limit in the NPRM. The Honda

method provides the smallest differential with the NPRM method (1 to 9 mm), the Alliance method provides the largest (55 to 61 mm). Again, the results will vary for other target locations and window/vehicle geometries. However, there does not appear to be a situation where any of the suggested methods will result in a lateral displacement limit of less than 100 mm. That is, each suggested method would reduce the stringency of the test by permitting the openings to be greater than 100 mm. As explained in the section below, this we cannot accept.



	A2	A2	A4	A4
	7 Deg.	13 Deg.	7 Deg.	13 Deg.
Honda	1	5	4	9
AIAM	16	14	10	14
Alliance	61	56	55	56

Figure 10 – Comparison of Displacement Measurement Methods

TRW requested allowing the zero reference plane to move with the door frame. We are declining this request. It is unclear to us why allowing the reference plane to move in the manner suggested is preferable from a safety standpoint than simply maintaining the position of the zero plane with respect to ground. The latter (NPRM) method is preferable because the door frame provides a reaction surface for the curtain air bags or advanced glazing. The door frame is part of the system designed to retain the occupant in the vehicle. If the zero reference plane is tied to movement of the door frame, a weak door frame could render the displacement limit meaningless. For example, under the TRW method, a vehicle that allows an impactor displacement of 150 mm with 50 mm of door deflection would be considered compliant, as would a vehicle that allows an impactor displacement of 100 mm with 0 mm of door deflection.

Further, the TRW suggestion would also add a significant amount of complexity to the testing. There would need to be a determination as to the sufficient number of measurement locations on the door and how the agency would assess movement of the door frame. The suggestion requires further study to properly integrate it into the test procedure and we are unable to conclude that use of our resources to pursue the matter would be warranted.

Unrealistic Assumptions

The methods of measurement suggested by the Alliance, AIAM and Honda are dependent on assumptions about the performance of the vehicle that may not be realistic. The Alliance and AIAM methods are very similar. Both these methods use a tangent to the side of the vehicle (zero excursion plane), translated some distance, as the limit of displacement (maximum excursion plane). The assumption apparently is that occupant excursions within this zone will be protected.

We do not agree with this assumption. For example, if vehicle A's exterior skin protrudes farther outboard than vehicle B's, but A's protruding exterior skin consists of only sheet metal or plastic or

some like material that provides little if any crush resistance, we do not agree that A's maximum excursion plane should be farther outboard at the bottom of the window opening than B's. More displacement of the headform would be permitted for vehicle A even though in a real-world crash, A's exterior skin could be easily leveled. Since the countermeasure of A would be permitted to allow more headform displacement outside of the window plane than that of B, the suggested approach would provide A's occupants less minimal protection in a rollover or side impact than the NPRM approach.

Relatedly, when the excursion plane is derived from the undeformed vehicle structure, if the roof structure has significant lateral deformation after impact, the original excursion plane may have very little relevance to occupant protection.

With Honda's method, it seems there is an underlying assumption that if ground contact occurs with the vehicle rotated 90 degrees, the door structure will be the initial point of contact, so that targets near the upper part of the glazing on a vehicle with a highly inclined/curved glazing could be permitted to displace farther than targets at the center. Under this method, the greater the inclination and/or curvature of the glazing in the lateral plane, the more displacement is allowed compared to the NPRM's approach (9 percent more at A4 with the 13 degree glazing). A vehicle with a more highly inclined glazing would be allowed more headform displacement at the top and bottom of the window compared to the NPRM. Given the unpredictable nature of rollover crashes, we cannot agree with this assumption. A vehicle might be rotated greater than 90 degrees during ground contact, resulting in initial contact near the upper glazing. Thus, to allow more displacement at the top of the glazing relative to the initial glazing position does not seem warranted.

Adding Complexity

The measurement methods suggested by the Alliance, AIAM, Honda and TRW are more complicated to implement than the method proposed by the agency. The NPRM's method of measuring displacement is actually very simple and straightforward. The point of zero displacement is simply the contact point with the side window glazing. From there, it is only necessary to keep track of how far the linear impactor translates along its axis of motion. No digitization or CAD techniques are required. To find the zero displacement point for the Alliance or AIAM method, one must hold a relatively thin straight edge in a lateral vehicle plane, aligned with the target center, against the outside of the vehicle. Headform contact with this straight edge defines the point of zero displacement. This can be done by digitizing the exterior of the vehicle. However, it is somewhat more onerous than the NPRM method. The Honda method is just as simple as the NPRM method in finding the point of zero displacement, but after that, we believe the method would require a digitization of the glazing. This digitized glazing would then need to be manipulated in a CAD program to determine the allowable displacement. The complexity of the TRW method has been discussed above.

Increasing the Displacement Limit

The agency is declining the requests to increase the allowable displacement limit.

The Alliance and Volvo believe the limit should not be based on the size of a child's head and the impact energy of an adult male. (In contrast, Honda commented that basing the requirement on the size of a child's head was appropriate.) We disagree with the Alliance and Volvo on this point. It is reasonable for the agency to adopt a displacement limit based on the anthropometry of a child since the standard is intended to mitigate ejection of all sizes of occupants, not just the mid-size male. It is possible for a child occupant to interact with an ejection mitigation countermeasure with relatively high impact energy if a large portion of their mass is considered. For example, an average 5-year-old child weighs about 18 kg (the same mass as the linear impactor). Due to the size of this child relative to a window opening, it would be much easier for their entire body mass to interact with the window opening than it would be for an adult. Also, the ejection mitigation countermeasure could be double-loaded by more than one occupant simultaneously during the rollover event, *e.g.,* a child in the rear seat and the driver in the front seat or two unbelted occupants in the same row. The 100 mm limit reduces the likelihood that openings will form during the rollover that are large enough to pass the head or other body part of a child or an adult.

The principle underlying the 100 mm displacement limit is to ensure that the entire window opening is covered, and covered by a countermeasure resilient enough to withstand the forces that could be imposed on it in a rollover without forming gaps or openings.[74] We chose a 100 mm displacement limit as a reasonable and objective measure of acceptable performance, taking into account the practicability of meeting the displacement limit, safety need, and the SAFETEA–LU goal of a standard that reduces complete and partial ejections of vehicle occupants. We adopt a displacement limit that will ensure that the countermeasure covering the entire window is wide enough and strong enough to mitigate ejection of a child's head, limb or body, or those of an adult, in the chaotic and unpredictable phases of a rollover.

IIHS believed that the NPRM selection of 100 mm displacement, partially based on other standards (FMVSS Nos. 206 and 217) and building codes, may be unreasonable. It noted that the vehicle testing reported in the NPRM did not show any that passed all the target points at 100 mm of displacement even though the field performance of these vehicles may be acceptable. IIHS stated that if the displacement requirement is too stringent it will lead manufacturers to make their air bags too stiff, with unknown consequences from this increased stiffness.

We understand the merits of having extensive field data that correlates the performance in the proposed test against ejection mitigation in the field. At the time of the NPRM development, there were very few rollover curtain-equipped vehicles in the available field data and the vehicles then-tested by the agency were not designed to have full window coverage as the NPRM requirements contemplated. Now more field data is available to us, and we have tested many more vehicles some of which have been designed to have extensive window opening coverage. However, the data set is still insufficient to correlate various displacement values and field performance.

Nonetheless, we do not accept IIHS's argument that the 100 mm value may be unreasonable because the value is used in FMVSS No. 206 and 217 and in the architectural code. These other standards and the architectural code referenced by the agency have basically the same purpose: retaining occupants, including children, in a vehicle in a crash event, or retaining children behind a barrier (railing). These precedents are supportive of the selected value. They were developed taking into consideration the size of children's heads and limbs and the ease or difficulty with which the parts can fit through openings. If the window opening countermeasure can limit the

[74] 74 FR 63193.

opening to 100 mm when impacted by the headform at the prescribed velocities, the countermeasure is more likely to be able to restrict the opening as needed when impacted by a lower mass at the same or higher velocity, or the same or larger mass at a lower velocity.

Requests to Decrease Displacement Limit

Advocates suggested that the proposed displacement limit be reduced by 50 percent to 50 mm. It believed that such a stringent requirement will "ensure dramatic reductions in occupant ejection, including partial ejection * * *." It stated further that the proposed 100 mm value "devalues the major contribution that advanced glazing can make" and that more lives would be saved by "a standard that effectively would encourage the use of advanced glazing in combination with air curtains * * *."[75] The suggestion to reduce the displacement limit was made by other commenters as well, including glazing manufacturers.

NHTSA does not believe that the level of stringency requested by Advocates and others is warranted. We believe that the 100 mm limit will be highly effective in the reduction of both complete and partial ejections. Certainly, ejections will continue in situations where the severity of the crash and resulting occupant energy will overwhelm the capacity of the countermeasure. However, the 100 mm limit strikes the appropriate balance between stringency and practicability.

There is no available data that can correlate various displacement values with field performance at this time. We cannot conclude that reducing the displacement limit by 50 percent will reduce ejection or side impact fatalities and injuries by a corresponding amount. The commenters did not provide data on this issue. On the other hand, we can estimate possible costs of indirectly requiring advanced glazing to be installed at side windows to meet a 50 mm displacement limit. In the FRIA, we estimated that the incremental difference in costs for going from tempered glass to laminated advanced glazing for a standard size side window in the first or row is $15. Thus, for a two row vehicle the total incremental cost would be $60. In addition, we believe that any costs associated with advanced glazing must be combined with the curtain bag incremental cost since a system with movable advanced glazing alone would not be able to perform to the level required for this standard. In comparison, the agency has determined that incremental cost of meeting the final rule with only curtain air bags will be $31 dollars per vehicle. The cost per equivalent fatality of a system comprised of a partial curtain in combination with laminated glazing was twice that of a system utilizing only a curtain.

Requests To Add Another Requirement

Many glazing manufacturers were in favor of applying an additional post-impact requirement in which a 40 mm sphere is used to determine the size of any remaining gaps. According to the commenters, this requirement would be intended to eliminate gaps that can exacerbate partial ejections. It is our interpretation of the comments that this test is to be applied to all vehicles, i.e., those using a combination of advanced glazing and side curtain air bags to meet the standard, and those using only side curtain air bags.

We do not agree with this suggestion. First, the requirement is not appropriate for vehicles with only side curtain air bags, given that there is a time dependence associated with a curtain's ejection mitigation performance. Once deployed, the pressure in the air bag continuously decreases. The 16 km/h test is done at 6 seconds to assure that the pressure does not decrease too quickly. It does not seem that the 40 mm gap test could be done after the 6-second impact, in any timeframe which is related to rollover and side impact ejections. Second, there is no shown safety need for the requirement. We cannot show that ejections that would not be prevented by the primary 100-mm displacement requirement would be prevented by a secondary 40-mm requirement. Third, it would seem that the 40-mm requirement would indirectly require installation of advanced glazing. As discussed above, the costs associated with advanced glazing installations at the side windows covered by this standard are substantial in comparison to a system only utilizing rollover curtains. For these reasons, the agency does not accept this suggestion.

c. Times and Speed at Which the Headform Impacts the Countermeasure

We have determined that there is a need for a relatively high speed impact shortly after countermeasure deployment and a lower speed impact late in the deployment. The two time delays correspond to relatively early and late times in a rollover event.[76] The first impact is at 20 km/h, and at 1.5 seconds after countermeasure deployment (1.5 second time delay). (The 20 km/h speed is reduced from the NPRM's proposal of 24 km/h; the rationale for which is discussed later in this preamble.) The second is a 16 km/h impact initiated 6 seconds after deployment.

1. Time Delay (Ejections Can Occur Both Early and Late in the Rollover Event)

i. NPRM

Two impacts were proposed because ejections can occur both early and late in the rollover event. In the advanced glazing program, NHTSA performed a series of simulations to recreate three NASS-investigated rollover crashes with ejected occupants.[77] The vehicles were a MY 1991 Toyota pickup, a MY 1986 Toyota Corolla and a MY 1985 Volkswagen Jetta.[78] Vehicle handling simulation software[79] reconstructed the vehicle motion up to the point where the vehicle started to roll. The linear and angular velocity at the end of the vehicle handling simulation was then used as input to a MADYMO[80] lumped parameter model of the vehicle to compute its complete rollover motion. The motion of the vehicle obtained from the MADYMO vehicle model was used as input to a MADYMO occupant simulation. Head and torso velocities of a Hybrid III 50th percentile male driver dummy were calculated for the three rollover simulations.

Table 30 shows the simulation resultant head velocity through the open window at the time of ejection. As indicated in the table, for the unrestrained simulations, the occupant of the pickup was completely ejected early (1st quarter-turn for Toyota truck) while the occupants of the other vehicles were ejected late (last quarter-turn for Corolla and Jetta) in the rollover event.

[75] NHTSA–2009–0183–0022, p. 3.

[76] Each impact takes place on a test specimen (e.g., a curtain) that was not previously subject to an impact test.

[77] "Ejection Mitigation Using Advanced Glazings: A Status Report," November 1995, Docket NHTSA–1996–1782–3. Pg. 6–1.

[78] The circumstances of the Toyota pickup rollover was that the vehicle was traveling at 96 km/h and went into a sharp turn and yaw, which resulted in a rollover. In the case of the Corolla, it was also traveling 96 km/h on a gravel road. The vehicle went out of control and left the road, resulting in roll initiation. The Volkswagen was traveling at 88 km/h when the driver fell asleep and the vehicle left the road. It struck a rock embankment and rolled over.

[79] VDANL software user's manual V2.34, STI, 1992.

[80] MADYMO user's manual V5.1, TNO, 1994.

TABLE 30—HEAD AND TORSO VELOCITIES OF A HYBRID III 50TH PERCENTILE MALE DUMMY IN 3 ROLLOVER SIMULATIONS

Vehicle	Vehicle ¼ turns	¼ Turns at complete ejection	Restraint use	Head to opening (km/h)	Head to glazing (km/h)	Torso to glazing (km/h)
Toyota PU	12		Yes	20	20	7
		1	No	5	20	16
Toyota Corolla (86)	6		Yes	15	15	11
		6	No	13	13	10
Volkswagen Jetta (85)	4		Yes	14	14	10
		4	No	22	18	16

The agency also considered other data indicating that very early occupant contact with the window area is possible in rollover crashes. Table 31 gives information on 30 rollover tests the agency performed from the mid-1980s to the mid-1990s. This data set included Rollover Test Device (RTD) tests, 208 Dolly tests, guardrail tests and pole tests.[81] A film analysis of dummy motion within the vehicles showed that, excluding a pole impact test, occupant contact with the window opening and surrounding area first occurred between 0.16 and 0.88 seconds after the event began.[82] We note, however, that the majority of these dummies were belted, which means they would be most representative of potential partial ejections. In addition, where the time of window breaking is known, most of these first contacts occurred prior to the window breaking due to roof contact.

TABLE 31—NHTSA FULL VEHICLE ROLLOVER TESTING FILM ANALYSIS

Test #	Make	Model	MY	Test type	Tilt angle (deg.)	Roll axis (deg.)	Vehicle speed (km/h)	¼ Turns	Total time (sec)
878	Honda	Accord	84	RTD	41	45	33.8	2	1.29
888	Chevrolet	Celebrity	82	RTD	41	45	37.0	4	3.58
920	Dodge	Omni	79	RTD	41	45	37.0	2	0.96
939	Mercury	Zephyr	82	RTD	41	60	37.0	2	2.08
1255	Ford	Bronco	88	RTD	30	45	37.0	2	1.17
1266	Dodge	Caravan	88	RTD	30	45	48.3	1	0.50
1267	Chevrolet	Pickup	88	RTD	30	45	48.3	4	2.58
1274	Nissan	Pickup	88	RTD	30	45	48.3	6	3.76
1289	Nissan	Pickup	89	RTD	30	45	48.3	2	0.83
1391	Dodge	Caravan	89	RTD	30	45	48.3	8	5.08
1392	Ford	Bronco	89	RTD	30	0	48.3	8	3.60
1393	Nissan	Pickup	89	RTD	30	0	48.3	4	2.35
1394	Nissan	Pickup	89	RTD	30	0	48.3	4	1.33
1395	Pontiac	Grand Am	89	RTD	30	0	48.3	2	1.54
1471	Dodge	Colt	89	RTD	30	90	48.3	2	0.99
1520	Ford	Ranger	88	RTD	30	0	48.3	2	0.75
1521	Dodge	Ram	88	RTD	30	0	48.3	4	1.42
1530	Dodge	Caravan	88	Guardrail	NA	NA	96.6	1	N/A
1531	Nissan	Pickup	88	Guardrail	NA	NA	96.6	4	N/A
1546	Plymouth	Reliant	81	RTD	41	45	33.8	6	3.00
1851	Volvo	240	91	RTD	30	0	48.3	6	2.50
1852	Volvo	740	91	RTD	30	0	48.3	8	3.00
1925	Nissan	Pickup	90	RTD	30	0	48.3	8	3.04
1929	Nissan	Pickup	90	RTD	30	0	48.3	6	2.25
2141	Nissan	Pickup	90	RTD	30	0	48.3	8	4.25
2270	Nissan	Pickup	89	RTD	30	0	48.3	8	3.50
2514	Ford	Explorer	94	208	23	0	48.3	11	5.50
2553	Ford	Explorer	93	208	23	0	48.3	10	N/A
3012	Ford	Explorer	94	208	23	0	48.3	11	N/A
3635	Ford	Explorer	94	208	23	0	48.3	12	5.17
Analysis of 5+ ¼ turn Tests:									
Average							47.2	8.3	3.7
Maximum							96.6	12	5.5
Average +2 standard deviations							55.2	12.3	5.8

[81] These tests were done as part of a research program evaluating full scale dynamic rollover test methods, occupant kinematics, and vehicle responses. The RTD tests were similar to the 208 Dolly test except that the vehicle was initially 4 feet off of the ground instead of 9 inches, and hydraulic cylinders were used to push the vehicle from the cart and produce an initial roll rate. The guardrail tests used a guardrail as a ramp to initiate a vehicle roll. The pole tests rolled a vehicle into a pole. Twenty-four of these were RTD tests on passenger cars, pickups and vans (the RTD testing was not geared towards ejection testing since all of the test dummies were belted), and four were 208 Dolly tests on Ford Explorers. The test films are available at the National Crash Analysis Center (NCAC) at George Washington University (www.ncac.gwu.edu).

[82] "Evaluation of Full Vehicle Rollover Films," 2008, Docket NHTSA–2006–26467.

The agency proposed that the ejection mitigation countermeasure be first tested at 1.5 seconds after deployment of the ejection countermeasure. As indicated earlier in this preamble, slightly less than half of the complete ejection fatalities occur when the vehicle rolls up to 5 quarter-turns.[83] As shown in Table 30, restricting the analysis to the tests with 5+ quarter-turns, the average amount of time to complete 1 full vehicle revolution (4 quarter-turns) was 1.62 seconds with a standard deviation of 0.31 seconds. Thus, the 1.5 second represented a period of time in which one full vehicle revolution occurs in a high energy rollover event. (We also noted that at 1.5 seconds into the rollover, roof contact would likely have occurred, leading to window breaking. Thus, as discussed later in this preamble, we proposed and adopt a requirement that if advanced glazing is present, it is pre-broken prior to this test.)

Additional rationale came from data obtained from the advanced glazing program (*see* Table 32, infra).[84] In that program, NHTSA tested vehicles on the DRF with 5th percentile adult female and 50th percentile adult male test dummies (near and far side).[85] Analysis of dummy head impacts with the glazing in the window opening showed that for the 5th percentile female far side occupant, the time to glazing impact after the DRF began rotating was between 1.3 and 1.8 seconds, which was in the range of two to three quarter-turns of rotation. Additional analysis of the DRF testing is presented later in this preamble.

TABLE 32—DRF TESTING RESULTS

Dummy	Far side impact time (sec.)	Far side impact ¼ turns
5th Female and 50th Male	1.3–1.8	2–3

The agency also proposed that ejection mitigation countermeasures be tested towards the end of a rollover. Data indicated that occupants could impact the window opening as late as 6 seconds after initiation of a rollover involving 5+ quarter-turns. The last three rows of Table 31, *supra,* show the average and maximum number of quarter-turns and the total time of rollovers involving 5+ quarter-turns.[86] This set of data contains 14 such tests. The average and maximum number of quarter-turns are 8.3 and 12, respectively. The average plus two standard deviations is 12.3 quarter-turns. Thus, 12.3 quarter-turns is the 98th percentile value for this subset of data. The average and maximum times to complete the entire rollover event were 3.7 and 5.5 seconds, respectively. The 98th percentile value was 5.8 seconds, which is not much different than the maximum time for the entire data set, which was 5.5 seconds.

Other information we considered also supported a 6-second impact time. The 1988–2005 NASS–CDS showed that rollovers with eleven quarter-turns account for about 90 percent of rollovers with fatal complete ejection, i.e., 10 percent of rollovers with fatal complete ejections have more than eleven quarter-turns. The data set provided in Table 31, *supra,* showed the vehicle that rolled eleven quarter-turns had the longest roll time (5.5 seconds) in the 208 Dolly test.[87]

A factor that the agency considered in determining the time delay for the lower speed impact was the practicability of curtains staying inflated for this length of time. Ford stated that its "Safety Canopy" system stays inflated for six seconds.[88] GM reportedly stated that its side curtain air bags designed for rollover protection maintain 80 percent inflation pressure for 5 seconds.[89] It appeared that a requirement that side curtain air bags must contain the headform when tested six seconds after deployment was realistic and attainable.

ii. Comments on Time Delay

The Alliance and Honda suggested different time delays than that proposed by the NPRM. Both commenters referenced NASS CDS data of the distribution of rollovers by the number of quarter-turns. The 1997–2007 data were presented in the PRIA. These data show that for all rollovers, not just those with ejections, the majority of the rollover population was at 1 to 2 quarter-turns. These commenters stated that since these data show that the cumulative percentage of rollovers is 90 percent at 5 quarter-turns, and 96 percent at 7 quarter-turns, the time delay for the late impact should be greatly reduced. They correlated these 5 and 7 quarter-turn values with the agency's full vehicle rollover test data to arrive at their requested time delays of 3.4 seconds (Alliance) and 3 seconds (Honda).

Guardian requested that NHTSA conduct an analysis of what protection exists under conditions when an air bag does not deploy. The commenter seemed to be concerned that the 1.5 second impact test was not being performed early enough to address ejections in side impacts. It suggested that this may lead to air bag entrapment of partially ejected occupants and that advanced glazing can prevent this.

Advocates was concerned about the test procedure impacting the ejection countermeasure at two discrete times. The commenter believed that the compliance test only takes a "snapshot of air curtain and sensor performance at two brief intervals over the several seconds during which an air curtain is supposed to provide sustained inflation and prevent excursion beyond 4 inches. For example, no sustained inflation is tested between the 1.5 and 6 second tests, when excursion could exceed the 4 inch maximum required by the proposed standard."[90] Advocates stated that a compliant system still may allow excursions beyond 100 mm at other points during the rollover, especially those longer than 6 seconds.

iii. Agency Response

The agency declines to increase or decrease the time delay for the 1.5 second and 6 second impacts. We also

[83] The 50 percent point in the cumulative distribution occurs between 5 and 6 quarter turns.

[84] Duffy, S., "Test Procedure for Evaluating Ejection Mitigation Systems," 2002 SAE Government/Industry Meeting.

[85] For this set of tests, the "near" and "far" side dummy configurations represent the trailing occupants in a rollover. The near side occupant simply means that they were initially placed near the door at what would have been behind the steering wheel, if the steering wheel were present. The far side occupant was moved to an initial position which was towards the centerline of the vehicle. This position could be thought of as a position that a trailing occupant could slide to as a yawed vehicle decelerates in the lateral direction, prior to rollover initiation.

[86] As mentioned earlier, just less than half of the complete ejection fatalities occur when the vehicle rolls up to 5 quarter-turns.

[87] The agency explained in the NPRM that this does not mean that rollover crashes with eleven quarter-turns only take 5–6 seconds. Five to six seconds may be a conservative assumption for this many quarter-turns for some types of rollover events. The 208 Dolly test has a very quick rollover initiation (high initial roll rate); the beginning of the rollover is well defined. This test only represents about 1% of field crashes. Viano, *supra.* The vast majority of field cases are soil and curb trip crashes. Soil trips involve high lateral deceleration in combination with low initial roll rates. Ideally, the curtain air bag should deploy in this early phase when the roll rate is still low but the occupant is moving towards the window due to the lateral deceleration. The rollover has a slow initiation, leading to a need for longer inflation. Therefore, some rollover crashes with less than eleven quarter-turns may have 5–6 second roll times.

[88] *http://media.ford.com/article_display.cfm?article_id=6447* (Last accessed October 6, 2010.)

[89] "Who Benefits From Side and Head Airbags?" (*http://www.edmunds.com/ownership/safety/articles/105563/article.html).*

[90] NHTSA–2009–0183–0022, p. 12.

have decided against adding a third impact test at a later time or performing any testing at time delays between 1.5 and 6 seconds or at a time representative of a side impact.

In developing the time delays in the standard, NHTSA recognized that the majority of occupants exposed to rollover crashes are in vehicles that roll two quarter-turns or less. However, we recognized that the distribution of ejected occupants who are seriously injured (maximum abbreviated injury scale (MAIS) 3+) or killed is skewed towards rollovers with higher degrees of rotation. According to NASS Crashworthiness Data System (CDS) data of occupants exposed to a rollover crash from 2000 to 2009, half of all fatal complete ejections occurred in crashes with six or more quarter-turns. We wanted to address the fatally and seriously injured populations.

This information was illustrated in the NPRM by the Figure 11 below. The updated target population for this final rule shows that the vast majority of the ejection fatalities (69 percent = 3,067/4,447) are complete ejections. This final rule is designed to mitigate ejections from rollover crashes that cause the most harm (those that result in complete ejection). By doing so, the countermeasures installed pursuant to this rule will reduce fatalities and injuries resulting from severe rollovers. Countermeasures installed to mitigate ejections in crashes with higher degrees of rotation will help occupants involved in those crashes as well as occupants exposed to rollovers of less severity. The inverse would not be true.

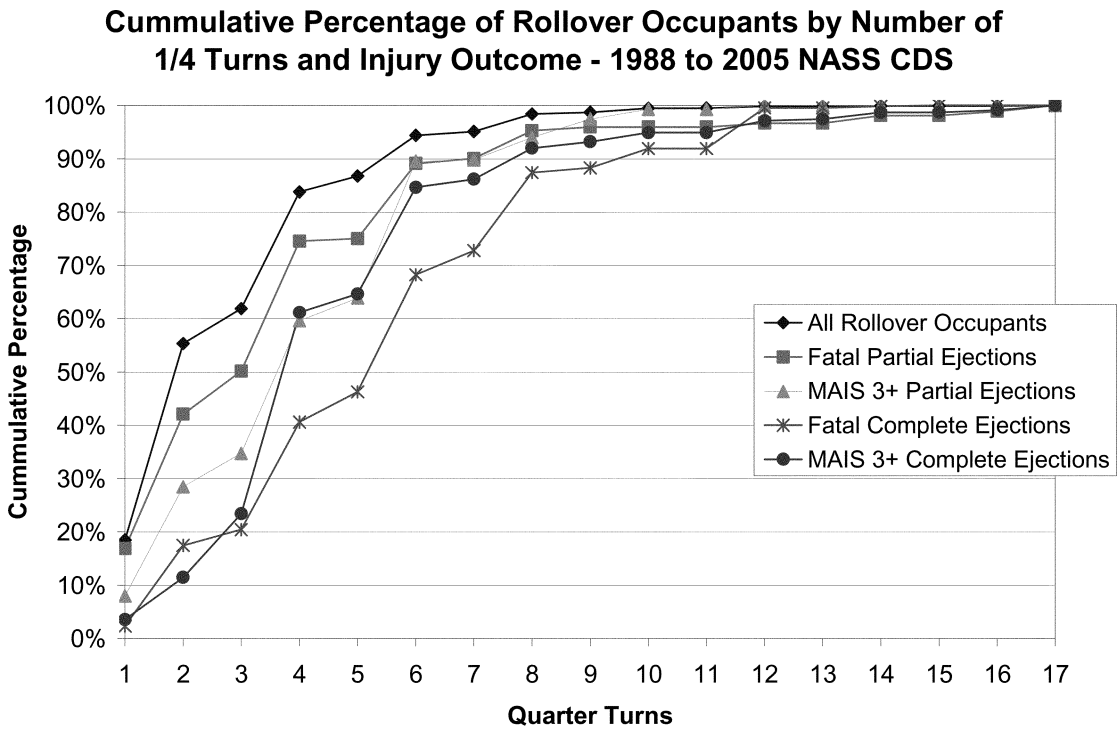


Figure 11

The Alliance indicated that a rollover time representing the cumulative percentage of at least 90 to 96 percent of rollovers is appropriate. Using this range of values and applying it to rollovers resulting in fatal complete ejections, the resulting number of quarter-turns is in the range of 10 to 12 quarter-turns for the 1997–2005 NASS CDS data and approximately 8 to 10 quarter-turns for the more recent 2000–2009 NASS CDS data. The Alliance showed a regression line through the quarter-turns versus rollover times for the agency's full vehicle rollover test data (Table 11 in the NPRM). The commenter did not show the equation for the line. We derived the equation as y = 0.48x, where y = rollover time in seconds and x = number of quarter-turns. Using this equation, the range of 8 to 12 quarter-turns gives the result of 3.8 to 5.8 seconds. Thus the upper end of this range is consistent with the time of the low speed impact proposed in the NPRM [91] and adopted by this final rule. (As noted in the NPRM, the 6-second value may be a conservative assumption for the corresponding number of quarter-turns seen in FMVSS No. 208 Dolly testing. Some rollover crashes with less than eleven quarter-turns may have 5 to 6 second roll times.)

Based on the analysis above, the agency declines to reduce the time delay for the second impact to less than 6 seconds, as reducing the time delay would not be consistent with our stated goal of protecting a "far-reaching population of people in real world crashes." [92]

Guardian's request that NHTSA conduct an analysis of what protection exists under conditions when an air bag does not deploy appears to relate to a concern with the 1.5 second impact test not being performed early enough to address ejections in side impacts. In a side crash, the occupant will interact with the side of the vehicle within a few tenths of a second. In response to Guardian, our experience with vehicles with side curtains that deploy in rollovers is that manufacturers design them to deploy in side impacts as well. These side curtain must provide head and thorax protection in an oblique pole test, pursuant to FMVSS No. 214, and

[91] 74 FR 63196.

[92] 74 FR 63182.

must be designed to deploy and be in position in a matter of milliseconds. In recent testing of side impact air curtains to FMVSS No. 214 and New Car Assessment Program protocols, we have not found non-deployment of or entrapment by side impact curtain air bag entrapment to be a problem.

Advocates requested that we add a third impact test with a delay time greater than 6 seconds. We decline to do so. In the NASS CDS database, combining MAIS 3+ injuries and fatalities results in only about 0.4 percent of ejected occupants are in rollovers with more than 16 quarter-turns (see Figure 11). Using the linear regression from the 208 Dolly testing (y = 0.48x) would result in a duration of 7.7 seconds at 16¼-turns. Hence, there is a diminishing return in terms of the population of ejection rollovers covered by increasing the delay time for the impact test beyond 6 seconds. In addition, there will be costs to redesigning ejection mitigation systems to accommodate a third impact after 6 seconds, assuming the design is practicable; NHTSA cannot conclude the redesign will be cost-effective. With regard to Advocates' concern that "no sustained inflation is tested between the 1.5 and 6 second tests, when excursion could exceed the 4 inch maximum required by the proposed standard," we will not add a test to assess the countermeasure between 1.5 seconds and 6 seconds. We know of no ejection mitigation side curtain system that deflates and inflates itself midway through the test.

Finally, we note that the regulatory text (S5.5(a)) has been clarified to indicate that the time delay applies to deployable countermeasures. For a daylight opening with a non-deployable countermeasure, *e.g.,* fixed advanced glazing, there is no time dependence for the impact. The impactor can be propelled at any time.

2. NPRM on Speed at Which the Headform Impacts the Countermeasure

i. NPRM on Impact Speed

As discussed above, our examination of field crash data has led to the conclusion that the impact test should have both a relatively high speed impact shortly after countermeasure deployment and a lower speed impact late in the deployment.

The first test in the NPRM was at a 24 km/h impact velocity, 1.5 seconds after countermeasure deployment. Field data show that crashes with 6 or more quarter-turns result in the majority of complete ejection fatalities. The 1.5 second time delay for the high speed impact corresponds well to the film analysis of vehicles that roll 5 or more quarter-turns in FMVSS No. 208 Dolly tests, for the amount of time it takes for one complete vehicle revolution. The NPRM reported that laboratory testing using the DRF showed that at around 1.5 seconds, a far side occupant could strike the window opening at nearly 30 km/h.[93] MADYMO computer simulation of three actual rollover crashes predicted that the maximum head speed into the window openings was 22 km/h.[94] Additional justification for the 24 km/h impact speed was found in side impact field data. NASS CDS shows that 35% of occupants completely ejected through the side windows in side impact are exposed to impacts with a ΔV greater than 24 km/h. It was also noted that FMVSS No. 201 also uses a 24 km/h impact speed for the upper interior tests.

The second test in the NPRM has a 6 second delay and a 16 km/h impact speed. Agency film analysis found that the maximum roll time was 5.5 seconds for a vehicle that rolled 12 quarter-turns. A separate film analysis of a much smaller data set found a maximum head speed into the window opening of 17 km/h.[95] Modeling of three rollover crashes showed a maximum torso impact speed of 16 km/h.

ii. Comments on Impact Speed

The Alliance, AIAM, and a number of vehicle manufacturers commented on the impact speed. All of these commenters requested that NHTSA reduce the impact speed of the higher speed 24 km/h test.[96] The requested levels of reduction varied. The commenters did not agree there was a need for a 24 km/h speed, and expressed concern about the potential adverse effects and unintended consequences of not reducing the impact speed, particularly as they relate to side impact protection, protection of out-of-position occupants, and performance in NCAP testing.

The Alliance requested that the 24 km/h test be reduced to 16 km/h. As discussed in the previous section, the Alliance suggested that a 16 km/h test be the only test and be performed at 3.4 seconds after curtain deployment. The Alliance stated that GM[97] and Ford[98] conducted extensive research in this area and have both concluded that the maximum impact energies in the range of 180 to 200 joules (J) were appropriate to address the vast majority of real world rollover events. The commenter stated that this energy level was also validated by the agency's own sled test research (*see* 74 FR at 63192) simulating both rollover and side impact events, which both produced kinetic energies in the range of 180 to 200 J.

Referring to the GM research, the Alliance stated the 16.2 km/h impact speed was derived from analysis of a series of rollover sensor development tests, in which data was collected in an attempt to quantify the kinetic energy associated with an occupant loading the roof rail airbag system. The 52 tests included both belted and unbelted test dummies. The Alliance stated that in all cases, the kinetic energy value associated with the dummy's interaction with the roof rail airbag surrogate (referred to in the study as a window membrane) was less than 180 J.

The Alliance stated that another very influential study that solidified GM's decision to test at 16.2 km/h was the NHTSA sled testing referenced in the NPRM. The sled tests were conducted to determine the effect lower body loading would have on the combined head and upper torso effective mass. The Alliance stated, "The sled testing representing the rollover condition was conducted at 16 km/h, while the side impact simulation was run at 24 km/h. Once the effective mass was determined, both impact conditions produced a kinetic energy between 180–200 J." The commenter suggested that this validates the approach GM had adopted in simulating the occupant kinetic energy in a rollover with an 18 kg impactor at a speed of 16.2 km/h, and shows that the kinetic energy associated with this subsystem test would be applicable to side impact as well."

The Alliance indicated that since they agree with the impactor mass of 18 kg, the appropriated impact "is derived from the equation for linear kinetic energy ($KE = 1/2mv^2$; m = mass and v = speed). The Alliance's recommended impact speed is calculated by substituting m = 18 kg and KE = 178 Joules, resulting in a speed of 16 km/h (4.44 m/s)."

To emphasize their belief that the 24 km/h test is too severe, both the

[93] The agency has reassessed the video data of the DRF testing and calculated lower speeds than originally reported. This is covered in more detail later in this preamble.

[94] 74 FR at 63195

[95] 74 FR at 63197

[96] The 24 km/h test imparts about 400 joules of energy, while the 16 km/h test imparts approximately 178 J.

[97] O'Brian-Mitchell, Bridget M., Lange, Robert C., "Ejection Mitigation in Rollover Events—Component Test Development," SAE 2007–01–0374.

[98] Docket No. NHTSA–2006–26467–0002.

Alliance and Volvo referred to the agency's analysis in the PRIA,[99] which indicated that a 24 km/h speed (for occupant to ejection countermeasure) corresponds to a pre-crash velocity of 133 km/h (83 mph). They indicated that such a pre-crash speed is too rare an occurrence to be reflected in the final rule.

AIAM and VW recommended that the agency first determine the appropriate impact energy and then establish the impactor mass and velocity based on this. AIAM was concerned that impact speeds projected by the agency are typically associated with masses smaller than the proposed 18 kg impactor. VW recommended an impact energy of 180 J, which would correspond to a 18 kg impactor traveling at 16 km/h. VW provided a table of its modeling results from a linear impactor into an air bag (Table 3 in VW comments) showing that impact excursion is primarily a function of the initial kinetic energy of the impactor, as opposed to mass and impact speed.

Honda requested that the agency focus on a maximum energy level of 200 J. The commenter referred to the analysis of GM showing that the effective mass of an occupant's initial contact with a side window in a full vehicle rollover test indicates a constant energy of less than 200 J. Honda stated that its own testing showed that the estimated peak head velocity and effective mass, when tested in accordance with FMVSS No. 208, were also less than 200 J. Honda stated that an upper threshold of 200 J would account for the energy imparted on the side window by a belted occupant.

Nissan commented that its preliminary study of impact energy associated with occupant ejection showed values below 207 J. Based on this and concerns of safety tradeoffs that could exist between FMVSS No. 214, it recommended that the final rule limit the higher speed impact to 20 km/h, corresponding to an energy of approximately 280 J.

Batzer and Ziejewski stated that based on the "testing and analysis that we have seen and performed, NHTSA's 15 mph [24.1 km/h] impact velocity choice is inappropriately high." They stated that a "two impacts against the upper half of the glazing" at 16.1 km/h would be an adequate requirement. They continue that "in side impacts, although a large relative occupant-to-glazing nominal velocity may result, the door actually takes the brunt of the energy and momentum."

Air bag supplier Takata expressed support for the proposed 24 km/h test, stating: "We believe it is important to test all the locations at the high energy level to ensure structural integrity of the countermeasure device."[100] The commenter also informed NHTSA that a 24 km/h test speed requirement would be practicable. (NHTSA–2006–26467–0019, *infra*.)

iii. Agency Response

As explained in this section, NHTSA has evaluated the comments asking us to base a decision on the impact speed on the findings of a GM study and a Ford study. After reviewing the findings of the studies, we do not find those GM and Ford data sufficiently informative.

However, we have carefully considered the comments recommending that the agency reassess the impactor speed proposed on the basis of what should be the impact energy imparted to the ejection mitigation countermeasure, given an impactor mass of 18 kg. We agree that, particularly in the case of a curtain air bag countermeasure, the energy imparted by the linear impactor is a critical factor in the determination of the stringency of the performance requirement as compared to only considering the impact speeds or impactor mass. We acknowledge that some data available to the agency, *e.g.,* DRF testing, vehicle interior video of FMVSS No. 208 Dolly tests, and MADYMO simulations, only allow for an assessment of impact speed. Estimates of energy from these data require assumptions to be made about effective mass values or further computational modeling.

Accordingly, we have reanalyzed sled test data from the advanced glazing program to measure the energy the mid-size adult male dummy imparted to the countermeasure. We analyzed the data from a 24.1 km/h (15 mph) test meant to be more indicative of a side impact condition and a 16.1 km/h (10 mph) test meant to be more indicative of a rollover condition. For the 24.1 km/h (side impact) test, we determined the energy imparted to the window opening was 290 J. For the 16 km/h (rollover) condition, the energy on the window opening was calculated to be 220 J. These were the only laboratory test data available to the agency for direct analysis of impact energy. For the limited conditions tested, the results were not at the estimated energy levels in the 400 J range, equivalent to the impactor energy when traveling at the 24 km/h speed considered by the NPRM.

After reviewing the comments, we also reanalyzed DRF data used in the NPRM and found that the original transcription of the film speed used to determine impact speed was not done properly. We stated in the NPRM that video analysis of dummy head impact velocities with the glazing showed that for the 5th percentile female far side occupant, the peak impact speed was 31 km/h. After reanalyzing the data for this final rule, we determined that the peak head and shoulder impact speeds were approximately half that reported in the NPRM.

We have determined that, based on a thorough analysis of all available information, including the reanalyzed sled testing used by the agency in the advanced glazing program and the DRF data discussed in the NPRM, the test speed for the 1.5 second test adopted by this final rule should be 20 km/h, rather than the proposed 24 km/h. A 20 km/h test would better represent the energies to which the ejection countermeasure will be exposed to in the field, particularly in rollovers.

A. Analysis of GM Study on Impact Energy

Several commenters referred to a GM study in which GM determined the effective mass and impact energy on a membrane covering the first row window. The agency had analyzed this study and provided a review of it in the NPRM and the Technical Analysis supporting the NPRM, regarding the basis for the impactor mass determination of 18 kg. A brief description of the study is provided below.

GM conducted a study to develop rollover sensors, using 52 full vehicle rollover tests. It also attempted to assess the effective mass and impact energy on the front window area by belted and unbelted test dummies. Forty-six percent of the tests were less than a quarter-turn, 27 percent were one quarter-turn and 27 percent were two quarter-turns. In the tests, the two front seats were occupied by 50th percentile adult male Hybrid III dummies. Half of the tests were with belted dummies and half were unbelted. The belt status versus number of quarter-turns was not reported by the authors.

The method used to estimate the effective mass required the calculation of the resultant loading on the dummy head by the window membrane using head acceleration, neck loading and a dummy head mass assumed to be 4.204

[99] NHTSA–2009–0183–0002, p. VIII 18.

[100] NHTSA–2009–0183–0015, p. 2.

kg.[101] The effective mass was then determined by using this head contact force along with the resultant head and chest accelerations. Energy levels were calculated by using effective mass and peak head velocity. As noted by various commenters to the NPRM for today's final rule, the estimated effective mass for most belted tests was about 5 kg and all were less than 10 kg. The effective mass for the unbelted occupants ranged from 5 to 85 kg. The authors reported that the highest energy level was 182.3 Nm.

We believe that the GM data set has little relevance to this rulemaking with respect to the loading of the side window openings in crashes that cause the most ejection harm. With regard to the energy values derived from this study, it is important to identify several key limitations. First, the study was done as a development tool for sensors, not as a means of determining the range of potential occupant loading/energy on ejection countermeasures in relatively severe rollover crashes. As such, vehicle dynamics that show a vehicle on the threshold of rolling or not rolling is of great interest in sensor development. From the distribution of quarter-turns in these tests, the focus of the study was on the minimum thresholds for sensor deployment, i.e., rollovers of two or fewer quarter-turns. In contrast, to cover 90 percent of all rollovers inducing serious injury and fatal ejections, a study of rollovers involving 8 or more quarter-turns is more appropriate. Regarding rollovers causing complete fatal ejections, a cumulative population of 90 percent of these crashes would necessitate an analysis of crashes involving 9 or more quarter-turns. The force imparted on the side window openings in these types of crashes is substantially greater than that discerned by GM in this study.

Second, although the authors state that the highest energy level estimated was below 182.3 J, they subsequently report a case where they estimate that the trailing side occupant alone imparts 243 J to the membrane. We thus believe it is more accurate to state that the highest energy calculated in this set of tests was at least 243 J. It would also be very important to know if the leading occupant was applying load at the same time as the trailing occupant, perhaps adding to the 243 J value. Nonetheless, we note that a single unbelted leading occupant was estimated to have more than 100 J of energy. If both a trailing and leading occupant were to load the window area simultaneously, the total energy would be 343 J. Restricting ourselves to consideration of the 243 J value, we can correlate this energy to the ejection mitigation test procedure by assuming an impactor mass of 18 kg. The corresponding impact velocity would be 18.7 km/h.

Third, the methodology and data presented in the GM study seem to indicate that only membrane loading from the dummy heads was estimated. The agency's sled testing indicated that more load is transmitted through the shoulder than the head, and even more load is imparted when both the head and shoulder impart loads at the same time. We do not believe only head loading should be considered when evaluating the load impacted by an occupant on the ejection mitigation countermeasure, even for unbelted dummies, as this may have contributed to lower energy estimates.

B. Analysis of Ford Study on Impact Energy

Several comments from vehicle manufacturers made reference to modeling Ford performed in which Ford estimated the effective mass and impact energy that occupants would impart to the first row window in a rollover. This information was originally presented to NHTSA at a February 7, 2007 meeting with the agency.[102] Ford conducted computer modeling on three vehicle models, with belted and unbelted 50th percentile adult male and 5th percentile adult female Hybrid III dummies. This was originally done "to determine the appropriate energy for a headform impact test procedure for Safety Canopy development." The reported effective mass range was about 5 to 35 kg (average of 14 kg) for belted occupants and 5 to 50 kg (average of 24 kg) for unbelted occupants. The reported peak energy values were similar for belted and unbelted occupants, at about 180 J. These maximum values appeared to occur early in the simulations (< 200 ms).

Ford indicated that they modeled curb trip and SAE J2114—Dolly Rollover Recommended Test Procedure (Dolly) tests. The speeds, vehicle roll rates, and quarter-turns were not reported.[103] As such, it is very difficult for us to assess the severity of the rollovers that were simulated. As was the case in our analysis of the GM study, rollovers that only produce a few quarter-turns are not representative of the ejection-causing crashes that we are attempting to cover by this standard.

The majority of the data was reported before 600 ms into the event. This is probably less than 2 quarter-turns into the event, depending on how Ford determined time zero. It is unclear if Ford only modeled part of the event. For vehicles that undergo many more quarter-turns, there may be impacts with the window area that were not captured by Ford's modeling only the first few quarter-turns.

The agency analyzed the Ford study and did not find the results to be persuasive. The fact that a set of simulations result in energy estimates below 180 J is of limited use to the agency's determination of an impact speed/energy that will protect a far-reaching population of occupants.

C. Reanalysis of Agency Data From NHTSA Sled Testing

Several commenters to the NPRM stated that the agency's own sled testing indicated that the appropriate energy of the impact should be below 200 J. They are referring to sled testing that was performed in 1993 as a follow-up to dummy pendulum impacts.[104] The sled tests were conducted to determine the appropriate mass of a linear impactor to be used in the testing of advanced glazing (the headform impactor).[105]

These tests were described as incorporating a "side impact" condition and a "rollover" condition, although they were both side impact sled tests. For the test designed to be more representative of a side impact condition, the target impact speed was 24.1 km/h and the dummy (a 50th percentile adult male BioSID) was positioned was seated upright. In the rollover condition, the target impact speed was described as 16.1 km/h[106] and the dummy was positioned leaning towards the door such that its head and torso would contact the simulated glazing (foam) at about the same time. This leaning position was intended to be more representative of an occupant's attitude in a rollover. In both conditions the foam was positioned such that head and shoulder contact with the foam was achieved at similar times.

[101] Although the membrane had force measurement instrumentation at each corner, these measurements were not used in the analysis due to a "data integrity issue."

[102] Docket No. NHTSA–2006–26467–0002.

[103] The SAE J2114 test uses the same test configuration as the 208 Dolly test. However, the 208 Dolly test is performed at a speed of 48 km/h. SAE J2114 does not have a recommended speed.

[104] "Ejection Mitigation Using Advanced Glazing: A Status Report," November 1995, Docket No. NHTSA–1996–1782–3. Pg. 7–10.

[105] These have been entered as test Nos. 10282—10287 in the NHTSA Biomechanics Test Database. They are accessible at *http://www-nrd.nhtsa.dot.gov/database/aspx/biodb/querytesttable.aspx.*

[106] Although we refer to this as the 16.1 km/h test, we found that the actual test speed for the test we analyzed in detail was 15.2 km/h.

It should be understood that the testing was not designed to directly measure the energy the countermeasure must absorb in order to prevent an occupant ejection. Rather, this set of tests was a follow-up to dummy pendulum impacts used to determine the appropriate mass of a linear impactor used to test advanced glazing. (If energy assessment had been the goal, a means of measuring displacement of the loaded reaction surface (foam or surface behind it) could have been undertaken. As it is, no direct measurement of the displacement of the loaded surface was made.)

In response to the comments to the NPRM, we reanalyzed the sled test data in an effort to estimate the energy the incoming dummy imparted to the foam. This new analysis is discussed in detail in the technical report accompanying this final rule. Briefly stated, for the 24.1 km/h (side impact) test, we determined that the energy imparted to the window opening was approximately 290 J (rounded up from 287 J). We believe this energy likely represents a minimum value for this test configuration.[107] From this energy value we estimated the effective mass of the test to be 13 kg. As described below, the energy and effective mass estimates for the 16.1 km/h (rollover) test were more complex. However, based on this analysis we estimate the energy of that impact to be 200 J and the effective mass to be 22 kg. However, this test was actually performed at approximately 15.5 km/h. If it had been correctly performed at 16.1 km/h (10 mph), the energy would have been 220 J. (Note that these values do not support the commenters to the NPRM that stated that the agency's sled testing indicated that the appropriate energy of the impact should be below 200 J. These sled tests alone provide a range of energies between 220 to 290 J that, assuming an impactor mass of 18 kg, correspond to a range of impact velocities of 18.5 to 20.6 km/h.)

24 Km/h Test

The process of reanalysis started with the 24.1 km/h upright (side impact) tests. The energy into the foam padding was determined by assessing the "work" done on the dummy, i.e., the integral of the lateral force versus lateral displacement on the dummy. The lateral force on the dummy was assumed to be the force measured by the load cells behind the foam (the foam was a surrogate for the window countermeasure) for the head and shoulder load cells. Equation (1) represents the energy of the head into the foam. A similar equation can be written for the shoulder.

$$Energy\,Head = \int F_h\,dy = \sum_{i=0}^{n} \frac{F_h(t_i) + F_h(t_{i+1})}{2}\left(y_{h/s}(t_{i+1}) - y_{h/s}(t_i)\right) \quad (1)$$

Where:

F_h = Force measured at head foam pad, assumed to be lateral force on dummy head.

$y_{h/s}$ = y (lateral) displacement of the dummy head relative to the sled.

T = Time

The analysis is set forth in detail in the technical report. We determined that, because in the 24.1 km/h test the dummy was initially positioned upright (i.e., the midsagittal plane aligned with a vertical axis), the head and shoulders of the dummy contacted the foam pads at about the same time. This resulted in the dummy maintaining its upright position during force application through the foam. We assumed there was no significant rigid body rotation; examination of the test video confirmed this assumption. This assumption allowed the use of the measured head c.g. (center of gravity) acceleration to be integrated once for velocity and twice for displacement. In the case of the torso/shoulder loading, the accelerometer at the first thoracic vertebra (T1) was used.

Three different types of foam padding were used in the original tests.[108] In order of increasing stiffness, the foams were: Polystyrene, Arsan and Ethafoam LC 200. Table 33 shows the estimated impact energy and the measured maximum force at the head and shoulder on the Ethafoam pads, as well as the maximum combined values. The combined maximum energy value was 287 J. We believe it is appropriate to consider the total energy value that combines the maximum head and shoulder components in that this would represent the total amount of energy that the countermeasure must absorb. The same type of energy estimate was made for the tests with Arsan and polystyrene using eq. 1. The energy estimates were 282 J and 252 J for Arsan and polystyrene, respectively. We expect the less stiff Arsan and polystyrene to result in lower energy estimates.

TABLE 33—ENERGY (EQ. 1) AND FORCE ON THE ETHAFOAM PADDING IN THE 24.1 KM/H SLED TEST

	Maximum energy (J)	Maximum force (N)
Head	97.1	2,569
Shoulder	190.1	3,220
Combined—Total	287	

We also reassessed the effective mass calculations in the 24.1 km/h Ethafoam test. Effective mass was calculated in three different ways. As was reported in the 1995 Advanced Glazing Report, we estimated the effective mass as a function of time during the foam contact by using eq. (2). Again, this is done for both the head and torso separately, and is added for a total effective mass estimate. The estimate over time was averaged to provide a single value of effective mass. However, averaging over different time periods can result in very different estimates of effective mass. The estimate below uses the time period between when the peak force value is achieved to when the minimum relative velocity between the dummy and the sled is achieved.

[107] We say "minimum" because by the nature of impact into foam, there were energy losses that would not be reflected in the estimated impact energy.

[108] We recognize that for all of the tests there was energy loss into the foam, i.e., the foam absorbed the energy of the impact without returning it to the dummy. The foam cells were heated, deformed beyond their elastic limit and/or were destroyed. Thus, the loads imparted to the dummy were lower than would be the case if foam were not present. Since energy was derived from the load cell force measured behind the foam pad and the displacement of the head (or shoulder) in the direction of force, the lower force imparted to the dummy resulted in a lower calculated energy. This is to say, the estimate of the work/energy needed for an ejection countermeasure was likely an underestimate. The extent of the underestimation is not known.

$$EM(t) = \frac{F(t)}{a_y(t)} \quad (2)$$

Where:
EM = effective mass
a_y = acceleration in the y (lateral) direction

The second method used to calculate effective mass was to solve for mass in the equation of kinetic energy by assuming that the estimated impact energy is equal to the kinetic energy of the effective mass prior to impact, as is shown in eq. (3).

$$EM = \frac{2Ei}{V_{y0}^2} \quad (3)$$

Where:
Ei = Energy of impact
V_{y0} = Lateral velocity relative to sled just prior to foam contact

The third and final method was to use impulse moment equations by integrating the force applied to the dummy and dividing by the change in velocity relative to the sled. This is shown in eq. (4).

$$EM = \frac{\int_{t0}^{tf} F(t)}{V_{y0} - V_{yf}} \quad (4)$$

Where:
V_{yf} = Lateral velocity relative to sled at maximum foam compression
tf = time of maximum foam compression (minimum relative velocity)

The estimates of effective mass of the combined head and shoulder from all three methods, which range from 12.2 to 13.1 for the 24.1 km/h impact, are shown in the fourth through the fifth columns in Table 34. The impulse method estimate is lower than the other two estimates, which match very closely. The second column in Table 34 shows the individual values of impact speed for the head and shoulder.

TABLE 34—IMPACT ENERGY ON THE ETHAFOAM PADDING IN THE 24 KM/H SLED TEST FROM MEASURED FORCE AND ACCELERATION DATA

	V_0 (m/s)	Method of Effective Mass Determination (kg)		
		Avg. Accel. (eq. 2)	Energy (eq. 3)	Impulse (eq. 4)
Head	6.85	4.32	4.14	4.19
Shoulder	6.53	8.58	8.92	7.97
Combined		12.9	13.1	12.2

The estimate of impact energy can also be made other than by using eq. (1). An alternate method rearranges the terms in eq. (3) and uses the effective mass in combination with the pre-impact dummy speed. If an effective mass of 13 kg were used in combination with a theoretical impact speed of 24.1 km/hr (6.71 m/s), the energy generated would be 293 J. Based on the above analysis, we believe that a reasonable estimate for the combined head and shoulder effective mass and energy for a 24.1 km/h impact to be 13 kg and 290 J, respectively. We can correlate this energy value to the ejection mitigation test procedure by assuming an impactor mass of 18 kg. The corresponding impact velocity is 20.5 km/h.

16.1 km/h Test

We also reanalyzed the 16.1 km/h testing with the dummy midsagittal plane oriented 25 degrees from the vertical (rollover configuration). The analysis of this test configuration was more complex, mainly because the coordinate system of the dummy was not aligned with that of the sled, and changed as the sled moved and particularly as the dummy interacted with the foam padding. We initially compensated for the dummy orientation by dividing the component of the local y (lateral) accelerometer values by the cosine of 25 degrees. Single and double integration is required to calculate the dummy velocity and displacement, respectively. Table 35 below shows the estimated impact energy on the Ethafoam padding in the 16.1 km/h sled test test using the same methods as used for the 24.1 km/h test. Application of eq. (1) for the head and a similar equation for the shoulder provided the estimate of impact energy shown in the fifth column of Table 35, below. We also generated the effective mass values by use of eq. (4), shown in the third column of Table 35. We used this effective mass estimate and the velocity relative to the sled of the head and shoulder at contact with the foam to estimate the incoming kinetic energy by rearranging the terms in eq. (3), shown in the fourth column of Table 35.[109]

[109] As discussed below, the actual sled speed at the time of dummy contact with the foam was 15.2 km/h (4.24 m/s) to 15.5 km/h (4.30 m/s) and lower than the intended sled speed of 16.1 km/h (4.47 m/s).

TABLE 35—IMPACT ENERGY ON THE ETHAFOAM PADDING IN THE 16.1 KM/H SLED TEST FROM MEASURED FORCE AND ACCELERATION DATA

	V_o (m/s)	EM (eq. 4)	Energy (eq. 3)	Energy (eq. 1)
Head	4.84	6.7 kg	78.5 J	68.3 J
Shoulder	4.06	13.1 kg	108 J	92.5 J
Combined		19.8 kg	187 J	161 J

We do not have a great deal of confidence in the energy values presented in Table 35, particularly in the estimate using eq. (1). As stated above, these estimates require integration of the dummy head and T1 acceleration values. To the extent the dummy head or torso becomes misaligned with the 25 degree tilt prior to and after foam contact, the integration of the sensor readings compounds the error in estimated velocity and displacement. Differences in the calculated initial head and shoulder velocity of 4.84 m/s and 4.06 m/s, respectively, are indicative of dummy rotation prior to foam contact. Examination of the video confirmed the rigid body rotation during dummy free-flight and after foam contact. Short of performing a much more rigorous video analysis of the test films, we opted for another strategy to estimate the energy of the 16.1 km/h impact configurations.

One strategy we employed was based on the fact that the constitutive properties of the foam for both the 16.1 km/h impact into the Ethafoam padding and 24.1 km/h impact into Ethafoam did not change, *i.e.,* the foam properties did not change. Based on this, we attempted to derive the dummy motion in the direction of force applied by the foam. We assumed that once in contact with the foam, the lateral force on the head or shoulder of the dummy can be represented by a mass on a spring, in parallel with a viscous dashpot. To simplify this analysis we assume the damping coefficient is zero and the force on the mass is simply a function of the spring stiffness ($F = -ky$). We can thus represent the energy stored in a spring, as shown in eq. (5).

$$Es = \frac{1}{2}ky^2 = \frac{F^2}{2k} \qquad (5)$$

Where:

Es = Energy stored in a spring

Using this concept we can derive eq. (6) to determine the impact energy of the 16.1 km/h test since we know the energy of the 24.1 km/h impact and the forces measured at the foam pads for each impact speed. The head and shoulder impact energies have ratios of 61 percent and 75 percent, respectively. The resulting estimate of total impact energy for the 16.1 km/h impact is 202 J. Using this energy value and the estimate for initial head and shoulder velocity as inputs to eq. (3), the effective mass for the head and shoulder are 5.1 kg and 17.3 kg, respectively. The combined effective mass is 22.3 kg. The results are given in Table 36.

$$\frac{E_{s1}}{E_{s2}} = \left(\frac{F_1}{F_2}\right)^2 \qquad (6)$$

TABLE 36—IMPACT ENERGY AND FORCE ON THE ETHAFOAM PADDING IN THE 16.1 KM/H SLED TEST ESTIMATED FROM A SPRING MODEL

	Max. energy (J)	Max. force (N)	Ratio of energy	Effective mass
Head	59.2	2,005	60.9%	5.05
Shoulder	143	2,789	75.0	17.3
Combined	202			22.3

Another strategy employed to estimate the energy of the 16.1 km/h test was based on the assumption that the estimate of sled velocity was a better representation of the dummy impact speed than the speed derived from the dummy accelerometers. The second column in Table 37 shows the sled speed just prior to dummy head and shoulder contact. Equation 4 can be used to estimate the effective mass if the time (t_f) of minimum relative dummy to sled velocity (v_{yf}) is known. However, the only estimate of this time is from the single integration of dummy accelerometers. Nonetheless, the EM and energy of impact, using eq. (3), are given in Table 37.

TABLE 37—HEAD IMPACT ENERGY INTO THE ETHAFOAM FOR THE 16.1 AND 24.1 KM/H TESTS, ESTIMATED BY ASSUMING SLED VELOCITY EQUALS THE IMPACT VELOCITY

	V_o (m/s)	EM (eq. 6.6.4) (kg)	Energy (eq. 6.6.3)
Head	4.30	7.53	69.5 J
Shoulder	4.24	13.8	124 J
Combined		21.4	194 J

By using the spring equation assumption (Table 36) and sled velocity rather than dummy sensor estimates for initial impact speed (Table 37), we estimate an effective mass range of 21.4 to 22.3 kg and an energy range of 194 to 202 J. We believe this range of estimates is superior to the energy and effective mass values using only dummy sensor derived estimates of dummy velocity and displacement (Table 35), particularly the estimate using eq. (1).

Thus, we believe that it is reasonable to estimate the effective mass and energy of the 16.1 km/h test as 22 kg (6.3 kg for the head and 15.6 kg for the shoulder) and 200 J, respectively.

Finally, we note that if the test had been actually performed at 16.1 km/h (4.47 m/s) rather than the actual value of approximately 15.5 km/h (4.3 m/s), the energy estimate for the test would be higher. There is no reason to believe that if the test were performed at a higher speed that it would change the effective mass estimate. Thus, if we use the 22 kg effective mass estimate, the impact energy at 16.1 km/h would be 220 J.

D. DRF Data

We also reanalyzed DRF data used in the NPRM and found an error in the analysis of impact speed. In the NPRM (74 FR at 63196), we discussed video analysis of data from the advanced glazing program of vehicles tested on the DRF with a 5th percentile adult female dummy and a 50th percentile adult male test dummy (near and far side).[110] We stated that video analysis of dummy head impact velocities with the glazing showed that for the 5th percentile female far side occupant, the time to glazing impact after the DRF began rotating was between 1.3 and 1.8 seconds, which was in the range of two to three quarter-turns of rotation, and that the peak impact speed was 31 km/h. In Table 12 of the NPRM (*id.*), we showed the estimated velocities for the near and far side dummies.

After reanalyzing the data for this final rule, we determined that the head impact speeds are approximately half of those reported in the NPRM. Apparently the reason for this was an error in film rate transcription during the original analysis. A reanalysis of the DRF videos found peak head and shoulder speeds between 15 and 16 km/h, see Table 38 below.[111] There is no way to directly determine the energy of the interaction between the dummies and the glazing in these DRF tests. However, assuming an effective mass for the 50th percentile male of 6.3 kg and 15.6 kg for the head and torso impact, respectively, the resultant impact energy would be 209 J. We can correlate this energy value to the ejection mitigation test procedure by assuming an impactor mass of 18 kg. The corresponding impact velocity would be 17.3 km/h.

TABLE 38—DRF TESTING PEAK VELOCITIES

Dummy	Impact speed (km/h)		Estimated impact energy (J)	
	Near Side	Far Side	Near Side	Far Side
5th Female:				
Head	7.2	14.5		
Shoulder	7.0	15.5		
50th Male:				
Head	9.2	15.2		209
Shoulder	9.0	15.8		

It is important to emphasize that this set of DRF tests was performed at a peak roll rate of 330–360 deg./sec. An analysis of field data submitted by Batzer and Ziejewski suggests that higher peak roll rates can occur in the field.[112] We would expect that if the DRF testing were performed at a higher roll rate, that higher impact speed would be possible. Modeling results provided by the agency in the NPRM showed a Toyota pickup rollover simulation with a head and torso to glazing speed of 20 and 16 km/h, respectively.[113] This would result in a total energy of 251 J, assuming a 22 kg effective mass.

E. Discussion and Conclusion

We agree with the importance of impact energy as a critical parameter in the determination of the appropriate impact speed for the 18 kg impactor in the ejection mitigation test procedure, particularly for a countermeasure consisting of side curtain air bags. Therefore, we have endeavored to take a fresh look at the available data provided by commenters and the data the agency used to justify the impact speed in the NPRM. Based on our analysis, best available data have led us to adopt an impact test speed of 20 km/h, consistent with Nissan's comment, and the associated 278 J energy level.

We do not agree with requests by commenters to decrease the impact speed to any level below the 20 km/h value. Honda requested a 17 km/h impact speed (200 J), based on an analysis of peak head velocity and effective mass involving belted occupants. We decline to restrict our rulemaking to countermeasures that are subject to performance requirements that account for the energy imparted on the side window by belted occupants. The Alliance indicated that the appropriate impact speed should be based on an energy of 178 Joules, resulting in a speed of 16 km/h (4.44 m/s). We did not find the supporting GM and Ford studies persuasive. We believe the use of the GM energy estimates as a basis for the final rule is problematic because the rollover severity used in the study only represents a small minority of the most harmful ejection-inducing crashes. Also, the study seems to only measure, or only contain, occupant loading through the head. We would expect shoulder or combined shoulder and head loading to result in higher energy estimates. The Ford modeling study also has limited usefulness given that lack of specificity and detail provided about the modeling.

We have also determined that commenters' contention that the agency's sled test data is supportive of only a 16 km/h impact to be unfounded. Our analysis showed these tests represent energies from 220 to 290 J, which correlated to impact speeds in the range of 17.8 to 20.4 km/h.

We acknowledge that there are practical limitations to the level of performance mandated by this Federal safety standard; the standard does not reflect the worst case scenario. The speeds at which our sled tests were run

[110] Duffy, S., "Test Procedure for Evaluating Ejection Mitigation Systems," 2002 SAE Government/Industry Meeting.

[111] Videos and electronic data from these tests have been placed in the NHTSA Component Database and can be accessed at www-nrd.nhtsa.dot.gov/database/aspx/comdb/querytesttable.aspx. Data from four tests are under test number 716. The file names for the 5th female near and far side tests are C00716C001 and C00716002, respectively. The file names for the 50th male near and far side tests are C00716C003 and C00716004, respectively.

[112] An IMECE paper submitted with Batzer's comments indicates that this range of peak roll rate is consistent with a 7–9 ¼-turn rollover.

[113] 74 FR at 63195.

did not generate the highest possible speeds that occupants in the field could interact with the window opening. Some vehicles roll over with a higher roll rate than generated by the DRF tests, resulting in higher impact velocities than those measured in the laboratory, and some occupants will weigh more than the dummies used or have a greater proportion of their mass contact the window opening. Nonetheless, ejection mitigation countermeasures installed pursuant to this standard will provide a level of protection even under more dire conditions. Moreover, this standard sets a reasonable, appropriate, and practicable level of performance at a reasonable cost.[114] It assures that vehicles will be equipped with ejection mitigation countermeasures suited to the energy generated in most rollover crashes. Consistent with the agency's principles for sound regulatory decision-making, the 20 km/h impact test is data-driven and supported by all the technical data available to date. A 400 J energy value has not been supported by any of the technical assessments thus far conducted.

The FRIA discusses the impacts of adopting a 20 km/h test versus a 24 km/h test. We performed a sensitivity analysis comparing the harm associated with crashes with an occupant impact speed of 20 km/h to that of crashes associated with an occupant impact speed of 24 km/h, and the resulting effect on the benefits analysis. This analysis settles on a supposition that the difference between a 20 km/h test speed and a 24 km/h test speed is about 7 percent of the overall benefits of the final rule. Nonetheless, we have several reasons for preferring the 20 km/h test requirement.

We have analyzed costs and other impacts associated with the 20 km/h and 24 km/h criteria, and have found the 20 km/h test requirement to be the most cost effective criterion. The FRIA compares the cost per equivalent life saved of a 20 km/h rollover curtain air bag with that of a 24 km/h rollover curtain air bag with a larger inflator (low end of cost range) to achieve higher air bag pressure and a 24 km/h rollover curtain air bag that has the same pressure as the 20 km/h curtain, but has greater volume (high end of the cost range). It is assumed that this system with greater volume requires additional air bag material and an additional inflator for a vehicle with 3 rows or 2 rows and a cargo area. Using the 3 percent discount rate as a basis of comparison, the 20 km/h system is the most cost effective at $1.4 million per equivalent life saved. This compares with a range in cost for the 24 km/h system from $1.6 to $2.8 million.

Not only does the 20 km/h test requirement impose minimal costs for the maximum benefit, a 20 km/h test requirement, as discussed above, it is better supported by technical data than a 24 km/h requirement as it better represents the forces to which the ejection countermeasure will be exposed to in the field than a 24 km/h requirement, particularly in rollovers.

Some vehicle manufacturers have commented that meeting a 24 km/h requirement will entail increasing air bag pressure in current bags, and have expressed concerns that more rigid bags will increase head injury criteria (HIC) values measured in a side impact test and IARVs measured in out-of-position (OOP) tests. Although whether those increased HIC values and IARVs in OOP tests from increased air bag pressure pose an unreasonable safety risk is not known, negative trade-offs concern the agency in any rulemaking. Those possible trade-offs can be avoided with a 20 km/h requirement. To illustrate, in agency testing the MY 2007 Mazda CX9 was able to meet the 20 km/h performance test at all locations tested, without modification. This vehicle has a 5-star side impact rating under the then-NCAP rating system.

Finally, some manufacturers pointed to their successful experience with rollover curtains installed on their vehicles to argue that the performance requirements of the proposed standard are too high. VW stated that it was unaware of any ejections occurring in 100,000 Tiguan, Q7 and Q5 vehicles with sealed curtain side air bags. GM stated that it started implementing ejection mitigation curtains with several 2005 model year vehicles and it is unaware of injuries due to ejection past an ejection mitigation air bag. GM submitted case studies of twelve rollover crashes investigated by GM and the University of Michigan and found no ejections had occurred.

In response to VW, the fact that VW is not aware of any ejections is not necessarily supportive of a conclusion that the ejection mitigation systems in the vehicles are sufficient. A much more detailed field data analysis of available rollover and side impact crashes would be necessary. For example, such information would have to include the number of rollover crashes, the number of quarter-turns, and the seat belt status of the occupants. Even then, it is difficult to draw conclusions from a limit number of crashes. Further, with regard to GM's twelve cases, almost all of these cases involved belted occupants. Our final rule focuses on ejection mitigation for both unbelted and belted occupants.

In sum, based on our analysis of the comments and a reanalysis of the basis for the impact tests, we have adopted an impact test speed of 20 km/h. We conclude that this level of energy is more representative of the energy the ejection countermeasure will typically be exposed to in the field, particularly in rollovers. Thus, the 20 km/h requirement is reasonable, appropriate, and practicable, and preferable to the 24 km/h test requirement.

d. Target Locations

This section discusses the NPRM's proposals concerning where the headform impactor will be aimed to assess the effectiveness of ejection mitigation countermeasures, the comments received on the NPRM, and our responses thereto. Because there are many issues relating to target locations, to make the discussion easier to follow we respond to the comments immediately after summarizing them issue by issue.

This final rule adopts the test procedures proposed in the NPRM for locating target locations except as follows: (1) The window opening for cargo areas behind the 1st and 2nd row will be impacted; (2) the lateral distance defining the window opening is increased from 50 to 100 mm; and (3) if necessary, the headform and targets will be rotated by 90 degrees to a horizontal orientation if this results in more impact locations (up to a maximum of four targets per window) than the vertical orientation. Additional changes include: instructing removal of gasket material or weather stripping used to create a waterproof seal between the glazing and the vehicle interior and the door and the door frame; allowing some portion of material bordering a window opening on the exterior of the vehicle to factor into our assessment of what is a window opening; and permitting the adjustment or removal of components that would interfere with the ejection impactor or headform in the test.

1. Why We Are Focusing On Side Windows and Not Other Openings

In general, comments from glazing manufacturers and consumer groups asked that the agency expand coverage to sun/moon roofs and backlights. EPGAA stated that '[w]hile NHTSA addresses third row windows which

[114] Some commenters said that unintended safety disbenefits would result from a 24 km/h test, such as a greater risk to out of position occupants or less protection in FMVSS No. 214 side impact crashes. We respond to these commenters in a later section of this preamble.

account for less than 1% of the injuries and deaths, it completely ignores sun roofs and rear windows which are also window openings through which outboard seated occupants could be ejected and together account for over 12% of the injuries and 7% of the deaths." Public Citizen (PC) commented that "[t]he agency should consider whether laminated glazing would counter the potential for ejection through the roof, which can be expected to increase as a result of the side curtain airbags that the standard requires." PC also mentioned that the PRIA quoted a 2002 agency report that estimated that 15 percent of occupants are ejected through sun roofs. Batzer and Ziejewski stated that NHTSA's "statistics indicate that the most common windows acting as ejection portals include the first row windows, the windshield, the sunroof, and the backlite [sic]."

Agency Response

We do not grant the request from Advocates for ejection mitigation coverage of doors and windshields. Door openings are already regulated by FMVSS No. 206, "Door locks and door retention components," which was upgraded in 2009 expressly to improve door lock and hinge requirements to reduce door openings in crashes. (72 FR 5385, February 6, 2007, Docket NHTSA–2006–23882.) Windshields are regulated by FMVSS No. 205, "Glazing materials," and the associated performance requirements in FMVSS No. 212, "Windshield mounting." No suggestion was made as to how these existing requirements could be enhanced.

Ejection mitigation through the backlight and through movable or fixed roof panels is not addressed by FMVSS Nos. 206, 205, or 212. Our most recent analysis of ejection route data set forth in this final rule and in the FRIA indicates that backlight and roof ejections rank 3rd, behind 2nd row window ejections.[115] For all crash types the backlight and roof represent 4.8 percent and 3.1 percent of fatalities, respectively. When crashes are limited to target population crash types, i.e., crashes involving lateral rollovers and side impact crashes, the backlight and roof represent 5.9 percent and 3.9 percent, respectively. Backlights are on nearly every vehicle and sun/moon roofs are not, so given those data, if a roof opening is present, it represents a greater risk for ejection than the backlight.

In the updated data analysis for this final rule, we provide a much more refined analysis of the roof ejections than was provided in the NPRM. This was achieved by performing a manual review of each case. Our analysis was able to segment the data by those with roof glazing (moon roofs) and those with sheet metal panels (sun roofs) as well as the pre-crash position of the panel. Closed moon roofs represent about half the fatal and MAIS 3+ ejections through the roof.

To fully understand this issue, the agency has assessed the cost effectiveness of using advanced glazing for the backlight and closed roof glazing. This analysis, set forth in the FRIA, includes all crash types (not limited to side impacts and rollovers) since the advanced glazing countermeasure does not need to deploy. The results are given in Table 39 at the 3 and 7 percent discount rates and at an assumed ejection effectiveness level of 20 percent. The 20 percent effectiveness value used in the FRIA is for illustration purposes. At the 20 percent level of effectiveness, the backlight glazing does not appear cost effective, while the roof glazing could be.

TABLE 39—COST PER EQUIVALENT LIFE SAVED (ELS) OF EJECTIONS THROUGH BACKLIGHT AND ROOF GLAZING WITH ADVANCED GLAZING

Assumed containment effectiveness	Cost per ELS			
	Backlight		Roof glazing	
	3%	7%	7%	3%
20%	$11.3M	$14.2M	$4.1M	$5.1M

Commenters to the NPRM argued that the PRIA stated that after implementation of FMVSS No. 226, roof ejections are likely to increase from their current level as a result of occupants, contained from side window ejections, being available for ejection from other portals. The agency agrees this is a reasonable possibility. In fact, our findings in analyzing the RODSS database cases with side curtains are consistent with this conclusion.[116] Commenters also indicated their belief that roof ejections may increase due to more and larger sun/moon roofs in the future. This forecast seems speculative since there was no data provided to support it.

In any event, we have determined it is not reasonable to expand this final rule to roof glazing. A major impediment is the lack of a proven performance test procedure for roof glazing. The current configuration of an ejection propulsion mechanism and ejection impactor has been years in development and is specially designed for horizontal impacts on nominally vertical surfaces. A comparable performance test will have to be developed that delivers an appropriate amount of impact energy to a pre-broken roof glazing or the opening covered by some other countermeasure.

Another factor that causes us not to expand this final rule to address ejections through the roof is an absence of notice to the public to add such a provision to the final rule. The public has not been provided meaningful notice that NHTSA was considering requirements for roof portals, and has not been provided an opportunity to comment on such requirements. Relatedly, the agency has not been given the benefit of the public's views of the matter. Accordingly, we are not extending this final rule to roof glazing.

However, NHTSA is interested in learning more about roof ejections and would like to explore this area further. We plan to examine field data to better understand the current and future extent of roof ejections, and will seek to learn about the future implementation of sun/moon roofs in vehicles and ideas about effective ejection countermeasures through those portals. The results of this work may find that future rulemaking on roof ejections could be warranted.

[115] These rankings exclude ejections through non-glazing areas.

[116] It is important to emphasize that the RODSS data is not a statistically representative sample of field data.

2. Why We Are Focusing on the Side Windows Adjacent to First Three Rows

We received comments on which side window openings should be subject to ejection mitigation requirements, and how the final rule should determine the rear boundary that defines which rear window openings are subject to the standard.

i. First Three Rows

Advocates believed that the rule should extend to "occupants in the rear seats of small buses and 15-passenger vans." Batzer and Ziejewski stated that "[t]he reasoning behind why only the first three rows of seats are required to have coverage seems insufficient. Why would not every designated seating position in every vehicle have the same level of safety?"

Agency Response

The final rule will not extend side window coverage beyond three rows. SAFTEA–LU directed us "to reduce complete and partial ejections of vehicle occupants from outboard seating positions." Our position in the NPRM was that field data showed a compelling need for ejection countermeasures to cover daylight openings adjacent to the first two rows of seating coverage. The update of the field data presented in this final rule supports this decision. For all crash types, the first and second row windows rank 1st and 3rd (54.2 percent and 7.7 percent, respectively) as far as fatal occupant ejection routes.[117] When crashes are limited to target population crash types, i.e., crashes involving lateral rollovers and side impact crashes, these rankings (50.3 percent and 7.7 percent, respectively) for fatal ejections do not change.

Third row ejections are a very limited part of the ejection population; in target population crashes they constitute only 0.3 percent and 0.7 percent of fatalities and MAIS 3+ injuries. Nonetheless, we proposed coverage to three rows since many vehicles already on the market with three rows of seating are equipped with rollover deployable side curtain air bags that cover daylight openings adjacent to all three rows. This trend toward third row coverage has continued. Further, we wanted to cover as much of the side opening as reasonably possible because we were concerned that, if only the first two row windows were covered, in a rollover crash unbelted occupants contained from ejecting through the first two windows could be ejected from an uncovered opening adjacent to the third row. To reduce that risk of ejection, and importantly, given that the ejection mitigation side air curtains installed on current vehicles demonstrate the practicability and cost-efficiency of a curtain spanning the side of the windows from the first through third rows, we felt justified in our decision to provide coverage of third row windows. Vehicles the agency has tested for this rulemaking with air bag curtains covering rows 1, 2 and 3 windows are the MY 2005 Honda Odyssey, MY 2006 Mercury Monterey, MY 2007 Chevrolet Tahoe, MY 2007 Ford Expedition, MY 2007 Jeep Commander, MY 2008 Dodge Caravan, MY 2008 Ford Taurus X, and MY2008 Toyota Highlander. These designs are typically a single curtain covering tethered at the A and D-pillars.

Insufficient reasons are available to support requiring side daylight opening coverage into 4th and higher rows.[118] Fourth and higher row ejections are a very limited part of the ejection population; in target population crashes they constitute only 0.6 percent and zero percent of fatalities and MAIS 3+ injuries, respectively. Extending coverage to 4+ rows goes beyond curtain air bag coverage that we have seen on any vehicle. It may be possible technically to extend a single curtain air bag to cover beyond 3 rows, or conceivably manufacturers could use two curtain air bags to cover the entire side of the vehicle. However, for a two curtain system without intervening pillars there is likely a need to tether the curtains together in order to provide tension near the curtain bottoms. We do not know if curtains tethered together will be able to meet the performance requirements of the standard adopted today. Moreover, depending on the design, the costs for covering windows adjacent to 4+ rows may be substantial.

Glazing manufacturers have indicated that some vehicle manufacturers place advanced glazing in fixed window positions in the rearmost rows of large vans. However, we have not tested these glazing applications to the adopted requirements, nor has any data been submitted to the agency. Thus, the performance of a glazing-only application in these higher rows is not known to us.

Given the above uncertainties about the availability and cost of countermeasures that could be used to cover windows adjacent to 4+ rows, and in view of the small numbers of ejections through those windows, we decline to extend this final rule to window openings beyond the 3rd row.

ii. Method of Determining 600 mm Behind Seating Reference Point (SgRP)

The Alliance commented that limiting the daylight opening to 600 mm behind the SgRP of the last row seat or behind the rearmost portion of a seat not fixed in the forward seating direction, in combination with the targeting method, "can result in targets being located in cargo areas and/or behind and below seat backs and head restraints." The Alliance believed that rearward occupant motion is resisted by the seat back and head restraint and that this is not considered by the "600 mm method." It also stated its belief that the combination of seats and seat belts "greatly reduces the risk of head and upper torso ejection in the area created by the proposed '600 mm' method."

The Alliance suggested an alternative of using the Head Restraint Measurement Device (HRMD) defined in FMVSS No. 202a to establish the rearward extent of the head. This approach would provide the limit of the daylight opening in the 3rd or last row.

Honda suggested that the fact that the 600 mm limit in FMVSS No. 226 is the same as in FMVSS No. 201 may not be appropriate when considering that FMVSS No. 201 has a different basis and objective than that of ejection mitigation. Honda suggested a different procedure to determine the daylight opening limit, which takes into consideration the movement of belted occupants in rollovers as well as the many fore-aft and seat back angle adjustments. Honda's method is based on the height of a 95th percentile occupant, with 200 mm added (1,018 mm) to account for upward movement of a belted occupant during a rollover. A 1,018 mm radius arc is centered at the SgRP and swept through the daylight opening. A reference line is drawn parallel to the torso line and translated 155 mm rearward and perpendicular to the torso line. The arc and the rear reference line provide the boundaries for the daylight opening.

NTEA stated, "NHTSA [should] consider adopting testing parameters similar to those found in [S6.3(b)] FMVSS 201 to effectively exclude any targets that are located behind the forward surface of a partition or bulkhead * * * . We believe it is neither practical nor beneficial to require test target points that could not possibly be contacted by the head of an occupant seated forward of the partition."

[117] These rankings exclude ejections through non-glazing areas. The second ranked fatal ejection route is the windshield, for both lateral rollovers and side impact crash populations.

[118] 74 FR 63201

Agency Response

The Alliance objected to the 600 mm limit because it "can result in targets being located in cargo areas and/or behind and below seat backs and head restraints." The Alliance's comment suggesting that seat belts would reduce the risk of an occupant's head and torso being ejected in the area behind the seat back and head restraints is not consistent with this final rule's goal of reducing partial and full ejections of belted and unbelted occupants. Similarly, the suggested use of the HRMD to define the limit of the opening in the third row disregards that this final is intended to protect belted and unbelted occupants.

It is correct that the 600 mm limit can result in target areas in the cargo area and/or behind and below the seat back. We chose that limit to address what can occur in the field. Our field data assessment, discussed in section IX.b. and in our technical report, has several cases where occupants were ejected rearward of their initial seated position. In RODSS case 5032 (SCI CA09061) a driver was completely ejected through the left 3rd row quarter panel window. In NASS case 2006–79–89 the driver was partially ejected from the left 2nd row window. In SCI case DS04016, an infant seated in the middle of the 2nd row was ejected through the 3rd row quarter panel window.

These cases demonstrate how rollovers, particularly of the long duration multiple quarter-turn variety, are chaotic events with complex vehicle and occupant kinematics that can result in occupants moving rearward of their seating position. In addition, rollovers can be preceded by planar impacts with a substantial rearward component, resulting in occupants moving towards the rear of the vehicle. The bulk of the benefits from this standard are for unbelted occupants. The limitations suggested by the vehicle manufacturers are not consistent with protecting this population. For the agency, the issue is not whether the standard will cover some area rearward of a seating position, but how far behind the seating position.

We decline to adopt Honda's technical method for limiting the daylight opening. Our technical report explains that the Honda method would result in a smaller area of coverage and potentially fewer impact targets than the NPRM method. Briefly stated, a small part of the area described by Honda would actually be farther rearward than the NPRM limit. However, the Honda derived limit has a smaller area overall. For some large windows, using the Honda method results in only two targets fitting in the window opening, whereas the NPRM's method results in four impact locations. Further, the Honda method increases the complexity of the standard.

Honda suggested that selection of a 600 mm rearward limit, to the extent that it is potentially based on FMVSS No. 201, may be too great a distance. We do not agree on this point. To the extent that FMVSS No. 201 attempts to protect occupants from interior impact in all crash modes, including rollovers, we believe that FMVSS No. 226 should be no less expansive in its rearward coverage than FMVSS No. 201. Moreover, since rollovers make up the largest portion of the target population for FMVSS No. 226, and because rollovers result in more chaotic occupant motion than any other crash type, it is our view that FMVSS No. 201's coverage should not prescribe the limits of the coverage of FMVSS No. 226.

The suggestions of the Alliance and Honda to reduce the 600 mm value will dampen the effectiveness of this final rule in protecting unbelted occupants in rollovers. Accordingly, we deny the requests. (We respond to NTEA's suggestion in the "Vehicle Applicability" section of this preamble.)

iii. Increasing 600 mm Limit for Vehicles With One or Two Rows of Seats

The NPRM proposed to limit the requirement to provide side daylight opening coverage to an area bounded by a plane 600 mm behind either the SgRP of a seat in the last row (for vehicles with fewer than 3 rows) or the SgRP of a seat in the 3rd row (for vehicles with 3 or more rows). As a result, for a vehicle with only one or two rows and with a cargo area behind the seats, all or part of the cargo area daylight opening rearward of that 1st or 2nd row would have been excluded under the NPRM.

After reviewing the comments from glazing manufacturers and Advocates and the updated field data showing the prevalence of ejections through side glazing in the area of the first three rows, we have reconsidered the proposed 600 mm limit for vehicles with less than 3 rows. We have also reconsidered this issue after reflecting on AIAM's comment which asked for clarification on whether a vehicle having windows to the rear of the last row of seats (*e.g.,* 2 rows of seats but a third side window next to the rear cargo area) would be subject to testing of the third side window.

Agency Response

For vehicles with only one or two rows of seating, we have decided to increase the 600 mm distance to 1,400 mm, measured from the SgRP of the seat in the last row. By extending the distance to 1,400 mm, we are subjecting more area of glazing to testing, *i.e.*, more of the glazing area in cargo area behind the 1st or 2nd row will need an ejection mitigation countermeasure. The window openings subject to testing under the 1,400 mm limit are those that would have been adjacent to a third row seat had the vehicle had a third row.

There is a safety need to cover this cargo area. In the NPRM (*see* Tables 16 and 17 of the NPRM preamble), we provided the distribution of ejected occupants by ejection route for all crashes. In these data tables, we did not have a category for cargo area ejections because data were not available. For this final rule, we undertook a manual review of each case to update ejection route data provided earlier in this preamble. In that review, we found that 0.5 percent of ejections in all crashes (and target population crashes) were ejected through the cargo area behind the 2nd row.[119] This is slightly more than the percentage for 3rd row ejections.

Further, our field data assessment discussed in section IX.b included a number of cases where occupants were ejected rearward of their initial seated position. As described earlier, in RODSS case 5032 (SCI CA09061), a driver was completely ejected through the left 3rd row quarter panel window. In NASS case 2006–79–89, the driver was partially ejected from the left 2nd row window. In SCI case DS04016, an infant in the middle of the 2nd row was ejected through the 3rd row quarter panel window. These cases demonstrate how rollover crashes are complex turbulent events that can propel unbelted occupants rearward in the vehicle. Rollovers involving planar impacts having a substantial rearward component can thrust an unbelted occupant rearward toward the rear window openings in a manner unlike other crash types.

Vehicles are already being produced that have side air bag curtains covering rows 1, 2 and 3 row windows (*e.g.,* the MY 2005 Honda Odyssey, MY 2006 Mercury Monterey, MY 2007 Chevrolet Tahoe, MY 2007 Ford Expedition, MY 2007 Jeep Commander, MY 2008 Dodge Caravan, MY 2008 Ford Taurus X, and MY 2008 Toyota Highlander). The designs typically use a single curtain

[119] There were no ejections through the cargo area windows behind any other row.

covering tethered at the A- and D-pillars.[120] Since there are designs that provide three rows of coverage, we believe that covering the cargo area behind the 1st or 2nd row of a vehicle up to window openings adjacent to where a third row would have been, offers no more of a technical challenge than manufacturers face in covering all openings adjacent to the 3rd row for vehicles with three rows.

Our FRIA calculates the cost effectiveness of extending a two-row curtain to cover the cargo area behind the second row and finds that it has a similar level of cost effectiveness as 3rd row coverage.[121] Accordingly, it is reasonable and appropriate for this final rule to include impact targets in window openings in the cargo area behind the 1st and 2nd row for vehicles with one or two rows of seating, if the window openings are located where they would have been adjacent to a third row seat had the vehicle had a third row.

We have determined that a third row seat would have been encompassed in an area bounded by a transverse plane 1,400 mm behind the rearmost SgRP of a first row seat (for vehicles with only one row of seats) or a second row seat (for vehicles with two rows of seats). Thus, we are extending the NPRM limit for these vehicles that have a cargo area behind the first or second row and no other row of seats, by 800 mm. We arrived at the 1,400 mm value through a small study of curtain coverage length of late model 3 row vehicles beyond the 2nd row SgRP. This study included 14 of the MY 2006 to MY 2009 vehicles that were in the agency impactor testing program. These vehicles had 3rd row rollover curtains or curtains covering the cargo area behind the second row. Our measurements indicated that a 1,400 mm dimension rearward from the 2nd row SgRP would cover the entire daylight opening area for all except one of the vehicles.[122]

The final rule will maintain the 600 mm value for vehicles with 3 or more rows.

3. Answers to Questions About Method for Determining Three-Row Area

i. AIAM and Hyundai asked: (a) Is the targeting procedure done on the entire daylight opening and then the targets are limited to those that are in the area forward of the 600 mm line; or (b) is the targeting procedure done only on the area forward of the 600 mm line. In addition, if (a) above is the answer, Hyundai sought clarification on whether the entire target outline needs to be located in the daylight opening or just the center of the target outline.

Our response is that the targeting procedure is performed on just the area forward of the 600 mm line (the second answer above), for a 3 row vehicle. (As indicated above, this final rule specifies this dimension as 1,400 mm for vehicle with fewer rows.) Proposed S5.2.4.2(a) stated in part that "the transverse vertical vehicle plane defines the rearward edge of the daylight opening for the purposes of determining target locations." The regulatory text adopted by this final rule (at S5.2.1.2(a)) slightly modifies the proposed text by indicating that the transverse vertical plane defines the rearward edge of the offset line (rather than the daylight opening) for the purposes of the targeting procedure performed on the daylight opening. To reiterate, the wording does not specify that the targeting procedure is performed on the entire opening and then only the targets forward of the 600 mm limit are used.

ii. NTEA asked if side daylight openings behind occupants of side facing seats would be subject to the standard since the SgRP is parallel to the opening. Similarly, for rear facing seats, NTEA asked whether the side opening associated with such a seat is tested and would glazing on the opposite side of the vehicle be tested. Finally, NTEA asked if there was a lateral distance from any side glazing to the SgRP of a forward or rear-facing seating location, beyond which the requirements for the testing would not apply.

Our answer is that daylight openings adjacent to both side and rear facing seats are potentially required to be targeted if they are part of the first three rows of seating. The definition of "row" adopted by the standard is still applicable. If these seats are fixed in a side or rear facing direction, the SgRP is not used to determine the rearward limit of the daylight opening. Rather, the limit is determined by the location of a vertical lateral vehicle plane located behind the rearmost portion of the rearmost seat. See proposed S5.2.4.2(a) and (b), and S5.2.1.2(a) and (b) in this final rule.

Daylight openings on either side of the vehicle are subject to testing even if the seat or seats in that row are on the opposite side of the vehicle. There is no limit on lateral distance from a seat to a daylight opening that would exclude an opening from coverage. Crash data from the field have shown that an occupant on one side of a vehicle can be ejected out of an opposite side window. These provisions are to reduce the likelihood of such ejections.

e. How We Are Testing The Ability Of These Side Windows To Mitigate Ejections

1. What is a "Window Opening"?

The NPRM proposed to define "side daylight opening" as—

> other than a door opening, the locus of all points where a horizontal line, perpendicular to the vehicle vertical longitudinal plane, is tangent to the periphery of the opening, including the area 50 millimeters inboard of the window glazing, but excluding any flexible gasket material or weather stripping used to create a waterproof seal between the glazing and the vehicle interior.

i. 50 mm Inboard of the Glazing

Reference to the area 50 mm inboard from the window glazing was intended to account for interior vehicle structure that might be in the vicinity of the daylight opening, which could restrict the size of the opening through which an occupant could be ejected. In other words, we wanted to include, as part of the opening, vehicle structures that were within 50 mm of the window opening, if those structures could restrict ejection through the opening.

The Alliance generally agreed with the proposed definition of daylight opening, except the commenter suggested extending the distance from the inside of the window glazing from 50 mm to 200 mm. The Alliance believed that the proposed 50 mm value "may result in structures or trim proximal to the daylight opening to be removed to gain access to a target location. Removal of these structures or trim could result in an unintended consequence of laboratory performance reduction of the ejection mitigation countermeasures."

AIAM did not request a change in the 50 mm value, but rather asked for clarification about the inclusion of "items of trim such as grab handles [that] may extend into the window area, potentially interfering with the motion of the impactor during a test." AIAM suggested that the standard specify one of the following: removing the trim item prior to the test, adjusting the target location so that the trim item is not engaged during impactor movement, conducting the test notwithstanding the interference of the trim item, or eliminating the target from testing requirements. Similarly, Honda and Hyundai requested guidance on

[120] The MY 2007 Chevrolet Tahoe uses a separate curtain to cover the 3rd row window.

[121] These cost effectiveness estimates are based on the cargo area and/or 3rd row area coverage alone. If they were to be lumped together with the first 2 rows of coverage, they become even more cost effective.

[122] More details of this study can be found in the technical report supporting this final rule.

positioning and/or removal of interior components, such as sun visors, the instrument panel, interior and exterior mirrors, and grab handles. Hyundai stated "certain interior structures which do not restrict the size of the daylight opening could still interfere with the linear travel of the impactor headform in the area 50 millimeters or more inboard toward the vehicle centerline from the window glazing interior surface."

Nissan asked that testing be performed without the headliner. It stated: "Nissan does not anticipate the headliner affecting performance of the side curtain air bag system. Though the headliner might affect the initial trajectory of the deploying side curtain air bag, the proposed delay times of 1.5 seconds and 6 seconds ensure sufficient time for full deployment, allowing the curtain air bag to correctly position itself prior to contact with the impactor. Replacing the headliner between tests would unnecessarily increase test complexity and could result in lab error."

Agency Response

We believe the Alliance's request that the definition for side daylight opening be modified to increase the 50 mm distance inside the window has some merit. We have examined interior trim components, such as panels covering the vehicle pillars, and found that surfaces that should be considered as part of the outline of the daylight opening can be more than 50 mm inside the window glazing. Figure 12 is a schematic showing the cross-section of a hypothetical door panel and glazing whose horizontal tangent is 60 mm inside the glazing. Based on the vehicles we examined, we believe that increasing the distance to 100 mm will be sufficient to encompass interior borders and other components around the daylight opening that might not be easily removed and whose removal may have an unknown effect on the performance of the countermeasure. These components could have a positive effect on ejection mitigation, so our decision is that the determination of the side daylight opening should be made with the components in place.

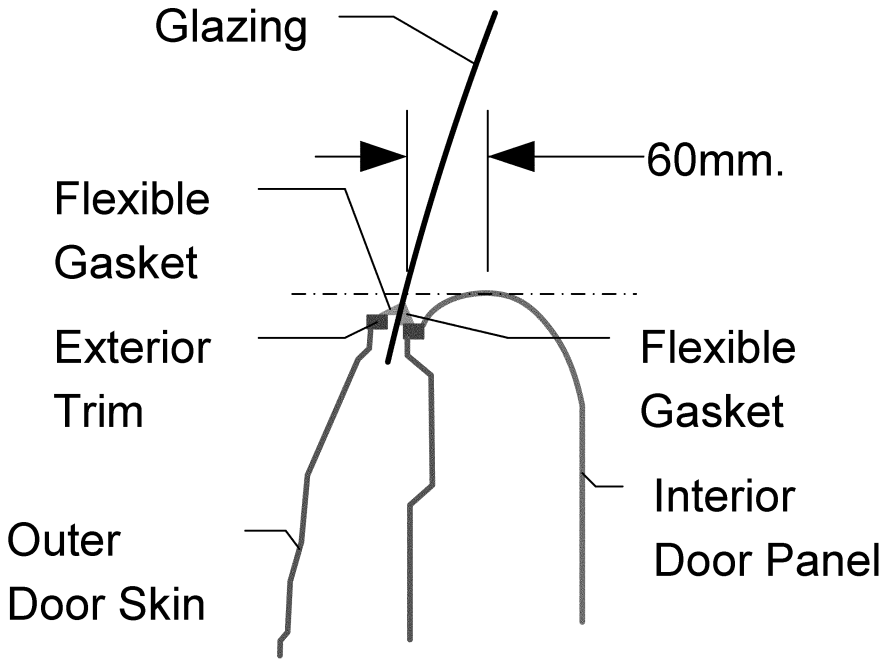


Figure 12 – Cross-section of a door and glazing providing an example of interior trim within 100 mm of the inside of the glazing opening dictating the daylight opening.

We will not increase the distance to 200 mm, however. A 200 mm distance is excessive and potentially includes more vehicle components in the determination of the window opening periphery than necessary. Although the linear impactor travels along a lateral horizontal path, during a rollover, people moving towards the window opening would not. Objects 200 mm from the window opening may have no ability to limit the potential for ejection. The Alliance did not provide a rationale justifying a 200 mm limit.

One concern we had relative to increasing the inboard distance from 50 mm to 100 mm was that even the 100 mm distance increases the possibility of including inappropriate vehicle components in the determination of the periphery of the window opening. The components should not be included because they are not relevant to the actual ejection portal, *i.e.,* they are unlikely to have a positive effect in mitigating ejection.

One of these components is the vehicle seat. In S6.3 of the proposed regulatory text, we expressly specified that the seat may be removed to conduct the test in an uncomplicated manner. Relatedly, in view of our increasing the inboard distance defining the opening to 100 mm, the final rule at S3 will specifically exclude seats from consideration in the definition of daylight opening.

Similarly, the agency also believes that we should expressly list grab handles as components that will not be included in the determination of a "side daylight opening." Both Hyundai and AIAM asked for clarification of the treatment of grab handles. Hyundai's comments showed two examples of grab handles that were both outside of the 50 mm limit (108 mm and 75 mm) proposed in the NPRM. At a distance

limit of 100 mm, one of these grab handles would be included, unless specifically called out for exclusion.

We believe grab handles should be excluded from contributing to the daylight opening for several reasons. First, we think it unlikely that they will contribute anything positive to ejection mitigation. Second, we believe there is a possibility that grab handles could interfere with the ejection impactor in the test. The final rule will add them to the definition of side daylight opening in S3 as an item that is excluded from consideration in the definition of the daylight opening (and to S6.3 as an item that can be removed if it obstructs the path of the travel).

ii. Conducting the Test With Various Items Around the Window Opening

The comments from AIAM, Honda, and Hyundai also extend to items of interior structure, aside from grab handles, that are not included in the definition of the daylight opening (because they have no potential for mitigating occupant ejection), but could restrict the travel of the impactor headform. AIAM suggested multiple ways of handling these items other than their removal, *i.e.*, changing the target position, eliminating a target, or performing the test with the item in place. In the NPRM, S6.3 specifically allowed for the removal of seats and the steering wheel. Our goal was to make sure the testing could be performed, even if these items need to be removed, as these items would provide no impediment to ejection in the real world.

We agree with AIAM, Honda, and Hyundai that there is a need to provide more specificity in this part of the standard (S6.3 and S6.4 of the final rule). One item mentioned by commenters was the exterior mirror. We believe this component is worthy of specific mention in the regulatory text as being an item that should be removed or adjusted so as not to impede the motion of the headform beyond the vehicle. As indicated by the National Forensic Engineers in its comments, exterior mirrors may break off during rollovers and are unlikely to have a role in mitigating ejection.

In the final rule, S6.3 will now specify that steering wheels, seats, grab handles and exterior mirrors may be removed or adjusted to facilitate testing and/or provide an unobstructed path for headform travel through and beyond the vehicle. In addition, we have added the steering column to the list since it is attached to the steering wheel and may be the means by which the steering wheel is removed or adjusted.

Beyond these components mentioned in S6.3, there are others that may obstruct the impactor path. For example, one could conceive of a rear drop-down entertainment center that blocks the upper targets. To address these items, S6.4 in the final rule will indicate that other vehicle components or structures may be removed or adjusted to provide an unobstructed path for the headform to travel through and beyond the vehicle.

Nissan requested that the final rule allow testing on a "cut body" and not a fully trimmed vehicle. It also requested that testing be done without the headliner since Nissan believes that the headliner will not affect the test results, but may instead result in laboratory error. Similarly, TRW wanted testing on a buck to be allowed.

We decline to make these changes requested by Nissan and TRW in the final rule. Manufacturers are free to conduct certification testing without the headliner, or on a cut body or test buck, as long as they are assured that the vehicle would meet FMVSS No. 226 when tested by NHTSA in the manner specified in the standard. We particularly understand why manufacturers might want to test on a cut body or buck during developmental testing. However, the agency prefers to test a vehicle in as near the as-manufactured condition as practicable, to better ensure that the performance we witness in the compliance laboratory is representative of the performance of the vehicle in the real world.

However, we recognize that there are practical difficulties of testing the ejection mitigation countermeasure in a laboratory. We have decided that S6.4 in the final rule will include language specifying the adjustment or removal of vehicle structure that interferes with the ejection propulsion mechanism and headform travel, but only to the extent necessary to allow positioning of the ejection propulsion mechanism and unobstructed path for the headform to travel. It has been our experience that for daylight openings that are not located in doors, there may be limited access on the opposite side of the vehicle to pass the impactor propulsion mechanism through. This may then require removal of a fixed window and or cutting of sheet metal to allow access on the non-tested side of the vehicle. These modifications will not affect the results of the impact testing.

iii. Removing Flexible Gasket Material For the Purpose of Determining the Daylight Opening

To keep the test area as large as possible, the proposed "daylight opening" definition excluded any flexible gasket material or weather stripping used to create a waterproof seal between the glazing and the vehicle interior. Flexible material is unlikely to impede occupant ejection through the opening.

Honda stated that while it understood the agency's desire to exclude gasket material from the daylight opening definition, it was concerned about the material being difficult to remove or damaged during removal for determination of the opening. Honda proposed an alternative where the gasket material is included in the daylight opening, but the 25 mm offset line defined in proposed S5.2.1(b), is decreased. It stated that this "retains the intention of addressing occupant ejection through side glazing, but test repeatability and validity are better assured." Similarly, TRW recommended that the opening be measured considering any gasket/weather stripping as potentially defining the opening, but the offset line be 20 mm from the opening rather than 25 mm. Honda stated that manufacturers would not enlarge the gasket material to reduce the daylight opening because of "styling, appearance and consumer acceptance." Nissan stated that "removing this [gasket] material prior to the test could expose the side curtain air bag system to sharp edges on the vehicle that it would not normally be exposed to during deployment and adversely affect system performance."

Both the AORC and TRW recommended that the agency obtain CAD data from the vehicle manufacturers and use this to determine the daylight opening and offset line. They believed that this would obviate the need for removal and reinstallation of the gasket/weather stripping, which they believed could lead to potential test variability.

Guardian, a glazing supplier, commented that: "The NPRM defines a window opening as the 'daylight opening' (page 63204). We believe the opening should include all related trim and gaskets that could be removed with the glass in a rollover situation."

In contrast, Takata indicated agreement with the proposed method of determining the target location.

Agency Response

We disagree with commenters that wish to allow gasket material or weather stripping to have a part in defining the opening. We continue to believe that this has the potential of causing an unnecessary reduction in the size of the opening, which may reduce the stringency of the test.

Most commenters wishing to include gasket material in the definition were concerned about potential test problems associated with removal and reinstallation of this gasket material or weather stripping in order to determine the daylight opening. We address the issue of testing with this material in the next section. In summary, we do not share this concern.

Both AORC and TRW suggested that CAD information submitted by manufacturers could be used by the agency to define the daylight opening, rather than removing any gasket material. It is certainly true that the agency can ask for information from manufacturers and this has been done for other FMVSSs [123] and is a part of FMVSS No. 226's framework concerning the rollover sensor.[124] However, we do not believe such a requirement is needed regarding the measurement of the window opening. We prefer to have a test procedure within the regulatory text of the standard that we can use to independently assess factors used in the compliance test, such as the size of the window opening, rather than depend upon information provided by the manufacturers.

TRW and Honda suggested a reduction in the offset line distance, defined in proposed S5.2.1(b), if the agency chooses to include gasket material in measuring the daylight opening. Honda did not suggest a value, but TRW recommended a reduction from 25 mm to 20 mm. No data were provided to indicate that the 5 mm reduction would compensate for reduction in the size of the opening that would occur from inclusion of the gasket material. There could still be a risk that measuring the size of the opening with gasket material in place could artificially reduce the testable area in a manner not in the best interest of safety. Given our decision to exclude the gasket material, we are not reducing the offset line distance.

On the other hand, we do believe that a small change in the definition of side daylight opening is necessary as it relates to gasket material and weather stripping. The NPRM referred to "flexible gasket material or weather strip[p]ing used to create a waterproof seal between the glazing and the vehicle interior." During our research, it became apparent that gasket material, in addition to sealing the glazing, may also provide a weather-tight seal between the door and the door frame. For purposes of defining the window opening, this gasket material should be treated the same as gasket material used for sealing glazing, because if it were not, it could artificially reduce the size of the daylight opening. Accordingly, S3 in this final rule excludes flexible gasket material or weather stripping used to create a waterproof seal between the glazing and the vehicle interior and the door and the door frame from the definition of daylight opening.

iv. Testing With Flexible Gasket Material In Place

In the section above, we stated that the final rule will continue to define the daylight opening without considering flexible gasket material or weather stripping. Thus, this material may, on some vehicles, need to be temporarily removed. However, this does not mean that the testing will be performed without this material. The NPRM proposed that the headform test be conducted with the flexible gasket material or weather stripping in place.[125]

The air bag suppliers commenting on this issue supported testing with weather stripping. TRW stated "the weather stripping must be present to provide representative inflatable countermeasure deployment, and occupant interaction with the countermeasure. Further, the absence of weather stripping during the test, could expose edges which could damage the countermeasure, affecting test performance." Takata stated that they "agree with the NHTSA's proposal to determine the target location and carry out the testing with [the gasket] materials."

As indicate in the previous section, most commenters wishing to include gasket material or weather stripping in defining the daylight opening were concerned about potential test problems associated with removal and reinstallation. We have not experienced difficulty or complexity in dealing with the gasket material in our testing. It has been our experience that gasket material, due to its flexible nature, can be moved aside to allow access to the vehicle surfaces that create the daylight opening. If the gasket covers the relevant vehicle surface that defines the daylight opening and needs to be removed temporarily to allow access to that area, once the measurement is made removal of the gasket need not be done again to define the opening. No data was submitted to indicate such a single removal and reinstallation or, for that matter, multiple removals and reinstallations, would have any effect on test results. We do not believe that removing and reinstalling the gasket will have any notable effect relative to other factors influencing test variability, such as normal manufacturer build-to-build variability.

We also agree with commenters who suggest that testing without this material may unnecessarily expose the air bag to sharp surfaces. In addition, the agency prefers to test a vehicle in as near the as-manufactured condition as practicable. Thus, in the final rule we have not added any regulatory text that indicates that flexible gasket or weather stripping will be removed during testing, as we have done in S6.3 for other parts of the vehicle.

v. Metal Dividers in Glazing

Hyundai requested clarification on how potentially non-structural steel dividing elements in a window opening should be handled. Our answer is such elements would serve to define the daylight opening since they do not consist of glazing. We currently have no reasonable way to exclude these dividing elements based on the extent to which they may or may not add structural integrity to the vehicle.

2. How We Determine Impactor Target Locations In An Objective And Repeatable Manner

i. Testing in "Any" Location

The Alliance, AIAM, Honda, Hyundai, AORC, TRW and Takata all requested that the final rule maintain defined locations for the impact targets as opposed to allowing any point in the window opening to be targeted. The Alliance AIAM, Honda, and Hyundai suggested that testing at any target point in the window opening would increase the testing burden for manufacturers without providing any meaningful information, and would introduce uncertainty in the certification process. The Alliance stated that "[t]he proposed *up to 4 targets* (without 'target reconstitution') achieves NHTSA's stated goal to 'assess how well the curtain covers the perimeter of the window opening' (FR 63204)." (Emphasis in text). AORC stated that "four impact points per window opening sufficiently represents the 'worse case' * * *." TRW also agreed with the view that the NPRM "adequately cover[s] the window opening by requiring that the most demanding locations of the opening be tested." Honda stated, in reference to

[123] For example, S22.4.1.2 of FMVSS No. 208 requires knowledge of the volumetric center of the static fully inflated air bag. The agency requires this information from vehicle manufacturers.

[124] The agency can ask the manufacturer to provide information about the rollover sensor's deployment capabilities. See proposed S4.2.4, *Technical Documentation.*

[125] 74 FR 63205

target points such as A1, that "coverage of these most challenging points by FMVSS No. 226 will successfully provide ejection mitigation with the adoption of this regulation." Both TRW and Takata suggested that the specification of exact target points supports a high level of repeatability, reproducibility and robustness of testing. In contrast, Advocates stated that the fixed target method limits the areas to be tested and performance outside of those areas will not be known.

Agency Response

We have decided to use the methodology of the NPRM to define the target points. First, we agree with the Alliance that the procedure using four defined targets achieves the agency's goal of assessing the coverage of the ejection mitigation countermeasure. We also agree with Honda's comment that the fixed target method will test or come very close to testing the worst case locations.

In response to Advocates, in developing the final rule's test procedure, we sought to achieve a full and robust assessment of side window opening coverage. We intentionally selected target locations that we believed will provide the greatest challenge to the ejection countermeasure. Based on our test data to date, we remain confident that this is the case with our current target selection method. If we were to test at any location, manufacturers will have less certainty in the certification process. Whether this would result in increased test burden is not clear. Although the concept of testing the window opening at any potential impact point has merit, we do not believe it is necessary for this standard to reduce certainty, since testing at defined target points will achieve our safety objectives.

ii. Methodology

The Alliance believed that the target locations should be determined in a manner consistent with the methods utilized by GM and Ford, which are based on occupant seating positions and "up and out" occupant kinematics in rollover events. The Alliance stated that GM uses three target points per window adjacent to a row of seating: (1) Upper rear; (2) centroid of window opening; and (3) head position of 5th percentile female with the seat back at a 10-degree rearward incline from vertical and the head position projected forward 30 degrees to the lateral axis. The Alliance indicated that, contrary to what was stated by the agency in the NPRM, for some vehicles, the lower forward GM target does not align with position A1. It stated that Ford uses three in the front window and two in the rear windows. Ford's front window locations are the same as GM's except that the target corresponding to the 5th percentile female position is projected forward from the lateral axis at 15 degrees rather than 30 degrees. For rear windows, Ford eliminates the 5th percentile female head target location.

The Alliance also requested that the rear window targets be reversed, i.e., the mirror image from that proposed by the agency. It stated that this would provide a "more consistent protocol" because the front window and rear window targets would be located in the same way, while achieving the stated goal of assessing "how well the curtain covers the perimeter of the windows opening."

The Alliance disagreed with the proposed method to add back a target (reconstitution). It believed that "[t]he combination of FMVSS 214 and FMVSS 226 requirements renders testing at any point and 'target reconstitution' unnecessary and redundant to provide enhanced side curtain coverage."

Batzer and Ziejewski indicated that "two impacts against the upper half of the glazing should be adequate." The commenter stated that for the bottom half of the window, the use of a headform is inappropriate. The commenter stated that known occupant danger for this region of the glass is arm and leg excursion and suggested that "a new device that simulates a forearm or calf/foot can, and should, be developed to validate the side curtain airbag against this mode of excursion. This need not be a 10 mph impact, but merely an excursion test."

Agency Response

The agency has decided not to reduce the number of target locations as requested by the Alliance and Batzer and Ziejewski. As expressed in Honda's comment, coverage of the most challenging points like A1 are necessary for FMVSS No. 226 to successfully ensure that adequate ejection mitigation is provided. The same level of ejection mitigation performance is not assured by the suggested alternative procedures.

We believe that three target locations are insufficient (and more so for the two locations resulting from the Ford procedure for rear windows) to test the entire perimeter of the daylight opening. The Alliance indicated that the GM and Ford target points are consistent with the assumption of "up and out" rollover occupant kinematics.[126] However, such an assumption ignores the possibility that during long duration, multiple quarter-turn rollovers, occupants can move to openings after impacting the ejection countermeasure, and impact the countermeasure multiple times. In addition, the GM and Ford impact locations seem to be most relevant to the belted occupant situations. As we have stated many times, the bulk of the benefits of this final rule come from unbelted occupants. The suggestion of Batzer and Ziejewski for two impacts near the upper part of the window is not well defined. It is not clear to us if the commenter is requesting two impact locations or two impacts on the same countermeasure. The latter would only be possible for a glazing-only countermeasure. If it is the former, it is unsatisfactory for the same reasons that we have expressed about the Ford procedure. We know from our own testing of vehicle systems that testing point A1 is vital to determine if the countermeasure provides full and robust coverage.

We are also declining the Alliance request to modify the target locations for rear windows such that they are the reverse of that proposed in the NPRM for rear windows. In Figure 13 below, illustrating the suggested Alliance targeting, it is shown that the Alliance procedure targeting can provide a large gap for daylight openings with a forward rake. It is our experience that, to the extent that the rear windows have a rake, this rake is forward. For rear window openings, matching the front window pattern creates a large gap of coverage, as shown in Figure 13. Further, the Alliance methodology crowds the targets closer together, raising the potential for forcing the elimination of targets based on the target reduction methodology. We are not aware of any reason why it is important to have consistency between the protocol used in the front and rear windows. Accordingly, we are denying the Alliance and Batzer and Ziejewski requests.

[126] The commenter did not define the meaning of "up and out." Based on the context of the Alliance's use of the "up and out" terminology, we assume that the term means that occupants would be ejected near their longitudinal vehicle location at the time of the rollover.

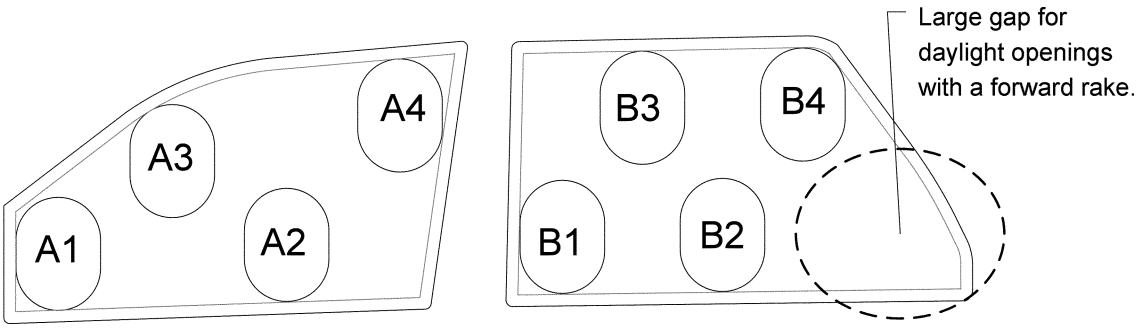


Figure 13 – Result of Alliance proposal for rear window targets with a forward rake.

iii. Reorienting the Targets

The Alliance, Hyundai, AORC, TRW, NTEA and Pilkington were all opposed to reorienting the impactor headform.[127] The Alliance stated that "[if a daylight opening is such that the headform cannot fit with 25 mm clearance when oriented with a vertical long axis, then NHTSA's goal to reduce the risk of head and upper torso ejection has already been achieved by the architectural characteristics of the vehicle, particularly when combined with belt usage."

Hyundai stated that they "found that the side daylight opening of some vehicles with high belt-lines [128] could not fit the outline of the impactor headform within the 25 millimeter offset line of the window opening." [129] Nonetheless, Hyundai opposed the rotation of the headform by 90 degrees for windows with small vertical dimensions where no targets will fit with the typical impactor orientations. It stated "these windows are unlikely exit portals." TRW believed that "revising the orientation of the headform for certain window shapes, while not doing so for others, does not appear to be based on any real world rationale." The Alliance, AORC and TRW raised testing concerns related to reorienting the impactor. The Alliance stated: "Arbitrary deviations from [the NPRM] approach introduce unnecessary setup variation and also increase the complexity of the impactor design."

The agency has decided that the final rule will allow the reorientation of the targets and the associated reorientation of the impactor headform, under specific conditions. We believe that, all things being equal, the size of an uncovered side window has some correlation to the risk of ejection. A gap in coverage of a small window could be an ejection portal, just as it could be for a large window. If the test procedure in the final rule does not allow for rotation of the headform, it could allow large gaps in the window coverage that could provide an ejection portal.

We examined two issues in investigating whether the headform should be reoriented. The first issue involved reviewing the number and location of impact targets for vehicles with relatively long and narrow side daylight openings (high beltline vehicles) under the NPRM targeting procedure. The second issue involved the pluses and minuses of systematically rotating the target outline in small increments in order to fit a single target in a window opening that would otherwise not accommodate a target.

In an April 15, 2010 meeting with NHTSA, Ford showed the impact locations for many of their current and future vehicles.[130] One of the vehicles was a MY 2010 Ford Taurus. In Table 40, we have summarized the number of impact targets in each daylight opening for many of the Ford vehicles, as provided by Ford.

TABLE 40—NUMBER OF TARGETS PER DAYLIGHT OPENING FOR FORD MODELS, ACCORDING TO THE NPRM TEST PROCEDURE

MY	Model	Type	Row 1	Row 2	Row 3
2010	Taurus	PC	1	1	NA
2010	Lincoln MKS	PC	2	2	NA
2010	Lincoln MKT	SUV	2	4	NA
2010	F150 Crew Cab	PU	4	4	NA
2010	F150 Super Cab	PU	4	2	NA
2010	F150 Regular Cab	PU	4	NA	NA
2010	Flex	SUV	4	4	4
2010	Mustang	PC	3	0	NA
2011	Fiesta	PC	3	2	NA
2012	Focus	PC	2	2	NA
2012	Future SUV	SUV	3	3	NA
	Next Gen. Full Size Van	Van	4	4	4

This table indicates that, without target rotation, more than half [7/12] of the vehicles on the list would have fewer than four targets in the row 1 windows. Similarly, for the second row windows, seven of 11 would have fewer

[127] This is the same as saying they did not want to rotate the targets, because the impactor headform orientation is aligned with the target orientation.

[128] The beltline of a vehicle is a term used in vehicle design and styling referring to the nominally horizontal imaginary line below the side glazing of a vehicle, which separates the glazing area from the lower body.

[129] NHTSA–2009–0183–0044, p. 6.

[130] Docket No. NHTSA–2009–0183–47.1

than four targets. This level of target reduction is much greater than we have seen in our research testing. There are several potential reasons for this emerging picture. First, manufacturers initially focused their introduction of rollover curtains on SUVs and pickups, which typically have larger windows. Second, the trend towards higher beltlines has reduced the height of windows.

The question then becomes, how extensive is the window opening coverage for windows with fewer than four vertically oriented targets? To help answer this question we also examined a partial side view of a MY 2010 Chevrolet Camaro. This view is shown in the technical report for this final rule. In Figure 14 below, we drew the outline of the daylight opening and the associated 25 mm offset line for illustration purposes. (These are approximations given the resolution of the image and given that we did not know the dimensions of the flexible gasket material around the opening. Also, we could not determine the exact outline at the forward lower corner because the view was obscured by the outside mirror. However, to the extent this drawing differs from the actual image of the vehicle, the differences would not be significant for the purposes of discussion in this section.)

If the targeting procedure defined in the NPRM is followed, the four initial target locations (primary and secondary targets) are as shown in the top graphic in Figure 14. (The procedure is explained in detail in the NPRM at 74 FR at 63205–63211.) Under the NPRM procedure, if the horizontal distance between target centers is less than 135 mm and the vertical distance between target centers is less than 170 mm, the targets are considered to be significantly overlapping and are eliminated. At the end of the process, only a single target would remain. See middle graphic of Figure 14(b). The forward edge of this target is 464 mm from the forward edge of the daylight opening outline, which would leave a large opening forward of the target untested. Occupant ejection could occur through that opening. Further, if the daylight opening were less than 1 mm smaller (a vertical dimension of less than 276.1 mm), under the NPRM procedure, there would be no targets in the window opening.

If we perform the same targeting procedure as defined in the NPRM except with a horizontally-oriented target outline (the long axis oriented horizontally), the result is the four targets shown in the bottom graphic of Figure 14. The forward edge of the most forward target was 173 mm from the forward edge of the daylight opening.

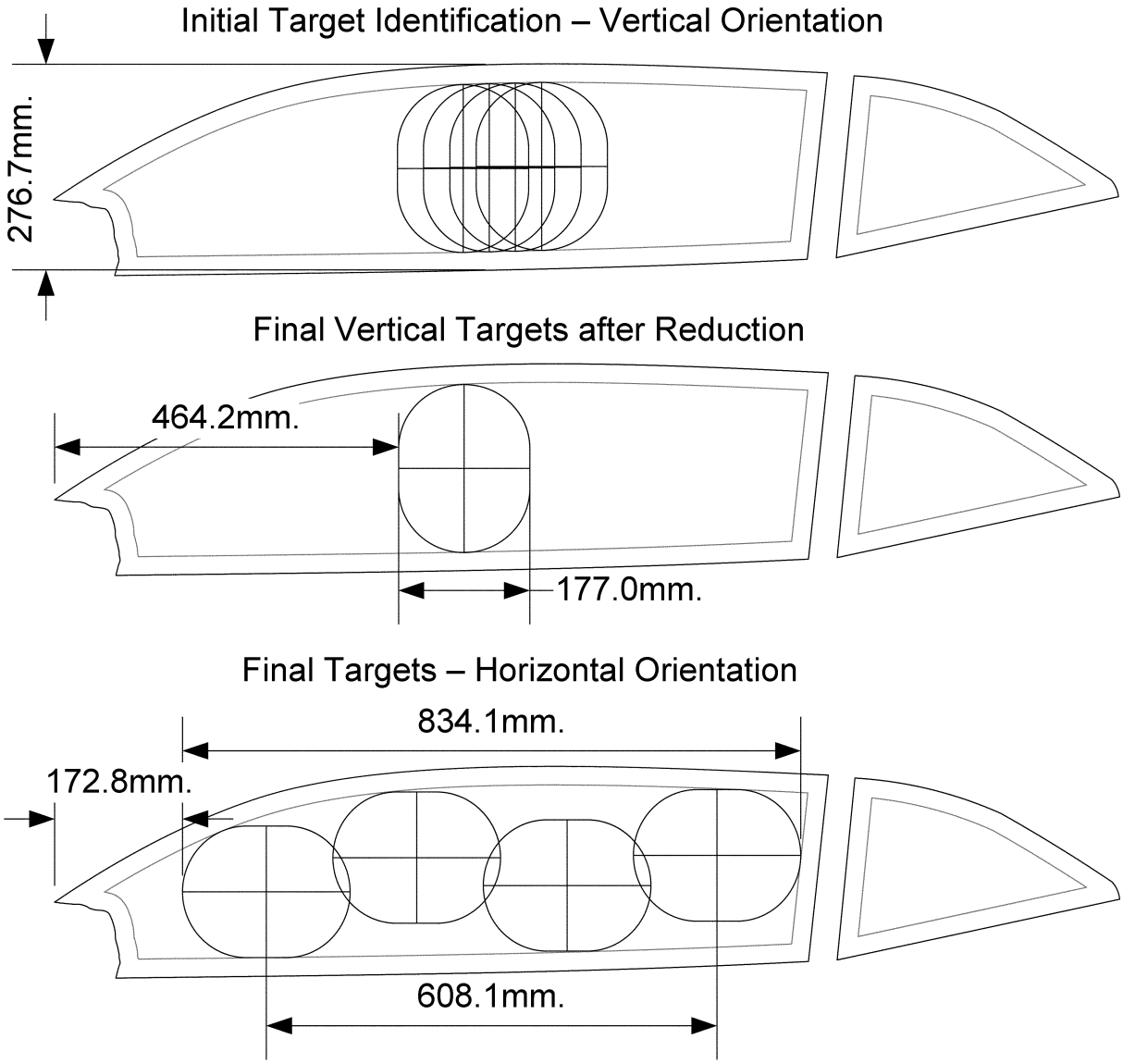


Figure 14 – Side daylight opening of a MY2010 Chevrolet Camaro - Showing initial and final vertical targets and final horizontal targets.

It appears that, if the target outline were to be kept only vertical, there would be an artifact in the test that could result in the exclusion of entire or large parts of some window openings from being tested, while not excluding a window that differed only by a few millimeters in dimension. For a long narrow window, the number of targets can jump from zero to four with an increase in vertical dimension of the window opening of only about 15 mm. If a long, narrow window had a vertical dimension of 277 mm, the NPRM procedure would result in no targets on the window opening. If the window vertical dimension were increased by only 5 percent, from 277 mm to 290 mm, under the NPRM procedure the targets would go from zero to four.

Figure 15 shows the result of the NPRM's targeting process with the vertical dimension of the daylight opening increased by 3 percent (from 277 mm to 285 mm). The four initial vertical target locations are shown in the top graphic. The target elimination process results in the two middle targets being removed but under the target reconstitution process a target is reconstituted between them; the final number of vertical targets is three, as shown in the middle graphic of the figure. The forward edge of the most forward target is 348 mm from the forward edge of the daylight opening, which is a substantial area. If we perform the targeting procedure with a horizontally oriented target outline, the four targets shown in the bottom graphic of Figure 15 result. The forward edge of the most forward target is 159 mm from the forward edge of the daylight opening.

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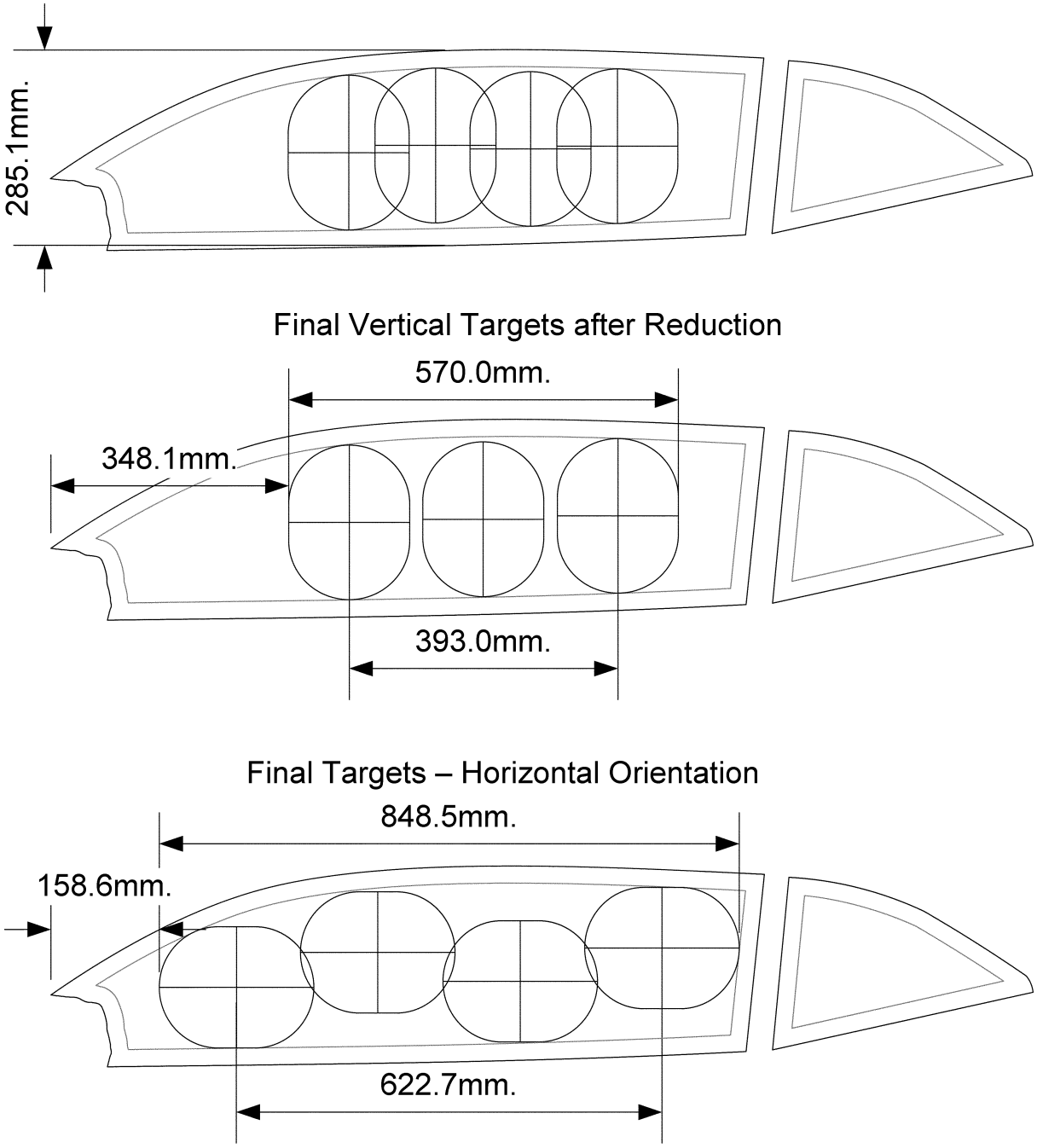

Figure 15 – Side daylight opening of a MY 2010 Chevrolet Camaro (approximate dimensions), with the height of the window increased by 3% - Showing initial and final vertical targets and final horizontal targets.

Figure 16 compares the horizontal coverage (dimension from leading edge of most forward target to the trailing edge of the most rearward target) of the daylight opening using the vertical and horizontal target outlines. The vertical targets show a great deal of sensitivity to the height of the daylight opening as opposed to the horizontal targets, which are very insensitive to opening height.

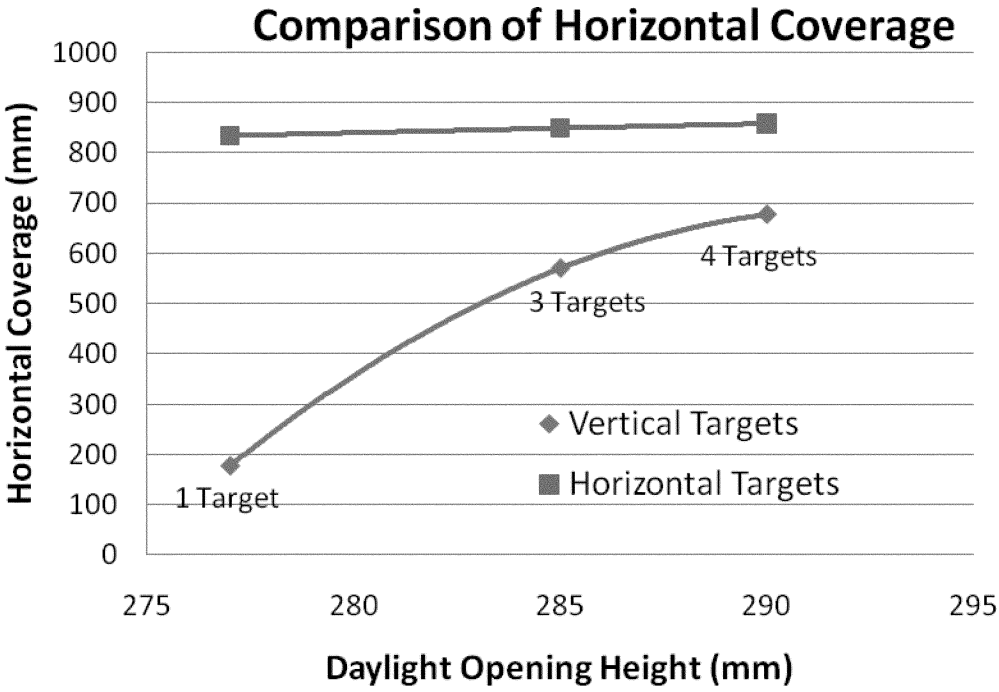

Figure 16

The second issue we explored involved the pluses and minuses of systematically rotating the target outline in small increments in order to fit a single target in a window opening that would otherwise not accommodate a target. Figure 17 depicts a daylight opening that is too small to fit a vertically oriented target outline within the offset line. Under the NPRM targeting procedure, such a daylight opening would not be impacted. However, rotating the target in increments of 5 degrees, from the initial vertical orientation, we find that the target outline will fit at an angle of 45 degrees.

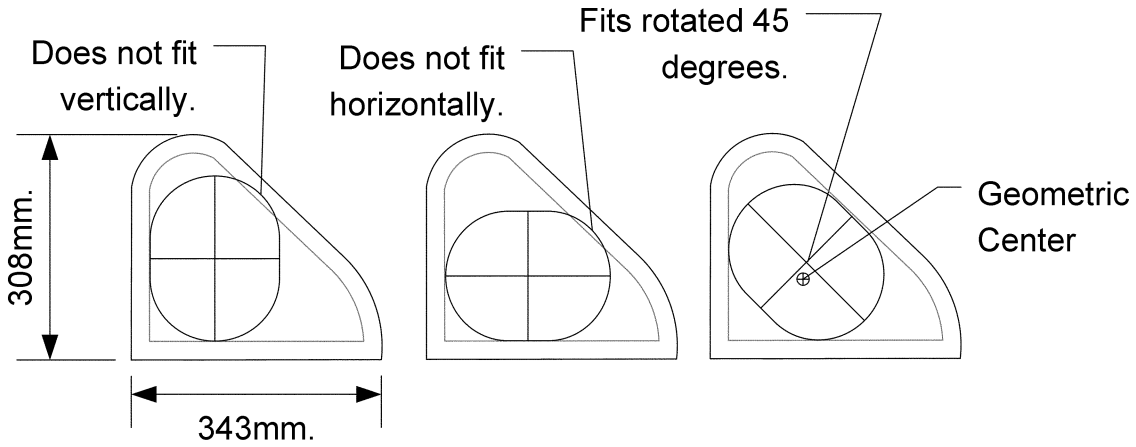

Figure 17 – Daylight opening shape where target outline only fits at some oblique orientation.

We disagree with the Hyundai comment that suggested that, if there are no vertically oriented targets that can fit in a window under the NPRM procedure, it is unlikely to be a portal for ejection. We have no data that supports the view that occupants maintain a vertical orientation when ejected through a window in a rollover. Given the chaotic nature of rollovers, we do not expect this to be the case. We know of no convincing reason why the target should not be rotated at the window opening, given that a simple and small rotation will enable us to test a countermeasure in a satisfactory manner and ensure that the ejection mitigation device fully covers the window opening.

If we specified that the targets may be reoriented (rotated) in a systematic manner, we could eliminate an artifact in the proposed procedure. In the section above, we saw that for a long

narrow window, the number of targets can jump from zero to four with an increase in vertical dimension of the window opening of about 15 mm. This is not desirable that a daylight opening would go from zero to 4 targets when the vertical dimension of the opening is above or below 276.1 mm. These artifacts of the combination of the window opening geometry and the orientation of the impactor under the NPRM are unacceptable, given that the standard would not assess the ability of the countermeasure installed at the window opening to prevent partial or complete ejections.

Contrary to the Alliance comments that rotating the headform is an "[a]bitrary deviation" of the test procedure, the agency believes that, for certain situations, to leave the headform in the vertical orientation would result in arbitrary results, not consistent with the need for daylight opening coverage. Similarly, we disagree with the TRW comment that implied that target reorientation needlessly complicates the test procedure. Rotating the target outlines would add little if any complexity to the standard. To the extent the procedure is more complicated, the need is justified.

Accordingly, the agency has decided that this final rule will allow the reorientation of the targets and the associated reorientation of the impactor headform, under specific conditions. The conditions are discussed below.

From the examples shown in the technical analysis above, any situation where fewer than four vertical targets can be placed in the daylight opening would allow for unacceptably large gaps in coverage. As shown in Figure 15, *supra,* the 3 vertically-oriented targets had 279 mm less horizontal window coverage than did the 4 horizontally oriented targets and the forwardmost horizontal target was 189 mm more forward than the vertical target.

Yet, the agency has chosen not to change the orientation of the impactor from vertical to horizontal when the same number of targets can be placed in the daylight opening in either orientation. This is so even though in some cases, it is possible that the horizontal targets provide more horizontal coverage of the window opening. There are several reasons for this decision.

First, regardless of target orientation, if the same number of targets can be placed within the window opening then the area being impacted in both cases would be essentially the same. For example, looking at Figure 18 below, the target outlines impact approximately the same amount of area in the window opening. What differs is the distribution of the targets within the opening, which is solely a function of the opening shape. The horizontal targets cover more of the window opening towards the bottom of the A-pillar and the vertical targets more fully cover more of the remaining areas of the window.

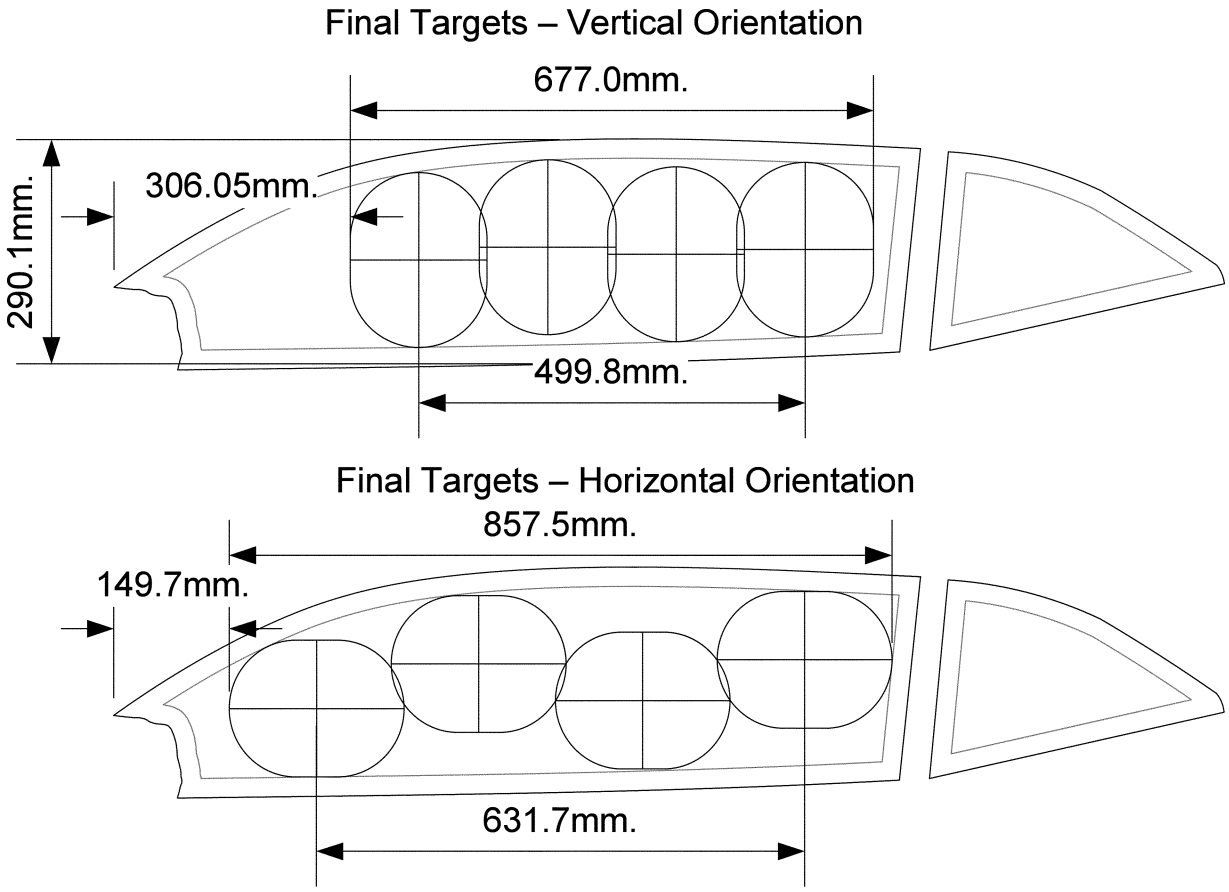

Figure 18 - Side daylight opening of a MY2010 Chevrolet Camaro, with the height of the window increased by 5% - Showing final vertical and horizontal targets.

Second, the bulk of our test data to date and the test data submitted by comments are with the impactor in the vertical orientation. This includes data that indicates that the proposed requirements are practicable. Without more test data with a horizontal orientation, we are reluctant to change the impactor orientation for all window openings. Notwithstanding that most of our testing was done with the impactor in the vertical orientation, when the number of targets is fewer because the target is oriented vertically, we believe that the importance of fuller window opening coverage outweighs all other considerations.

Third, there are window openings that would otherwise not accommodate a target unless the target outline is rotated to some oblique angle. See Figure 17. We find it objectionable not to specify that the impactor may be rotated.

We find no reasonable argument that would compel us not to allow rotation of the impactor beyond the vertical or horizontal configurations given that this might result in such a window not being covered by any countermeasure. To say that an occupant's head or some other body part cannot reorient itself during the rollover event, including the head or body part of a belted occupant, is not logical.

The conditions for the rotation of the targets and impactor headform by 90 degrees to a horizontal orientation are specified in the final rule regulatory text at S5.2.5.2 and S5.6.2, respectively. The conditions for the incremental 5 degree rotation of the targets and impactor headform are specified in final rule regulatory text S5.2.5.3 and S5.6.3, respectively. The 5 degree increment reorientation is about the y axis of the target and achieved by rotating the target's positive z axis toward the vehicle's positive x axis.[131] At each increment of rotation, an attempt is made to fit the target within the offset line of the side daylight opening. At the first increment of rotation where the target will fit, the target is placed such that its center is as close as possible to the geometric center of the side daylight opening.

iv. Suppose Even by Rotating the Headform the Vehicle Has No Target Locations

AIAM and VSC requested that the regulatory text expressly state that vehicles without any target locations are excluded from the standard. Hyundai suggested that any window not having targets according to the proposed requirement should be excluded.

Agency Response

We have added text to S4.2 of the standard to state that if a side daylight opening contains no target locations, the impact test is not performed on that opening.

The vehicle is not excluded from FMVSS No. 226, however. There are a number of requirements in section S4.2 of the standard that apply to vehicles that have an ejection mitigation countermeasure that deploys in the event of a rollover. Paragraph S4.2.2 requires the vehicles to have a monitoring system with a readiness indicator meeting certain specifications. Paragraph S4.2.3 requires the vehicle owner's manual to have written information about the ejection mitigation system and the readiness indicator. Paragraph S4.2.4 requires the manufacturer of the vehicle to make available to the agency, upon request, certain information about the rollover sensor system. Vehicles that have an ejection mitigation countermeasure that deploys in the event of a rollover are subject to these requirements even if side daylight openings contain no target locations. Since the vehicle is subject to FMVSS No. 226, the vehicle may be counted as a vehicle that meets the ejection mitigation requirements of the standard for phase-in and advanced credit purposes.

v. Decision Not To Test Target of Greatest Displacement

Vehicle manufacturers were supportive of a method to reduce the number of tests. However, not all supported the alternative presented in the NPRM to test at the 24 km/h impact speed at only the target location with the greatest displacement during the 16 km/h impact. Hyundai stated that "no significant additional information would be gained by testing all of the lesser displacement locations." The Alliance alternatively suggested a single impact speed and time delay for all target locations (16 km/h with a 3.4 second delay). The Alliance opined that "[d]eployment of side curtain airbags is highly dependent on placement of garnish trim and performance of attachments in the vehicle body. If a subsequent test needs to be performed [on] one side of a vehicle after an airbag is deployed, a new airbag and new garnish trim will have to be installed."[132] They mentioned that this reinstallation may not be representative of factory installation. In addition, it alleges that attachment points may wear or deform after multiple tests.

AIAM stated that "[t]here would be no reduction in test burden unless the agency were to require manufacturers to identify which impact location had the largest displacement in their low speed certification testing, so that the agency could perform its high speed test at the same location. Otherwise, the manufacturer could be required to conduct high speed tests at all impactor locations, to assure that it has test data for the same location that the agency tests."

Air bag suppliers were mixed in their responses on this topic. TRW recommended "keeping all four impact tests at both impact speeds. This is because NHTSA testing could identify a different 'worst point' than is identified by the OEM in their tests. Therefore, vehicle manufacturers would likely need to test more extensively than NHTSA. Thus while the compliance testing burden may be slightly lowered, testing at the manufacturer [sic] will probably not be diminished significantly." Takata suggested the alternative of testing all target locations at the 24 km/h-1.5 second test, then performing the 16 km/h-6 second test only at the location experiencing the greatest displacement in the first series. Takata believed that "it is important to test all the locations at the high energy level to ensure structural integrity of the countermeasure device. This approach identifies a robust design and also reduces the number of tests."

Agency Response

After considering the comments, we have determined that the final rule will require that all target locations be impacted at the higher and lower impact velocities rather than just impacting one target location at the higher speed test. This adopts the regulatory text option presented in proposed S5.5(2A) (except, as discussed earlier in this preamble, the higher speed will be 20 km/h rather than 24 km/h).

We found the comments from AIAM, TRW, and Takata to be informative and persuasive. We agree with AIAM and TRW that there is unlikely to be a significant reduction of test burden to the industry by only requiring a 1.5 second-high speed test at the location that yields the greatest displacement at the 6 second-low speed test. This is because our ejection mitigation side air curtain test data indicates that there is typically no clear distinction between the displacements of several of the target points in a vehicle window

[131] Looking at the left side of the vehicle from the outside, the rotation is counterclockwise and looking at the right side of the vehicle, the rotation is clockwise.

[132] NHTSA–2009–0183–0029, p. 30.

opening. There sometimes is no clear distinction that a certain target is the "weakest," showing the most displacement in the 16 km/h-6 second test. Agency testing of production vehicles set forth earlier in this preamble indicates that the weakest target location is not obvious across data from the 24 km/h-1.5 second test, 20 km/h-1.5 second test, or the 16 km/h-6 second test. Based on limited data from our new impactor, we found that there is less difference in displacement between the 20 km/h-1.5 second and 16 km/h-6 second tests. (See rank of the displacement by target location for the second row testing of the MY 2008 Highlander, Tables 10–18, *supra.*) Thus, vehicle manufacturers might not be assured from their data which target location will be the weakest in a NHTSA test. Accordingly, they may end up testing all of the targets to all of the impact speeds.

We also agree with Takata's comments that all target locations must be tested at the higher impact speed to assure that the testing determines the robustness of the designs. However, not only must the robustness of design be assessed at the top impact speed of 20 km/h, performance at 6 seconds must also be determined. The agency can only assure this by impacting all locations at 16 km/h with a 6 second delay.

AORC suggested that the standard could specify that manufacturers will pronounce to us which target point should be tested at the higher speed. We do not agree with the logic of binding the agency to only impact target locations deemed by the manufacturer to have the greatest displacement in the 16 km/h test. Such an approach would be an unacceptable limitation of the agency's ability to independently determine how to test a vehicle.

We also did not find compelling the comments expressed by the Alliance. We have already discussed and rejected the commenter's suggestion that FMVSS No. 226 should have only a single impact speed and time delay for all target locations (16 km/h with a 3.4 second delay).

With regard to the commenter's suggestion that there should be only one 16 km/h test due to wear and tear on and effect of trim components on testing, we decline this suggestion also. There was no showing that issues related to trim components justify reducing the tests to a single impact speed. Moreover, the Alliance's concerns about trim components appear inconsistent with Nissan's comment. Nissan indicated that it would like the final rule to allow testing on an untrimmed "cut body" and that the headliner would not be expected to affect performance of the side curtain air bag system. This indicates to us the possibility that trim components generally might not have a significant effect on curtain performance. The Alliance's comments about trim components are not substantiated and do not justify reducing the number of tests to one.

This final rule does reduce a test burden on manufacturers of vehicles that use only non-movable (fixed) glazing as the ejection mitigation countermeasure to meet FMVSS No. 226, without use of a deployable ejection mitigation countermeasure. We have written the standard to apply only the 20 km/h-1.5 second test to the daylight opening with the non-movable glazing, and not the 16 km/h-6 second test. If the displacement limit can be met at the window opening in the 20 km/h-1.5 second test, we will not subject the window opening to the 16 km/h-6 second test. This is because the 20 km/h test would be redundant. If the displacement limit is met in the high speed test, we believe the limit will be met in the low speed test.

vi. Reconstitution of Targets

The Alliance disagreed with the proposed method to add back a target (reconstitution). It believed that "[t]he combination of FMVSS 214 and FMVSS 226 requirements renders testing at any point and 'target reconstitution' unnecessary and redundant to provide enhanced side curtain coverage."

Agency Response

We disagree with the Alliance's position that target reconstitution is unnecessary and redundant. A large space between two impact locations in a daylight opening is not consistent with our desire for full window coverage. Reconstituting (adding back) a target back between two distantly-spaced targets helps to meet our goal. We note that both the Ford and GM internal ejection test procedures have an impact location at the geometric center of the window. For many window shapes assessed under the procedures of this final rule, the target at the center of the window would be close to the location that would be covered by the middle target reconstituted. Thus, the Ford and GM procedures appear to recognize the merits of testing for full window coverage.

f. Glazing Issues

The NPRM proposed to allow movable windows made from advanced glazing to be in position (up and closed) for the compliance test, but pre-broken by a specified test procedure to simulate the breakage of glazing during a rollover. Tempered (non-advanced) glazing shatters when broken, so for tempered glazing, we proposed that we would conduct the glazing breaking procedure and shatter the glazing, remove the glazing, or retract the glazing, at the manufacturer's option.

1. Positioning the Glazing

The NPRM discussed the pros and cons of advanced glazing for ejection mitigation. Advanced glazing may enhance the performance of current air bag curtain designs. Vehicles tested by NHTSA showed an average displacement reduction across target locations and test types of 51 mm.[133] However, the updated target population data show that 31 percent of front seat ejections and 28 percent of all target population ejections are through windows that were partially or fully open prior to the crash. Further, the agency was concerned that in the real world, advanced glazing would not be as effective as an ejection countermeasure due to vehicle structural deformation and the effects of inertial loading of the window mass.

The NPRM requested comments on several alternatives, including the alternative of testing all movable windows removed or retracted, regardless of whether the window is laminated or tempered; fixed laminated windows would be permitted to be kept in place, but pre-broken.

Comments

Commenters were divided in their views of how Standard No. 226 should test vehicles that have advanced glazing covering a side daylight opening.

Vehicle manufacturers and air bag suppliers did not support testing with advanced glazing in place. Ford stated that "[s]ide glazing retention, regardless of construction-type (*e.g.,* laminated or tempered), in real-world rollover crashes is random and unpredictable." Ford stated that side glazing retention "is dependent on the unique characteristics of that particular crash (*e.g.,* number of quarter turns, vehicle roll rate and deceleration, objects contacted, occupant loading, vehicle deformations, etc.)." The commenter

[133] We stated in the NPRM that we believed that incorporation of advanced glazing for ejection mitigation would be relatively expensive compared to the implementation of air bags. The PRIA showed that the proposed requirements would add about $33 per light vehicle at a total cost of $568 million for the full curtain countermeasure. A partial curtain plus advanced glazing would have an incremental and total cost of $88 and $1,494 million, respectively.

referred to an SAE paper from Kramer, et al.[134] in which the authors stated "there is information from the field (FARS and other individual collisions) that document ejections through laminated side glass." Ford recommended [135] that—

> the eventual requirements of FMVSS 226 be focused on rollover activated side curtain technology, with consideration of the associated capabilities of this technology, because these devices are designed to deploy regardless of side glazing status in a rollover (*e.g.,* retained, up, down or partially open) or construction of the glazing.

Honda had a similar view, stating that "a vehicle with movable windows, being operated with a laminated glazing even partially open, could result in the window falling out of the window frame due to body deformation resulting from the crash or subsequent ground contact during a rollover event." It stated that because the pre-breaking procedure allows the window to be in the full up position it "may not fully simulate real world conditions." Honda suggested that all testing should be done with the windows "removed or retracted prior to the impact test instead of allowing pre-breaking for movable windows." For fixed laminated windows, the commenter said that "the concerns mentioned above would not apply and pre-breaking would be a suitable method of simulating real world conditions * * *."

AORC and TRW expressed concerns about testing glazing with the window up. They suggested that the agency could test without any glazing present, but either increase the amount of allowable excursion, or reduce the energy level (*i.e.* reduce the impactor velocity) for impact locations which have advanced glazing, to reflect the enhanced performance expected if the advanced glazing were present.

In contrast, glazing suppliers stated that all testing should be performed with the advanced glazing in place because they believed that the NPRM provided strong support of advanced glazing in reducing impactor displacement.

Consumer groups overall supported the use of advanced glazing. IIHS described roof crush and side impact testing it did on several vehicles with front row laminated glazing. IIHS stated that all the laminated glazing remained intact within the window frame. IIHS suggested NHTSA provide an incentive to vehicle manufacturers to use advanced glazing, such as by testing all vehicles without the glazing in place but allow a higher displacement for vehicles equipped with laminated glazing. In contrast, Advocates suggested NHTSA should test with both air curtains and advanced glazing and require a much reduced displacement limit. Public Citizen wanted the final rule to specifically disallow the use of advanced glazing on a vehicle unless it was in combination with side curtain air bags. Public Citizen stated there is a lack of evidence that laminated glazing will perform well enough on its own.

Agency Response

This final rule does not allow the use of movable glazing as the sole means of meeting the displacement limit of the standard (*i.e.,* movable glazing is not permitted to be used without a side curtain air bag). It also specifies that if a vehicle has movable advanced glazing, the 16 km/h-6 second test will be performed with the glazing retracted or removed from the daylight opening. Our decision is based on the following factors.

First, field data already evidence an incongruity between the glazing countermeasure and the foreseeable use of it by the public. The updated target population data show that 31 percent of front seat ejections and 28 percent of all target population ejections are through windows that were partially or fully open prior to the crash. We have no small concerns about a countermeasure that can be easily, totally and most likely unknowingly counteracted by motorists by the simple and everyday act of opening a window. As crash data show, many in the target population already operate their vehicles in a manner that negates the efficacy of the countermeasure. Any benefits accruing from advanced glazing will not be achieved if the window were partially or fully down.

Second, in contrast to IIHS's roof crush and side impact laboratory test findings, the field data of real-world performance of advanced glazing are showing that even when movable advanced glazing is initially up, such glazing may not be present as an effective countermeasure beyond the initial phase of a rollover. Rollovers are one of the most severe and unpredictable vehicle crash events. Based on an analysis of field data and the comments on the NPRM, we are not confident at this time that movable advanced glazing used alone, without an ejection mitigation side air curtain to supplement it, will be a viable countermeasure throughout a rollover crash. The following illustrates some real world examples of the un-predictable nature of advanced glazing in rollovers.

In NASS CDS case 2001–43–190, a MY 2000 Audi A8 experienced a left leading, four quarter-turn rollover.[136] This vehicle did not have side curtain air bags. The unbelted driver was completely ejected through the sunroof. The belted front passenger was not ejected. The technical report accompanying this final rule shows the interior views of the passenger and driver sides of the vehicle, respectively. The passenger side laminated glazing has completely detached from the first and second row windows. However, the first and second row driver side windows are in place. The first row driver side window was coded as being partially open prior the crash. It remained so after the crash, although it was extensively damaged. The second row driver side window was in place and undamaged.

In SCI case CA09063 (RODSS 7242), a MY 2003 Lincoln Aviator with laminated glass in the driver's side window sustained a head-on collision followed by a three quarter-turn rollover. This vehicle had rollover deployable curtain air bags, but they did not deploy. The driver and right front passenger were belted. There were no ejections. Both laminated driver and front row passenger windows detached from the window opening.

In SCI Case CA10006 (RODSS 8289), a MY 2003 Lincoln Aviator experienced an eight quarter-turn rollover. This vehicle had rollover deployable curtain air bags, which deployed. The driver and right front passenger were belted. The belted driver was killed due to partial ejection of her head. Both laminated driver and front row passenger windows vacated the window opening. The passenger side window glazing is shown in the foreground of a photograph of the scene, completely detached from the vehicle.

In these examples, it is not possible from the visual evidence to determine when in the rollover event the advanced glazing detached from the window opening, nor the cause(s) of the separation. In all except one of the cases there was a belted occupant adjacent to the window that detached from its opening. In these cases, occupant interaction may have been a factor. The rear passenger side window of the Audi did not have an adjacent occupant, so

[134] Kramer *et al.* "A Comparative Study of Automotive Side Window Occupant Containment Characteristics for Tempered and Laminated Glass," SAE Paper 2006–01–1492.

[135] NHTSA–2009–0183–0020, p. 4.

[136] Although the NASS coding indicates that the first 2 rows of side windows were tempered glass, we determined this to be incorrect from the photographic evidence.

occupant contact was not likely the cause of the window vacating the opening. Other potential causes are structural deformation and inertial forces due to impact or vehicle rotation.

We found compelling the Ford and Honda comments discussing the potential for advanced glazing to detach from the window opening in real-world rollovers. We agree with Ford that the retention of advanced glazing, particularly movable glazing, can be a function of the random and unpredictable nature of rollovers. We also believe there is merit to the Honda contentions that movable advanced glazing could vacate the window frame due to vehicle body deformation resulting from crash dynamics or ground contact, even when the window is partially up, and that the pre-breaking procedure performed in a full-up position may not fully simulate these conditions. We found their comments to be consistent with the information presented above, which shows examples of field performance of advanced glazing (specifically laminated glazing) in several rollover and combination crashes (rollover in combination with planar impacts). Particularly interesting is the Audi A8 rollover, where the glazing on one side of the vehicle vacated, but the windows on the other side did not.

Ejection is a major cause of death and injury in rollover crashes. As stated in our discussion of the safety need for this rulemaking, according to 2000–2009 FARS data, about half of the occupants killed in rollovers were completely ejected from their vehicle. A double-pair comparison from the last ten years of FARS data show that avoiding complete ejection is associated with a 64 percent decrease in the risk of death. The ejection countermeasures that should be installed in response to this final rule are those which have been shown to perform well in keeping occupants in the vehicle in rollover crashes. We are unable, at this time, to assert our confidence in the ability of advanced glazing to retain occupants throughout a multiple quarter-turn rollover when used alone in movable window applications.

We have learned from the comments about ways to improve FMVSS No. 226's ability to distinguish between countermeasures. We saw that the test procedure should be enhanced to ensure that the vehicle will provide ejection mitigation protection throughout a multiple quarter-turn real-world rollover. The proposed impactor test of ejection countermeasures is appropriate and worthwhile, but we have learned that to better replicate real-world conditions, it is imperative to remove any kind of glazing on a movable window when preparing for the 16 km/h-6 second test. Since there is a reasonable possibility that the movable window glazing will vacate the vehicle in the later stages of the crash, by removing the glazing in the test we better replicate the real-world condition. Removing such glazing, and expressly stating in the standard that vehicles are not allowed to use movable glazing as the sole means of complying with the standard, assure that movable advanced glazing will be used with an ejection mitigation side curtain air bag or other deployable safety system. These provisions assure that the movable glazing will have to be supplemented by a side curtain air bag or other countermeasure, thus assuring a minimal level of safety in the event the window is partially or fully rolled down or vacates the window opening due to the dynamics of the crash.

It is possible that there could be modifications to the designs of the window frame that may improve the ability of movable advanced glazing to remain within the window opening during a rollover.[137] However, the agency currently does not have the information to make this determination. We assume that this is what the AORC meant when it stated that a single integrity test for laminated glazing could be established to verify retention. Unfortunately, we did not learn of these potential test parameters from the comments.

Some glazing manufacturers indicated that the problem of the open window could be mitigated by newer vehicle safety technology that rolls windows up prior to a crash. It is our understanding that at least some of these systems are initiated when the ESC is activated.[138] ESC would activate in only a portion of the rollover events that make up our target population, *i.e.*, most likely single vehicle rollover crashes. The remainder would not be covered. Moreover, the effectiveness, cost and practicability of an automatic roll up system in achieving the benefits of ejection mitigation throughout a multiple quarter-turn rollover has not been demonstrated.

Accordingly, for the 16 km/h-6 second test, if a vehicle has movable advanced glazing as all or part of the ejection countermeasure, the test will be performed with the glazing retracted or removed from the daylight opening. Based on the 28 percent of the target population ejected through windows open prior to the crash and uncertainties about the field performance of the current movable advanced glazing, we cannot agree to the request that all impact testing be performed with the movable advanced glazing in place.

If the advanced glazing is fixed in place, we will not remove it in the 16 km/h-6 second test. It is reasonable to assume that glazing permanently fixed in the up position will be up when the vehicle is on the road. We will pre-break the fixed glazing, to replicate the state of the glazing during the stages of a rollover event, but we will not remove it. Likewise, if the glazing is fixed, we will pre-break it but will not remove it in the 20 km/h-1.5 second test. Thus, it remains technically possible under the standard to have fixed advanced glazing as the standalone countermeasure. This provides an incentive to manufacturers to use advanced glazing.

Movable advanced glazing will not be removed in the 20 km/h-1.5 second test. This test will be performed with the advanced glazing in place, but the glazing will be pre-broken to replicate the state of the glazing at the outset of a rollover event. Although advanced glazing could vacate the opening late in the crash event after many quarter-turns, we have more confidence that advanced glazing will not be dislodged early in the rollover event represented by the 20 km/h-1.5 second test. This is because vehicle structural deformation and inertial effects resulting from ground contacts contributing to glazing being dislodge will be cumulative, *i.e.,* increase as the rollover event continues.

IIHS's tests also showed that the advanced glazing on some of the vehicles it tested remained within the frame in roof crush and side impact testing. Allowing movable advanced glazing to be in position in the high speed (20 km/h-1.5 second) test will provide an incentive to vehicle manufacturers to use advanced glazing to meet the standard's requirements or enhance ejection mitigation performance of side curtains.

We decline the suggestions to provide an incentive for advanced glazing by increasing or decreasing the allowable displacement of 100 mm. TRW and AORC suggested increasing the allowed

[137] The agency researched such window frame modifications during the research into advanced glazing as a standalone ejection mitigation countermeasure. "Ejection Mitigation Using Advanced Glazings: A Status Report," November 1995, DOT DMS NHTSA–1996–1782–3, pp. 4–7 to 4–10. Results indicated that adequate retention was maintained in the area of encapsulation, but that the unsupported (nonencapsulated) top edge was subject to large deflections. (pg. 7–29).

[138] Mercedes offers this feature and calls it Pre-Safe.

displacement, or decreasing the impact speed, at places on the window opening that had advanced glazing. We cannot agree to lessen the severity of the test for advanced glazing as this would reduce the protection of the motorists, particularly those who may have the window partially or fully rolled down. Advocates suggested decreasing the displacement limit below 100 mm for combined advanced glazing plus curtain air bag. As explained earlier in this preamble, the 100 mm limit strikes the appropriate balance between stringency and practicability.

Advocates also stated that vehicle structural deformation will reduce the effectiveness of the curtain air bags and advanced glazing will increase roof strength.[139] It presented no data to substantiate these claims. NHTSA is not aware of a technical or engineering basis for the view that side curtain air bag performance will be reduced by structural deformation.

Our concerns about the performance of advanced glazing also extend to the deformation of the window opening. Because of its mass, advanced glazing will be much more susceptible to inertial loading from vehicle rotation and vehicle ground contact than will curtain air bags. That was the point of our statement in the NPRM (74 FR at 63213) about advanced glazing having greater mass compared to an air bag curtain. In response to comments from some glazing suppliers, we did not mean to imply that laminates had a weight penalty when compared to tempered glazing.

2. Window Pre-Breaking Specification and Method

We have determined that there is a safety need to have a glazing breaking procedure applied to both the interior and exterior sides of the glazing. We are slightly modifying the proposed procedure, to adopt use of a 75 mm offset pattern to reduce the glazing preparation time.

NPRM

In the NPRM, we proposed specifications and a method that called for punching holes in the glazing in a 50 mm horizontal and vertical matrix ("50 mm matrix") on both sides of the glazing. A spring-loaded automatic center punch was to be used to make the holes. The punch has approximately a 5 mm diameter before coming to a point. The spring on the punch was adjusted such that 150 N ±25 N of force[140] was required for activation. The details of the procedure were described in the NPRM. When punching a hole, we placed a 100 mm by 100 mm piece of plywood on the opposite side of the glazing as a reaction surface against the punch. In testing glazing that will disintegrate under the procedure (*e.g.,* tempered glazing), the vehicle manufacturer could opt to remove or completely retract the tempered glazing and thereby bypass the window breaking process.

We also noted that we would be continuing research into window pre-breaking methods, specifically, a variation of the 50 mm matrix hole punch method where the holes on either side of the glass are offset by 25 mm. Initial indications at the time of the NPRM were that this variation exhibits the potentially positive attribute of lessening the chances of penetrating the inner membrane between the glass layers. 74 FR at 63215.

Comments

The Alliance said that use of different punches and punch settings can produce differing amounts of penetration and potential damage to the plastic laminate. The commenter also believed that the tolerance for the punch activation force is too large (17% of nominal value), and that the "rigid" backing material needs to be specified, as does the pressure/force applied to the backing material. The AORC supported offsetting the breaking pattern by 25 millimeters from the inside to the outside of the window, to reduce the potential that a punch impacting the same point from both sides of the window would produce a hole through the laminate. Guardian, EPGAA and Solutia believed that the 50 mm pre-breakage procedure was excessive and not consistent with real-world conditions, particularly breakage of the interior side of the glazing. Guardian commented that at a minimum the pre-breaking procedure be altered to offset the punch locations on either side of the glazing. Exatec asked about the suitability of the procedure for non-glass advanced glazing material.

Agency Response

We disagree with the comments from the vehicle manufacturers and air bag suppliers that the proposed pre-breaking procedure was too time consuming, onerous, or impractical. Nonetheless, the procedure we adopt today calls for less than half the number of punched holes, reducing the glazing preparation time.

We have performed well over 100 tests with advanced laminated glazing using various methods of pre-breaking. About 30 of these tests have been performed using a 50 mm matrix. We estimate that it takes our laboratory technicians about 30 minutes to mark the 50 mm grid pattern and punch all the holes for a relatively large front row side window. The time it takes to mark the holes per glazing pane can be significantly shortened by laying an unmarked pane on top of an already marked pane. If a subsequent test is to be performed (as might be the case during research and development) and the door trim is installed, it takes approximately 20 to 60 minutes to replace the glazing. Often this is done in parallel with preparations for other aspects of the test, so the overall test time is not affected appreciably. This procedure is not difficult or onerous to conduct.[141]

Nor is the procedure gratuitous. To the contrary, the pre-breakage procedure is crucial to ensuring that advanced glazing will perform as intended in the field. Advanced glazing is weakened when pre-broken; the more breakage of the glazing, generally the more displacement of the impactor. See Table 23 of the NPRM, 74 FR at 63215. The pre-breakage procedure is intended to condition the glazing to mimic the degree of breakage that is occurring in the field. Crash information and the results of impact testing corroborate the necessity of the proposed procedure.

In the technical report accompanying this final rule, we have images from several rollover crashes. The first was a MY 2000 Audi A8 that underwent four quarter-turns. The second was a MY 2003 Lincoln Aviator that was exposed to a frontal impact followed by a three quarter-turn rollover. The last vehicle was also a 2003 Aviator that experienced an eight quarter-turn rollover. The technical report also shows a close-up of the driver side window laminated glazing of the Aviator that rolled eight quarter-turns. In all of the cases, the crash scene photographs show the degree to which both sides of the glazing have been disintegrated, especially for those laminates that have vacated the window

[139] The relevance of the Advocates comment about advanced glazing increasing roof strength is not clear to us. In the May 12, 2009, FMVSS No. 216 final rule, the agency stated that we had investigated the contribution of tempered side windows to roof strength and found that it had limited effect (74 FR 22371). We have no reason to believe that there would not be similar results from advanced laminates.

[140] This force level worked well for the samples of advanced glazing tested by the agency.

[141] When testing with tempered glass, if the glass pane does not move completely out of the window opening into the door, it must be removed by opening the door trim. This glass pane removal takes about 20 to 60 minutes as well, due to the removal and reinstallation of door trim.

opening. This finding that advanced glazing experienced severe damage to both inside and outside surfaces and detached from the vehicle supports our belief that pre-breaking the advanced laminate should be aggressive. The technical report also has a view of the driver's advanced glazing in a 2000 Audi A8 from NASS case 2001–43–190. The glazing remained in the window. Some areas appear more highly damaged than others.

Accordingly, we are adopting the glazing breaking procedure, with slight changes that reduce the number of punched holes.

In the NPRM preamble (74 FR at 63215), we stated that that the agency was contemplating using a method for glazing pre-breaking that takes the 50 mm matrix and offsets the holes horizontally on each side of the glazing by 25 mm. Initial indications were that this variation exhibits the potentially positive attribute of lessening the chances of penetrating the inner membrane between the glass layers. Our research since the NPRM has been focused on this and another alternative offset method. This alternative uses a 75 mm by 75 mm hole punch pattern on both sides of the glazing. However, the matrix on the inside of the glazing is offset by 37.5 mm [75 mm/2] horizontally. A 75 mm matrix pattern is used to reduce the number of breakage points from the 50 mm matrix, and as stated before, the offset reduces the chances of completely penetrating the material sandwiched between the glazing layers. The technical report provides a schematic of the 50 and 75 mm offset patterns.

Our new results are consistent with our previous results. See the technical report for this final rule. We found that the method of pre-breaking the laminated window has a discernable effect on the test results. We compared the 50 mm offset pattern to the 75 mm offset pattern. When these treatments were able to be compared statistically, there were no significant differences between the 50 and 75 mm offset hole punch pattern as it relates to impactor displacement. Moreover, given that finding and the finding that the 75 mm offset has less than half the number of punched holes, reducing the glazing preparation time, this final rule adopts the use of the 75 mm offset pattern.

In response to Exatec, the final rule will clarify that it is only necessary to attempt to make the holes in the glazing and to not actually succeed. However, we will not change the procedure to stop after the first row is attempted. We have no firm basis at this time to treat one type of advanced glazing any differently than another. It is conceivable that the punches might not break the material, but could produce stress concentrations that weaken it.

Finally, we decline all but one of the Alliance's requests because we do not believe that the procedure is not repeatable or reproducible and no information to the contrary was provided by the commenter. We believe that the tolerances and values for center punch angle, activation force and punch tip diameter are sufficient. We will specifically call out the material for the 100 mm x 100 mm reaction surface, rather than simply indicate that it should be rigid. The final rule will specify the use of plywood with a minimum thickness of 18 mm (standard ¾ inch), which is the material we used during our testing. Although we believe any sufficiently rigid material will adequately perform this function, for simplicity we will specify plywood.

g. Test Procedure Tolerances

The proposed regulatory text had tolerances on various test parameters of the proposed test procedure. For example, the proposed text specified that the target outline must be aligned within ±1 degree of the vehicle longitudinal plane when determining the proper target location. Tolerances were selected such that they would not affect the test results, yet not be so small as to be unusable. In some instances, we based tolerances on those of other FMVSSs because those tolerances have been practicable and useful. For example, the tolerance on the impactor alignment with the vehicle lateral axis was based on a similar linear impactor tolerance in S5.2.5(c) of FMVSS No. 202a, "Head Restraints." Tolerance selection was based on test experience and engineering judgment. Comments were requested on whether the tolerances assure an objective, repeatable and practical test procedure.

Comments

1. The Alliance "requested that impactor specification be updated to clarify that the long axis of the impactor headform is to maintain a vertical orientation throughout the full stroke of the impact event. This approach is recommended in an effort to maximize repeatability and reproducibility of test results." The Alliance stated that they had observed some impactors that constrain this motion and others that do not.

Agency Response

We agree with the request. The headform should not be able to freely rotate during the impact test. Both our original and new test devices have a specific mechanism to constrain them from rotation about their axis of travel. Thus, we have added a specification that the ejection impactor is inspected after the test, to make sure that it is still within the ± 1 degree tolerance required at launch.

2. TRW and AORC expressed concern about the ± 0.1 second tolerance on the impact times of 1.5 and 6 seconds. They suggested a tolerance of ± 0.05 seconds to reduce the amount of test variability due to air bag pressure changes. The AORC also would like the agency to clarify the time delay such that it would be the period of time the "unimpeded impactor would arrive at the target location."

Agency Response

We are declining these requests. To answer the questions, it is important to keep in mind that under the test procedures, the impactor is to strike the countermeasure at the specified speeds and time delays.

The target location is found by projecting the daylight opening on a vehicle vertical longitudinal plane and then projecting the target onto that plane. There are an infinite number of parallel vertical longitudinal planes, or alternatively, the vertical longitudinal plane can be thought of as having any lateral location. Assembling all the planes, each with a projection of the target, creates a three dimensional projection of the target, which crosses the vehicle laterally. Or, in other words, imagine the 2 dimensional target being translated along the transverse vehicle axis, creating a path the impactor headform should be setup to travel along.

If the countermeasure is an air bag, it is deployed, and the ejection impactor is to strike the countermeasure (air bag) at the impact target location, at the specified speed and time delay. The trigger for the time delay is the activation of the countermeasure. For a curtain air bag, that would be the time at which the deployment is activated. The speed and time of impact of the impactor are measured at contact with the countermeasure (air bag) and must both be within the specified tolerances. To make it clear that it is the countermeasure that must be contacted at the specified time intervals, we have added text to S5.5(a).

Since the agency anticipates that its tests will involve testing side curtain air bags, we need to account for the effect of the air bag on the impactor's timing. The calibration testing of our new impactor indicates that the impactor would meet the timing tolerance

reduction recommended by commenters if the target were at a static location. However, although our experience has been that curtain air bags deploy in a very consistent and repeatable manner, the fact is they are not static. Also, we determine contact time on a curtain through video analysis. All in all, because of the variables and calculations needed to establish contact time with the countermeasure, we believe it is more reasonable to maintain the ± 0.1 second impact time tolerance.

3. The AORC suggests the procedure specify that contact with the countermeasure occurs when the impactor is beyond the influence of the propulsion system.

Agency Response

We agree and have modified S5.5 of the regulatory text by adding a statement that the specified ejection impactor velocities must be achieved after propulsion has ceased.

4. Honda asked if the agency has any intention of specifying the interval between each impact test. It also stated that the impactor speed might decrease after propulsion, so it requested that "NHTSA clarify the position (by time) that the impact speed should be measured." Honda also asked how contact with the countermeasure is determined, and requested that we clearly state the speed and displacement measurement methods. Honda further requested that NHTSA provide the accuracy, sampling time, and filtering of each sensor.

Agency Response

We do not agree with the suggestion to specify an interval between multiple tests. We do not know of a reason to rest the equipment between tests. We have no reason to believe that the amount of time between tests would have any effect on the test results.

As explained above in answering TRW and AORC, the speed and time of impact are measured at contact with the countermeasure and must both be within the specified tolerances. We have made these measurements during our research testing, in several ways. As indicated above, one method we have used to determine time of contact within a resolution of about 5 ms is video analysis. Another method is to know prior to the test the approximate location of the impactor stroke where contact will occur. In either case, the velocity versus time output of the ejection impactor can then be used to determine if the contact time and velocity parameters were met.

There is no need to provide in the standard a specification for velocity and displacement measurement. There are multiple ways of measuring impactor displacement and velocity. The output of displacement-based instruments such as Linear Variable Differential Transformers (LVDTs) or string potentiometers can be used directly for displacement or differentiated to give velocity. Accelerometer output can be integrated once for velocity and twice for displacement. A light-based speed trap can be used for velocity measurement as well. The agency has used all of these methods. We believe it would be counterproductive to specify a single method in the regulatory text in that this may limit our flexibility in conducting compliance testing. We note also that we found that our new impactor loses very little speed over large ranges of stroke. If the speed is correctly set, it is not difficult to meet the ±0.5 km/h speed tolerance.

h. Impactor Test Device Characteristics

The agency proposed certain characteristics that the impactor should be calibrated to meet in order to enhance the repeatability of the test, i.e., to increase the likelihood that the headform will be delivered to the countermeasure and interact with it in a repeatable manner. One was a 20 mm limit on static deflection when the impactor is loaded by a 27 kg mass. There were two specifications to limit the amount of energy the impactor may lose due to friction. The proposal specified that the ejection impactor must not lose more than 10 and 15 percent of the 24 and 16 km/h impact velocity, respectively, in 300 mm of unobstructed dynamic travel. Second, it must not require more than an average of 570 N of force to push the impactor rearward with a 27 kg mass attached to it. Finally, we required that impactor be able to deliver the center of the headform through a theoretical cylindrical shape.

The agency stated that the research test device used to develop the proposal had not been optimized for compliance test purposes (74 FR at 63216, footnote 81.). Thus, we stated our belief that tighter tolerances on the calibration characteristics could be attained with an optimized design. *Id.* Nonetheless, the agency's impactor was found to meet the percentage velocity reduction, on an average basis.

Comments

Honda asked that the agency indicate in the regulatory text where the static deflection of the impactor headform should be measured. With respect to the targeting accuracy requirement, Honda wanted to know "if it is necessary to verify accuracy of the actual contact position after each impact test, as long as the test device satisfies the specifications." It stated that with testing of an air bag it would not seem to be possible to verify whether the targeting accuracy was achieved during the test. Also with respect to this targeting accuracy requirement, it wished to have the agency specify a calibration method.

TRW believed that the performance attributes of the impactor are adequately covered by the AORC impactor specifications, as presented at the 2009 SAE Government/Industry meeting. These specifications are provided below in Table 41, for the convenience of the reader.

TABLE 41—AORC RECOMMENDATIONS FOR IMPACTOR PERFORMANCE [142]

Variable	Maximum variance	Preliminary recommendation
Velocity	± 0.75 km/h	± 0.25 km/h.
Deflection	>> 25 mm	< 10 mm.
Time Delay to Impact	400 ms	< 100 mm (or redefine time to contact).
Excursion Accuracy	± 4.6 mm	± 2 mm.
Dynamic Friction	2.62	< 0.25.
Design Margin	− 20% (TYP)	TBD.

[142] Stein, Doug, "Linear Impactor Performance Characteristics for Ejection Mitigation Testing," SAE Government/Industry Meeting, February 6, 2009, Washington DC. *File Impactor_Charaterization.ppt,* available at *http://www.aorc.org/coep.asp.*

The AORC commented that NHTSA should adopt similar specifications for impactor performance as used by the agency in their solicitation for a new impactor (Solicitation Number DTNH22–09–Q–00071).

The highlights of that solicitation are provided in the bullets below. An asterisk notes that the solicitation requirement matches the AORC recommendation.

- The ejection mitigation impactor must be capable of measuring the displacement of the moving impactor mechanism throughout the entire stroke, with an accuracy of ±2 mm.*
- The maximum radial deflection of the ejection mitigation impactor must not exceed 10 mm.*
- When the ejection mitigation impactor assembly is used in conjunction with the support frame, it must have a vertical radial deflection of no more than 15 mm.
- The maximum dynamic coefficient of friction of the ejection mitigation impactor must not exceed 0.25.*
- The moving impactor mechanism must be designed for use at peak velocities between 15 km/h and 25 km/h, with a tolerance within the range of ±0.25 km/h; a range of ±0.15 km/h or less is preferred.*
- When used with an appropriate propulsion system, the time from the signal to deploy the air curtain to the peak velocity of the moving impactor mechanism (minus any pre-programmed delay time) must not exceed 100 milliseconds for any velocity within the range of 15 km/h to 25 km/h. These velocities must also be achieved prior to the impactor making contact with deployed air curtains of current production.*
- When the headform is fired at 24 km/h, point P must remain within cylinder C from the position at which the moving impactor mechanism achieves peak velocity to the position 100 millimeters beyond the position of peak velocity. Point P is the geometric center of the headform on the outer surface of the headform, and cylinder C is a 20-millimeter diameter cylinder, centered on point P and parallel to the headform's direction of motion.

Agency Response

Many provisions of the impactor test device calibration have been modified to make them consistent with some of the calibration procedures suggested by AORC and others. The static deflection provision has been changed from 20 mm under a 27 kg load, to 20 mm under a 981 N force applied in four orthogonal directions, with the device in a test-ready configuration. The final rule will require a limit on the dynamic coefficient of 0.25, measured in four orientations with the shaft loaded with a 100 kg mass. We believe this provision will fulfill the requirement previously specified by the unobstructed velocity test and obstructed push force tests.

In response to Honda, we have added text to S7.2 in the final rule to indicate that the movement of the ejection impactor targeting point in the x–z plane (vehicle vertical-longitudinal plane) should be measured. In other words, looking along the y axis (direction of travel), the center of the headform face should not deflect more than the specified value. We have also added additional detail to this section to indicate that this static deflection test is to be performed with the impactor attached to the propulsion mechanism, including any support frame connecting it to the floor. In addition, the force is now applied in four orthogonal directions, rather than just downward. This is an acknowledgement that loading on the impactor can be in any direction.

Since the test is performed on the device in a test-ready configuration, the allowable displacement is 20 mm rather than the 10 mm recommended by the AORC in Table 41. The 10 mm value would be more appropriate for a test that excludes the supporting frame of the test device, as did the AORC recommendation.

There is no reason to specify the displacement measurement accuracy for the impactor since we will use a method sufficiently accurate to determine that the displacement limit has been exceeded or not. There is also no reason to specify a minimum time from launch until the impact speed is obtained; how long it takes the impactor is irrelevant to the test as long as it arrives at the specified delay times of 1.5 ±0.1 seconds and 6.0 ±0.1 seconds.

A very important impactor characteristic is dynamic friction. We have indicated in S7.3 of the standard that the dynamic friction must not exceed 0.25. This matches the AORC recommendation. In the technical report for this final rule, we provided these dynamic friction measurements for the agency's new impactor and how the agency determined dynamic friction characteristics.

We note that the dynamic friction test differs from the static deflection test in that it need not be done on the support frame that would connect to the impactor in a test-ready configuration. We believe this is acceptable since it is not likely that the static deflection of the entire frame will influence the dynamic friction determination. We also think it is acceptable that the perpendicular loading for the dynamic friction testing is achieved through gravity and rotation of the impactor and bearings rather than by pulling in four orthogonal directions, as is done in the static deflection tests. Practically speaking, there is no other way to perform the test.

We believe that this detailed dynamic friction test in S7.3 of the standard will fulfill the purpose of the requirements previously specified in the NPRM for unobstructed velocity (proposed S7.2.1) and obstructed push force (proposed S7.2.2). We have reduced the maximum allowable dynamic coefficient of friction of the test device by a factor of 5 from 1.29 (NPRM) to 0.25 (final rule). In addition, S7.2.1 allowed as much as a 15 percent velocity loss over a range of impactor stroke. Testing of the new impactor found about a 1 percent loss in impactor speed over a stroke of more than 150 mm. Thus, we conclude that proposed S7.2.1 can be removed with no negative effect on the test procedure.

We understood Honda's comments on the issue of targeting accuracy (see S7.4 in the final rule) as seeking clarification as to when the accuracy is to be determined, i.e., would the tester need to know that for any particular impact test the ejection impactor targeting point was within the required cylindrical targeting zone shown in Figure 16 of the NPRM. The answer to Honda's question is provided in S7 of the standard, where it is stated: "[t]he ability of a test device to meet these specifications may be determined outside of the vehicle." That is, it is necessary that the test device being used meet the characteristics in S7, but these need not and cannot be determined during the test. We cannot see that it would be feasible to perform these calibration measurements during a vehicle test. Honda requested the agency specify how often and/or when these calibration tests should be done. We cannot make such a pronouncement in the regulatory text. Frequency of calibration is a test device and due care-specific issue and must be determined case by case.

Honda also wanted to know how targeting accuracy would be measured by the agency. On our new impactor, we made this determination through analysis of high speed video. We found that the impactor met the required accuracy. We can envision other measurement techniques that utilize witness marks on stationary targets, or that make witness marks on the headform.

i. Readiness Indicator

NHTSA proposed a requirement for a monitoring system with a readiness

indicator for ejection mitigation systems that deploy in a rollover, such as that required for frontal air bags in S4.5.2 of FMVSS No. 208. 74 FR at 63218.

No comments were received opposing the proposal. Accordingly, the proposal is adopted for the reasons discussed in the NPRM.

j. Other Issues

1. Rollover Sensors

The NPRM did not require vehicle manufacturers to provide a sensor that deploys the ejection countermeasure in a rollover or side impact crash, and did not dictate the performance of any supplied sensor. We were concerned as to whether specifying performance features for the sensor could satisfactorily capture the myriad of rollovers occurring in the real-world. Moreover, we explained that ejection mitigation air bag curtains are now being designed, developed, and implemented by industry and are deploying satisfactorily in the field.

We believed there would be no incentive for manufacturers to provide an ejection mitigation side curtain designed to meet the standard without providing the sensor to deploy it in a rollover crash. In addition, under the proposed requirements of the standard, manufacturers would be required to provide written information to NHTSA, upon the agency's request, explaining the basic operational characteristics of their rollover sensor system. We also proposed to deploy the side curtain in our compliance testing only if the owner's manual or other written material informs the owner that the vehicle is equipped with an ejection mitigation countermeasure that deploys in the event of a rollover.

The NPRM also discussed alternatives considered by the agency to the approach proposed, such as requiring that the rollover sensors be provided as a piece of equipment and defining such a piece of equipment, or specifying a test that would assure the presence of a rollover sensor on the vehicle. Advantages and disadvantages of the approaches were presented.

Comments

Nearly all comments from vehicle manufacturers and air bag suppliers supported the NPRM's not establishing specific rollover sensor requirements or performance tests. The Alliance concurred with the NPRM that sensors are performing well in the field. GM stated its support for only deploying air bags "during the compliance test that have been identified in the owner's manual as rollover-enabled. This is a practicable and reasonable approach." GM agreed that manufacturers would have no incentive to misidentify an air bag system as rollover capable. AIAM stated that manufacturers have their own test and calibration processes for crash sensors, so adding any tests in the final rule would only add complexity to manufacturers' test plans for little or no benefit. AIAM believed that the definition of sensor deployment requirements is vehicle specific due to the different nature of such factors as mass distribution, center of gravity height and use of stability systems. Therefore, AIAM believed that setting a generic test requirement would not be feasible.

On the other hand, Honda believed that "some manner of performance criteria may be necessary for rollover sensors required for deployment of such countermeasures." The commenter encouraged NHTSA to establish basic performance criteria "consistent with other elements of the test procedure for FMVSS No. 226, if possible." Honda suggested a definition for "rollover sensor" and suggested that NHTSA "establish a minimum requirement for the system configuration."

Advocates and Public Citizen requested that the final rule place requirements on sensors that would deploy the ejection countermeasures rather than leave it to the discretion of the manufacturer. Advocates believed that NHTSA should specify requirements for sensors to ensure sustained inflation throughout the long event of a rollover with multiple quarter-turns. Public Citizen recommended a dynamic test that "would allow the agency to measure both the presence and the performance of rollover sensors."

IIHS stated that while it understood the agency's reluctance to specify performance requirements for sensors that may not capture the scope of real-world rollover crash scenarios, NHTSA should continue monitoring field data to determine the adequacy of the agency's approach.

Agency Response

This final rule adopts the approach of the NPRM and does not specify direct rollover sensor specifications. The agency is not aware of any repeatable rollover test that replicates the breadth of real-world rollovers addressed by this rulemaking. Current dynamic tests, such as the 208 Dolly test, do not allow the agency to determine how well the sensor will perform in the field. The 208 Dolly test offers little challenge to the sensor and, according to Viano and Parenteau,[143] represents a very small portion of rollover crashes. See the NPRM, 74 FR at 63218, for additional discussion of dynamic rollover testing.

With respect to Honda's comment on specification of "some manner of performance criteria" and/or a definition for "rollover sensor," this concept is very similar to an option discussed in the NPRM preamble (Equipment Definition Option) (74 FR at 63218). We indicated in that analysis that this option was problematic for several reasons. We stated that such an option has the—

> limitation of having to definitively specify the item of equipment it would be requiring, which might necessitate adopting and applying an overly restricted view of what a deployable rollover is and perhaps what it is not. For example, we can contemplate rollovers that have such an extremely slow roll rate when it would not be necessary or desirable for the countermeasure to deploy. That being the case, a reasonable definition of a rollover sensor might include a roll rate specification as a function of roll angle. Developing such a definition requires vehicle roll angle versus rate data, which are not readily available to NHTSA. Another potential drawback of this option is that without a test or tests to assess compliance with the definition, enforcement of the requirement could be restricted. An approach for a compliance test could be for NHTSA to remove the sensor from the vehicle and subject the sensor to a performance test to assess whether a specified performance requirement is achieved, but the agency has limited information at this time on which to develop performance parameters or a compliance test.

Id.

As Honda's comments did not address the shortcomings of this option, the agency continues to have concerns. We thus decline to implement Honda's request in this final rule.

In view of the determination to adopt the approach of the NPRM, and after reviewing the comments, we conclude that it is critical that written information be provided in the owner's manual that describes how the ejection mitigation countermeasure deploys in the event of a rollover (see regulatory text of S4.2.3(a) of this final rule) [144] and how

[143] Viano D, Parenteau C., "Rollover Crash Sensing and Safety Overview," SAE 2004–01–0342.

[144] Ford provided excerpts from the owner's manual of a vehicle with a rollover curtain air bag, and asked if the information would meet the requirements of S4.2.3(a), "Written information." (NHTSA–2009–0183–0047, p. 20.) Ford's excerpt stated in part: "The Safety Canopy system is designed to activate when the vehicle sustains lateral deceleration sufficient to cause the side crash sensor to close an electrical circuit that initiates Safety Canopy inflation or when a certain likelihood of a rollover event is detected by the rollover sensor." Our answer is yes.

system readiness is monitored (see S4.2.3(b)). It is also important that the test procedure not deploy the ejection countermeasure if this information is not provided (see S5.5(c)). We also adopt the requirement that the final rule require manufacturers to provide more detailed technical information to the agency upon request (see S4.2.4).

Field data on vehicles with rollover sensors continue to indicate that curtains are deploying in rollovers when they should. Of the 21 RODSS cases, four NASS cases and 48 SCI cases believed to involve vehicle rollover crashes and presumed to have rollover deployable curtains, five were determined not to have deployed.

We conducted an in-depth review of these five cases. Four of the five cases had a significant frontal impact that preceded the rollover. These impacts may have destroyed the vehicle battery and thus eliminated the primary power source for deploying the rollover curtain. There is also some question as to whether one of these vehicles was definitely equipped with a rollover sensor, since the system was an option on this vehicle. In one case, the vehicle's kinematics were very complex and may have included some motion not typical of a lateral rollover.

After reviewing the five non-deployment cases, it was not apparent to us that there was a problem with the rollover sensor that would have been identified by a test for a sensor, such as the Equipment Definition test or Presence test discussed in the NPRM (74 FR at 63218). We cannot make a finding that in these cases, the rollover curtains' non-deployment was unrelated to the initial frontal impacts. A presence test that only addressed whether the curtain will deploy, that did not account for a significant initial frontal impact, might not have made any difference on the deployment of these rollover curtains.

We have become interested, however, after reviewing the field data, as to whether ejection mitigation systems could have a backup power source, such as a capacitor, that can provide the power for curtain deployment within some short time period after primary power is lost. It is our understanding that generally vehicles currently have such energy storage systems, but these systems may not have the ability to deploy rollover curtains when the rollover is subsequent to a frontal impact causing the loss of power. There were only a handful of cases on hand. We would like to learn more about this issue.

We are not ready to specify in this final rule some sort of requirement related to the ability to deploy the curtain after loss of primary power. For one thing, we believe that this issue is outside of the scope of notice of the NPRM. Moreover, NHTSA would like to gain more knowledge in this area. We would like to analyze the vehicle kinematics that result when a frontal crash is followed by a rollover to better understand the amount of time secondary power is, and should be, available. Data available from event data recorders may provide a starting point for the analysis of this issue. We have begun a review of the EDR data available to the agency and will continue to monitor data as it becomes available. We would like to find out if there is a problem in the field and seek to know more about the amount of storage time capacitors typically have vis-à-vis their ability to deploy the curtain after power is lost.

2. Quasi-Static Loading

We requested comments on the need for an additional test that would impose quasi-static loading on the ejection countermeasure. Films of occupant kinematics in vehicle rollover testing and in DRF testing indicate that ejection mitigation countermeasures can be exposed to quasi-static loading during a rollover, in addition to short-duration impacts that the headform test replicates. Quasi-static loading can occur when an occupant contacts the countermeasure and loads it throughout or nearly throughout an entire rollover event.

Comments

AIAM commented that in the absence of data demonstrating that countermeasures designed to meet the proposed requirements are not adequate to address quasi-static loading, there is no basis for adopting such a test requirement at this time.

Agency Response

We are not adopting a requirement at this time. Instead, we plan to pursue some limited testing in the near term to see how an ejection mitigation countermeasure that performs well to the requirements in the final rule performs in a quasi-static test. At this time, there are no data available to the agency. Therefore, we cannot determine the consistency, or lack thereof, between quasi-static performance and impact test performance.

3. Full Vehicle Test

The NPRM explained the agency's position that the component test of FMVSS No. 226 would not only distinguish between acceptable and unacceptable performance in side curtain air bags, but has advantages over a full vehicle dynamic test. The acceptable (or poor) performance in the laboratory test correlated to the acceptable (or poor) performance in the dynamic test. The component test was able to reveal deficiencies in window coverage of ejection mitigation curtains that resulted in partial or full ejections in dynamic conditions. Incorporating the component test into an ejection mitigation standard would ensure that ejection mitigation countermeasures provide sufficient coverage of the window opening for as long in the crash event as the risk of ejection exists, which is a key component contributing to the efficacy of the system.

The NPRM further noted that rollover crash tests can have an undesirable amount of variability in vehicle and occupant kinematics. In contrast, the repeatability of the component test has been shown to be good. Moreover, there are many types of rollover crashes, and within each crash type the vehicle speed and other parameters can vary widely. A curb trip can be a very fast event with a relatively high lateral acceleration. Soil and gravel trips have lower lateral accelerations than a curb trip and lower initial roll rates. Fall-over rollovers are the longest duration events, and it can be difficult to distinguish between rollover and non-rollover events. Viano and Parenteau correlated eight different tests to six rollover definitions from NASS–CDS. Their analysis indicated that the types of rollovers occurring in the real-world varied significantly. Soil trip rollovers accounted for more than 47 percent of the rollovers in the field, while less than 1 percent of real-world rollovers were represented by the 208 Dolly test. 74 FR at 63185.

The NPRM also discussed our belief that occupant kinematics will also vary with these crash types, resulting in different probabilities of occupant contact on certain areas of the side window opening with differing impact energies. *Id.* A single full vehicle rollover test could narrowly focus on only certain types of rollover crashes occurring in the field. We noted in the NPRM our concern that a comprehensive assessment of ejection mitigation countermeasures through full vehicle dynamic testing may only be possible if it were to involve multiple crash scenarios. Such a suite of tests imposes test burdens that could be lessened by a component test. We also noted that a comprehensive suite of full-vehicle dynamic tests would likely involve many more years of research, which would delay the rulemaking

action and the potential for incorporating life-saving technologies. The agency stated that such a delay appears unwarranted, given that NHTSA believes the component test will be an effective means of determining the acceptability of ejection countermeasures.

Comments

AIAM agreed with the agency's view that a dynamic full vehicle test should not be pursued at this time. The commenter concurred that it is not clear how the agency could represent the wide range of rollover crash scenarios with a single test mode, and that manufacturer certification using a series of test modes would be unduly burdensome. AIAM also stated, "Making a dynamic rollover test adequately repeatable for regulatory purposes would also be a very significant challenge." AIAM supported continued research on developing a practicable dynamic test approach that provides additional safety benefits.

In contrast, Batzer and Ziejewski recommended that in addition to an impact test, NHTSA should "mandate that all manufacturers perform at least one FMVSS–208 style dolly rollover test." Advocates believed that the FMVSS No. 226 impact test does not account for "door-window frame distortion that can occur in rollover crashes" and that this could result in reduced curtain air bag effectiveness. Public Citizen also supported a whole vehicle dynamic test. Public Citizen stated that further delays needed to develop a dynamic test would "benefit occupants in rollover crashes, if a dynamic rollover test resulted in a better standard that was more representative of real world crash conditions." The commenter also stated that the agency "cannot simply add up the sum of the target populations identified in each of its rollover rulemakings and claim to have protected occupants."

Agency Response

For the reasons discussed in the NPRM, the final rule will not contain a full vehicle dynamic test to evaluate ejection mitigation.

We understand the appeal of a dynamic test for ejection mitigation as well as all aspects of rollover protection, a complement of sorts to frontal and side protection offered by the dynamic tests in FMVSS Nos. 208 and 214, respectively. As a matter of fact, the agency is currently pursuing a research program looking at the development of a dynamic test to address roof strength. In addition, the agency has been pursuing laboratory research on restraint system (*e.g.,* seat belt system) optimization for rollover crashes.

As it happens, however, a full vehicle dynamic test for rollover crashworthiness systems is not available. An FMVSS No. 208 (frontal impact) or No. 214 (side impact) test presents different challenges than a rollover test. Frontal and side impacts, while deadly, are less complex by comparison to a rollover crash. As explained in the NPRM, rollover crash tests have a high degree of variability in vehicle and occupant kinematics. There are many types of rollover crashes, and within each crash type the vehicle speed, roll rate, roll axis and other parameters can vary widely. In contrast, the critical parameters for planar crashes can be captured by the direction of impact and ΔV. It is a relatively simple matter to develop a test(s) (*i.e.,* a vehicle into barrier or object into vehicle) that results in the desired vehicle ΔV in the desired direction.

Nor might a full vehicle dynamic test be available as an outgrowth of the agency's roof crush and seat belt system research. The vehicle kinematics involved in assessing enhanced protection of the occupant within the vehicle (studied in the roof crush and belt system programs) may be significantly different from those involved in mitigating the risks of occupant ejection to belted and unbelted occupants. A dynamic test that is appropriate for assessing roof crush and seat belt performance may not necessarily provide the same kind of challenge to ejection mitigation.

It may or may not be suitable to have a single rollover test to assess roof crush and seat belt performance. For ejection mitigation, it is unlikely that a single rollover test would be sufficient to address the many types of rollovers that occur in the field.[145] We would want the dynamic test to assure that an ejection mitigation countermeasure constrains belted and unbelted occupants in all types of rollover crashes. However, at this time there is no archetype rollover crash that can be replicated in laboratory testing.[146]

We stated in the NPRM preamble, "a comprehensive assessment of ejection mitigation countermeasures through full vehicle dynamic testing may only be possible if it were to involve multiple crash scenarios. Such a suite of tests imposes test burdens that could be assuaged by a component test such as that proposed today." 74 FR at 63186. We hope that in the future, a full vehicle dynamic test, or a suite of tests, could be developed that is appropriate for use in FMVSS No. 226. However, at this time, there is not a viable full vehicle rollover test procedure to evaluate ejection mitigation. In response to Public Citizen, we strongly disagree that a delay of this rulemaking to develop a dynamic test would be justified. This final rule will save over 370 lives a year. Each year delayed to develop what is now an indefinable full vehicle test will have a substantial human cost.

Public Citizen also commented that the agency "cannot simply add up the sum of the target populations identified in each of its rollover rulemakings and claim to have protected occupants." The agency takes great care when doing the benefits assessment to not double count lives saved. If we assume a specific population is saved by one of our standards, we do not count them again when determining the benefits for another. In this way, our estimates are conservative.

4. Minor Clarifications to the Proposed Regulatory Text

In preparing the final rule regulatory text, we made some changes to make the text clearer and easier to understand. The changes were not meant to alter the requirements of the proposal. Below we provide a listing of the more noteworthy of these minor changes and a brief rationale for the change.

S3. *Ejection Impactor*—Deleted "It consists of an ejection headform attached to a shaft" and moved it to S7.1. This was done because this descriptive information is consistent with the type of information provided in S7.1.

S3. *Ejection propulsion mechanism*—Deleted "specified in S7.2 of this Standard No. 226." This was deleted because S7.2 (New S7.3) does not really

[145] We have already discussed our determination that the 208 Dolly test is not suitable for ejection mitigation testing. See, e.g., 74 FR at 63185. The 208 Dolly test represents less than 1 percent of real-world rollovers. Further, some recent experience with the 208 Dolly test makes problematic its implementation as a replacement for the impact test or an additional test. During recent tests in our rollover restraints research program, we attempted to subject a MY 2007 Ford Expedition to the 208 Dolly procedure. However, two out of five attempts failed to initiate a roll of even one quarter-turn. We acknowledge that the above was not a typical result of 208 Dolly testing within the agency's experience, but it does highlight testing issues.

[146] A full vehicle dynamic test would presumably involve the use of anthropomorphic test devices (ATDs). There is some question whether the currently available ATDs offer an acceptable level of biofidelity with respect to occupant ejection. For example, the hip articulation for the Hybrid III dummies is limited, which may alter their ability to replicated real world occupant kinematics. An appropriate ATD for use in the test would have to be explored.

provide information specific to the propulsion mechanism.

S3. *Target Outline*—Eliminated the term "target outline" and replace it with "target" throughout the regulatory text. This does not result in any substantive change in the standard, since in the NPRM these terms were defined to be interchangeable in the regulatory text.

S3. *Walk-in van*—Deleted the second sentence indicating that the seating position must be forward facing and edited the first sentence to indicate the only seating position is the driver. This was done to eliminate redundancy in the definition.

S4.1.1—Added text to the first sentence referencing S8. This was done to provide clarity and similarity with other standards.

S5.1—The wording of the third sentence was modified to clarify that the countermeasure was being struck at the defined target locations.

New S5.2.1.1 (NPRM S5.2.1(a)), S5.5.5, S5.4.1.1—All occurrences of "daylight opening" were replaced with "side daylight opening."

New S5.2.1.1 (NPRM S5.2.1(a)), second sentences—Added the word "projection" after "side daylight opening."

New S5.2.2(a) (NPRM S5.2)—Deleted "and the x–z plane of the target outline within ±1 degree of a vehicle vertical longitudinal plane." This was a redundant constraint. However, text was added to indicate that the y axis of the target points outboard.

New S5.2.3.3 (NPRM S5.2.2.3)—Revisions were made to the structure of this section to clarify the determination of primary targets.

S5.5(a)—The sentence was modified to make it clear that it was the countermeasure that must be impacted at the specified time.

S5.5(a) and (b)—Replaced "velocity" with "speed."

S6.1—Added text to clarify how the vehicle attitude is to be adjusted.

k. Practicability

NHTSA believed that meeting the proposed requirements as they applied to the side windows at the first three rows was practicable. There were a number of vehicles with side air bag curtains that cover the windows adjacent to rows 1, 2, and 3, such as the 2005–2007 MY Honda Odyssey, 2006 Mercury Monterey, 2007 Chevrolet Tahoe, and 2007 Ford Expedition.[147] The agency also believed it was practicable to produce vehicles that would meet the proposed performance requirements.

The NPRM had a proposed 24 km/h–1.5 second test, which has been reduced in this final rule to 20 km/h-1.5 second. Some of the current production vehicles tested during the development of the NPRM came close to meeting the 100 mm displacement limit at all target locations and impact speeds. The most challenging target location was A1, with A4 being the least challenging. For the 2nd row windows, the limited data indicated target location B1 was more challenging than B4. Only two vehicles were tested at the 3rd row. For these systems, C4 was more challenging than C1.

The agency stated that the primary parameters that determine the stringency of the test were: (a) The impactor dimensions and mass; (b) the displacement limit; (c) impactor speed and time of impact; and (d) target locations. Comments focused on (c) above, specifically impactor speed, to argue for reducing the stringency of the test based on practicability grounds.

We discussed in an earlier section of this preamble our decision to reduce the impactor speed from 24 km/h–1.5 second (400 J) to 20 km/h–1.5 second (278 J), based on a reanalysis of the research data used for the NPRM. We believe this reduction in test velocity resolves many of the comments, described below, that raised concerns about the practicability of meeting a 24 km/h–1.5 second test. However, we wish to address the concerns about practicability to explore any remaining questions about the practicability of meeting a 20 km/h–1.5 second requirement. Further, we would like to discuss issues relating to the practicability and cost of meeting a 24 km/h–1.5 second requirement.

Comments

All comments relating to practicability were submitted by vehicle manufacturers. The comments were focused on side curtain air bags as the sole countermeasure for the FMVSS No. 226 requirements. The comments did not appear to dispute the potential of manufacturing side curtain air bag systems that could meet the NPRM; rather they expressed concerns with the potential negative trade-offs associated with such systems for both side impact and OOP occupants.

Honda referred to agency statements in the NPRM that indicated that two methods of improving the ejection mitigation performance of curtain air bags were to make them thicker and to increase their internal pressure. Honda provided data on the relationship between internal pressure and impactor displacement. Honda argued that increasing tank pressure of an air bag design to meet the proposed requirements (to produce less displacement of the impactor) results in notable increases in Nij and neck compression measures. Honda believed that if 200 J is set as the impact energy limit (17 km/h impact), "the primary objective of the side curtain airbag of occupant protection can be balanced with the proposal for occupant ejection mitigation without significant change to current side curtain airbag designs for some vehicles."

VW also provided information showing the relationship between impactor displacement and air bag pressure. It estimated that the initial internal pressure would need "to be increased 2–3 times depending on the actual kinetic energy of the impactor and the NPRM's required excursion limits." VW stated that "the above mentioned pressure increase for the ejection mitigation test will result in a detuning of the airbag and in deterioration of the side crash test results" relevant to NCAP and IIHS consumer information programs. VW believed there would be a reduction of overall fleet star ratings and a reduction in occupant safety in conventional side crashes.

The Alliance provided research performed by Toyota that the Alliance believed "illustrates the increased OOP risk associated with the high impact energy (400 Joule impact) and limited excursion (100 mm) requirements proposed in the NPRM." In this research, two SUVs and two passenger cars were tested to the 24 km/h–1.5 second impact test and subsequently to OOP testing using the Technical Working Group (TWG) Recommended Practice with an inboard facing 5th percentile adult female dummy.[148] When changes were made to the side curtain air bag systems by increasing internal pressure and coverage to meet a 160 mm displacement limit when tested at 24 km/h–1.5 seconds, the Alliance reported that OOP values increased from approximately 80 percent of IARVs to about 105 percent of IARVs.

[147] Since that time the following vehicles with three rows of coverage have been tested: MY 2007 Jeep Commander, MY 2008 Dodge Caravan, MY 2008 Ford Taurus X, and MY 2008 Toyota Highlander.

[148] The TWG Recommended Procedures were developed to evaluate the risk of side air bags to children who are out-of-position. Through a voluntary agreement with NHTSA, vehicle manufacturers consented to meet the TWG. The agency requests the results of testing through the Buying a Safer Car program and publishes the data annually.

Agency Response

It appears from the comments that if the impact speed was 24 km/h, some manufacturers would have to increase the air pressure in their side curtain air bags to meet the requirement. We estimate that this approach to meet a 24 km/h test would add $7.53 to the $31 incremental cost of meeting a 20 km/h test. This added cost is for a larger capacity inflator. Some manufacturers have commented that increasing air bag pressure in current bags to meet a 24 km/h–1.5 second test increases HIC values measured in a side impact test and IARVs measured in OOP tests. If manufacturers were attempting to bring a curtain air bag into compliance that was well outside of the 100 mm limit by only increasing internal pressure, the air bag would likely become more rigid. Whether those increased HIC values and IARVs in OOP tests from increased air bag pressure pose an unreasonable safety risk has not been shown, but so-called "negative trade-offs" concern the agency in any rulemaking.

New side curtain air bag designs appear to be evolving that show promise in meeting the 100 mm limit of impactor displacement when tested to a 24 km/h-1.5 second condition, without undesirably affecting side impact and OOP test results.

However, if these systems require significantly more air bag volume, they may be more costly than a system that meets a 24 km/h requirement by increased air pressure. We estimate that, for a vehicle with an air bag system that uses higher volume and more material to meet the 24 km/h requirement, $37.87 would be added to the $31 incremental cost of a system that meets a 20 km/h requirement.[149]

Air bag supplier Takata met with the agency on July 28, 2009, to discuss its effort at designing an ejection mitigation system to meet a December 2006 NHTSA ejection mitigation research test procedure at a displacement limit of 100 mm at 24 km/h-1.5 second impact.[150] Takata explained that it believed there were two potential ways of meeting the requirement: By way of retaining a strong membrane over the window opening, or by absorbing the impactor energy. For the first approach, Takata stated that the strong membrane could be achieved by laminated glazing or a high stiffness/pressure curtain. The second energy absorption method could be achieved by air bags of increased volume or air bags of a different shape to increase impactor stroke. Takata said it chose this second approach, to develop an air bag of a different shape.[151]

Takata stated that a new air bag design it has developed was integrated into a sedan and tested to the 24 km/h-1.5 second and 16 km/h-6 second impacts, and to TWG OOP requirements using both the 5th percentile adult female and 6-year-old (6YO) child dummies. The greatest displacement for the 24 km/h-1.5 second test was approximately 82 mm at A1. The greatest displacement at the 16 km/h-6 second test was approximately 79 mm at B1. The air bag pressure at time of impact was reported as 30 kPa.

The results from the TWG testing are shown in Takata's docket submission. The 5th percentile adult female results have a maximum value of approximately 55 percent of the IARVs. For the 6YO child dummy, no injury measure exceeded 20 percent of the IARVs.

Takata determined that its new shape curtain could meet the 100 mm displacement limit without advanced glazing with a sufficient compliance margin in a sedan design. At the time of the presentation, Takata indicated that it was working on increasing the compliance margin for a sport utility vehicle (SUV) design and working with a vehicle manufacturer to introduce the technology to the market.

In its comment to the NPRM, the Alliance stated that NHTSA should not interpret information about the performance of innovative side air bag design concepts developed in an attempt to meet the NPRM to mean that "the requirements of the NPRM are practicable."[152] The Alliance claimed that the air bag supplier design evaluations have not addressed the following areas: The ability of the air bags to be deployed in time for a side impact and provide adequate side impact protection; the ability to integrate these bags with FMVSS No. 201 countermeasures; the ability to function in a complete vehicle environment; and the ability to implement this technology across vehicle architectures.

We understand that integrating a component into a full vehicle design involves many factors. However, the Alliance did not provide a convincing discussion as to why NHTSA should not consider a system such as Takata's an indication of the practicability of meeting a 24 km/h-1.5 second impact test.

The Alliance and others questioned whether innovative systems could be packaged in a vehicle to meet FMVSS No. 201 requirements. The commenters did not explain how new ejection mitigation side air curtains would pose unique design problems that would impede the ability to certify to FMVSS No. 201, when current vehicles with rollover side air curtains already are certified to that standard. There was no showing that changes to the air curtains or to the inflator will present insurmountable problems in packaging the equipment to FMVSS No. 201. It also appears that Takata is now working on implementing its system across vehicle architectures. Takata has indicated that its new system has been successfully integrated into a passenger car[153] and is in the midst of SUV integration. Takata did not provide cost data.

The proposed 24 km/h-1.5 second impact has been reduced to 20 km/h-1.5 second in this final rule after our reanalysis of the technical basis for the energy requirement and our FRIA analysis showing a 20 km/h requirement to be more cost effective. With this reduction in impactor speed, vehicles will be able to meet the final rule's requirements with fewer changes to existing designs. Data from agency testing of production vehicles presented earlier in this preamble demonstrate the practicability of the requirements of this final rule. The MY 2007 Mazda CX9 was able to meet the performance tests in the final rule (20 km/h), without modification. This vehicle had a 5-star side impact rating in the 2007 NCAP program.

We recognize that most side curtains will need design changes to various degrees to meet the requirements of this final rule. As Takata indicated in its 2009 meeting, there are several ways to possibly improve performance in the ejection mitigation test. Manufacturers will have to decide what suits their particular situation best. Manufacturers could increase air bag internal pressure to make the air bag stiffer and/or increase the volume to make the air bag thicker. They could possibly change the air bag shape, such as Takata has done, reducing the need for drastic changes in pressure and volume. They might decide to use advanced glazing to

[149] A curtain air bag with more volume will require more air bag material and may also utilize an extra inflator if a single inflator is not sufficient. An extra inflator adds significant cost to a curtain air bag system.

[150] Docket NHTSA–2006–26467–0019.

[151] We note that Takata claimed that it achieved the necessary performance by a change in shape, rather than an increase in pressure or volume.

[152] NHTSA–2009–0183–0029, p. 20.

[153] The Toyota data provided by the Alliance indicated that it was more difficult to meet TWG guidelines in the passenger environment than in SUVs.

supplement ejection mitigation side air curtain performance in meeting the 20 km/h–1.5 second test. In addition, the availability of lead time and a phase-in schedule and advanced credits will provide manufacturers time and flexibility to implement design changes to meet the standard.

Lastly, the Alliance referred to data presented to NHTSA by Ford in a September 10, 2008 meeting [154] obtained by a load cell Ford placed on the impactor shaft behind the headform. The Alliance believed that "[p]reliminary testing has shown the need to further research energy and excursion targets to ensure a 'balanced approach' between excursion and curtain stiffness (load cell measurement) in order to avoid unintended consequences." In response, to our knowledge, no one has established the biomechanical relevance of a uniaxial load measurement on the shaft of an ejection impactor to occupant injury. Until and unless such a relationship can be established, the agency has no reasonable way to judge such data.

l. Vehicle Applicability

This standard applies to passenger cars, multipurpose passenger vehicles (MPVs), trucks and buses with a GVWR of 4,536 kg (10,000 lb) or less, except as noted in this section. Manufacturers are installing or plan to install side impact air bag window curtains in many of these vehicles. These side air bag window curtains are capable of meeting FMVSS No. 214's pole test requirements, which apply to passenger cars, MPVs, trucks and buses with GVWR of 4,536 kg or less. An FMVSS No. 214 air bag window curtain system can be augmented for use as an ejection mitigation window curtain system.

1. Convertibles

The NPRM tentatively determined that the standard should apply to convertibles. We requested comments on the practicability of certifying convertibles to the proposed performance test with door-mounted ejection mitigation curtains and/or advanced glazing.

Comments

All comments from vehicle manufacturers and air bag manufacturers opposed the inclusion of convertibles in FMVSS No. 226 for practicability reasons. Many stated that there was no technology that would allow a convertible to meet the proposed requirements. The AIAM explained that although convertibles can meet FMVSS No. 214's pole test using a door-mounted upwardly deploying air bag, the inflated bag does not have a door frame to which the curtain can be tethered to achieve the lateral stiffness needed for ejection mitigation. Further, the curtains need to be retained by the convertible top, which may not have the same retention capability as the door trim of conventional vehicles.

The Alliance informed the agency that the agency was incorrect in thinking that research from Porsche indicated the feasibility of a door-mounted air bag system for ejection mitigation. The Alliance explained that Porsche meant to describe a "technologically neutral solution" for a coupe, "which unlike a convertible, can be fitted with framed windows." The Alliance stated that it believed that "advanced glazing, with or without a door-mounted airbag, does not constitute a practicable compliance solution for convertibles." AORC stated that its members have been working on this technology but have not yet verified performance relative to this specification.

Comments from Pilkington and from Public Citizen supported including convertibles in the applicability of the standard.

Agency Response

We have decided that the standard will not apply to convertibles. We found compelling the practicability concerns raised by vehicle manufacturers and air bag suppliers related to the near-term technical challenges involved with producing a compliant convertible.

In NPRM preamble, we mentioned Porsche's development of door-mounted curtains that would deploy upward toward the vehicle roof in a rollover. Comments from the Alliance to the NPRM indicated that Porsche was not developing this curtain for ejection mitigation of convertibles, but rather for a coupe.

We sought comments on the feasibility of a door-mounted upwardly-deploying curtain for ejection mitigation of convertibles. Comments from vehicle manufacturers and air bag suppliers indicated that current air bag designs are not effective for ejection mitigation purposes in vehicles without a window frame because the air bag cannot be tethered at the leading edge of the curtain without a firm door frame to which to attach. We concur that an ejection mitigation side curtain air bag must be sturdily tethered in order to meet the displacement limits of this final rule. At this time, convertibles lack the rigid door frame or door pillar to which the ejection mitigation side curtain air bag could be tethered. We agree that current ejection mitigation side curtain air bag designs cannot be used on convertibles, and we are not aware of information indicating the feasibility of developing designs that could be used on convertibles in the foreseeable future.

Advanced glazing will not be an available countermeasure for use in convertibles to meet the standard. Honda and others stated that the advanced glazing on a convertible door is likely to fall out in a rollover crash due to the lack of roof structure and rigid structure around the window opening. In our review of field data on advanced glazing, we found sufficient evidence of glazing vacating the window opening in real world rollover crashes that we decided not to allow movable advanced glazing to be the sole countermeasure used to meet the displacement limits of the standard. Also, movable glazing cannot be present during the 16 km/h-6 second test. With these changes, the glazing-only countermeasure is no longer viable for a movable window opening. A convertible would have to pass the 16 km/h-6 second test with just the door mounted ejection mitigation side curtain air bag. As previously discussed, we do not believe it is practicable for convertibles to meet the test with only an air bag at this time.

In response to a comment from the Alliance, our reasons for excluding convertibles from the standard are not based on FMVSS No. 216's exclusion of convertibles from roof crush resistance requirements. However, we acknowledge that convertibles can pose unique challenges related to the roof. As shown previously in this preamble, there were 16 fatalities and 18 MAIS 3+ injuries due to ejections through a convertible roof closed prior to the crash. For convertibles where the roof was open, the fatalities and MAIS 3+ injuries were 31 and 84, respectively. This indicates that about half of the ejection fatalities through the roof area occurred even when the roof was closed before the crash. (These estimates are based on an extremely small sample size.) These data reflect the problematic nature of convertible ejection protection.

2. Original Roof Modified

NHTSA proposed to exclude vehicles whose original roof was replaced, raised or otherwise modified. A definition of "modified roof" was adopted. No commenter opposed the proposal. NTEA commented in support of it. This final rule adopts the proposed exclusion and definition.

[154] NHTSA–2006–26467–0016.

3. Multi-Stage Manufacture of Work Trucks

NTEA asked that NHTSA exclude work trucks built in two or more stages ("multi-stage vehicles") from FMVSS No. 226. NTEA stated that it expects that if ejection mitigation side curtain air bags are installed by a chassis manufacturer to meet FMVSS No. 226, "this manner of compliance by the chassis manufacturers will result in restrictive or non-existent pass-through compliance guidance for multi-stage manufacturers of work trucks." The commenter believed that the purchasers of these vehicles require an extensive variety of end designs, "including bulkheads and partitions to protect the driver from loose cargo in the back of the vehicle," and that the design of most vehicles will almost certainly affect the performance of the chassis manufacturers' side curtain air bag systems. The commenter believed that "pass-through compliance will prohibit any completions or alterations that could affect the vehicle's center of gravity thus potentially affecting the sensor(s) that control side curtain bag deployment. Also expected to be prohibited for pass-through compliance would be any changes to the trim or headliner around any of the regulated window space." [155]

NHTSA is declining the request for a blanket exclusion of all work trucks built in two or more stages from FMVSS No. 226. To provide relief to multi-stage manufacturers and alterers, we have already excluded vehicles whose original roof was removed, in part or in total, by an alterer or final stage manufacturer. That exclusion addresses designs that will specifically affect side curtain air bag coverage or inflators for which pass-through guidance might not be available.

A final-stage manufacturer can either stay within the incomplete vehicle document (IVD) furnished by the incomplete vehicle manufacturer (which are typically large vehicle manufacturers, such as GM or Ford), or the final-stage manufacturer can work with incomplete vehicle manufacturers to enable the final-stage manufacturer to certify to the new standard.[156] The final-stage manufacturer can also certify to the standard using due care based on an assessment of the information available to the manufacturer.

NTEA contended that work-performing vehicles should be excluded from the standard because producing these vehicles may involve changing the vehicle's center of gravity, which the commenter stated could potentially affect the sensor(s) that control side curtain air bag deployment. The standard adopted today does not specify any requirements for the rollover sensor. In the compliance test, we manually deploy the ejection mitigation side curtain air bags with the stationary vehicle set up in the test laboratory. Changing the center of gravity of the vehicle would not affect our ability to manually deploy the side curtain air bags in the laboratory test. Likewise, lowering the vehicle floor would not affect the ability to manually deploy the side curtain air bags in the test.

Since no certification requirement exists with regard to the sensor, the IVD will not have center of gravity restrictions regarding sensor performance. We have no sound reason to exclude multi-stage work vehicles from the standard based on possible restrictions relating to sensor performance.

Furthermore, we do not believe that changing the center of gravity of the vehicle will affect whether or not an ejection mitigation side curtain air bags deploys in a real world rollover. We believe that incomplete vehicle manufacturers will be able to develop rollover detection technology that can address variability in the vehicle's center of gravity.[157] Sensors that are based on roll angle and roll rate can be made to deploy the air bag when the vehicle rolls, despite changes to the center of gravity of the vehicle involved in installing bulkheads, partitions, etc., to which NTEA alludes. However, such changes may have an effect on the optimization of the sensor for the particular vehicle, which could result in the systems deploying earlier or later than would otherwise be the case. Nonetheless, even without sensor optimization, work vehicles with ejection mitigation side curtain air bags would continue to provide ejection protection to their occupants. If these vehicles were excluded because of center of gravity changes, they would offer no ejection protection in rollovers and no protection against ejection in side impacts.

Some modifications made by a final-stage manufacturer or alterer to the interior of the vehicle could affect the vehicle's compliance with FMVSS No. 226. An example of this is installing a partition. NTEA sought to exclude multi-stage manufactured vehicles with bulkheads and partitions from FMVSS No. 226 since installation of a bulkhead or partition "will almost certainly affect the performance of the chassis manufacturers' side curtain air bag systems."

We decline to adopt a blanket exclusion of multi-stage vehicles with bulkheads or partitions in work vehicles.[158] Such an exclusion would be unreasonably broad. Bulkheads and partitions can be installed so as not to interfere with the deployment of ejection mitigation side curtain air bags. Bulkheads and partitions can be designed to allow for sufficient clearance to allow the air bags to deploy, or may have break-away features to allow a curtain air bag to deploy.[159] The incomplete vehicle manufacturers will be able to provide the appropriate guidance to allow for pass-through certifications. Even if the IVD does not provide guidance, the final-stage manufacturer will be able to ascertain the clearance needed to install the bulkhead or partition. The bulkhead and partition designs will enable the final customer to purchase a vehicle certified to FMVSS No. 226 and to provide the protection of side curtain air bags to their employees who will be occupying the vehicle.

We disagree with the Alliance's comment that the National Traffic and Motor Vehicle Safety Act precludes the agency from applying FMVSS No. 226 to vehicles with partitions. Partitioned vehicles are not a vehicle type. In any event, it is not impracticable to meet the standard with a partition. Manufacturers will be able to determine how to provide a clearance for the ejection mitigation side curtain air bags and/or design and position the partition to take advantage of the shape of the air bag.

NTEA also expressed concerns related to testing cost for those multi-staged vehicles for which pass-through would not be available. It stated that it received estimates for testing costs "from $9,000 to $25,000 for 1–3 rows at 5 tests per

[155] NHTSA–2009–0183–0017, p. 3.

[156] For a discussion of NHTSA's certification regulations for final stage manufacturers, see 71 FR 28168, May 15, 2006, Docket No. NHTSA–2006–24664, Response to petitions for reconsideration of a final rule implementing regulations pertaining to multi-stage vehicles and to altered vehicles. The Background section of that document provides concepts and terminology relating to the certification of multi-stage vehicles.

[157] Mercedes' comment to the NPRM indicated that vehicle manufacturers will work toward developing rollover detection technology for use in large vehicles with center of gravity different than those of passenger cars.

[158] As discussed later in this section, we are allowing a limited exclusion of "security partitions" in multi-stage manufactured or altered law enforcement vehicles, correctional institution vehicles, taxis and limousines.

[159] *See* 75 FR 12123, 12128–12131, March 15, 2010, for a discussion of approaches that are available to multi-stage manufacturers enabling them to certify to FMVSS No. 214's pole test using side impact curtain air bags in vehicles with partitions.

window, and $14,000 to $40,000 for 1–3 rows at 8 tests per window (assuming new airbags and glass for each impact." We do not believe those estimates are accurate. In the PRIA, the agency estimated testing costs would consist of $100 for labor, $300 for an air bag and $400 for advanced glazing.[160] For a 3 row vehicle, assuming testing every target at both test speeds; this would result in a testing cost estimate of $19,200.

NTEA also questioned the potential availability of testing facilities to fulfill the need of the multi-stage manufacturers. We believe testing facilities will be able and willing to provide the market demand for testing. The agency purchased a state-of-the-art ejection mitigation test device for about $150,000 and received delivery in 4½ months.

In addition, multi-stage manufacturers have an additional year after the phase-in is completed to certify compliance to FMVSS No. 226. This leadtime available to multi-stage manufacturers will provide enough time for the manufacturers to work with incomplete vehicle manufacturers to address pass-through certification guidance or perform whatever testing they deem is necessary for certification purposes, including the basis for certifying vehicles with a partition or bulkhead.

NTEA noted that it expected any change to the trim or headliner around any of the window space to be prohibited by the IVD for pass-through compliance. We do not agree. In its comment, Nissan stated that it did not anticipate the headliner would affect performance of the side curtain air bag system. NTEA did not provide information showing otherwise. Further, the multi-stage manufacturers have ample lead time to work with incomplete vehicle manufacturers to develop acceptable trim and headliner changes or to work with test laboratories themselves to assess what changes to the trim or headliner can be made that will not affect the performance of the ejection mitigation system.

We are adopting a suggestion of NTEA with regard to partitions. One of NTEA's comments related to vehicles with partitions or bulkheads that separate areas of the vehicle with and without seating positions. It stated that to the extent the proposed standard applied to multi-stage produced trucks, "NHTSA [should] consider adopting testing parameters similar to those found in FMVSS 201 to effectively exclude any targets that are located behind the forward surface of a partition or bulkhead * * *. We believe it is neither practical nor beneficial to require test target points that could not possibly be contacted by the head of an occupant seated forward of the partition."[161]

We find merit in this suggestion to be consistent with FMVSS No. 201. If there is a permanent partition or bulkhead that separates areas of the vehicle with designated seating positions (DSgPs) from areas that do not have DSgPs, we believe there is no sensible reason to target daylight openings in the latter area. The likelihood of an occupant being ejected from an opening in an area without a DSgP is low. However, to reduce the likelihood an occupant would be in the area without a DSgP, the partition or bulkhead must be fixed to the vehicle and not provide access for an occupant to pass through it. A partition with a door would not be considered as separating the occupant space from non-occupant space.

This final rule makes a limited exclusion of security partitions in multi-stage manufactured or altered law enforcement vehicles, correctional institution vehicles, taxis and limousines. The Alliance and Volvo commented that police vehicles, taxis and limousines with partitions between the first and second rows should be excluded from FMVSS No. 226. The Alliance claimed that any partition installed in a way to not interfere with curtain deployment would leave "a significant gap between the outboard edge of the partition and the inboard surface of the vehicle trim thus rendering it unable to provide either complete security or privacy." The Alliance believed that upwardly-deploying air bags are not feasible. Volvo believed that installing a partition is "always done by a third party and is, for this reason, beyond the vehicle manufacture[r]'s control. To take this potential adaptation into consideration during design, development, and testing would not be possible."

Considering that law enforcement vehicles are more likely to be involved in risky driving operations than other passenger vehicles, NHTSA prefers that the vehicles provide ejection mitigation countermeasures. However, we agree to exclude some vehicles from the standard under certain circumstances due to practical considerations.

Security partitions (*e.g.,* prisoner partitions) are necessary for the safety and security of law enforcement officers. These partitions must be flush against the sides of the vehicle to prevent a rear seat occupant's hand or article from intruding into the officer's compartment. A partition installed by a final-stage manufacturer in an incomplete vehicle or by an alterer in a completed vehicle will interfere with the ejection mitigation side curtain air bags currently being produced. The curtains are tethered from the A-pillar to the C-pillar, so a partition between the 1st and 2nd rows or between the 2nd and 3rd rows will prevent the curtain from properly covering the window opening.

After considering the comments, we believe it would be difficult for incomplete vehicle manufacturers providing vehicles to the final stage manufacturers or alterers to have an alternative design which would be compatible with a security partition.[162] Thus, we are excluding from the standard law enforcement vehicles, correctional institution vehicles, taxis and limousines, if they have a fixed security partition separating the 1st and 2nd or 2nd and 3rd rows, and if they are manufactured in more than one stage or are altered. We do not believe that compatible designs, such as a split curtain, are impossible. Rather, we believe compatible designs will need time to develop.

We do not believe there is any technical barrier to designing curtain(s) to cover side windows that are separated by a partition with two separate curtains. The front of the first row curtain and rear of the second row curtain could be tethered to the A- and C-pillars, respectively. Each curtain could be separately tethered to the B-pillar. We also believe that such a split curtain system could use a single inflator to feed both air bags. The trim on the B-pillar and on the header in front and behind the partition could be split to allow the two air bags to deploy independently. Development of such a vehicle specific curtain would likely require time, and the resources available to an incomplete vehicle manufacturer, i.e., a large vehicle manufacturer.

[160] PRIA, pg. V–21.

[161] This provision is found in S6.3(b) of FMVSS No. 201. Footnote added.

[162] In FMVSS No. 214, we do not exclude police and other vehicles from meeting the standard's pole test requirements. The pole test does not apply to rear seats. To meet the pole test, vehicles must provide head, thorax and pelvic protection. Side window curtains can be used to meet the pole test, but seat- and door-mounted air bags in the front seat are also available for use as well in meeting FMVSS No. 214. Thus, multi-stage manufacturers can work together such that the vehicle in which the partition is installed can meet FMVSS No. 214 with a front seat seat-mounted or door-mounted air bag. At this time there is no countermeasure available from incomplete vehicle manufacturers that could meet FMVSS No. 226 with a security partition flush to the side of the vehicle. A countermeasure only using advanced glazing for movable windows will not meet today's requirements because the 16 km/h test must be passed without glazing in place.

Because we believe incomplete vehicle manufacturers are able to develop a curtain design that is compatible with a partition, we are not extending this exclusion to law enforcement vehicles, correctional institution vehicles, taxis and limousines if they are built in a single stage. We believe it is practicable for such a vehicle to have a single design to meet the final rule and that manufacturers of such vehicles will be capable of applying the necessary resources to meet the standard.

4. Other Issues

i. Vehicles That Have No Doors and Walk-In Vans

Comments were requested but none were received on whether vehicles are still being manufactured that have no doors, or exclusively have doors that are designed to be easily attached or removed so that the vehicle can be operated without doors. NHTSA proposed excluding the vehicles on practicability grounds. This final rule adopts the exclusion.

We did not receive comments on the proposed exclusion of walk-in vans. This final rule excludes the vehicles on practicability grounds.

ii. Vehicles Over 4,536 kg

A few commenters requested that the standard not be limited to vehicles under 4,536 kg (10,000 lb) GVWR. Batzer and Ziejewski stated that school buses over 4,536 kg offered ejection mitigation by virtue of the divider-bar requirement and, therefore, commercial vehicles over 4,536 kg GVWR should be covered as well. The commenter stated that "[w]hile this could conceivably cause some manufacturers distress, they could be provided the opportunity to petition NHTSA for a waiver, and notify the purchaser that their vehicle does not fully comply with pertinent FMVSS regulations." [163]

We did not propose to apply the standard to vehicles with a GVWR over 4,536 kg and did not discuss the possibility of this application of the standard or request comments on this issue. Thus, the requests are outside the scope of the rulemaking. Also, we note that the National Traffic and Motor Vehicle Safety Act provides very limited authority to NHTSA to grant exemptions to manufacturers from meeting the requirements of the Federal motor vehicle safety standards. General authority to grant waivers is not available.

[163] NHTSA–2009–0183–0009, p. 1.

m. Lead Time and Phase-In Schedules; Reporting Requirements

Motor vehicle manufacturers will need lead time to develop and install ejection mitigation countermeasures and rollover sensors. Although inflatable side curtain air bags are being developed in new vehicles to meet the September 1, 2010 date that begins the phase-in of the FMVSS No. 214 final rule for the pole test, to meet the requirements adopted today, these side curtains will have to be made larger to cover more of the window opening, will have to be made more robust to remain inflated longer, and will have to be enhanced (by tethering and other means) to retain vehicle occupants within the vehicle. Moreover, rollover sensors will need to be installed to deploy the ejection mitigation countermeasures in rollover crashes, to augment the sensors needed to deploy the side curtains in side impacts.

Our tests of vehicles to the NPRM's proposed requirements found that vehicle manufacturers were at different stages with respect to designing inflatable ejection mitigation side curtains that meet the requirements then-proposed. Vehicle manufacturers also face unique manufacturing constraints and challenges, *e.g.,* each face differences in the technological advances incorporated in their current air bag systems, differences in engineering resources, and differences in the numbers and type of vehicles for which ejection mitigation systems will need to be incorporated. NHTSA believed that these differing situations can best be accommodated by phasing in the ejection mitigation requirements and by allowing the use of advanced credits.

NHTSA proposed that the phase-in would be implemented in accordance with the following schedule: 20 percent of each manufacturer's vehicles manufactured during the first production year beginning three years after publication of a final rule (for illustration purposes, assuming the final rule is issued in January 2011, under the NPRM that effective date would have been September 1, 2014); 40 percent of each manufacturer's vehicles manufactured during the production year beginning four years after publication of a final rule; 75 percent of vehicles manufactured during the production year beginning five years after publication of a final rule; and all vehicles (without use of advanced credits) manufactured on or after the September 1st following six years after publication of a final rule.

NHTSA also proposed to permit "limited line" manufacturers that produce three or fewer carlines the option of achieving full compliance when the phase-in is completed. The NPRM also proposed that manufacturers of vehicles manufactured in two or more stages and alterers would not be required to meet the phase-in schedule and would not have to achieve full compliance until one year after the phase-in is completed. NHTSA proposed reporting requirements to accompany the phase-in.

Comments

The Alliance asked for an additional year of lead time, believing that it will take at least 12 months after publication of the final rule to obtain impactors meeting the specified performance requirements. Further, the Alliance stated that "even after the devices have been acquired, they must be installed, pre-tested and run-in before they can produce consistent test results which are necessary prior to the initiation of a development process that will yield reproducible results. These logistical steps will unfortunately eliminate one-third of the lead-time intended by the NPRM and because manufacturers will utilize the impactor in the development process, this lost time will significantly impact manufacturers' ability to achieve compliance in the first year of the phase-in as proposed."

The AIAM stated that an additional year of lead time is needed for vehicles not utilizing roof rail mounted curtain air bags to meet FMVSS No. 214. It claimed that these vehicles would need significantly greater redesign and that this work cannot begin until the final rule is issued.

Several vehicle manufacturers asked for the application of advanced credits in the 100 percent certification year. The Alliance contended that manufacturers producing vehicles that do not meet FMVSS No. 214 by way of a side window air bag curtain will need to use credits in the 100 percent year to be able to redesign vehicles to meet FMVSS No. 226. The commenter stated its belief that vehicles with a GVWR over 2,722 kg (6,000 lb) will need more lead time to install larger air bag cushions and inflators to cover the vehicles' larger windows. Porsche stated that compliance with future ejection mitigation requirements will necessitate significant changes to the body-in-white, greenhouse and interior fittings which can only be implemented with the launch of a new vehicle model. Mercedes commented that large vehicles, such as the Mercedes-Benz Sprinter, have large window openings

which Mercedes stated will require a completely new generation of large air bag curtains.

In contrast, glazing manufacturers and consumer groups requested a one-year reduction in both the lead time and phase-in of the final rule. Advocates requested that the phase-in be changed to 40 percent, 75 percent and 100 percent. Guardian stated that "advanced glazing technology is available today." EPGAA stated "many manufacturers' models already incorporate advanced glazing and airbags, and as NHTSA's testing shows, little or no changes are required to existing airbags to achieve compliance with the proposed standard."

Agency Response

To accelerate the ejection mitigation benefits provided by this final rule, the agency has decided to reduce the lead time by a year, to two years of lead time, and to require larger percentages of a manufacturer's fleet to meet the new standard in the first two years of the phase-in schedule than proposed. The overall timetable is comparable to the schedules in FMVSS Nos. 214 and 216, and with the Phase I advanced air bag implementation in FMVSS No. 208.

We reject the argument of the Alliance that a lack of availability of impact testers will delay compliance. Many vehicle manufacturers and air bag manufacturers presented test data to the agency indicating they have access to impact testers and are able to perform the tests. The lead time and phase-in timetable provided will afford sufficient time to perform compliance tests.

We reject the AIAM request for increased lead time for vehicles that do not or will not use curtains to meet the FMVSS No. 214 upgrade. If manufacturers need more time for such vehicles, they can address this through the flexibility offered by the phase-in and credits. AIAM indicated that the additional year was needed to "fully separate the 214 and ejection mitigation phase-in periods." We do not know of a reason why full separation is needed between completion of the phase-in of the FMVSS No. 214 upgraded requirements and the first year of the FMVSS No. 226 phase-in.

The 24 km/h-1.5 second impact proposed in the NPRM has been reduced in this final rule to 20 km/h-1.5 seconds after our reanalysis of the technical basis for the energy requirement. With this reduction in impactor speed, it is expected that fewer changes will be needed to existing designs to meet the final rule's requirements. Data from agency testing of production vehicles presented earlier in this preamble showed that the MY 2007 Mazda CX9 was able to meet the performance tests in the final rule, without modification. Given this reduction in stringency of the test, fewer and/or less substantial vehicle design changes will be needed to meet the standard, and less lead time required to begin phasing in the requirements across the fleet. Accordingly, we believe that two years of lead time are sufficient prior to the phase-in. For the same reason, a greater percentage of vehicles will be able to meet the requirements in each of the phase-in years. Thus, we are slightly increasing the percentages of vehicles in the fleet that will need to meet the ejection mitigation standard during the first two years of the phase-in.

However, vehicle manufacturers are at different stages with respect to designing ejection mitigation systems, and also face differences in the challenges they face and the resources available to them. To provide flexibility to manufacturers in managing their resources to meet this schedule, this final rule provides a multi-year phase-in period and allows credits to be used in the 100 percent phase-in year. The agency did allow the use of credits for the 100 percent year for the advanced air bag rulemaking in FMVSS No. 208. We generally agree with the comments from AIAM stating that credits allow for manufacturer flexibility and earlier safety benefits. The added flexibility of allowing credits in the 100 percent year will allow manufacturers a more seamless introduction of compliant vehicles while enhancing their ability to manage their engineering and manufacturing resources.

We found particularly compelling the comments from Mercedes (regarding the Sprinter), Porsche (regarding the long product cycle of their sports cars), Volvo and other manufacturers. The use of advanced credits in the 100 percent year will provide relief to manufacturers of vehicles with very large windows, vehicles with very long product cycles, and vehicles that are not as far along having side curtain air bags as other vehicles.

The comments showed that manufacturers have unique problems depending on factors such as organizational resources, product mix, and product life cycle. A manufacturer with many different models may have more flexibility in determining which vehicles to certify and in accruing credits. However, this larger portfolio may require greater effort to bring all vehicles into compliance. On the other hand, manufacturers with small portfolios may have less flexibility, but may be able to focus resources on a much smaller number of vehicles to upgrade. The final rule phase-in schedule, even with the added year of credit use, may result in some manufacturers needing to reassess and modify their plans. Nonetheless, we believe that the two-year lead time and the four-year phase-in correctly balances the manufacturers' needs for flexibility and the needs of the agency to limit the length of time for the phase-in to a reasonable period and achieve the safety benefits of the final rule as quickly as practicable.

NHTSA has decided that the lead time and phase-in will continue to apply to all vehicles under 4,536 kg (10,000 lb).[164] We have balanced the safety need to implement the requirements of this final rule as quickly as practicable with the realistic burdens of manufacture.[165] We believe that the relief provided by the additional year to use credits will allow manufacturers the flexibility to address any specific problems associated with bringing heavier vehicles into compliance. Some vehicle manufacturers pointed to FMVSS Nos. 214 and 216 as examples of standards where the certification schedule gave special treatment to heavier vehicles. For example, for FMVSS No. 214, the agency stated that more time was being provided for the pole test of vehicles with GVWR greater than 3,856 kg (8,500 lb) because the vehicles had never been regulated in FMVSS No. 214 and thus "more redesign of the vehicle side structure, interior trim, and/or optimization of dynamically deploying head/side protection systems may be needed in these vehicles than in light vehicles."[166] We do not find the analogy persuasive. The changes needed to meet FMVSS Nos. 214 and 216 were primarily

[164] This does not include limited line manufacturers, manufacturers of multi-stage vehicles, and alterers. Those manufacturers are not required to achieve full compliance until one year after the phase-in is completed.

[165] The agency estimates that vehicles between the ranges of 2,722 kg (6,000 lb) to 4,536 kg (10,000 lb) and 3,856 kg (8,500 lb) to 4,536 kg (10,000 lb) constitute 25 percent and 6 percent of the annual production of vehicles with a GVWR less than 4,536 kg (10,000 lb). The 25 percent estimate can be found in the FRIA for the recent FMVSS No. 216 upgrade (Docket NHTSA–2009–0093). The 6 percent estimate is derived from MY 2010 submissions to the NCAP Buying a Safer Car program and Ward's 2009 Yearbook. We believe that to exclude 25 percent of vehicles less than 4,536 kg (10,000 lb) from meeting FMVSS No. 226 until the end of the phase-in, as would be the case for the 2,722 kg (6,000 lb) split, would be unacceptable in terms of the delayed safety benefits. We also believe that the 6 percent of vehicles, represented by the 3,856 kg (8,500 lb) split, represents a number that can be accommodated with accrued advanced credits.

[166] 72 FR 51911.

structural. FMVSS No. 226 countermeasures for larger vehicles, as indicated by commenters, will likely be larger curtains and longer-lasting inflators. The two-year lead time and phase-in timetable for FMVSS No. 226, and the use of credits in the 100 percent year, will provide the time needed to meet the standard.

We do not agree with the commenters expressing concern that countermeasures for heavier vehicles may have more OOP issues and therefore, in general, need more time to comply. Toyota data submitted by the Alliance indicated that OOP concerns were actually greater for passenger cars than they were for larger vehicles. Further, there is the potential of using advanced glazing in these heavier vehicles, particularly for fixed windows.

We take this opportunity to correct Public Citizen's apparent misinterpretation of the PRIA that led the commenter to believe that the agency estimated that 25 percent of MY 2011 vehicles would be able to comply with the NPRM. In the PRIA, we said that none of the curtain systems tested met the proposed 100 mm displacement limit. However, although none of the current curtain air bags met the displacement requirement, the non-compliant curtains would provide some amount of ejection mitigation. Since we do not want to double count the potential benefits of the rulemaking with the benefits that the non-compliant curtains already provide, these potential benefits were excluded from the benefits estimate.[167] Thus, the 25 percent value quoted by Public Citizen is an adjustment factor, not a compliance rate.[168]

Reporting Requirements

The Alliance mentioned that the NPRM requires manufacturers to report advanced credits 60 days after the end of the production year. It stated that this means the first report would be due on August 31, 2011. (Under the NPRM the first report would actually have to be filed 60 days after the date of August 31, 2011, rather than on August 31.) It opined that "[b]ecause the rule will likely not be finalized until 2011 and the impactors complying with the specifications contained in the final rule may not be available to all manufacturers until the 2012 timeframe, the Alliance recommended that section 585.105 of the regulation be revised so as to provide manufacturers up to one year after the end of the first advanced credit production period to file their advanced credit phase-in report for that year.

We disagree with this request. The commenter's rationale for putting off the filing of the report for a year was the same one it used to argue for an increase in lead time by one year, i.e., an alleged lack of availability of impact testers meeting the final rule requirements. We disagree with this reason because, as previously stated, many vehicle manufacturers and air bag manufacturers presented test data to the agency indicating they have access to impact testers and are able to perform tests. Further, allowing manufacturers one year after the end of the MY 2011 production period ends to report would lead to logistical difficulties for the agency's compliance testing program. At the time we would be purchasing vehicles for the MY 2011 compliance testing, we would not know which vehicles to purchase for testing to FMVSS No. 226 without the reports. If the reports were not due until October 1, 2012, it might be difficult to procure the certified MY 2011 vehicles at that time.

AIAM and VSC asked that small volume and limited line manufacturers be exempt from the phase-in reporting until the first year that they must comply or can earn credits. We agree with the comment. These entities are exempt from the phase-in requirements, so they should be exempt from reporting requirements as well.

XI. Costs and Benefits

The FRIA we have placed in the docket analyzes the impacts of this final rule. A summary of the FRIA follows.

The agency believes that side curtain air bags will be used to pass the ejection mitigation test. We believe that most manufacturers will widen the side curtain air bags that they are providing to meet FMVSS No. 214's pole test requirements, or replace combination (combo) seat-mounted side air bags with a curtain to pass the impactor test of the standard adopted today. We assume that for the most part vehicle manufacturers will install a single-window curtain for each side of the vehicle, and that these window curtains will provide protection for occupants of the first three rows.

This final rule will save 373 lives and prevent 476 serious injuries per year (see Table 42 below). The cost of this final rule is approximately $31 per vehicle (see Table 43). The cost per equivalent life saved is estimated to be $1.4 million (3 percent discount rate)—$1.7 million (7 percent discount rate) (see Table 44 below). Annualized costs and benefits are provided in Table 45.

TABLE 42—ESTIMATED BENEFITS

Fatalities	373
Serious Injuries	476

TABLE 43—ESTIMATED COSTS *

[2009 Economics]

Per Vehicle	$31.
Total Fleet (16.5 million vehicles).	$507 million.

* The system costs are based on vehicles that are equipped with an FMVSS No. 214 curtain system. According to vehicle manufacturers' projections made in 2006, 98.7 percent of Model Year (MY) 2011 vehicles will be equipped with curtain bags and 55 percent of vehicles with curtain bags will be equipped with a rollover sensor.

TABLE 44—COST PER EQUIVALENT LIFE SAVED

3% Discount rate	7% Discount rate
$1.4M	$1.7M

TABLE 45—ANNUALIZED COSTS AND BENEFITS

[In millions of $2009 dollars]

	Annual costs	Annualized benefits	Net benefits
3% Discount Rate	$507M	$2,279M	$1,773
7% Discount Rate	507M	1,814M	1,307

[167] For example, a curtain air bag that completely covers the front window opening and meets the 100 mm displacement requirement at A2, A3, and A4, but not A1. We assumed that the air bag system would provide some benefits, even if it failed to meet the displacement requirement at A1.

[168] The PRIA stated that current ejection mitigation curtain systems are only 46 percent effective in preventing occupants from ejection and that 55 percent of MY 2011 vehicles would be equipped with these non-compliant air bags.

The agency received several comments about the PRIA's cost benefit analysis. Several glazing manufacturers commented that the agency's analysis underestimated air bag costs, did not adequately consider benefits of advanced glazing associated with enhanced security, UV shading, weight reduction, improved energy efficiency, etc., and overstated the cost of advanced glazing. Public Citizen stated that the agency underestimated the benefits of FMVSS No. 226 because we overestimated the effectiveness of ESC. Conversely, IIHS stated we overestimated the benefits of FMVSS No. 226 because we underestimated the benefits of FMVSS No. 216.

In the FRIA, NHTSA responds to all relevant comments on the costs and benefits estimated by the NPRM and PRIA.

XII. Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The agency has considered the impact of this rulemaking action under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures. This rulemaking is economically significant and was reviewed by the Office of Management and Budget under E.O. 12866, "Regulatory Planning and Review." The rulemaking action has also been determined to be significant under the Department's regulatory policies and procedures. NHTSA has placed in the docket a Final Regulatory Impact Analysis describing the costs and benefits of this rulemaking action.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended, requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. I hereby certify that this final rule will not have a significant economic impact on a substantial number of small entities. Small organizations and small governmental units will not be significantly affected since the potential cost impacts associated with this final rule will not significantly affect the price of new motor vehicles.

The final rule could indirectly affect air bag manufacturers and suppliers. These entities do not qualify as small entities.

The final rule will directly affect motor vehicle manufacturers. The FRIA discusses the economic impact of the final rule on small vehicle manufacturers, of which there are six. We believe that the final rule will not have a significant economic impact on these manufacturers. The standard will employ static testing of the ejection mitigation system. The test does not involve destructive crash testing. It only involves the replacement of certain components and small vehicle manufacturers can perform such testing themselves. They can certify compliance using a combination of their own engineering analyses and testing and component testing by air bag suppliers. Already much of the air bag development work for these small vehicle manufacturers is done by air bag suppliers. While typically, air bag suppliers will supply larger vehicle manufacturers during the lead time and phase-in period of this final rule, this rulemaking accounts for this limitation by allowing more time to small manufacturers and limited line manufacturers to comply with the upgraded requirements. They have a year past the end of the phase-in period to comply. This additional time provides flexibility to those entities and enough time to work with the air bag suppliers to meet their needs.

Final-stage vehicle manufacturers buy incomplete vehicles and complete the vehicle. Alterers modify new vehicles, such as by raising the roofs of vehicles. In both cases, NHTSA concludes that the impacts of this final rule on such entities is not significant. Final-stage manufacturers and alterers engaged in raising the roofs of vehicles would not be affected by this final rule because the rule excludes vehicles with raised roofs from the ejection mitigation requirements.

NHTSA believes that work vehicles can be produced in compliance with the standard. Partitions separating a driver from cargo can be installed to accommodate an ejection mitigation side curtain air bag by providing clearance for the air bag. This final rule accommodates partitions installed in police vehicles, limousines and taxis by final-stage manufacturer and alterers by excluding those vehicles from the standard.

Executive Order 13132 (Federalism)

NHTSA has examined today's final rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rulemaking would not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The final rule would 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."

NHTSA rules can preempt in two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision: When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. 49 U.S.C. 30103(b)(1). It is this statutory command by Congress that preempts any non-identical State legislative and administrative law addressing the same aspect of performance.

The express preemption provision described above is subject to a savings clause under which "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. 30103(e) Pursuant to this provision, State common law tort causes of action against motor vehicle manufacturers that might otherwise be preempted by the express preemption provision are generally preserved. However, the Supreme Court has recognized the possibility, in some instances, of implied preemption of such State common law tort causes of action by virtue of NHTSA's rules, even if not expressly preempted. This second way that NHTSA rules can preempt is dependent upon there being an actual conflict between an FMVSS and the higher standard that would effectively be imposed on motor vehicle manufacturers if someone obtained a State common law tort judgment against the manufacturer, notwithstanding the manufacturer's compliance with the NHTSA standard. Because most NHTSA standards established by an FMVSS are minimum standards, a State common law tort cause of action that seeks to impose a higher standard on motor vehicle manufacturers will generally not be preempted. However, if and when such a conflict does exist—for example, when the standard at issue is both a minimum and a maximum standard—the State common law tort cause of action is impliedly preempted. See *Geier* v. *American Honda Motor Co.,* 529 U.S. 861 (2000).

Pursuant to Executive Order 13132 and 12988, NHTSA has considered whether this rule could or should preempt State common law causes of action. The agency's ability to announce its conclusion regarding the preemptive effect of one of its rules reduces the likelihood that preemption will be an issue in any subsequent tort litigation.

To this end, the agency has examined the nature (*e.g.,* the language and structure of the regulatory text) and objectives of today's rule and finds that this rule, like many NHTSA rules, prescribes only a minimum safety standard. As such, NHTSA does not intend that this rule preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's rule. Establishment of a higher standard by means of State tort law would not conflict with the minimum standard announced here. Without any conflict, there could not be any implied preemption of a State common law tort cause of action.

Executive Order 12778 (Civil Justice Reform)

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows.

The issue of preemption is discussed above in connection with E.O. 13132. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceedings before they may file suit in court.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year ($100 million adjusted annually for inflation, with base year of 1995). These effects are discussed earlier in this preamble and in the FRIA.

UMRA also requires an agency issuing a final rule subject to the Act to select the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule." The preamble and the FRIA discuss several alternatives we considered, and the resulting cost and benefits of various alternative countermeasures. The alternatives considered were: (a) Exclusion of the front lower corner of the front side window area (test point A1); (b) a component test consisting of a single headform impact at the center of the side window opening area; and, (c) a full-vehicle dynamic test to evaluate a countermeasure's retention capability instead of the headform component test. The countermeasures examined for alternatives (a) and (b) were various levels of partial window coverage ("partial curtain"). We also examined the potential countermeasure of a partial curtain in combination with the installation of laminated glazing in the front window openings to prevent ejections through test point A1 and the lower gap ("partial curtain plus laminated glazing"). However, as discussed in this preamble and in the FRIA, none of these alternatives achieved the objectives of the alternative adopted today. The agency believes that it has selected the least costly, most cost-effective and least burdensome alternative that achieves the objectives of the rulemaking.

National Environmental Policy Act

NHTSA has analyzed this final rule for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action would not have any significant impact on the quality of the human environment.

Plain Language

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please write to us about them.

Paperwork Reduction Act (PRA)

Under the PRA of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. The final rule contains a collection of information, i.e., the phase-in reporting requirements, requirements to place consumer information about the readiness indicator and about the sensor in the vehicle owner's manual (S4.2.3), and requirements for providing information to NHTSA about a rollover sensor in a compliance test (S4.2.4). There is no burden to the general public.

The collection of information would require manufacturers of passenger cars and of trucks, buses and MPVs with a GVWR of 4,536 kg (10,000 lb) or less, to annually submit a report, and maintain records related to the report, concerning the number of such vehicles that meet the ejection mitigation requirements of this FMVSS. The phase-in of the test requirements would be completed approximately seven years after publication of a final rule (eight years counting the 100 percent credit year). The purpose of the reporting requirements is to aid the agency in determining whether a manufacturer has complied with the ejection mitigation requirements during the phase-in of those requirements, including the manufacturer's use of advanced credits.

Under the PRA, the agency must publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each collection of information. This was accomplished in the NPRM preceding this final rule (74 FR 63225). The Office of Management and Budget (OMB) has promulgated regulations describing what must be included in such a document. Pursuant to OMB's regulations (5 CFR 320.8(d)), NHTSA sought public comment on the following:

(1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) How to enhance the quality, utility, and clarity of the information to be collected; and,

(4) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

We published our estimates of the burden to vehicle manufacturers, as follows:

- NHTSA estimated that there are 21 manufacturers of passenger cars, multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kg (10,000 lb) or less;
- NHTSA estimated that the total annual reporting and recordkeeping burden resulting from the collection of information is 1,260 hours;
- NHTSA estimated that the total annual cost burden, in U.S. dollars, will be $0. No additional resources would be expended by vehicle manufacturers to gather annual production information because they already compile this data for their own use.

NHTSA did not receive any comments on the above. Therefore, we are submitting a request for OMB clearance of the collection of information required under today's final rule.

National Technology Transfer and Advancement Act

Under the National Technology Transfer and Advancement Act of 1995 (NTTAA) (Pub. L. 104–113), all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.

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, such as the International Organization for Standardization (ISO) and the Society of Automotive Engineers. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

Commenters requested that the agency apply voluntary industry standards SAE J2568—Intrusion Resistance of Safety Glazing Systems for Road Vehicles or BSI AU 209—Vehicle Security. These industry standards specify that after testing there must not be separation within the glazing or between the glazing and vehicle body, which would allow for passage of a 40 mm diameter sphere (40 mm gap test).

We studied the potential of applying these standards, but decided against adopting them for several reasons. These standards provide glazing intrusion resistance requirements from external impact (outside-in) as opposed to ejection mitigation (inside-out). Additionally, the requirements are not appropriate for vehicles with only side curtain air bags, given that there is a time dependence associated with a curtain's ejection mitigation performance. Once deployed, the pressure in the air bag continuously decreases. The 16 km/h test is done at 6 seconds to assure that the pressure does not decrease too quickly. It does not seem that the 40 mm gap test could be done after the 6-second impact, in any timeframe which is related to rollover and side impact ejections.

Further, there was no shown safety need for applying the suggested standards. We cannot show that ejections that would not be prevented by the primary 100-mm displacement requirement would be prevented by a secondary 40-mm requirement. Also, it seemed that the 40-mm requirement would indirectly require installation of advanced glazing. As discussed in this preamble, the costs associated with advanced glazing installations at the side windows covered by the standard adopted today are substantial in comparison to a system only utilizing rollover curtains. For these reasons, the agency did not accept the suggestions.

List of Subjects

49 CFR Part 571

Imports, Incorporation by reference, Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

49 CFR Part 585

Motor vehicle safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, NHTSA amends 49 CFR parts 571 and 585 as set forth below.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

■ 1. The authority citation for part 571 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50.

■ 2. Section 571.5(b) is amended by adding, in alphabetical order, an entry to the list of materials incorporated by reference, as follows:

§ 571.5 Matter incorporated by reference.

* * * * *

(b) * * *

"Parts List; Ejection Mitigation Headform Drawing Package," December 2010; "Parts List and Drawings; Ejection Mitigation Headform Drawing Package," December 2010. Copies may be obtained by contacting: Reprographics Technologies, 9000 Virginia Manor Rd., Beltsville, MD 20705, telephone (301) 210–5600.	571.226, S7.1.1

* * * * *

■ 3. Section 571.226 is added to read as follows:

§ 571.226 Standard No. 226; Ejection Mitigation.

S1. *Purpose and Scope.* This standard establishes requirements for ejection mitigation systems to reduce the likelihood of complete and partial ejections of vehicle occupants through side windows during rollovers or side impact events.

S2. *Application.* This standard applies to passenger cars, and to multipurpose passenger vehicles, trucks and buses with a gross vehicle weight rating of 4,536 kg or less, except walk-in vans, modified roof vehicles and convertibles. Also excluded from this standard are law enforcement vehicles, correctional institution vehicles, taxis and limousines, if they have a fixed security partition separating the 1st and 2nd or 2nd and 3rd rows and if they are produced by more than one manufacturer or are altered (within the meaning of 49 CFR 567.7).

S3. *Definitions.*

Ejection impactor means a device specified in S7.1 of this standard that is a component of the ejection mitigation test device and is the moving mass that strikes the ejection mitigation countermeasure.

Ejection impactor targeting point means the intersection of the y-axis of the ejection headform and the outer surface of the ejection headform.

Ejection mitigation countermeasure means a device or devices, except seat belts, integrated into the vehicle that reduce the likelihood of occupant ejection through a side window opening, and that requires no action by the occupant for activation.

Ejection propulsion mechanism means a device that is a component of the ejection mitigation test device consisting of a mechanism capable of propelling the ejection impactor and constraining it to move along its axis or shaft.

Limited-line manufacturer means a manufacturer that sells three or fewer carlines, as that term is defined in 49 CFR 583.4, in the United States during a production year.

Modified roof means the replacement roof on a motor vehicle whose original roof has been removed, in part or in total.

Row means a set of one or more seats whose seat outlines do not overlap with the seat outline of any other seats, when all seats are adjusted to their rearmost normal riding or driving position, when viewed from the side.

Seat outline means the outer limits of a seat projected laterally onto a vertical longitudinal vehicle plane.

Side daylight opening means, other than a door opening, the locus of all points where a horizontal line, perpendicular to the vehicle vertical longitudinal plane, is tangent to the periphery of the opening. The periphery includes surfaces 100 millimeters inboard of the inside surface of the window glazing and 25 mm outboard of the outside surface of the side glazing. The periphery excludes the following: any flexible gasket material or weather stripping used to create a waterproof seal between the glazing or door and the vehicle interior; grab handles used to facilitate occupant egress and ingress; and any part of a seat.

Small manufacturer means an original vehicle manufacturer that produces or assembles fewer than 5,000 vehicles annually for sale in the United States.

Target means the x-z plane projection of the ejection headform face as shown in Figure 1.

Walk-in van means a special cargo/mail delivery vehicle that only has a driver designated seating position. The vehicle has a sliding (or folding) side door and a roof clearance that enables a person of medium stature to enter the passenger compartment area in an upright position.

Zero displacement plane means, a vertical plane parallel to the vehicle longitudinal centerline and tangent to the most outboard surface of the ejection headform when the headform is aligned with an impact target location and just touching the inside surface of a window covering the side daylight opening.

S4. *Phase-in, performance and other requirements.*

S4.1 *Phase-in requirements.*

S4.1.1 Except as provided in S4.1.3 of this standard, a percentage of each manufacturer's vehicle production, as specified in S8 of this standard, manufactured on or after September 1, 2013 to August 31, 2017, shall meet the requirements of S4.2. Vehicles that are not subject to the phase-in may be certified as meeting the requirements specified in this standard.

S4.1.2 Except as provided in S4.1.3 of this section, each vehicle manufactured on or after September 1, 2017 must meet the requirements of S4.2 without use of advanced credits.

S4.1.3 *Exceptions from the phase-in; special allowances.*

(a) Vehicles produced by a small manufacturer and by a limited line manufacturer are not subject to S4.1.1 of this standard, but are subject to S4.1.2.

(b) Vehicles that are altered (within the meaning of 49 CFR 567.7) before September 1, 2018, after having been previously certified in accordance with part 567 of this chapter, and vehicles manufactured in two or more stages before September 1, 2018, are not required to meet the requirements of S4.2. Vehicles that are altered on or after September 1, 2018, and vehicles that are manufactured in two or more stages on or after September 1, 2018, must meet the requirements of S4.2.

S4.2 *Performance and other requirements.*

S4.2.1 When the ejection propulsion mechanism propels the ejection impactor into the impact target locations of each side daylight opening of a vehicle according to the test procedures specified in S5 of this standard, the most outboard surface of the ejection headform must not displace more than 100 millimeters beyond the zero displacement plane.

S4.2.1.1 No vehicle shall use movable glazing as the sole means of meeting the displacement limit of S4.2.1.

S4.2.1.2 Vehicles with an ejection mitigation countermeasure that deploys in the event of a rollover must deploy the countermeasure for the side daylight opening being tested according to the procedure specified in S5 of this standard.

S4.2.1.3 If a side daylight opening contains no target locations, the impact test of S4.2.1 is not performed on that opening.

S4.2.2 Vehicles that have an ejection mitigation countermeasure that deploys in the event of a rollover must have a monitoring system with a readiness indicator. The indicator shall monitor its own readiness and must be clearly visible from the driver's designated seating position. The same readiness indicator required by S4.5.2 of FMVSS No. 208 may be used to meet the requirement. A list of the elements of the system being monitored by the indicator shall be included with the information furnished in accordance with S4.2.3.

S4.2.3 *Written information.*

(a) Vehicles with an ejection mitigation countermeasure that deploys in the event of a rollover must be described as such in the vehicle's owner manual or in other written information provided by the vehicle manufacturer to the consumer.

(b) Vehicles that have an ejection mitigation countermeasure that deploys in the event of a rollover must include in written information a discussion of the readiness indicator required by S4.2.2, specifying a list of the elements of the system being monitored by the indicator, a discussion of the purpose and location of the telltale, and instructions to the consumer on the steps to take if the telltale is illuminated.

S4.2.4 *Technical Documentation.* For vehicles that have an ejection mitigation countermeasure that deploys in the event of a rollover, the vehicle manufacturer must make available to the agency, upon request, the following information: A discussion of the sensor system used to deploy the countermeasure, including the pertinent inputs to the computer or calculations within the computer and how its algorithm uses that information to determine if the countermeasure should be deployed.

S5. *Test procedures.*

S5.1 Demonstrate compliance with S4.2 of this standard in accordance with the test procedures specified in this standard, under the conditions of S6, using the equipment described in S7. In the impact test described by these procedures, target locations are identified (S5.2) and the zero displacement plane location is determined (S5.3). The glazing is pre-broken, fully retracted or removed prior to the impact test (S5.4). The countermeasure is deployed, if applicable, and an ejection impactor (see S7.1) strikes the countermeasure at the impact target locations, at the specified speeds and times (S5.5). The lateral displacement of the ejection impactor beyond the zero displacement plane is measured.

S5.2 *Determination of impact target locations.*

S5.2.1 *Boundary of target location.*

S5.2.1.1 *Initial determination of offset line.* Determine the location of an offset-line within the side daylight opening by projecting each point of the side daylight opening laterally onto a vehicle vertical longitudinal plane. Move each point by 25±2 mm towards the center of the side daylight opening projection and perpendicular to a line tangent to the projection at that point, while maintaining the point on a vehicle vertical longitudinal plane.

S5.2.1.2 *Rearmost limit of offset line.*

(a) *Seats fixed in a forward facing direction.* Except as provided in S5.2.1.2(b), if an offset line extends rearward of a transverse vertical vehicle plane located behind the seating reference point at the distance specified in 5.2.1.2(a)(1) or (2), the transverse vertical vehicle plane defines the rearward edge of the offset line for the purposes of determining target locations.

(1) For a vehicle with fewer than 3 rows—1,400 mm behind the rearmost SgRP.

(2) For a vehicle with 3 or more rows—600 mm behind the 3rd row SgRP.

(b) *Seats not fixed in a forward facing direction.* When the last row seat adjacent to the opening, in the case of a vehicle with fewer than 3 rows, or the 3rd row seat adjacent to the opening, in the case of a vehicle with 3 or more rows, is not fixed in the forward facing direction, the offset line may extend farther rearward than specified in S5.2.1.2(a) under the following conditions. With the seat in any non-forward facing orientation, the seat back set at an inclination position closest to the manufacturer's design seat back angle, and all other seat adjustments at any possible position of adjustment, determine the location of a vertical transverse vehicle plane located behind the portion of the seat rearmost in the vehicle, at the distance specified in 5.2.1.2(b)(1) and (2). The boundary of target locations extends to this vertical plane if it is farther rearward than the plane determined in S5.2.1.2(a).

(1) For a vehicle with fewer than 3 rows—1,400 mm behind the portion of the seat rearmost in the vehicle.

(2) For a vehicle with 3 or more rows—600 mm behind the portion of the seat rearmost in the vehicle, for a seat in the 3rd row.

(c) *Vehicles with partitions or bulkheads.* If a vehicle has a fixed traverse partition or bulkhead through which there is no occupant access and behind which there are no designated seating positions, a vertical transverse vehicle plane 25 mm forward of the most forward portion of the partition or bulkhead defines the rearward edge of the offset line for the purposes of determining target locations when said plane is forward of the limiting plane defined in S5.2.1.2(a) or (b).

S5.2.2 *Preliminary target locations.*

(a) To identify the impact target locations, the following procedures are performed with the x and z axes of the target, shown in Figure 1 (provided for illustration purposes), aligned within ±1 degree of the vehicle longitudinal and vertical axes, respectively, and the target y axis pointing in the outboard direction.

(b) Place targets at any location inside the offset-line where the target is tangent to within ±2 mm of the offset-line at just two or three points (see Figure 2) (figure provided for illustration purposes).

S5.2.3 *Determination of primary target locations.* Divide the side daylight opening into four quadrants by passing a vertical line and a horizontal line, in a vehicle vertical longitudinal plane, through the geometric center of the side daylight opening.

S5.2.3.1 *Front windows.* For any side daylight opening forward of the vehicle B-pillar, the primary quadrants are the forward-lower and rearward-upper.

S5.2.3.2 *Rear windows.* For any side daylight opening rearward of the B-pillar, the primary quadrants are the forward-upper and rearward-lower.

S5.2.3.3 If a primary quadrant contains only one target center, that target is the primary target for that quadrant (*see* Figure 3) (figure provided for illustration purposes). If there is more than one target center in a primary quadrant, the primary target for that quadrant is the lowest target in a lower quadrant and the highest target in an upper quadrant. If there is a primary quadrant that does not contain a target center, the target center closest to the primary quadrant outline is the primary target.

S5.2.4 *Determination of secondary target locations.*

S5.2.4.1 *Front windows.* Measure the horizontal distance between the centers of the primary targets. For a side daylight opening forward of the B-pillar, place one secondary target center rearward of the forward primary target by one-third of the horizontal distance between the primary target centers and tangent with upper portion of the offset-line. Place another secondary target center rearward of the forward primary target by two-thirds of the horizontal distance between the primary target centers and tangent with the lower portion of the offset-line (*see* figure 4) (figure provided for illustration purposes).

S5.2.4.2 *Rear windows.* For side daylight openings rearward of the B-pillar, place one secondary target center rearward of the forward primary target by one-third of the horizontal distance between the primary target centers and tangent with lower portion of the offset-line. Place another secondary target center rearward of the forward primary target by two-thirds of the horizontal distance between the primary target centers and tangent with the upper portion of the offset-line (*see* Figure 4) (figure provided for illustration purposes).

S5.2.5 *Target adjustment.*

S5.2.5.1 *Target elimination and reconstitution.*

S5.2.5.1.1 *Target elimination.* Determine the horizontal and vertical distance between the centers of the targets. If the minimum distance between the z axes of the targets is less than 135 mm and the minimum distance between the x axes of the targets is less than 170 mm, eliminate the targets in the order of priority given in steps 1 through 4 of Table 1 (see Figure 5) (figure provided for illustration purposes). In each case, both the z axes of the targets must be closer than 135 mm and x axes of the targets must be closer than 170 mm. If the minimum distance between the z axes of the targets is not less than 135 mm or the minimum distance between the y axes of the targets is not less than 170 mm, do not eliminate the target. Continue checking all the targets listed in steps 1 through 4 of Table 1.

TABLE 1—PRIORITY LIST OF TARGET DISTANCE TO BE CHECKED AGAINST LIMITS

Step	Measure distance from z axis to z axis and x axis to x axis for these targets	Eliminate this target if distances between z axes of targets and x axes of targets are less than 135 mm and 170 mm, respectively
1	Upper Secondary to Lower Secondary	Upper Secondary.
2	Upper Primary to Upper or Remaining Secondary	Upper or Remaining Secondary.

TABLE 1—PRIORITY LIST OF TARGET DISTANCE TO BE CHECKED AGAINST LIMITS—Continued

Step	Measure distance from z axis to z axis and x axis to x axis for these targets	Eliminate this target if distances between z axes of targets and x axes of targets are less than 135 mm and 170 mm, respectively
3	Lower Primary to Lower or Remaining Secondary	Lower or Remaining Secondary.
4	Upper Primary to Lower Primary	Upper Primary.

S5.2.5.1.2 *Target reconstitution.* If after following the procedure given in S5.2.5.1.1, there are only two targets remaining, determine the absolute distance between the centers of these targets. If this distance is greater than or equal to 360 mm, place a target such that its center bisects a line connecting the centers of the remaining targets.

S5.2.5.2 *Target reorientation—90 degree rotation.* If after following the procedure given in S5.2.5.1 there are less than four targets in a side daylight opening, repeat the procedure in 5.2 through 5.2.5.1.2, with a modification to S5.2 as follows. Reorient the target by rotating it 90 degrees about the y axis of the target such that the target positive z axis is aligned within ±1 degree of the vehicle longitudinal axis, pointing in the direction of the vehicle positive x axis. If after performing the procedure in this section, the remaining targets exceed the number of targets determined with the original orientation of the target, the reoriented targets represent the final target locations for the side daylight opening.

S5.2.5.3 *Target reorientation—incremental rotation.* If after following the procedure given in S5.2.5.2 there are no targets in a side daylight opening, starting with the target in the position defined in S5.2.2.2(a), reorient the target by rotating it in 5 degree increments about the y axis of the target by rotating the target positive z axis toward the vehicle positive x axis. At each increment of rotation, attempt to fit the target within the offset line of the side daylight opening. At the first increment of rotation where the target will fit, place the target center as close as possible to the geometric center of the side daylight opening. If more than one position exists that is closest to the geometric center of the side daylight opening, select the lowest.

S5.3 *Determination of zero displacement plane.* The glazing covering the target location of the side daylight opening being tested is intact and in place in the case of fixed glazing and intact and fully closed in the case of movable glazing. With the ejection impactor targeting point aligned within ±2 mm of the center of any target location specified in S5.2, and with the ejection impactor on the inside of the vehicle, slowly move the impactor towards the window until contact is made with the interior of the glazing with no more than 20 N of pressure being applied to the window. The location of the most outboard surface of the headform establishes the zero displacement plane for this target location.

S5.4 *Window position and condition.*Subject to S5.5(b), prior to impact testing, the glazing covering the target location must be removed from the side daylight opening, fully retracted, or pre-broken according to the procedure in S5.4.1, at the vehicle manufacturer's option.

S5.4.1 *Window glazing pre-breaking procedure.*

S5.4.1.1 *Breakage pattern.* Locate the geometric center of the side daylight opening, established in S5.2.3 of this standard. Mark the outside surface of the window glazing in a horizontal and vertical grid of points separated by 75±2 mm with one point coincident within ±2 mm of the geometric center of the side daylight opening (see Figure 6) (figure provided for illustration purposes). Mark the inside surface of the window glazing in a horizontal and vertical grid of points separated by 75±2 mm with the entire grid horizontally offset by 37.5 ± 2 mm from the grid of points on the outside of the glazing.

S5.4.1.2 *Breakage method.*

(a) Start with the inside surface of the window and forward-most, lowest mark made as specified in S5.4.1.1 of this standard. Use a center punch in this procedure. The punch tip has a 5 ±2 mm diameter prior to coming to a point. The spring is adjusted to require 150 ±25 N of force to activate the punch. Only once at each mark location, apply pressure to activate the spring in the center punch in a direction which is perpendicular to the tangent of the window surface at the point of contact, within ±10 degrees. Apply the pressure only once at each mark location, even if the glazing does not break or no hole results.

(b) Use a 100 ±10 mm x 100 ±10 mm piece of plywood with a minimum thickness of 18 mm as a reaction surface on the opposite side of the glazing to prevent to the extent possible the window surface from deforming by more than 10 mm when pressure is being applied to the hole-punch.

(c) Continue the procedure with the center punch by moving rearward in the grid until the end of a row is reached. When the end of a row is reached, move to the forward-most mark on the next higher row and continue the procedure. Continue in this pattern until the procedure is conducted at each marked location on the inside surface of the glazing.

(d) Repeat the process on the outside surface of the window.

(e) If punching a hole causes the glazing to disintegrate, halt the breakage procedure and proceed with the headform impact test.

S5.5 *Impact speeds and time delays.* The ejection impactor speeds specified below must be achieved after propulsion has ceased.

(a) *Vehicles with or without an ejection mitigation countermeasure that deploys in a rollover.* For a vehicle with an ejection mitigation countermeasure that deploys in a rollover, using the ejection propulsion mechanism, propel the ejection impactor such that it first strikes the countermeasure, while aligned with any target location specified in S5.2 of this standard, 1.5 ±0.1 seconds after activation of the ejection mitigation countermeasure that deploys in the event of a rollover, and at a speed of 20 ±0.5 km/h. For a vehicle without an ejection mitigation countermeasure that deploys in a rollover, propel the ejection impactor at any time such that it first strikes the countermeasure, while aligned with any target location specified in S5.2 of this standard, at a speed of 20 ±0.5 km/h.

(b) *Vehicles with an ejection mitigation countermeasure that deploys in a rollover.* For a vehicle with an ejection mitigation countermeasure that deploys in a rollover, remove or fully retract any movable glazing from the side daylight opening. Using the ejection propulsion mechanism, propel the ejection impactor such that it first strikes the countermeasure, while aligned with any target location specified in S5.2 of this standard, 6.0 ±0.1 seconds after activation of an ejection mitigation countermeasure that deploys in the event of a rollover, and at a speed of 16 ±0.5 km/h.

(c) An ejection mitigation countermeasure that deploys in the event of a rollover is described as such

in the vehicle's owner manual or in other written information provided by the vehicle manufacturer to the consumer.

S5.6 *Ejection impactor orientation.*

S5.6.1 If the targets for the side daylight opening being impacted were determined by the procedure specified in S5.2.2 through S5.2.5.1 only, the ejection impactor orientation is as follows. At the time of launch of the ejection impactor the x, y and z axes of the ejection headform must be aligned within ±1 degree of the vehicle longitudinal, transverse and vertical axes, respectively.

S5.6.2 If the targets for the side daylight opening being impacted were determined by the procedure specified in S5.2.5.2, the ejection impactor orientation is as follows. At the time of launch the ejection impactor is rotated by 90 degrees about the ejection headform y axis, from the orientation specified in S5.6.1, resulting in the headform positive z axis pointing in the direction of the vehicle positive x axis.

S5.6.3 If the targets for the side daylight opening being impacted were determined by the procedure specified in S5.2.5.3, the ejection impactor orientation is as follows. At the time of launch the ejection impactor is rotated about the y axis of the ejection headform by rotating the headform positive z axis towards the vehicle positive x axis, in the increment determined to be necessary in S5.2.5.3 to fit the target within the side daylight opening.

S5.6.4 After any test, extend the ejection impactor to the zero plane and determine that x, y and z axes of the ejection headform remain aligned within ±1 degree of its orientation at launch as specified in S5.6.1—5.6.3.

S6 *General test conditions.*

S6.1 *Vehicle test attitude.* The vehicle is supported off its suspension at an attitude determined in accordance with S6.1(a) through (e).

(a) The vehicle is loaded to its unloaded vehicle weight.

(b) All tires are inflated to the manufacturer's specifications listed on the vehicle's tire placard.

(c) Place vehicle on a level surface.

(c) Pitch: Measure the sill angle of the driver door sill and mark where the angle is measured.

(d) Roll: Mark a point on the vehicle body above the left and right front wheel wells. Determine the vertical height of these two points from the level surface.

(e) Support the vehicle off its suspension such that the driver door sill angle is within ± 1 degree of that measured at the marked area in S6.1(c) and the vertical height difference of the two points marked in S6.1(d) is within ± 5 mm of the vertical height difference determined in S6.1(d).

S6.2 *Doors.*

(a) Except as provided in S6.2(b) or S6.2(c), doors, including any rear hatchback or tailgate, are fully closed and latched but not locked.

(b) During testing, any side door on the opposite side of the longitudinal centerline of the vehicle from the target to be impacted may be open or removed.

(c) During testing, any rear hatchback or tailgate may be open or removed for testing any target.

S6.3 *Steering wheel, steering column, seats, grab handles, and exterior mirrors.* During targeting and testing, the steering wheel, steering column, seats, grab handles and exterior mirrors may be removed from the vehicle or adjusted to facilitate testing and/or provide an unobstructed path for headform travel through and beyond the vehicle.

S6.4 *Other vehicle components and structures.* During targeting and testing, interior vehicle components and vehicle structures other than specified in S6.2 and S6.3 may be removed or adjusted to the extent necessary to allow positioning of the ejection propulsion mechanism and provide an unobstructed path for the headform travel through and beyond the vehicle.

S6.5 *Temperature and humidity.*

(a) During testing, the ambient temperature is between 18 degrees C. and 29 degrees C., at any relative humidity between 10 percent and 70 percent.

(b) The headform specified in S7.1.1 of this standard is exposed to the conditions specified in S6.5(a) for a continuous period not less than one hour, prior to the test.

S7. *Ejection mitigation test device specifications.* The ejection mitigation test device consists of an ejection impactor and ejection propulsion mechanism with the following specifications. The ability of a test device to meet these specifications may be determined outside of the vehicle.

S7.1 *Ejection impactor.* The ejection impactor consists of an ejection headform attached to a shaft. The ejection impactor has a mass of 18 kg ±0.05 kg. The shaft is parallel to the y axis of the headform.

S7.1.1 *Ejection headform dimensions.* The ejection headform has the dimensions shown in Figure 1 and is depicted in the "Parts List; Ejection Mitigation Headform Drawing Package," December 2010, and the "Parts List and Drawings; Ejection Mitigation Headform Drawing Package," December 2010 (incorporated by reference; see § 571.5).

S7.2 *Static deflection.* The ejection impactor targeting point must not deflect more than 20 mm in the x-z plane when a 981 N ± 5 N force is applied in a vehicle vertical longitudinal plane, through the y axis of the headform and no more than 5 mm rear of the posterior surface of the headform. The force is applied once in each of the following headform axes: +z, −z, +x, −x. The static deflection measurement is made with the ejection impactor extended 400 mm outboard of the theoretical point of impact with the countermeasure and attached to the ejection propulsion mechanism, including any support frame and anchors.

S7.3 *Frictional characteristics.*

(a) Measure the dynamic coefficient of friction of the ejection impactor and any associated bearings and bearing housing in a test ready orientation. Repeat the measurement in three more orientations with the ejection impactor and any associated bearings and bearing housing rotated 90, 180 and 270 degrees about the headform y axis. Perform the measurement five consecutive times at each orientation.

(b) Measure the average force necessary to move the ejection impactor 200 mm rearward into the ejection propulsion mechanism at a rate of 50 (±13) mm per second, starting at a point 400 mm outboard of the theoretical point of impact with the countermeasure. Measure the force to an accuracy of ±5 N. The measurement excludes the force measured over the first 25 mm of travel and is recorded at a minimum frequency of 100 Hz. During the test a 100 kg ± 0.5 kg mass is attached to the impactor with its center of gravity passing through the axis of motion of the impactor and no more than 5 mm rear of the posterior surface of the headform.

(c) Take the five force level averages made at each impactor orientation in S7.3(a) and average them. Take the maximum of the force average values and divide by 9.81 times the combined mass of the ejection impactor and mass added in S7.3(b). The resulting value must not exceed 0.25.

S7.4 *Targeting accuracy.* Determine the distance "D" along the axis of travel of the ejection impactor from its launch point to the theoretical point of impact with the countermeasure, when moving at the speed specified in S5.5. Determine that the ejection mitigation test device can deliver the ejection impactor targeting point to within ±10 mm of an axis normal to and passing through the target center, as the unobstructed impactor passes through a zone defined by vertical longitudinal

planes 50 mm forward and rearward of "D."

S8 *Phase-in Schedule for Vehicle Certification.*

S8.1 *Vehicles manufactured on or after September 1, 2013 and before September 1, 2016.* At anytime during the production years ending August 31, 2014, August 31, 2015, and August 31, 2016, each manufacturer shall, upon request from the Office of Vehicle Safety Compliance, provide information identifying the vehicles (by make, model and vehicle identification number) that have been certified as complying with this standard. The manufacturer's designation of a vehicle as a certified vehicle is irrevocable.

S8.2 *Vehicles manufactured on or after September 1, 2013 and before September 1, 2014.* Subject to S8.9, for vehicles manufactured on or after September 1, 2013 and before September 1, 2014, the number of vehicles complying with S4.2 shall be not less than 25 percent of:

(a) The manufacturer's average annual production of vehicles manufactured in the three previous production years; or

(b) The manufacturer's production in the current production year.

S8.4 *Vehicles manufactured on or after September 1, 2015 and before September 1, 2016.* Subject to S8.9, for vehicles manufactured on or after September 1, 2015 and before September 1, 2016, the number of vehicles complying with S4.2 shall be not less than 75 percent of:

(a) The manufacturer's average annual production of vehicles manufactured in the three previous production years; or

(b) The manufacturer's production in the current production year.

S8.5 *Vehicles manufactured on or after September 1, 2016 and before September 1, 2017.* Subject to S8.9, for vehicles manufactured on or after September 1, 2016 and before September 1, 2017, the number of vehicles complying with S4.2 shall be not less than 100 percent of the manufacturer's production in the current production year.

8.6 *Vehicles produced by more than one manufacturer.* For the purpose of calculating average annual production of vehicles for each manufacturer and the number of vehicles manufactured by each manufacturer under S8.1 through S8.4, a vehicle produced by more than one manufacturer shall be attributed to a single manufacturer as follows, subject to S8.7.

(a) A vehicle that is imported shall be attributed to the importer.

(b) A vehicle manufactured in the United States by more than one manufacturer, one of which also markets the vehicle, shall be attributed to the manufacturer that markets the vehicle.

S8.7 A vehicle produced by more than one manufacturer shall be attributed to any one of the vehicle's manufacturers specified by an express written contract, reported to the National Highway Traffic Safety Administration under 49 CFR part 585, between the manufacturer so specified and the manufacturer to which the vehicle would otherwise be attributed under S8.5.

S8.8 For the purposes of calculating average annual production of vehicles for each manufacturer and the number of vehicles manufactured by each manufacturer under S8, do not count any vehicle that is excluded by this standard from the requirements.

S8.9 Calculation of complying vehicles.

(a) For the purposes of calculating the vehicles complying with S8.2, a manufacturer may count a vehicle if it is manufactured on or after March 1, 2011 but before September 1, 2014.

(b) For purposes of complying with S8.3, a manufacturer may count a vehicle if it—

(1) Is manufactured on or after March 1, 2011 but before September 1, 2015 and,

(2) Is not counted toward compliance with S8.2.

(c) For purposes of complying with S8.4, a manufacturer may count a vehicle if it—

(1) Is manufactured on or after March 1, 2011 but before September 1, 2016 and,

(2) Is not counted toward compliance with S8.2 or S8.3.

(d) For purposes of complying with S8.5, a manufacturer may count a vehicle if it—

(1) Is manufactured on or after March 1, 2011 but before September 1, 2017 and,

(2) Is not counted toward compliance with S8.2, S8.3, or S8.4.

(e) For the purposes of calculating average annual production of vehicles for each manufacturer and the number of vehicles manufactured by each manufacturer, each vehicle that is excluded from having to meet this standard is not counted.

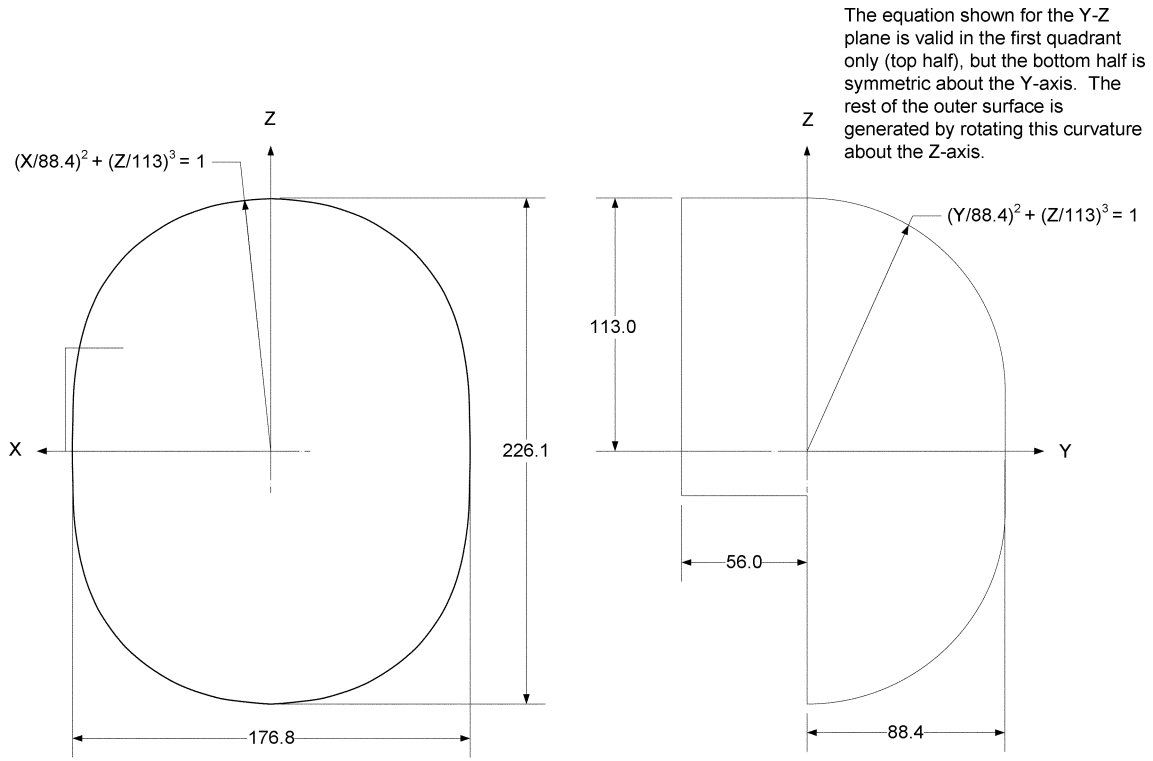

Figure 1 – Ejection Headform Face. All dimensions are millimeters.

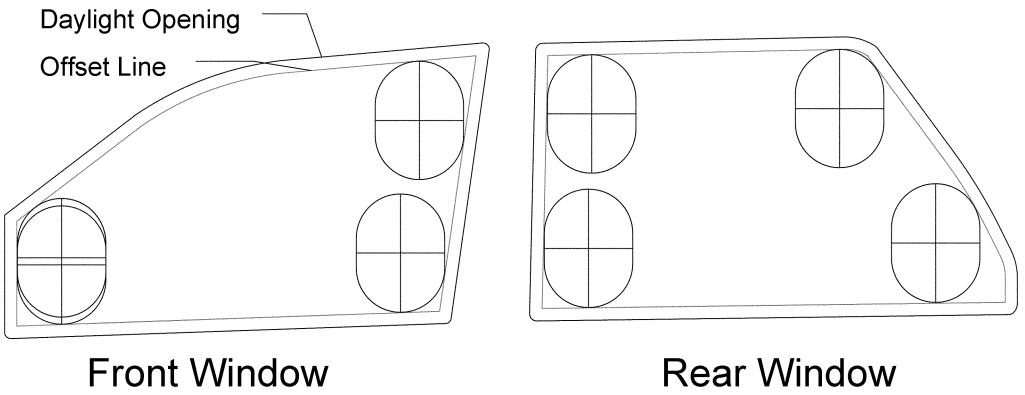

Figure 2

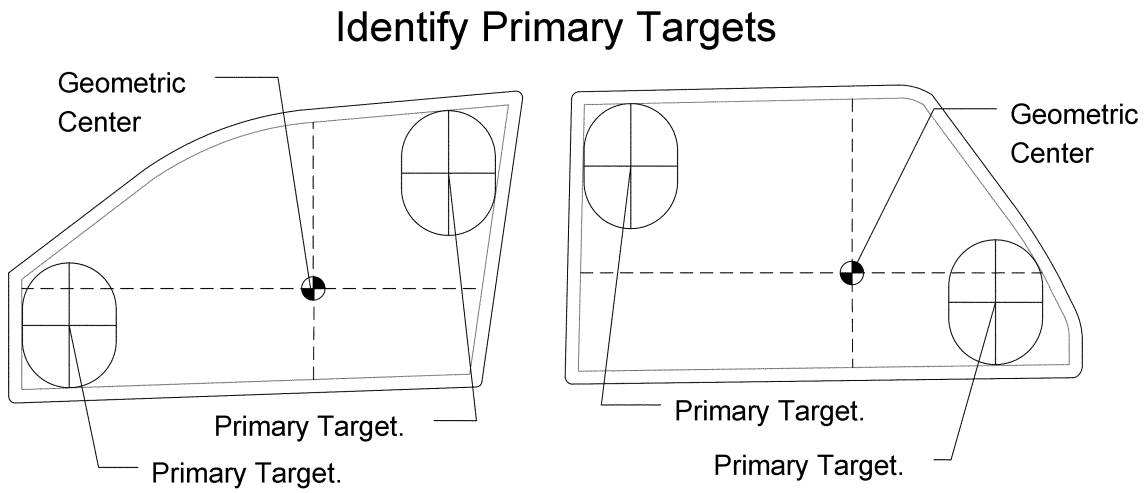

Figure 3

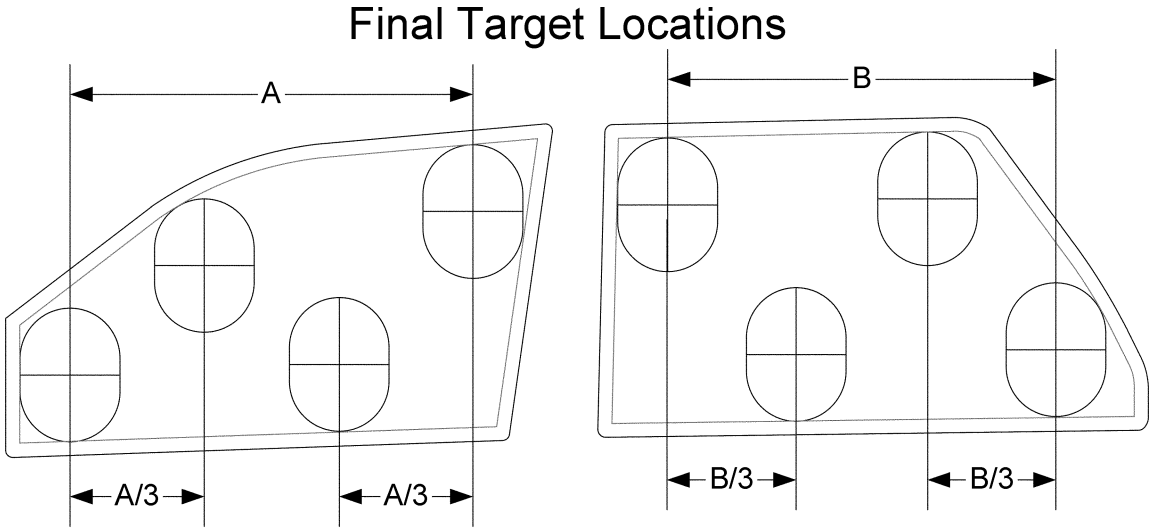

Figure 4

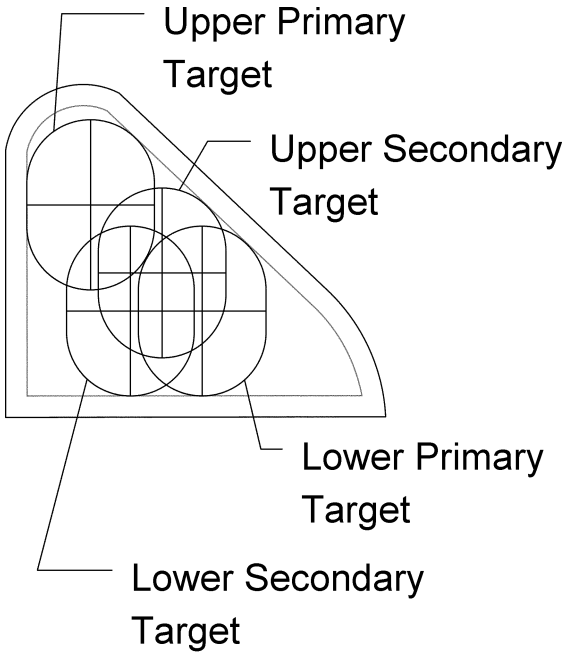

Figure 5

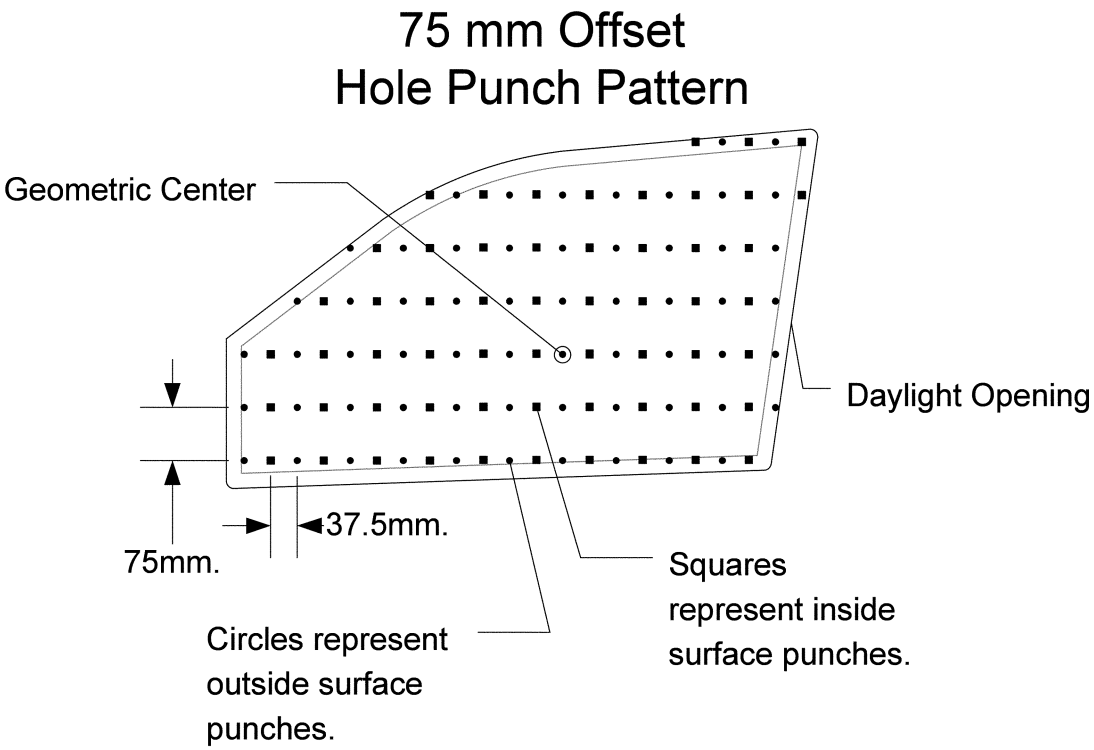

Figure 6

■ 4. The authority citation for part 585 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.

■ 5. Part 585 is amended by adding Subpart K to read as follows:

PART 585—PHASE-IN REPORTING REQUIREMENTS

* * * * *

Subpart K—Ejection Mitigation Phase-in Reporting Requirements

585.100 Scope.
585.101 Purpose.
585.102 Applicability.
585.103 Definitions.
585.104 Response to inquiries.
585.105 Reporting requirements.
585.106 Records.

Subpart K—Ejection Mitigation Phase-in Reporting Requirements

§ 585.100 Scope.

This part establishes requirements for manufacturers of passenger cars, and of trucks, buses and multipurpose passenger vehicles with a gross vehicle weight rating (GVWR) of 4,536 kilograms (kg) (10,000 pounds (lb)) or less, to submit a report, and maintain records related to the report, concerning the number of such vehicles that meet the ejection mitigation requirements of Standard No. 226, *Ejection Mitigation* (49 CFR 571.226).

§ 585.101 Purpose.

The purpose of these reporting requirements is to assist the National Highway Traffic Safety Administration in determining whether a manufacturer has complied with the requirements of Standard No. 226, *Ejection Mitigation* (49 CFR 571.226).

§ 585.102 Applicability.

This part applies to manufacturers of passenger cars, and of trucks, buses and multipurpose passenger vehicles with a GVWR of 4,536 kg (10,000 lb) or less. However, this subpart does not apply to vehicles excluded by Standard No. 226 (49 CFR 571.226) from the requirements of that standard. This subpart does not apply to manufacturers whose production consists exclusively of vehicles manufactured in two or more stages, to manufacturers whose production of motor vehicles for the United States market is less than 5,000 vehicles in a production year, and to limited line manufacturers.

§ 585.103 Definitions.

(a) All terms defined in 49 U.S.C. 30102 are used in their statutory meaning.

(b) *Bus, gross vehicle weight rating* or *GVWR, multipurpose passenger vehicle, passenger car,* and *truck* are used as defined in § 571.3 of this chapter.

(c) *Production year* means the 12-month period between September 1 of one year and August 31 of the following year, inclusive.

(d) *Limited line manufacturer* means a manufacturer that sells three or fewer carlines, as that term is defined in 49 CFR 583.4, in the United States during a production year.

§ 585.104 Response to inquiries.

At anytime during the production years ending August 31, 2014, August 31, 2015, August 31, 2016, and August 31, 2017, each manufacturer shall, upon request from the Office of Vehicle Safety Compliance, provide information identifying the vehicles (by make, model and vehicle identification number) that have been certified as complying with the ejection mitigation requirements of Standard No. 226, *Ejection mitigation* (49 CFR 571.226). The manufacturer's designation of a vehicle as a certified vehicle is irrevocable.

§ 585.105 Reporting requirements.

(a) *Advanced credit phase-in reporting requirements.* (1) Within 60 days after the end of the production years ending August 31, 2011, through August 31, 2017, each manufacturer certifying vehicles manufactured during any of those production years as complying with the ejection mitigation requirements of Standard No. 226 (49 CFR 571.226) shall submit a report to the National Highway Traffic Safety Administration providing the information specified in paragraph (c) of this section and in § 585.2 of this part.

(b) *Phase-in reporting requirements.* Within 60 days after the end of each of the production years ending August 31, 2014, through August 31, 2017, each manufacturer shall submit a report to the National Highway Traffic Safety Administration concerning its compliance with the ejection mitigation requirements of Standard No. 226 (49 CFR 571.226) for its vehicles produced in that year. Each report shall provide the information specified in paragraph (d) of this section and in § 585.2 of this part.

(c) *Advanced credit phase-in report content*—(1) *Production of complying vehicles.* With respect to the reports identified in § 585.105(a), each manufacturer shall report for the production year for which the report is filed the number of vehicles, by make and model year, that are certified as meeting the ejection mitigation requirements of Standard No. 226 (49 CFR 571.226).

(d) *Phase-in report content*—

(1) *Basis for phase-in production goals.* Each manufacturer shall provide the number of passenger cars, multipurpose passenger vehicles, trucks, and buses, with a gross vehicle weight rating of 4,536 kilograms (10,000 pounds) or less, manufactured in the current production year, or, at the manufacturer's option, in each of the three previous production years. A new manufacturer that is, for the first time, manufacturing these vehicles for sale in the United States must report the number of these vehicles manufactured during the current production year.

(2) *Production of complying vehicles.* Each manufacturer shall report for the production year being reported on information on the number of passenger cars, multipurpose passenger vehicles, trucks, and buses, with a gross vehicle weight rating of 4,536 kilograms (10,000 pounds) or less that meet the ejection mitigation requirements of Standard No. 226 (49 CFR 571.226). The manufacturer shall report the vehicles produced during the preceding years for which the manufacturer is claiming credits as having been produced during the production year being reported on.

§ 585.106 Records.

Each manufacturer shall maintain records of the Vehicle Identification Number for each vehicle for which information is reported under § 585.105 until December 31, 2020.

Issued on January 5, 2011.

David L. Strickland,

Administrator.

[FR Doc. 2011–547 Filed 1–13–11; 8:45 am]

BILLING CODE 4910–59–P

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No. 12 January 19, 2011

Part III

Department of Transportation

49 CFR Parts 171, 172, 173, et al.
Hazardous Materials: Harmonization With the United Nations Recommendations, International Maritime Dangerous Goods Code, and the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air; Final Rule

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 171, 172, 173, 175, 176, 178, and 180

[Docket Nos. PHMSA–2009–0126 (HM–215K)]

RIN 2137–AE45

Hazardous Materials: Harmonization With the United Nations Recommendations, International Maritime Dangerous Goods Code, and the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air

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

ACTION: Final rule.

SUMMARY: PHMSA is amending the Hazardous Materials Regulations to maintain alignment with international standards by incorporating various amendments, including changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport limited quantities, and vessel stowage requirements. These revisions are necessary to harmonize the Hazardous Materials Regulations with recent changes made to the International Maritime Dangerous Goods Code, the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air, and the United Nations Recommendations on the Transport of Dangerous Goods—Model Regulations.

DATES: *Effective date:* January 19, 2011.

Voluntary compliance date: PHMSA is authorizing voluntary compliance beginning January 1, 2011.

Delayed compliance date: Compliance with the amendments adopted in this final rule is required beginning January 1, 2012.

Incorporation by reference date: The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of January 19, 2011.

FOR FURTHER INFORMATION CONTACT: Michael Stevens, telephone (202) 366–8553, or Shane Kelley, telephone (202) 366–0656, Standards and Rulemaking Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., 2nd Floor, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background
II. Primary Topics of Concern Discussed in the ANPRM
III. Comments Submitted in Response to Noteworthy Harmonization Amendments Proposed in the August 24, 2010 NPRM; the Final Rule
A. Harmonization Amendments Adopted in This Final Rule
B. Harmonization Amendments Not Considered for Adoption in This Final Rule
IV. Section-by-Section Review
V. Regulatory Analyses and Notices
A. Statutory/Legal Authority for the Rulemaking
B. Executive Order 12866 and DOT Regulatory Policies and Procedures
C. Executive Order 13132
D. Executive Order 13175
E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies
F. Paperwork Reduction Act
G. Regulatory Identifier Number (RIN)
H. Unfunded Mandates Reform Act
I. Environmental Assessment
J. Privacy Act
K. International Trade Analysis

I. Background

In a final rule published under Docket HM–181 (55 FR 52402, December 21, 1990), the Research and Special Programs Administration (RSPA), the predecessor agency to the Pipeline and Hazardous Materials Safety Administration (PHMSA), comprehensively revised the Hazardous Materials Regulations (HMR; 49 CFR Parts 171 to 180) to harmonize U.S. hazardous materials transportation requirements with the United Nations Recommendations on the Transport of Dangerous Goods (UN Model Regulations). The UN Model Regulations are not regulations, but rather are recommendations issued by the UN Committee of Experts on the Transport of Dangerous Goods (UNSCOE) and the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). These Model Regulations are amended and updated biennially by the UNSCOE and serve as the basis for national, regional, and international modal regulations, including the International Maritime Organization's International Maritime Dangerous Goods Code (IMDG Code) and International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions).

Since publication of the 1990 rule, we have issued eight additional international harmonization rules (Dockets HM–215A (59 FR 67390, December 29, 1994); HM–215B (62 FR 24690, December 16, 1996); HM–215C (63 FR 57929, October 29, 1998); HM–215D (66 FR 8644, February 1, 2001); HM–215E (68 FR 1013, January 8, 2003); HM–215G (69 FR 76044, December 20, 2004); HM–215I (71 FR 78596, December 29, 2006); and HM–215J (74 FR 2200, January 14, 2009)) based on the corresponding biennial updates of the UN Model Regulations, the IMDG Code, and the ICAO Technical Instructions.

To maintain alignment of the HMR with international requirements, in this final rule, we are incorporating changes based on the sixteenth revised edition of the UN Model Regulations, Amendment 35–10 to the IMDG Code, and the 2011–2012 ICAO TI, which becomes effective January 1, 2011 (the IMDG Code is effective January 1, 2012).

Federal law and policy strongly favor the harmonization of domestic and international standards for hazardous materials transportation. The Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) permits PHMSA to depart from international standards in order to promote safety or other overriding public interest, but otherwise requires PHMSA to align the HMR with international transport standards and requirements to the extent practicable (*see* 49 U.S.C. 5120). Harmonization enhances international trade by minimizing the costs and other burdens of complying with multiple or inconsistent safety requirements for transportation of hazardous materials to and from the United States. This becomes increasingly important as the volume of international hazardous materials shipments grows. Harmonization also enhances safety for international movements, but only if the international standards themselves provide an appropriate level of safety. PHMSA actively participates in the development of international standards for the transportation of hazardous materials, frequently advocating the adoption in international standards of particular HMR requirements.

When considering the adoption of international standards under the HMR, we review and evaluate each amendment on its own merit, on the basis of its overall impact on transportation safety, and the economic implications associated with its adoption into the HMR. Our goal is to harmonize without diminishing the level of safety currently provided by the HMR and not impose undue burdens on the regulated public.

II. Primary Topics of Concern Discussed in the ANPRM

PHMSA published an advance notice of proposed rulemaking (ANPRM) (74

FR 53982, October 21, 2009) highlighting issues under consideration for harmonization with international standards and requesting comments as to whether the HMR should be amended to incorporate specific international standards and the potential benefits and costs of doing so.

Comments on specific harmonization issues covered in the ANPRM are discussed in brief below. Please review the notice of proposed rulemaking (NPRM) (75 FR 52070, August 24, 2010) for a complete discussion of comments to the ANPRM.

A. Limited Quantities and Consumer Commodities

PHMSA has long recognized the need to authorize limited exceptions for the transportation of classes and quantities of hazardous materials described as limited quantities, or consumer commodities reclassed as ORM–D. Considerable efforts have been made internationally to harmonize multi-modal standards with regard to the transport of limited quantities, including consumer commodities. PHMSA held public meetings on this issue in February 2006 and March 2008 to discuss potential impacts on domestic stakeholders. Additionally, this issue was discussed during the agency's pre-UN public meetings held in 2006 and 2007. There was considerable domestic interest in pursuing further harmonization internationally due to the potential for substantial savings in transportation costs and improved transportation efficiency. In the ANPRM (74 FR 53982, October 21, 2009), PHMSA invited comments on this issue with regard to aligning the HMR with the UN Model Regulations for the domestic and international transport of limited quantities and consumer commodities. Of particular concern was any potential negative impact on domestic transportation through the elimination of the transportation mechanism for limited quantity hazardous materials reclassed as ORM–D. While some changes adopted in the UN Model Regulations are similar to provisions currently in the HMR (*e.g.,* inner packaging limits and authorized use of non-specification outer packagings), some changes are not (*e.g.,* marking and labeling). In the ANPRM, PHMSA suggested that, depending on comments received and our own evaluation, the agency may determine that the significance of any amendments on this issue may warrant a separate rulemaking action.

We received several comments submitted in response to the ANPRM supporting adoption of the UN Model Regulation limited quantity provisions into the HMR. The commenters urged PHMSA to move forward and adopt the limited quantity provisions as prescribed in the sixteenth revised edition of the UN Model Regulations. However, several commenters expressed concern that this should not be done at the expense of the ORM–D provisions currently in the HMR. Some altogether opposed the elimination of the existing provisions for ORM–D materials as part of HM–215K and recommended that any changes to the requirements be made through a separate rulemaking.

In the NPRM (75 FR 52070, August 24, 2010), PHMSA outlined its determination, partially based on our perception of favorable comments received in response to the ANPRM, that aligning the existing limited quantity provisions in the HMR with the international standards and regulations (*i.e.,* UN Model Regulations, IMDG Code and the ICAO TI) would enhance safety by facilitating a single, uniform system of transporting limited quantity materials. We emphasized the proposals did not include the immediate or short-term removal of the existing provisions in the HMR for limited quantities reclassed as ORM–D (including those for consumer commodities, cartridges, small arms and cartridges, power device) and included a delayed compliance period we believed was sufficient in length to allow stakeholders time to comply with the transition to the revised limited quantity requirements and eventual elimination of the ORM–D classification. Because the limited quantity provisions in the UN Model Regulations and the IMDG Code are closely aligned with those already contained in the HMR, we contended that domestic alignment for highway, rail and vessel transportation would result in minimal impact and regulatory burden. And, because of the inherent risk unique to air transportation, we believed full harmonization with the ICAO TI (where appropriate) was necessary with regard to the materials authorized and quantity limits for limited quantities (including consumer commodities) intended for transport by air.

B. Classification of Division 1.4S Explosives

For eight Division 1.4 explosive articles (UN0323, UN0366, UN0441, UN0445, UN0455, UN0456, UN0460, and UN0500), the UN Model Regulations have been amended to require a Type 6(d) test to determine whether such articles may be assigned to Compatibility Group S. Assignment to Compatibility Group S indicates that hazardous effects from accidental functioning are limited to the extent the article or substance does not significantly hinder or prohibit fire fighting or emergency response efforts in the immediate vicinity of a package containing the material. The test is designed to be performed on a single package containing an explosive article or explosive substance to determine if the package is capable of containing any hazardous effects in the event of an accidental functioning of its contents. The amendment is supplemented by revisions to the explosives testing standards in the UN Manual of Tests and Criteria as well as the adoption of a new special provision that would authorize the use of the above mentioned identification numbers only if the results of the Type 6(d) test successfully demonstrate that any hazardous effects are confined within a package. In the ANPRM, we invited commenters to provide data and information concerning the possible safety impacts of the new test provisions and compliance costs that would be incurred if the new test were adopted into the HMR. In addition, we invited commenters to provide suggestions or recommendations concerning whether to apply the test to already-approved explosives.

We received several comments both supporting and opposing adoption of the Type 6(d) test to determine whether a Division 1.4 explosive article may be assigned to Compatibility Group S. All the commenters who addressed this issue indicated that, if adopted, the test must be applied to previously-approved articles in a manner that is reasonable and not overly broad. One suggestion was to allow the classification of previously-approved explosive articles to be based on results of testing of product groups by a PHMSA-approved laboratory or on results of self-testing and video documentation by the manufacturer.

Commenters opposing adoption of the Type 6(d) test suggested that more research on the practical effect of this testing requirement is necessary and that the lack of grandfathering criteria for products already approved as Division 1.4S explosives (*e.g.,* power device cartridges) is impractical, expensive, and impedes commerce. They also indicated concern regarding the cost of articles consumed in testing in addition to the cost of pre-testing or redesign of an article by a manufacturer to ensure passing the Type 6(d) test, but did not quantify these costs.

C. Classification of Sour Crude Oil

Currently, all types of petroleum crude oil are listed as a Class 3 flammable liquid in the § 172.101 Hazardous Materials Table (HMT). PHMSA is aware that transportation of a certain type of crude oil known as "sour" crude oil may pose risks not associated with other types of crude oil due to its inherent potential of evolving hydrogen sulfide, a highly toxic and flammable gas. Sour crude oil, commonly found in North America, contains a high concentration of sulfur. The evolution of hydrogen sulfide vapors from crude oil is dependent on temperature, packaging confinement, transport conditions (*e.g.,* sloshing), bacteria, and sulfur concentration, among many other potential factors. When transported in bulk packagings such as cargo tanks or tank cars, the evolved hydrogen sulfide gas may build up in the vapor space of the packaging, posing a potential risk, particularly during loading and unloading.

Based on the risk of toxic vapors, the UN Model Regulations were amended by assigning a new identification number and shipping description for sour crude oil with a flammable primary hazard and a toxic subsidiary hazard. Additionally, a new special provision was added specifying the assignment of a Packing Group (PG) based on the degree of danger presented by either the flammability or toxicity hazard of the sour crude oil. For example, sour crude oil meeting flammability criteria for Class 3, PG II, and toxicity criteria for Division 6.1, PG I, poisonous-by-inhalation, would be classified as a Class 3, PG I material.

In the ANPRM, PHMSA invited commenters to provide data and information concerning the impact on domestic shippers and carriers if these requirements were adopted in the HMR. The agency also asked for comments addressing which hazard communication methods (*e.g.,* package markings, shipping papers) and/or packaging requirements are most cost-effective for communicating the hazards and reducing the risks of transporting sour crude oil.

We received comments opposing adoption of the UN amendments for the description and classification of sour crude oil into the HMR. The commenters recommended against requiring domestic use of the new proper shipping name for sour crude oil with a Division 6.1 subsidiary risk and recommended that use be limited to international transport. Commenters further recommended that PHMSA should require drivers engaged in the loading and unloading of sour crude oil to wear a hydrogen sulfide monitoring device and have respiratory protection accessible, and require warning signs at the cargo tank manhole and area of operation. Additionally, commenters recognized that hydrogen sulfide gas is a hazard, but suggested that classification of crude oil at the time of shipment may not reflect the toxicity of hydrogen sulfide in the vapor space of a cargo tank or other packaging after the crude oil has been in transportation. They also noted that there are best industry practices already in place that address this issue and that the Occupational Safety and Health Administration (OSHA) has requirements in place to communicate the hazards of hydrogen sulfide in the workplace. They supported other means of hazard communication to ensure that workers are aware of the hazards of hydrogen sulfide such as a marking on a bulk packaging.

D. IBC Rebottling

Under both the UN Model Regulations and the HMR, replacement of the rigid plastic receptacle of a composite IBC is considered a "repair" under certain conditions and, thus not subject to design qualification testing as a new or different design. The UN Model Regulations were amended to specify that a replacement bottle (*i.e.,* rigid plastic receptacle) must be of the original tested design type and limits the replacement to a bottle from the original manufacturer. In the ANPRM, we invited comments on this amendment and how, if adopted into the HMR, it would impact the use of IBCs in domestic or international commerce.

All commenters who addressed this issue supported the adoption of the UN Model Regulations definition of "repair" for IBC rebottling purposes. The comments included a request for an extended compliance date of January 1, 2012 to provide users and manufacturers of composite IBCs adequate time to implement the provision and not place them at an economic disadvantage with international counterparts.

E. Metal Hydride Storage Systems in Conveyances

A metal hydride storage system is a single complete hydrogen storage system that includes a receptacle, metal hydride, a pressure relief device, a shut-off valve, service equipment, and internal components. The HMR currently do not prescribe specific packaging or shipping methods for metal hydride storage systems containing hydrogen. However, PHMSA has issued a number of special permits to allow the use of these systems for transport. The UN Model Regulations, in new Packing Instruction P205, prescribe standards for the construction, qualification, marking and requalification of such systems. In the ANPRM, PHMSA invited comments on whether similar standards should be adopted into the HMR. One commenter supported adoption of the standards for the construction, qualification, marking, and requalification of metal hydride storage systems containing hydrogen.

F. In Vitro Testing for Corrosivity

In 1993, RSPA began recognizing an alternative test method (*i.e., in vitro* testing commercially available as Corrositex®), which is not carried out in live animals, to determine the corrosivity of a hazardous material for transportation purposes under the terms and conditions specified in a special permit (DOT–SP 10904). Similar *in vitro* test methods are prescribed in the following Organization for Economic Cooperation and Development (OECD) Guidelines for the Testing of Chemicals and were adopted in the UN Model Regulations:

- No. 430, "*In Vitro* Skin Corrosion: Transcutaneous Electrical Resistance Test (TER)" (2004);
- No. 431, "*In Vitro* Skin Corrosion: Human Skin Model Test" (2004); and,
- No. 435, "*In Vitro* Membrane Barrier Test Method for Skin Corrosion" (2006).

Because methods 430 and 431 can be used to determine corrosivity for other than transportation purposes, they cannot be used to determine the Packing Group (PG) assignment of a material that tests positive for corrosivity for the purposes of hazardous materials transportation. A negative result for corrosivity under methods 430 and 431 can, however, preclude further testing to determine PG assignment using method 404, the current OECD Guideline involving *in vivo* testing or method 435, the newly adopted OECD Guideline involving *in vitro* testing.

All commenters responding to the ANPRM supported adoption and use of the OECD *in vitro* test methods for determining corrosivity on the basis of reducing the number of tests requiring live animals.

III. Comments Submitted in Response to Noteworthy Harmonization Amendments Proposed in the August 24, 2010 NPRM; the Final Rule

In our latest harmonization effort, we received over 2,200 comments in response to the NPRM (75 FR 52070, August 24, 2010). The majority of the

comments received were from individuals in support of adoption of corrosivity testing methods not based on the results of live animal testing. The following individuals, companies, and organizations submitted comments to the NPRM (in chronological order of submittal). We note, however, that in lieu of listing each individual commenting, we have listed PETA as a proxy for all comments received supporting adoption of corrosivity testing methods alternative to live animal testing:

(1) R.R. Street & Co. (Street);
(2) Infotrac;
(3) Vanguard Logistics Services (VLS);
(4) Zebrowski, Department of Energy (DOE);
(5) 3M;
(6) The Japan Electrical Manufacturer's Association (JEMA);
(7) Andersen Products (Andersen);
(8) FedEx Express (FedEx);
(9) Saft America, Inc. (Saft);
(10) People for the Ethical Treatment of Animals (PETA);
(11) Toshiba America Electronic Components, Inc. (TAEC);
(12) Association of Hazmat Shippers, Inc. (AHS);
(13) National Nuclear Security Administration Service Center, DOE (NNSA);
(14) Sporting Arms and Ammunition Manufacturer's Institute (SAAMI);
(15) Baker Hughes (Baker);
(16) Signa Chemistry, Inc. (Signa);
(17) Institute of Maker's of Explosives (IME);
(18) United Parcel Service (UPS);
(19) Titan Specialties, Ltd. (Titan);
(20) Human Focused Testing;
(21) American Veterinary Medical Association (AVMA);
(22) Valspar;
(23) Utility Solid Waste Activities Group (USWAG);
(24) Trulite, Inc. (Trulite);
(25) The Rechargeable Battery Association (PRBA);
(26) American Petroleum Institute (API);
(27) American Coatings Association, Inc. (ACA);
(28) BIC Corporation (BIC);
(29) American Trucking Associations (ATA);
(30) Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA);
(31) Healthcare Distribution Management Association (HDMA);
(32) Aviation Suppliers Association (ASA);
(33) Modification and Replacement Parts Association (MARPA);
(34) International Vessel Operators Dangerous Goods Association (IVODGA);
(35) TravelScoot, USA (Scoot);
(36) Dangerous Goods Advisory Council (DGAC);
(37) Lilliputian Systems, Inc. (LSI);
(38) Department of Defense Explosives Safety Board (ESB);
(39) Ensign-Bickford Aerospace & Defense (EBAD)
(40) Safety Specialists, Inc. (SSI);
(41) Owen Compliance Services, Inc. (OCS);
(42) Potomac Strategy Associates (PSA);
(43) Arkema, Inc. (Arkema);
(44) Association of American Railroads (AAR);
(45) Air Line Pilots Association (ALPA);
(46) US Fuel Cell Council (USFCC);
(47) International Air Transport Association (IATA);
(48) Alaska Airlines (AA);
(49) PPG Industries, Inc. (PPG); and
(50) Edgcomb Law Group (ELG).

A. Harmonization Amendments Adopted in This Final Rule

In this final rule, PHMSA is adopting the following amendments to harmonize the HMR with the most recent revisions to the UN Model Regulations, ICAO Technical Instructions, and the IMDG Code:

1. Petitions for Rulemaking

We are addressing one petition for rulemaking, P–1550, from PETA requesting that PHMSA incorporate by reference OECD Guidelines 430, 431 and 435 into the HMR that prescribe *in vitro* testing methods for determining corrosivity.

2. Hazardous Materials Table (HMT)

Amendments to the HMT to add, revise, or remove certain proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, bulk packaging requirements, passenger and cargo aircraft maximum quantity limitations, and vessel stowage provisions.

3. Organic Peroxide Tables

Amendments to the Organic Peroxide Tables to add, revise, or remove certain hazardous materials and provisions.

4. Incorporation by Reference

Amendments to incorporate by reference the 2011–2012 ICAO Technical Instructions, Amendment 35–10 to the IMDG Code, sixteenth revised edition of the UN Model Regulations and the fifth revised edition of the UN Manual of Tests and Criteria. Additionally, we are updating our incorporation by reference of the Canadian Transportation of Dangerous Goods Regulations to include Amendment 6 (SOR/2008–34) February 7, 2008 (pertains to miscellaneous amendments); and Amendment 7 (SOR/2007–179) August 22, 2007 (pertains to highway cargo tanks). This incorporation by reference augments the broad reciprocity provided in § 171.12 where the HMR allow the use of the Canadian TDG Regulations under certain conditions when transporting hazardous materials to or from Canada by highway or rail.

5. Limited Quantities

We received a number of comments in response to the limited quantity and ORM–D classification amendments proposed in the August 2010 NPRM. Commenters can basically be categorized into two groups: Those supporting harmonization with the international standards and regulations for limited quantities and those in opposition to the eventual elimination of the ORM–D classification. The remainder of the commenters offered suggestions or revisions to clarify or aid understanding of the proposed amendments.

Those commenters generally supporting harmonization of the limited quantity provisions include:

Alaska Airlines;
American Coatings Association;
American Trucking Associations;
Association of Hazmat Shipper, Inc.;
Council on Safe Transportation of Hazardous Articles, Inc.;
Dangerous Goods Advisory Council;
FedEx Express;
International Vessel Operators Dangerous Goods Association;
PPG Industries, Inc.;
Sporting Arms and Ammunition Manufacturers Institute, Inc.; and
United Parcel Service.

Those commenters opposing the eventual elimination of the ORM–D hazard classification include:

American Coatings Association;
Aviation Suppliers Association;
Healthcare Distribution Management Association;
Modification and Replacement Parts Association;
PPG Industries, Inc.;
Safety Specialists, Inc.;
Utility Solid Waste Activities Group; and
Valspar.

Due to the large number of commenters and the variety of comments provided, we outline pertinent topic areas to better address all the comments. The comments are discussed and addressed as follows:

a. *Air-specific requirements.* In the NPRM, we proposed to revise § 173.27 to add a new table outlining air transport requirements for limited quantity material including package quantity limits consistent with the ICAO Technical Instructions. The proposed quantity limits for air transport differ from the quantity limits for other modes, which was a point of contention for some commenters. Three commenters (ACA, DGAC, SSI) disagreed with the adoption of the proposed package limits in the table and one commenter (COSTHA) expressed concern that the table is too broad. ACA asserted:

Introducing these limits will only frustrate domestic transportation and introduce unnecessary complexity into a fairly simple process. In the coatings industry, air shipments are not the norm and are only used when there is some urgency or the destination is a remote location. Requiring different inner and outer packaging quantity limits for air will eliminate the efficiency of a "one size fits all LQ shipments" process.

SSI added:

Some materials that were ORM–D may not be eligible to be shipped as limited quantity. Most inner packagings have been severely reduced. Isopropanol UN1219 (rubbing alcohol) can be presently shipped in inner containers up to 1 liter. Under the new Table 3 the inner container is reduced to 500 milliliter. This product is normally sold in pints, quarts, and gallons. Quarts would not be eligible for limited quantity air shipments. This will require shippers to ship in UN standard packaging, apply hazard class labels and meet all other requirements for fully regulated shipments.

We understand that more inner packagings may be required of a material authorized to be shipped as a limited quantity by air. SSI used Isopropanol as an example in their comments where the inner packaging quantity limits are reduced from 1 liter to 500 milliliters for a Packing Group II Class 3 (flammable liquid) when the current limits of the HMR are compared with the ICAO Technical Instructions. SSI also stated that the product is sold in pints, quarts and gallons. Currently under the HMR, the gallon is ineligible as a limited quantity. Under the amendment proposed in the NPRM, the gallon and quart would be ineligible for air transport as a limited quantity. However, because the outer packaging quantity limit is 1 liter for a Packing Group II Class 3 (flammable liquid), SSI would just have to substitute 2 one-pint inner packagings for a one-quart container of product in the same package.

DGAC reasoned:

The HMR limited quantity provisions predate ICAO TI limited quantity provisions. When limited quantity provisions were introduced in the ICAO TI * * * on the basis of existing U.S. limited quantity provisions, additional limitations were included * * * RSPA and PHMSA have, up until now, not deemed it necessary to incorporate these limitations in the HMR. The long intervening period between when the limits were first introduced in the ICAO TI and the present suggests that it is unnecessary to adopt these limits for the sake of harmonization. Further, [we are] unaware of any new safety information that would justify introducing these limits at this time.

DGAC further argued:

Introducing these limits will serve to frustrate domestic transportation. A key objective of * * * PHMSA has been to provide multimodal harmonization * * * so that the same package will essentially be suitable by all modes of transportation. This is currently true for limited quantity packages * * * By introducing new limits, as shown in the table referenced by proposed § 173.27(f), limited quantity packages prepared for ground or sea transport may not necessarily be suitable for air transport. Most shippers commonly transport * * * limited quantity packages by modes other than air. Currently, with limited quantity package requirements for all modes closely aligned, transporting a limited quantity package is relatively straightforward. If the limitations on inner and outer package quantity limits and new performance requirements are introduced * * * it may be necessary to repackage ground/sea limited quantity packages for purposes of air transport. [We] are unaware of any safety concerns that would justify the imposition of these new limitations.

Major differences already exist under the HMR for the air transport of limited quantities as compared to other modes. For example, limited quantity and consumer commodity inner packagings containing liquids are subject to the pressure differential capability requirements in § 173.27(c).

COSTHA explained further confusion:

It is important for shippers to use the § 172.101 Table to determine eligibility for a limited quantity * * * However, if one uses only Table 3, the shipper may inappropriately determine that a material is eligible for shipment as a limited quantity. For example, [c]hlorosilanes are not permitted to be packaged in accordance with limited quantity provisions * * * however, [certain classes of PG II materials] (many chlorosilanes fall into these classes) are identified as having acceptable limits * * * according to the § 173.27 Table 3. Given that limited quantities is a source of confusion for many shippers and carriers, this table does less to clarify a point and more to confuse the reader.

Section 173.27(f) clearly states that, for transportation by aircraft, materials packaged as limited quantities must be eligible for transportation aboard a passenger-carrying aircraft. In this final rule, we are adding additional clarification in § 173.27(f) to emphasize this critical step in determining limited quantity eligibility by also referring the reader to Column (9A) of the HMT. As stated in the NPRM, PHMSA is studying the feasibility of revising the HMT to further assist in determining limited quantity eligibility by air or possibly by all modes of transportation.

Two commenters (ASA, MARPA) were critical of the nature of proposed regulatory changes without an apparent safety need, specifically with regard to the limited quantity marking for air transport consistent with the ICAO Technical Instructions. The commenters argued that the constant changes make compliance with the regulations difficult. ASA and MARPA stated:

The 2009–2010 [ICAO TI] authorized * * * the UN identification number in a diamond shape [as] the mandatory way to mark limited quantity packages starting in 2011 * * * Beginning in 2011, ICAO has abandoned the marking protocols announced in 2009, and established a new, different identification protocol for identifying limited quantities * * * Instead of placing the UN identification number in the diamond shape, shippers will be required to place a "Y" in the diamond shape * * * There appears to be no reason other than mere harmonization for the sake of harmonization for adopting the ICAO limited quantity marking. [The] marking provides no additional value * * * because many people in the United States system will have no idea what the "Y" marking means * * * Although "Y" is the letter that precedes limited quantity packing instructions in the ICAO system, the letter "Y" has no special meaning in the existing United States Regulations.

b. *Dual marking system.* Support for harmonization efforts including the adoption of the square-on-point limited quantity marking (*i.e.,* the square-on-point with top and bottom portions black and the center white) generally coincided with support for the eventual elimination of the ORM–D classification along with the ORM–D marking. The basis for support was that this would eliminate a dual system of marking packages for domestic and international transportation. With regard to elimination of a dual marking system, some commenters (AA, FedEx, IVOGDA) indicated that a dual system of marking creates confusion and requires carriers and shippers to adjust their training programs to account for this dual system. They therefore recommend PHMSA consider an earlier implementation date than the proposed January 1, 2013 date. AA added:

We encounter almost every day reused boxes in the U.S. mail, passenger baggage, or cargo shipments that have old ORM–D marks. This takes considerable time to inspect and causes frustration to the public when non-hazardous shipments are denied transportation because of a marking they do not understand as an indication of hazardous materials.

PHMSA notes that adoption of a new limited quantity marking(s) may not necessarily alleviate or eliminate use of packaging premarked with the limited quantity square-on-point for non-hazardous materials.

Notwithstanding the general comments regarding dual marking, several commenters offered suggestions or revisions to improve or clarify the proposed requirements. As part of the NPRM, we authorized voluntary use of

the limited quantity marking. UPS urged PHMSA to delay voluntary use to allow carriers time to develop appropriate training in response to a final rule, stating that:

> In [our] experience, this kind of authorization * * * can lead to practical difficulties which in turn could have compliance and safety implications * * * Training in UPS will be needed to educate U.S. package handlers of the meaning of the limited quantity marking.

Additionally, on the basis of their opposition to adoption of the air transport requirements for limited quantities consistent with the ICAO TI, DGAC recommended that:

> The "Y" package mark [proposed] in § 172.315 not be required * * * [and] recommend that [PHMSA] allow permissive use of the "Y" mark for all modes of transport when the package meets the relevant requirements of the ICAO TI.

We agree with the DGAC recommendation that a "Y" marked package in full conformance with the air transport requirements for a limited quantity package should be authorized transportation by all modes and are revising § 171.22 accordingly. However, we do not agree with their suggestion that the limited quantity "Y" mark be voluntary. There are currently two different ways to mark a package of limited quantities in the HMR and a third (four if counting packaged ORM–D–AIR materials) would be very disruptive. Therefore, in this final rule, PHMSA is adopting the "Y" mark as proposed and providing a transition period to allow for the continued use of existing markings until January 1, 2012.

c. *Elimination of the ORM–D class.* Most commenters opposing the elimination of the ORM–D classification recommend using a separate rulemaking to implement this proposal. Some question whether the costs of eliminating this classification have been fully considered; others question whether there is sufficient safety justification to warrant replacing the current domestic ORM–D provisions with internationally harmonized provisions. A sampling of comments received follows. ACA argued:

> Although [we] supported harmonization of the limited quantities exceptions at the UN discussions, [there was an] understanding that the consumer commodity exception was a separate issue * * * In the coatings and adhesives industry, we are unaware of any major incidents with consumer commodity shipments. While PHMSA indicates that "aligning the existing limited quantity provisions in the HMR with the international standards will substantially enhance safety," we question how this applies to the proposal to eliminate ORM–D consumer commodities.

Valspar asserted:

> We believe PHMSA has overreached the HM–215 harmonization process by proposing * * * to eliminate the well-defined ORM–D (Consumer Commodity) hazard class. We believe any proposal * * * should not be linked to the international harmonization program. In several industry/regulatory conferences it has been proposed that Limited Quantity and Consumer Commodity are synonymous. We do not agree with this premise and strive to ensure that our "Consumer Commodities" meet the spirit and HMR definition of "* * * intended or suitable for sale through retail sales agencies or instrumentalities for consumption by individuals for purposes of personal care or household use." [We ship] many items under Limited Quantity provisions that we do not believe meet the "suitability" test and assert there is an important distinction between the two. We applaud PHMSA for clearly defining the pathway to ORM–D through Limited Quantity and Special Provision options and can only imagine whether this can be misused through other less clear regulation * * * We challenge PHMSA to revisit the assertion to Executive Order 12866 cited in the HM–215K NPRM that only considers the listed harmonization to be beneficial, with no acknowledgement of the financial cost to ORM–D shippers.

DGAC expressed concern that:

> Eliminating the ORM–D classification and package marking [will make it] that such packages will no longer be excepted from the § 175.75 requirements for air transport. No similar requirement applies under the ICAO TI so * * * this change cannot be justified on the basis of harmonization * * * [We believe] PHMSA considers limited quantity packages and currently classified ORM–D packages as posing comparable hazard[s]. Consistent with that approach, we recommend that PHMSA similarly except all limited quantity packages from the § 175.75 requirements.

We agree with DGAC regarding § 175.75 quantity limits for limited quantity packages and are revising the section accordingly. Limited quantity shipments will enjoy the same exception from the § 175.75 quantity limits as ORM–D–AIR materials currently receive.

USWAG stated:

> We believe elimination of the ORM–D standards for transportation * * * will disrupt longstanding shipping practices while failing to provide commensurate safety benefits.

The commenter also expressed concern for downstream shippers who have received ORM–D packages but can no longer transport this package beginning on the January 1, 2014 proposed compliance date. USWAG encouraged PHMSA to implement a phased-in approach that would authorize downstream shippers (that do not repackage these materials) to use ORM–D provisions for an additional period of time.

One commenter (HDMA) provided information that the proposal as written would impose significant cost on the domestic transport of medicines and other healthcare or consumer products. HDMA members concluded that compliance with the regulations would require replacement of more than 10 million plastic totes embossed with the ORM–D marking, costing members an estimated $70 million to purchase new totes with the new limited quantity marking. HDMA is prepared to phase out the use of totes with the ORM–D marking but believes this should be done over an extended period of time to enable existing totes embossed with the marking to be used over their lifetime. HDMA stated:

> PHMSA may not have recognized that some industries rely on containers that are embossed with the transport mark and hence conversion to a new mark is considerably more complicated than simply changing a label.

Just as PHMSA has done in the past, if there is merit to a particular segment of the regulated community requiring a longer transition period to be considered, it shall be observed on a case-by-case basis. In their comments, HDMA did not indicate what a "normal" lifetime would be. In their defense, however, they provided comments that were quantified and directly related to their concerns about the regulatory and economic burden placed upon their particular industry.

Finally, several commenters (*e.g.,* COSTHA, FedEx) noted concern over use of the ORM–D mark after the transition period ends (*i.e.,* beginning January 1, 2014). The commenters recommend that PHMSA clarify that at the end of the transition period, a package marked with the ORM–D mark will no longer indicate that a packaging contains a hazardous material (*i.e.,* a consumer commodity).

d. *Conclusion.* In the August 2010 NPRM, PHMSA outlined our determination, partially based on our perception of favorable comments received in response to the ANPRM, that aligning the existing limited quantity provisions in the HMR with the international standards and regulations (*i.e.,* UN Model Regulations, IMDG Code and the ICAO TI) would enhance safety by facilitating a single, uniform system of transporting limited quantity materials. We emphasized the proposals did not include the immediate or short-term removal of the existing provisions in the HMR for limited quantities reclassed as ORM–D (including those

for consumer commodities, cartridges, small arms and cartridges, power device) and included a delayed compliance period we believed was sufficient in length to allow stakeholders time to comply with the transition to the revised limited quantity requirements and eventual elimination of the ORM–D classification.

Based on careful consideration of the comments received in response to the proposals made in the NPRM, PHMSA is moving forward with a substantially revised final rule that adopts the new limited quantity provisions and the eventual phase-out of the ORM–D hazard class. This will implement a standardized system for national and international multimodal transportation. The approach of deminimis quantities, excepted quantities, limited quantities and consumer commodities will all have the same provisions and requirements for international and national transportation in a system that will promote compliance, efficiency and consistent training and lower costs after implementation.

6. Classification of Certain Division 1.4S Explosives

In the August 24, 2010 NPRM, PHMSA stated it understood commenter concerns that prescribing additional tests usually results in increased research and development costs. PHMSA also acknowledged that it believed there was merit to additional prescribed tests when they result in a credible and measureable increase in safety. Consequently, in the NPRM we proposed to require the phased-in testing of all new and previously approved Division 1.4S explosives articles and substances, depending on the intended mode of transport. For newly produced explosive articles, a person who successfully performs the Type 6(d) test would not be required to also perform the Type 6(a) test. PHMSA believes such initiatives will greatly reduce research and development costs without compromising safety.

In the NPRM, PHMSA proposed to adopt the requirement for the Type 6(d) test as prescribed in Section 16.7 of the fifth revised edition of the UN Manual of Tests and Criteria in the new § 172.102(c)(1), special provision 347. For affected articles (or substances) intended for transportation by aircraft, the proposed compliance date of this new requirement was April 1, 2011. If a manufacturer or approval holder of affected articles that previously classed and approved an article as Division 1.4S chooses to continue offering such shipments by aircraft, we proposed the articles must be successfully tested under Test Series 6(d) and a new approval be obtained from PHMSA. Additionally, we proposed that a previously classed and approved Division 1.4S article that is not successfully tested under Test Series 6(d) must be assigned to a compatibility group other than "S" (*e.g.,* B, C, or D) prior to the April 1, 2011 compliance date if intended for transportation by aircraft on or after that date. PHMSA also proposed that the effective date of testing to maintain Division 1.4S classification or reassignment to a higher compatibility group other than "S" be no later than January 1, 2014 for Division 1.4S articles approved prior to January 1, 2012 and are intended for domestic highway or rail transportation. For previously-approved affected articles transported by highway, rail and vessel, reassignment to a compatibility group other than "S" may be accomplished by using existing data and, when recommended by an authorized examination and testing agency, approved by PHMSA. For international highway, rail and vessel transportation, the effective date of Type 6(d) testing requirements or reassignment for new and previously produced affected articles would be January 1, 2012 (*i.e.,* the compliance date of a final rule under this docket, if adopted as proposed).

A number of commenters (Baker, EBAD, ESD, IME, Infotrac, NNSA, OCS, SAAMI, and Titan) addressed our proposal to adopt the Type 6(d) test and associated requirements. Several commenters expressed support for comments submitted by IME and requested that PHMSA give consideration to their comments. Thus, our response to comments will primarily be structured based on the comments IME submitted.

a. Compliance *dates* (i) *Air transport.* IME expressed concern that the proposed compliance date for Type 6(d) testing to determine Division 1.4S classification for materials to be transported by air precedes the compliance date for the rulemaking in general. IME stated:

> The "compliance date of a final rule under this docket" will be January 1, 2012. Simultaneously, however, the proposal establishes a compliance date for transportation by aircraft of April 1, 2011. Accordingly, the compliance date for an individual mode regulated under the rule would precede the compliance date for the rule itself, rendering the April 1, 2011 compliance date both unreasonable and unenforceable.

We disagree. As general policy, PHMSA implements a one-year transition period for international harmonization rulemakings. Thus, we typically publish a rulemaking under the HM–215 docket to be effective January 1 of a given year (to coincide with international effective dates) and require compliance one year later to afford stakeholders the opportunity to prepare for compliance. PHMSA is not bound to the one year transition period and has discretion to institute an earlier compliance date when circumstances warrant. The implementation of this requirement was viewed to be significant by the ICAO Dangerous Goods Panel and an emergency addendum was requested from the Air Navigation Commission. Preventing the transportation of an explosive article with the ability to exit its packaging that could result in collateral damage on a passenger aircraft was determined to be an immediate safety concern and was implemented on very short notice for international air transportation. Therefore, because of concern for the safety in transport of these articles by air and to affect a transition for international air transport with minimal disharmony in compliance dates (the Type 6(d) test is required under ICAO Technical Instructions as of January 1, 2011), we proposed to implement the April 1, 2011, compliance date for Type 6(d) testing for transport by aircraft.

IME also expressed concern that the proposed compliance date of April 1, 2011 for air transport is unattainable. IME stated further:

> [T]hat PHMSA's internal policy establishes a 120-day review period for processing approvals * * *. [W]e have determined that in order to meet the April 1, 2011 compliance deadline for air transportation, approval applicants planning to continue shipping by air would have to ensure that all required testing is completed and the results submitted to PHMSA by December 2, 2010. The required testing must be performed or witnessed by "an authorized examination and testing agency approved by PHMSA." On average, the lead time required to schedule testing with a PHMSA-approved laboratory is six weeks. An additional two weeks would then be required for testing the laboratory to perform the required tests and generate a report * * *. Accordingly, applicants intending to meet the April 1, 2011 deadline would have [had to] finalize arrangements with the testing laboratories by October 4, 2010—twenty-one days prior to the close of the public comment period * * *. Given the impossibility of timely compliance, the proposed April 1, 2011 date will function not as a compliance deadline, but as an automatic prohibition on [of] air transport of the affected 1.4S articles.

PHMSA acknowledges the strict compliance timeline proposed for the air transport of affected articles and substances. We note, however, that the PHMSA imposed 120-day period for

processing of approvals is not a minimum time period but general guidance for estimating the time period to review and process an approval application dependent on multiple factors such as the complexity of an application or errors in its submittal. The approval process may take less than 120 days and routinely does. Additionally, PHMSA's Approvals and Permits Division recently streamlined the explosive approval process to accommodate an influx of approval requests based on adoption of Type 6(d) test prescribed in this rulemaking. Finally, shippers are not constrained to the use of domestic laboratories approved by PHMSA but may utilize the resources of laboratories under the umbrella of other competent authorities (*e.g.,* Transport Canada). However, given the strict timeline proposed in the August 2010 NPRM, the significant number of approval applications we expect to receive, and the potential for delays at authorized testing laboratories attempting to accommodate the volume of testing or reclassification requests, we are extending the compliance date for air transport to July 1, 2011.

(ii) *Vessel transport.* IME noted our failure to indicate a compliance date for domestic vessel transportation. We agree. Our intent was to implement a compliance date that coincides with the effective date of the IMDG Code requirement for the Type 6(d) test (January 1, 2012). Therefore in this final rule, we will require the Type 6(d) test for Division 1.4S classification beginning January 1, 2012 for both domestic and international vessel transportation.

(iii) *Modal variability.* IME expressed concern that the varying compliance dates for air transport (proposed April 1, 2011), international highway, rail, and vessel (domestic and international) (proposed January 1, 2012), and domestic highway and rail (proposed January 1, 2014) will result in confusion and unintentional noncompliance with specific regard to downstream customers. IME reasoned:

> The customer has no way of knowing that the manufacturer ships only domestically [by highway] and has not, therefore, reclassified the product to meet the earlier compliance date for international transport. This leads to unintentional noncompliance by the downstream customer * * *. We recommend that PHMSA promulgate a single compliance date for all modes and for domestic and international transportation.

We disagree. Unawareness of a requirement cannot be used as a defense for non-compliance. Downstream customers or shippers may utilize a number of resources to determine whether an explosive article or substance subject to the Type 6(d) test has been successfully tested. For example, they can obtain a copy of the approval issued by PHMSA. Additionally, it is the shipper's responsibility to properly class and describe a material (*see* § 173.22) and to be trained on any applicable requirements (*see* § 172.704) of the HMR. That said, the Approvals and Permits Division will issue guidance to all current approval holders for affected Division 1.4S articles and materials to provide detailed instruction on the new requirement for Type 6(d) testing. This will include issuing new or amended approvals indicating whether a Type 6(d) test has been successfully conducted which can then be used by downstream customers and shippers to aid in transport decision-making.

b. *Testing requirements.* (i) *Self-testing.* In response to the ANPRM, IME recommended allowing self-testing and video documentation for articles previously approved as Division 1.4S. IME continued to assert that testing requirements for previously approved articles not be overly broad and questioned why this recommendation was not addressed even though PHMSA specifically acknowledged IME's comments in the NPRM. IME reiterated:

> Providing manufacturers with the option to self-test is an effective means of ensuring reasonable application of the new test. Additionally, allowing self-testing of already approved explosives articles will assist industry in minimizing the financial impact of implementation of a new test on already approved, safely transported, explosives.

We disagree. PHMSA believes a uniform process for testing using the Type 6(d) test to determine Division 1.4S classification is the best approach and we do not believe incorporating variability into the process by allowing self-testing and video-documentation for already approved articles complements this approach. PHMSA understands the need to facilitate any possible cost reduction regarding the application of this new testing requirement. We also maintain, however, that in the interest of uniform safety standards under the HMR, requiring that testing be observed or conducted by a PHMSA-approved laboratory is the best approach. This approach will not be codified in the HMR but rather will be incorporated into the explosives approval process as specified in § 173.56 of the HMR.

(ii) *Clarification of NPRM preamble.* Certain phrases and terms were used in the August 2010, NPRM which have caused confusion. We would like to clarify. Regarding the phrase "incremental testing," use of the phrase refers to the staggered compliance dates depending on the mode of transport or domestic/international transport and does not indicate differences in reclassification testing. We are removing any reference to this phrase in the preamble to this final rule to avoid further confusion. Regarding the term "design," as in "previously approved designs," the term was meant to signify individual explosives articles or substances. We are also deleting any use of this term in the preamble to this final rule to avoid any ambiguity in the use of the term.

(iii) *Modal difference.* In response to our proposed implementation of the new testing requirement for Division 1.4S classification, IME objected to any varying testing criteria tied to the intended mode of transport, stating:

> Such action is not consistent with the UN classification system; additionally, an explosive's reaction to stimuli is not affected by the mode of transport. PHMSA offers no rationale for excluding the use of existing test data for the reclassification of articles intended for air transport, and the distinction would inevitably result in confusion and unintended noncompliance in the regulated community.

We agree that there should be uniform testing criteria across all modes. We apologize for the lack of clarity in implementation of this new testing requirement and will clarify further in the following section (c) discussion of our implementation of the Type 6(d) test.

(iv) *Laboratory recommendation.* For previously approved articles, we proposed to allow reassignment to a compatibility group other than "S" using existing data and when recommended by a PHMSA-approved laboratory. IME did not support the proposal to require a recommendation from a PHMSA-approved laboratory where a previously approved article is being reassigned. IME argued:

> Inability to successfully pass the new Type 6(d) test does not invalidate the original laboratory tests and recommendation[s] that were previously sufficient to attain 1.4S classification. Accordingly, there is no rational basis for requiring a laboratory recommendation to support a downgrade in classification. A laboratory recommendation should only be required where the original classification is not supported by laboratory testing and a corresponding recommendation * * * [W]e are also concerned that if the proposal is promulgated as drafted, some testing laboratories may be reticent to issue the required recommendation solely on the basis of existing test data, and may require new testing.

We appreciate the concerns presented by IME. Again, we apologize for any lack of clarity in implementing this new

provision. As indicated previously, our Approvals and Permits Division will be issuing guidance and instruction on testing or reclassification of previously approved Division 1.4S articles or substances. As part of that instruction and in order to alleviate any potential problems from laboratories being reticent to provide a recommendation based on existing data, the Approvals and Permits Division will be providing guidelines to laboratories for which types or batches of already approved articles and substances should be reclassed into which type of downgraded compatibility group.

c. *Implementation of the Type 6(d) test in the explosives approval process.* As IME accurately summarized in its comments, there are three categories of explosive articles or substances affected by the test requirement: (1) Previously approved Division 1.4S articles that will pass the Type 6(d) test; (2) previously approved Division 1.4S articles that will not pass the Type 6(d) test and therefore need to be reassigned to a more conservative compatibility group other than "S"; and (3) new explosive articles for which Division 1.4S classification must be determined through successful Type 6(d) testing. All explosive articles affected by the Type 6(d) test requirement fit into these three categories regardless of the mode of transport. The compliance date for affected articles is dependent upon the intended mode of transport and whether they are to be transported domestically or internationally. Beginning January 1, 2012, any new explosive articles must be successfully subjected to the Type 6(d) test to determine whether Division 1.4S classification is appropriate. However, for a new explosive material intended for transport by aircraft, the compliance date for successful Type 6(d) testing is no later than July 1, 2011. For existing approved Division 1.4S articles intended for transport by air, successful Type 6(d) testing is also required no later than July 1, 2011; otherwise, the articles must be reassigned to another compatibility group and a new approval issued by PHMSA prior to being offered for transportation or transported by aircraft. Beginning January 1, 2012, existing approved Division 1.4S articles intended for international transport by highway, rail, or vessel and for domestic transport by vessel, successful Type 6(d) testing is required; otherwise, the articles must be reassigned to another compatibility group and a new approval issued by PHMSA prior to being offered for transportation. Finally, for existing approved Division 1.4S articles intended for domestic transportation by highway or rail, successful testing or compatibility group reassignment is required beginning January 1, 2014.

We realize the intended mode of transport may change as markets change and evolve but staggered compliance dates we believe are necessary in order to provide sufficient time to manufacturers, shippers, PHMSA-approved laboratories, and our Approvals and Permits Division to accommodate the number of approved Division 1.4S articles that will need testing or reclassification as well as attempting to allay some of the costs to manufacturers who only transport by domestic highway or rail.

d. *Federal considerations.* Two commenters (ESB, NNSA) within the Department of Defense and Department of Energy, respectively, objected to the Type 6(d) test requirement for previously approved Division 1.4S explosive material based on cost and logistical concerns. NNSA noted:

> [M]ore significant than the added costs, are the limited testing assets available necessary to complete testing by the prescribed deadline in the NPRM. [We do not] recognize the need to conduct UN Test Series 6(d) testing on all future permanent hazard classification requests as specified in the NPRM.

ESB added:

> [We object to] with applying the test Type 6(d) for articles previously classified. DOD has been assigning classifications using a methodology that includes assessing projections, fireballs, and jets of flame from unconfined initiation testing. DOD would consider this methodology as equivalent testing and criteria for the assignments of the eight Divisions 1.4 explosive [a]rticles. The DOD [has] not noted any transportation issues with the 378 articles assigned these UN numbers * * * Conducting test Type 6(d) for the 378 articles would take a considerable amount of time without any credible or measurable increase in safety * * * Reclassifying * * * by reassigning CGs other than S is also not a viable option due to the complexity of DOD logistics. Consolidating, and remarking each shipping container located at strategic positions around the world for [defense purposes] would be costly, time consuming and potentially have little safety improvements.

ESB recommended adding a grandfathered exception or issuing a special permit for previously approved DOD Division 1.4S material. We acknowledge concerns by Federal agencies regarding costs and time constraints in the interest of national security. We are currently working directly with potentially affected government stakeholders to remedy concerns regarding implementation of the new requirement for the Type 6(d) test on such entities.

7. Classification of Sour Crude Oil

PHMSA agreed with comments submitted in response to the October 2009 ANPRM that a new proper shipping name is not necessary and that there are more appropriate ways to communicate the potential inhalation hazard risk to transport workers. Therefore, in the August 2010 NPRM, PHMSA proposed to adopt the new proper shipping name found in the UN Model Regulations—"Petroleum sour crude oil, flammable, toxic"—with the letter "I" in Column (1) of the HMT indicating that this description is appropriate for use during international transportation. However, PHMSA did not propose to require use of the new proper shipping name for domestic transportation. PHMSA did propose that a new marking be applied to bulk packagings containing sour crude oil to communicate the potential inhalation risk in transportation.

Three commenters (API, ATA, DGAC) opposed our proposed requirements as ill-conceived and impractical and had concerns with the new marking. They believe the new marking is not necessary based on industry best practices already in place. One commenter (AAR) sought clarification of rail carrier requirements in relation to the proposed marking requirement. Although the commenters opposed our proposed requirements, they strongly support hazard communication processes and procedures to protect employees, the public and the environment from any unreasonable risk of danger from hydrogen sulfide gas. API noted:

> Cargo specific testing of individual packages upon loading, followed by the required identification, classification, packaging selection, marks, labels, placards, and documentation process is impractical. The physical and chemical criteria of the DG/HazMat define the basic shipping information * * * The preparation of shipping information and selection of packagings is typically done well in advance of loading on the basis of known, reliably measured, physical and chemical criteria of the materials being transported. When a wide range of the test results is possible, the DG/HazMat classifiers generally utilize the most conservative data to develop the basic shipping information * * * It is impossible to predict the concentration of H2S in the head space vapors evolving from liquid petroleum crude oils. There is not [a] standardized test, statistical correlation, or known methodology to do this * * * Without a reliable, proven methodology, any attempt to develop a classification process regarding potential, future H2S vapor space concentrations is unrealistic * * * API could

support the use of a differentiated graphic, unique in communicating the potential H2S vapor [but any] such mark should be considered voluntary and not mandated * * *. Companies should be allowed the flexibility in choosing an option that works best for their operations.

DGAC added:

[W]e are concerned that providing a warning for select crude oils may result in decreased vigilance when other substances also posing a potential hydrogen sulfide risk are handled * * *. If * * * PHMSA maintains that a mark is still necessary, we recommend that the applicability of any marking be limited to cargo tank truck operations * * * PHMSA should allow the warning to appear in the vicinity of the loading/unloading operation or on the vehicle at the loading location. This would avoid the need to add and remove the mark from the cargo tank truck * * * We consider the proposed GHS poison mark to be inappropriate * * * Applying the PHMSA proposed mark on crude oil tanks that do not meet the inhalation toxicity criteria results in a hazard communication conflict which should and can be avoided * * *. Should PHMSA maintain a warning is needed, we recommend a warning sign in English that conveys the message that there is a potential hydrogen sulfide hazard. An example could be * * * "Danger, Possible Hydrogen Sulfide Inhalation Hazard," * * * [to be possibly] supplemented by pictograms.

ATA expressed concerns that:

Not every load of sour crude will form hydrogen sulfide during transportation, which will require carriers to repeatedly affix and remove markings * * * If carriers are required to repeatedly alter marking requirements, issues of employee safety from climbing on top of tank trucks as well as economic issues * * * must be better understood. [We] recommend that the warning be located at the loading or unloading facility rather than on the tank truck or other bulk container.

We agree in part with the comments. We continue to maintain that there is a safety risk to hazmat employees that may become exposed to hydrogen sulfide vapor in proximity to openings on packagings during a loading or unloading operation due to elevated concentrations of hydrogen sulfide vapors. We do not believe this risk is limited to cargo tank motor vehicles. It may be that the primary mode of transportation for petroleum crude oil is by cargo tank motor vehicle, but we also continue to maintain that any proposed requirement should apply to all bulk packagings as we believe this risk may be present in any packaging with a bulk quantity of petroleum crude oil.

PHMSA agrees with commenters who have stated that a hazard warning statement specific to hydrogen sulfide gas on bulk packagings would provide for appropriate communication of the risk of potential exposure to such gas. PHMSA notes that such a marking is both specific to the gas and aligns with corresponding warnings currently employed in practice on the shipping documentation. Therefore, in this final rule, PHMSA is amending the marking requirement originally proposed to provide more flexibility to shippers and carriers by allowing a text warning such as "Danger, Possible Hydrogen Sulfide Inhalation Hazard" on bulk packagings containing sour crude to communicate the potential inhalation risk in transportation. *See* Section 172.327 for a discussion of the new marking requirements.

8. IBC Rebottling

In the NPRM, PHMSA proposed to adopt the revised definition of "repair" for composite IBCs consistent with international standards. To specifically address commenters' concerns, PHMSA noted that any proposed compliance date would be no earlier than January 1, 2012, thus providing ample time to comply with the new IBC requirement. We did not receive any additional comments in response to the NPRM. Therefore, in this final rule we are adopting the revised definition of "repair" of an IBC as proposed. *See* Section 180.350 for a discussion of the revised requirement.

9. Metal Hydride Storage Systems in Conveyances

In the August 2010 NPRM, PHMSA proposed to adopt the standards for the construction, qualification, marking and requalification of hydrogen in metal hydride storage systems adopted in the UN Model Regulations. We did not receive any additional comments in response to the NPRM. Therefore, in this final rule we are adopting the requirements as proposed. *See* Section 173.311 for a discussion of requirements for hydrogen in a metal hydride storage system.

10. In Vitro Testing for Corrosivity

Based on the overwhelming support for adoption into the HMR, in the NPRM PHMSA proposed to adopt and authorize the use of the OECD *in vitro* methods. We received over 2,200 comments additional to that received from PETA, in response to the NPRM supporting the adoption of *in vitro* testing methods to determine corrosivity and urging PHMSA to stop the requirement for use of methods based on live animal testing. Therefore, in this final rule we are adopting the OECD *in vitro* testing methods as proposed. *See* Section 173.137 for further discussion of such methods.

B. Harmonization Amendments Not Considered for Adoption in This Final Rule

This final rule makes changes to the HMR based on amendments made in the UN Model Regulations (sixteenth revised edition), IMDG Code (Amendment 35–10) and the ICAO Technical Instructions (2011–2012), which becomes effective January 1, 2011 (the IMDG Code is effective January 1, 2012). We are not, however, adopting all the amendments made to the various international standards into the HMR. In many cases, we have not adopted amendments to the international recommendations and regulations because the framework or structure of the HMR makes adoption unnecessary. In other cases, we have handled, or will be handling, the amendments in separate rulemaking proceedings.

One of the goals of this rulemaking is to continue to maintain consistency between the HMR and the international requirements. We are not striving to make the HMR identical to the international regulations, but rather to remove or avoid potential barriers to international transportation.

Below is a listing of those significant amendments to the international regulations that we are not adopting in this final rule, with a brief explanation of why the amendment was not included:

1. Requirements for Radioactive Materials

In the NPRM, we did not propose to adopt provisions pertaining to the transportation of Class 7 (radioactive) materials into the HMR. Amendments to requirements pertaining to the transportation of Class 7 (radioactive) materials are based on changes contained in the International Atomic Energy Agency (IAEA) publication, "IAEA Safety Standards: Regulations for the Safe Transport of Radioactive Materials." Due to their complexity, these changes are being addressed in a separate rulemaking.

2. Requirements for Lithium Batteries

PHMSA published an NPRM under Docket HM–224F (75 FR 1302, January 11, 2010) that proposed to adopt provisions to ensure all lithium batteries are packaged properly to reduce the possibility of damage to lithium batteries that could lead to a catastrophic incident, and to minimize the consequences of an incident should one occur. In addition, PHMSA proposed to require lithium battery shipments to be accompanied by hazard communication that ensures appropriate

and careful handling by air carrier personnel, including the flight crew, and informs both transport workers and emergency response personnel of actions to be taken in an emergency. The NPRM, which PHMSA developed in close coordination with our colleagues in the Federal Aviation Administration, is the latest in a series of actions PHMSA has taken to address the very serious risks posed by lithium batteries in transportation. The NPRM included proposed revisions to the HMR that were based on lithium battery provisions in the sixteenth revised edition of the UN Model Regulations. Therefore, except for wheelchairs powered by lithium ion batteries, we are not adopting new provisions pertaining to the transportation of lithium cells and batteries in this rulemaking. The docket for the lithium battery rulemaking can be found elsewhere at *http://www.regulations.gov* under PHMSA–2009–0095.

We note that a number of commenters objected to our inclusion of limitations on the stowage of lithium batteries in § 175.75 of the HMR and strongly urged that the limitations be removed from this rulemaking and addressed in a separate lithium battery rulemaking such as HM–224F. We agree. All reference to lithium batteries in our revisions to § 175.75 are removed from this rulemaking.

3. Requirements for Air Packaging

We are not adopting provisions pertaining to certain packagings offered for transportation by aircraft under this rulemaking. PHMSA is considering certain amendments to the HMR related to requirements for the packaging of hazardous materials intended for transportation by aircraft under a separate docket (HM–231A). These would include amendments based on the reformatted packing instructions in the 2011–2012 ICAO Technical Instructions. PHMSA published an ANPRM (73 FR 38361, July 7, 2008) and an NPRM (75 FR 27273, May 14, 2010) related to combination packaging standards offered in air transportation. *See http://www.regulations.gov* under PHMSA–2007–29364 for more information.

IV. Section-by-Section Review

Following is a section-by-section review of the amendments in this final rule:

Part 171

Section 171.7

The "National Technology Transfer and Advancement Act of 1996" directs agencies to use voluntary consensus standards. According to the Office of Management and Budget (OMB) Circular A–119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," government agencies must use voluntary consensus standards wherever practical in the development of regulations. Agency adoption of industry standards promotes productivity and efficiency in government and industry, expands opportunities for international trade, conserves resources, improves health and safety, and protects the environment.

To these ends, PHMSA actively participates in the development and updating of consensus standards through representation on more than 20 consensus standard bodies. PHMSA regularly reviews updated consensus standards and considers their merit for inclusion in the HMR.

Section 171.7 lists all materials incorporated by reference (IBR materials) into the HMR. For this rulemaking, we evaluated updated international consensus standards and regulations pertaining to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations, and vessel stowage requirements and determined that the revised standards provide an enhanced level of safety without imposing significant compliance burdens. These materials have a well-established and documented safety history. Their adoption maintains the high safety standard currently achieved under the HMR.

Some commenters (IATA, PRBA, Saft) indicated concern that the fifth revised edition of the UN Recommendations on the Transportation of Dangerous Goods, Manual of Tests and Criteria (UN Manual) was not included among the IBR materials to be updated and suggest that PHMSA include the document.

We agree. PHMSA proposed to incorporate by reference the fifth revised edition of the UN Manual under docket HM–224F published January 11, 2010 (75 FR 1302) because the revised version of the manual contained updated tests for lithium cells and batteries. However, that rulemaking will have an effective date later than this final rule. This rule contains provisions regarding new test requirements for other materials (*e.g.,* explosives) that are found in the updated edition of the UN Manual making it necessary for us to incorporate by reference the fifth edition. Therefore, we are including the updated fifth revised edition of the UN Manual and updating the IBR materials referenced in the HMR by adding and revising material under the following organizations:

- The *American Society for Testing and Materials (ASTM)*
  - ASTM D56–05, Standard Test Method for Flash Point by Tag Closed Tester (Referenced in § 173.120(c)(1)(i)(A); Added to § 171.7).
  - ASTM D86–07a, Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure (Referenced in § 173.121; Added to § 171.7).
  - ASTM D93–08, Standard Test Methods for Flash Point by Pensky-Martens Closed Cup Tester (Referenced in § 173.120(c)(1)(ii)(A); Added to § 171.7).
  - ASTM D1078–05, Standard Test Method for Distillation Range of Volatile Organic Liquids (Referenced in § 173.121; Added to § 171.7).
  - ASTM D3278–96(2004)e1, Standard Test Methods for Flash Point of Liquids by Small Scale Closed-Cup Apparatus (Referenced in §§ 173.120(c)(1)(i)(B) and 173.120(c)(1)(ii)(B); Added to § 171.7).
  - ASTM D3828–07a, Standard Test Methods for Flash Point by Small Scale Closed cup Tester (Referenced in § 173.120(c)(1)(i)(C); Added to § 171.7).
- The *International Civil Aviation Organization (ICAO)* Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions), 2009–2010 Edition is revised to incorporate 2011–2012 Edition.
- The *International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS)* Amendments 2002, Chapter II–2/Regulation 19, Consolidated Edition 2004 is revised to incorporate the 2009 Edition.
- The *International Maritime Organization (IMO)* International Maritime Dangerous Goods Code, 2008 Edition, Incorporating Amendment 34–08, English Edition, Volumes 1 and 2 is revised to incorporate Amendment 35–10.
- The *International Organization for Standardization (ISO)*
  - ISO 1516:2002(E), Determination of flash/no flash—Closed cup equilibrium method (Referenced in § 173.120; Added to § 171.7).
  - ISO 1523:2002(E), Determination of flash point—Closed cup equilibrium method (Referenced in § 173.120; Added to § 171.7).
  - ISO 2592:1973(E), Petroleum products—Determination of flash and fire points—Cleveland open cup method (Revised to incorporate the 2000 Edition).

○ ISO 2719:2002(E), Determination of flash point—Pensky-Martens closed cup method (Referenced in § 173.120; Added to § 171.7).

○ ISO 3405:2000(E), Petroleum products—Determination of distillation characteristics at atmospheric pressure (Referenced in § 173.121; Added to § 171.7).

○ ISO 3679:2004(E), Determination of flash point—Rapid equilibrium closed cup method (Referenced in § 173.120; Added to § 171.7).

○ ISO 3680:2004(E), Determination of flash/no flash—Rapid equilibrium closed cup method (Referenced in § 173.120; Added to § 171.7).

○ ISO 3924:1999(E), Petroleum products—Determination of boiling range distribution—Gas chromatography method (Referenced in § 173.121; Added to § 171.7).

○ ISO 4626:1980(E), Volatile organic liquids—Determination of boiling range of organic solvents used as raw materials (Referenced in § 173.121; Added to § 171.7).

○ ISO 4706:2008(E), Gas cylinders—Refillable welded steel cylinders—Test pressure 60 bar and below (Referenced in § 178.71; Added to § 171.7).

○ ISO 10297:1999, Gas cylinders—Refillable gas cylinder valves—Specification and type testing, First edition, May 1999, (E) (Revised to incorporate 2006 Edition).

○ ISO 10461:2005, Gas cylinders—Seamless aluminum-alloy gas cylinders, Periodic inspection and testing, Second edition, February 2005, (E) (Revised to incorporate Amendment 1 (2006)).

○ ISO 10692–2:2001(E), Gas cylinders—Gas cylinder valve connections for use in the micro-electronics industry—Part 2: Specification and type testing for valve to cylinder connections (Referenced in § 173.40; Added to § 171.7).

○ ISO 13736:2008(E), Determination of flash point—Abel closed-cup method (Referenced in § 173.120; Added to § 171.7).

○ ISO 16111:2008(E), Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride (Referenced in §§ 173.311 and 178.71; Added to § 171.7).

○ ISO 18172–1:2007(E), Gas cylinders—Refillable welded stainless steel cylinders—Part 1: Test pressure 6 MPa and below (Referenced in § 178.71; Added to § 171.7).

○ ISO 20703:2006(E), Gas cylinders—Refillable welded aluminum-alloy cylinders—Design, construction and testing (Referenced in § 178.71; Added to § 171.7).

• *Organization for Economic Cooperation and Development (OECD)*

○ Guidelines for the Testing of Chemicals, Test Guideline 404, Acute Dermal Irritation/Corrosion (1992) (Revised to incorporate 2002 edition).

○ Guidelines for the Testing of Chemicals, Test Guideline 430, *In Vitro* Skin Corrosion: Transcutaneous Electrical Resistance Test (TER) (2004) (Referenced in § 173.137; Added to § 171.7).

○ Guidelines for the Testing of Chemicals, Test Guideline 431, *In Vitro* Skin Corrosion: Human Skin Model Test (2004) (Referenced in § 173.137; Added to § 171.7).

○ Guidelines for the Testing of Chemicals, Test Guideline 435, *In Vitro* Membrane Barrier Test Method for Skin Corrosion (2006) (Referenced in § 173.137; Added to § 171.7).

• *Transport Canada,* Transportation of Dangerous Goods Regulations, including Clear Language Amendments 1 through 5 (Revised to add SOR/2008–34 (Amendment 6; February 7, 2008) in its entirety and SOR/2007–179 (Amendment 7; July 31, 2007)).

• *The United Nations Recommendations on the Transport of Dangerous Goods, Model Regulations,* fifteenth revised edition (2007), Volumes I and II (Revised to incorporate the sixteenth revised edition).

• *The United Nations Recommendations on the Transport of Dangerous Goods, Manual of Tests and Criteria,* fourth revised edition, (2003), and Addendum 2 (2004). (Revised to incorporate the fifth revised edition).

Section 171.8

This section defines terms generally used throughout the HMR that have broad or multi-modal applicability. We received no comments regarding our proposed adoption of new definitions. Therefore, in this final rule PHMSA is adding the following defined terms based on their adoption in the UN Model Regulations:

Metal hydride storage system. This term means a single complete hydrogen storage system that includes a receptacle, metal hydride, pressure relief device, shut-off valve, service equipment and internal components used for the transportation of hydrogen only.

Open cryogenic receptacle. This term means a transportable thermally insulated receptacle for refrigerated liquefied gases maintained at atmospheric pressure by continuous venting of the refrigerated gas.

Additionally, we proposed to revise the definition of *Oxidizing gas* to specify that an oxidizing gas is a pure gas or gas mixture with an oxidizing power greater than 23.5% as determined by a method specified in ISO 10156:1996 or 10156–2:2005. *See* also Sections 172.101 and 173.115, for discussion of changes to the "Compressed gas, n.o.s., UN1956." HMT entry and definition, respectively. We received no comments on the revised definition. Therefore, in this final rule we are adopting the revision as proposed.

Section 171.23

Section 171.23 prescribes the conditional requirements for specific materials and packages transported under the various international standards as permitted by the HMR. In this final rule we are removing the § 171.23(b)(9) requirement that stipulates Division 6.1 poisonous materials transported as limited quantities are not excepted from labeling. This change aligns the labeling requirements in the HMR for limited quantities with the international standards without compromising safety.

Section 171.25

Section 171.25 prescribes the additional requirements for specific materials and packages transported under the IMDG Code as permitted by the HMR. In this final rule, we are deleting paragraphs (c)(5) and (d)(3). Paragraphs (c)(5) and (d)(3) required portable tanks, cargo tanks, and tank cars containing cryogenic liquids transported by vessel to be stowed on deck regardless of the stowage requirements authorized under the IMDG Code. The IMDG Code now requires this same stowage for certain packagings containing cryogenic materials aboard a vessel, thus, paragraphs (c)(5) and (d)(3) are no longer necessary.

Effective January 1, 1997, vehicles and mechanical equipment containing internal combustion engines were no longer subject to the IMDG Code as conditionally designated under Amendment 28–96. Effective January 1, 2012, such articles will once again be subject to the IMDG Code under Amendment 35–10. Because the new requirements in the IMDG Code are more stringent than requirements for similar material in the HMR, PHMSA is amending § 171.25 by revising paragraph (b)(1) and adding a new paragraph (b)(4) permitting use of the IMDG Code or the HMR to prepare and stow vehicles and mechanical equipment containing internal combustion engines when offered for transport by vessel.

Part 172

Section 172.101

Introductory text to the § 172.101 HMT contains explanatory text for each of the columns that comprise the HMT. Currently, § 172.101(c)(10) provides specific requirements regarding the selection of an appropriate proper shipping name for mixtures and solutions containing more than one hazardous material of the same hazard class. In many cases, such mixtures and solutions are best described by a generic or "not otherwise specified" entry (*i.e.,* an "n.o.s." entry). For example, a solution containing two or more flammable liquid constituents may best be described under the entry "Flammable liquids, n.o.s., UN1993." However, in some cases where two or more hazardous materials are present, a single hazardous material may predominate where the other hazardous materials may be present in only trace amounts. In such cases, a description applicable to the predominant material may be more appropriate. A recent incident underscores the importance of using the most specific and appropriate shipping description. In that incident, an aluminum cylinder containing 99.9% pure ethyl chloride ruptured in storage incidental to transport. It was determined that the root cause was a reaction between the cylinder's contents and the aluminum. The relevant construction standard for the cylinder indicated that ethyl chloride was reactive with aluminum and that aluminum was not recommended for the transport of ethyl chloride. However, the shipper selected a generic compressed gas shipping description rather than the ethyl chloride name due to the presence of trace amounts of other hazardous materials. While we note that the general requirements for packagings still broadly address the responsibility of the shipper in selecting a packaging that is compatible with its lading, and that these requirements were also applicable and apparently overlooked, the incident nonetheless highlights the benefit of using a more specific description, where appropriate, to help ensure that the most appropriate transport provisions are followed.

To address this issue, the UN Model Regulations were amended to require, except as otherwise specified, that a mixture or solution of a single predominant hazardous material containing only traces of one or more additional hazardous materials listed by name in the HMT or additional non-hazardous constituents be assigned the UN number and proper shipping name of the predominant material contributing to the overall hazard classification of the mixture or solution. Adopting a similar provision in the HMR will enhance a shipper's ability to select the most appropriate shipping description. In the NPRM, PHMSA proposed to add a new paragraph, § 172.101(c)(10)(iv), outlining the authorization to describe the mixture or solution based on the predominant material contributing to the hazard classification.

One commenter (DOE) suggested that we remove the reference to non-hazardous material in § 172.101(c)(10)(iv) because the mixture of hazardous material and non-hazardous material is already addressed in § 172.101(c)(10)(i). Additionally, the commenter asked for clarification of instances when the provision should be used and asked to define the meaning of "trace amounts."

We agree. It is correct that § 172.101(c)(10)(i) already addresses a mixture or solution of a hazardous material and non-hazardous material. The provision pertains to a mixture or solution containing non-hazardous material in such quantities that it does not alter the physical state or purity of the hazardous material it is mixed with, as well as either the hazard classification, packing group, subsidiary hazard, or emergency response procedures. The intent of new paragraph § 172.101(c)(10)(iv) is to provide instruction for selecting the most appropriate proper shipping name for a mixture or solution of a hazardous material and traces of one or more other hazardous materials, one or more non-hazardous materials, or both. Where such a mixture or solution occurs that the trace amount of material does not affect the classification, the material must be described using the most appropriate proper shipping name for the predominant hazardous material. Based on the comment received and reconsideration of our proposal, we are instead revising paragraph (c)(10)(i) to provide clarification on properly describing a material that is a mixture or solution of a predominant hazardous material and trace amounts of hazardous or non-hazardous material, or both; rather than add a new paragraph (c)(10)(iv). The six conditions in § 172.101(c)(10)(i) that currently limit a mixture or solution of hazardous material with a non-hazardous material from being described using the proper shipping name of the hazardous material would also apply to a mixture or solution of a single predominant hazardous material and trace amounts of other hazardous or non-hazardous materials or both.

With regard to instances when the provision would be used, we would expect it to be applied in cases of mixtures or solutions of a hazardous material that contain small amounts of preservatives or are contaminated with trace amounts of hazardous material in such a way that the "trace amounts" do not affect the packaging, the hazard class, the packing group, *etc* of the hazardous material. As for defining "trace amounts" we do not specifically define this term because determination of when an amount of material affects the hazard classification is highly variable depending on the physical and chemical properties of the materials involved and the quantities of material involved. Therefore, in this final rule, we are revising § 172.101(c)(10)(i) to provide instruction on properly describing a material that is a mixture or solution of a predominant hazardous material and trace amounts of hazardous or non-hazardous material, or both.

Paragraph (e) of § 172.101 provides explanations for the letters that precede identification numbers assigned to proper shipping names in the HMT. In this final rule, PHMSA is adding an explanation for identification numbers associated with certain descriptions under the ICAO Technical Instructions and are preceded by the letters "ID." Additionally, PHMSA is authorizing use of the international air description, "ID8000, Consumer commodity, 9" in the HMT with material and article eligibility for use of the description based on Special provision A112 and Packing Instruction Y963 of the 2011–2012 ICAO Technical Instructions.

Hazardous Materials Table (HMT)

In this final rule, PHMSA is making various amendments to the HMT. Readers should review all changes for a complete understanding of the amendments. For purposes of the Government Printing Office's typesetting procedures, changes to the HMT appear under three sections of the Table, "remove," "add," and "revise." Certain entries in the HMT, such as those with revisions to the proper shipping names, appear as a "remove" and "add." Amendments to the HMT include the following:

New HMT entries

UN3482	Alkali metal dispersions, flammable *or* Alkaline earth metal dispersions, flammable.
UN3496	Batteries, nickel-metal hydride.

This new HMT entry for UN3496 includes a W in Column (1) to indicate use of this hazardous materials description is limited to vessel transport of these materials.

Two commenters (Saft, PRBA) indicated concern with our proposed assignment of Special Provision 130 (for transportation of dry batteries—*i.e.,* "Batteries, dry, sealed, n.o.s.") to this entry and the potential for confusion leading to use of this entry for modes other than vessel.

We agree. To help clarify the use of this entry, we have included additional language in Column (2) to refer shippers transporting nickel-metal hydride batteries by modes other than vessel to the HMT entry "Batteries, dry, sealed, n.o.s." for instruction on the transport requirements for nickel-metal hydride batteries. Additionally, we have revised Special Provision 130 to make clear that for other than nickel-metal hydride batteries transported by vessel subject to Special Provision 340, dry batteries must be transported in accordance with Special Provision 130.

UN3485	Calcium hypochlorite, dry, corrosive *or* Calcium hypochlorite mixtures, dry, corrosive *with more than 39% available chlorine (8.8% available oxygen).*
UN3487	Calcium hypochlorite, hydrated, corrosive *or* Calcium hypochlorite, hydrated mixture, corrosive *with not less than 5.5% but not more than 16% water.*
UN3486	Calcium hypochlorite mixture, dry, corrosive *with more than 10% but not more than 39% available chlorine.*
ID8000	Consumer commodity.

This shipping description is added to the HMT as a Class 9 miscellaneous hazardous material to be used for the air transportation of limited quantities of certain hazardous materials of Class 2 (non-toxic aerosols only), Class 3 (PG II and III only), Division 6.1 (PG III only), and of UN identification numbers UN3077, UN3082, and UN3175, provided such materials do not have a subsidiary risk and are authorized aboard a passenger-carrying aircraft. This amendment is based on changes incorporated into the 2011–2012 ICAO TI.

UN3484	Hydrazine aqueous solution, flammable *with more than 37% hydrazine, by mass.*
UN3495	Iodine.

Iodine is transported globally under a number of different shipping descriptions dependent on the shipper. In the interest of reducing risks associated with transport of iodine under various descriptions and therefore, various packaging, we are adding this unique UN identification number and shipping description to provide for specific packaging requirements and faster identification and access to emergency response information.

UN1471	Lithium hypochlorite, dry *or* Lithium hypochlorite mixture, Division 5.1, PG III.

Lithium hypochlorite is a common commercial product used as a disinfectant that is often mixed with other non-hazardous organic salts. Currently, the HMT only provides for a Division 5.1, PG II designation for this material, yet testing conducted in accordance with the UN Manual of Tests and Criteria has indicated that some common commercial mixtures meet the criteria for classification in Division 5.1, PG III. Therefore, PHMSA is adding a line to the current entry to allow for classification of lithium hypochlorite and mixtures of lithium hypochlorite in PG III, where appropriate.

One commenter (FMC) noted that the addition of the proposed PG III entry for the "Lithium hypochlorite, UN1471" shipping description retains the italicized text "with more than 39% available chlorine (8.8% available oxygen)" as well as the word "dry" for lithium hypochlorite mixtures and that this is not consistent with the hazardous materials description in the dangerous goods list in the UN Model Regulations, the ICAO Technical Instructions, and the soon to be adopted IMDG Code. FMC requested that PHMSA revise the entry by deleting the qualifying text as well as the word "dry" to be consistent with international standards and regulations and to provide shippers with the most appropriate shipping description for the transport of lithium hypochlorite materials. Additionally, FMC stated:

> [M]ore fundamental and practical problems will arise if this qualifying text is retained in the HMR entry for UN1471. Some of the commercial lithium hypochlorite products shipped domestically and internationally by FMC have less than 39% available chlorine (8.8% available oxygen), and so would not be properly described by the entry as it is proposed to be modified. [T]hese products nevertheless meet the criteria for classification in Division 5.1, Packing Group II or III. Consequently, under the HMR, FMC must describe these products by an appropriate entry in the HMT associated with the correct class and packing group, namely "Hypochlorites, inorganic, n.o.s." (UN3212) if the product meets Packing Group II criteria, or, since UN3212 does not provide a Packing Group III option, "Oxidizing solid, n.o.s." (UN1479) if the product meets the criteria for assignment to Packing Group III. Thus, for road and rail transport within the United States FMC's lithium hypochlorite products would have to be described by one of three different entries.

We agree. Removing the italicized text would facilitate a uniform process of describing lithium hypochlorite materials for transport purposes without reducing the safety of transport when using this description in lieu the descriptions discussed in the comment by FMC. Additionally, we are making a conforming amendment (with the IMDG Code) to the PG II entry for UN1471 to assign special provisions T3 and TP33 applicable to a portable tank when used to transport this material. T3 outlines

the minimum test pressure, minimum shell thickness, bottom opening requirements, and pressure relief requirements in addition to the design and constructions requirements for the portable tank. TP33 outlines provisions for transport of granular or powdered solids. Therefore, in this final rule, we are adopting the PG III entry for "Lithium hypochlorite, UN1471" without the italicized text and the word "dry," as well as making a conforming revision to the shipping description for the PG II entry already in the HMT to read, "Lithium hypochlorite, dry *or* Lithium hypochlorite mixtures, UN1471."

UN3483	Motor fuel anti-knock mixture, flammable.
UN3494	Petroleum sour crude oil, flammable, toxic (this entry is identified in the HMT as appropriate for international transportation under § 172.101(b)(5)).
UN3492	Toxic-by-inhalation liquid, corrosive, flammable, n.o.s. *with an inhalation toxicity lower than or equal to 200 ml/m*^{3} *and saturated vapor concentration greater than or equal to 500* LC_{50}.
UN3493	Toxic-by-inhalation liquid, corrosive, flammable, n.o.s. *with an inhalation toxicity lower than or equal to 1000 ml/m*^{3} *and saturated vapor concentration greater than or equal to 10* LC_{50}.
UN3488	Toxic-by-inhalation liquid, flammable, corrosive, n.o.s. *with an inhalation toxicity lower than or equal to 200 ml/m*^{3} *and saturated vapor concentration greater than or equal to 500* LC_{50}.
UN3489	Toxic-by-inhalation liquid, flammable, corrosive, n.o.s. *with an inhalation toxicity lower than or equal to* 1000 ml/m^3 and saturated vapor concentration greater than or equal to 10 LC_{50}.
UN3490	Toxic-by-inhalation liquid, water-reactive, flammable, n.o.s. *with an inhalation toxicity lower than or equal to 200 ml/m*^{3} *and saturated vapor concentration greater than or equal to 500* LC_{50}.
UN3491	Toxic-by-inhalation liquid, water-reactive, flammable, n.o.s. *with an inhalation toxicity lower than or equal to 1000 ml/m*^{3} *and saturated vapor concentration greater than or equal to 10* LC_{50}.

Based on a recommendation by a commenter (PPG), we note that two new entries for toxic-by-inhalation (TIH) material (*i.e.*, UN3492 and UN3493) added in the sixteenth revised edition of the UN Model Regulations and in this final rule will likely be removed from the dangerous goods table in the seventeenth revised edition of the UN Model Regulations. Shippers who choose to use these new descriptions on shipping papers and markings on boxes may incur additional costs when having to change the material descriptions again should the descriptions be removed from the UN Model Regulations and subsequently, the HMR.

Additionally, because of the addition of generic TIH descriptions for toxic, flammable, corrosive material (*i.e.*, UN 3488, UN3499), PPG believes the domestic entries for "sec-Butyl chloroformate, NA2742" and "Isobutyl chloroformate, NA2742" are obsolete and recommended that these materials be described using the generic TIH descriptions for consistent hazard communication of these materials between modes of transportation.

We agree. Therefore, in this final rule, as a conforming amendment to the addition of the generic TIH entries, we are deleting the domestic use entries "sec-Butyl chloroformate, NA2742" and "Isobutyl chloroformate, NA2742" from the HMT.

Amendments to the Column (1) Symbols

The entries "Elevated temperature liquid, flammable, n.o.s., *with flash point above 37.8 °C, at or above its flash point,* UN3256," "Elevated temperature liquid, n.o.s., *at or above 100 °C and below its flash point (including molten metals, molten salts, etc.),* UN3257," and "Elevated temperature solid, n.o.s., *at or above 240 °C,* UN3258" are revised by adding the symbol G. The symbol G identifies proper shipping names for which a technical name of the hazardous material is required in parentheses in association with the basic description. Requiring the technical name(s) for certain elevated temperatures materials will help emergency responders in selecting the proper materials for extinguishing a fire involving these hazardous materials and will aid in estimating the temperature properties of the materials (*e.g.,* the melting point).

The entries "Metal catalyst, dry, UN2881" and "Metal catalyst, wetted *with a visible excess of liquid,* UN1378" are revised by adding the symbol G. The symbol G identifies proper shipping names for which a technical name of the hazardous material is required in parentheses in association with the basic description. Requiring the technical name(s) for metal catalysts will aid emergency responders in selecting the proper fire suppressant (*e.g.,* CO_2) if the hazardous material is involved in a fire or in identifying other materials the metal catalyst could react with.

The entry "Powder, smokeless, UN0509," is revised by deleting the symbol D. The symbol D identifies a proper shipping name for domestic use only. This entry has been adopted into the UN Model Regulations, the ICAO TI, and the IMDG Code. This deletion is consistent with our final rule published under Docket HM–215J (74 FR 2200, January 14, 2009) in which we indicated our intent to remove the symbol D in a future rulemaking upon adoption of the entry into international regulations.

For the following Division 5.1 (oxidizer) materials and Division 6.1 (toxic) materials, the entries are revised by adding the symbol G. The symbol G identifies proper shipping names for which one or more technical names of the hazardous material must be entered in parentheses in association with the basic description on a shipping paper. Knowledge of the technical name of toxic materials may aid emergency responders with implementing more appropriate first aid measures:

UN3141	Antimony compounds, inorganic, liquid, n.o.s.
UN1549	Antimony compounds, inorganic, solid, n.o.s.
UN1556	Arsenic compounds, liquid, n.o.s. *inorganic, including arsenates, n.o.s.; arsenites, n.o.s.; arsenic sulfides, n.o.s.; and organic compounds of arsenic, n.o.s.*
UN1557	Arsenic compounds, solid, n.o.s. *inorganic, including arsenates, n.o.s.; arsenites, n.o.s.; arsenic sulfides, n.o.s.; and organic compounds of arsenic, n.o.s.*
UN1564	Barium compounds, n.o.s.
UN1566	Beryllium compounds, n.o.s.
UN3213	Bromates, inorganic, aqueous solution, n.o.s.
UN1450	Bromates, inorganic, n.o.s.

UN2570	Cadmium compounds.
UN3210	Chlorates, inorganic, aqueous solution, n.o.s.
UN1461	Chlorates, inorganic, n.o.s.
UN1462	Chlorites, inorganic, n.o.s.
UN1583	Chloropicrin mixtures, n.o.s.
UN3362	Chlorosilanes, toxic, corrosive, flammable, n.o.s.
UN3361	Chlorosilanes, toxic, corrosive, n.o.s.
UN1935	Cyanide solutions, n.o.s.
UN2856	Fluorosilicates, n.o.s.
UN3212	Hypochlorites, inorganic, n.o.s.
UN2291	Lead compounds, soluble, n.o.s.
UN2024	Mercury compounds, liquid, n.o.s.
UN2025	Mercury compounds, solid, n.o.s.
UN3144	Nicotine compounds, liquid, n.o.s. *or* Nicotine preparations, liquid, n.o.s.
UN1665	Nicotine compounds, solid, n.o.s. *or* Nicotine preparations, solid, n.o.s.
UN3219	Nitrites, inorganic, aqueous solution, n.o.s.
UN2627	Nitrites, inorganic, n.o.s.
UN3214	Permanganates, inorganic, aqueous solution, n.o.s.
UN1482	Permanganates, inorganic, n.o.s.
UN2026	Phenylmercuric compounds, n.o.s.
UN2630	Selenates *or* Selenites.
UN3440	Selenium compound, liquid, n.o.s.
UN3283	Selenium compound, solid, n.o.s.
UN3284	Tellurium compound, solid, n.o.s.
UN3285	Vanadium compound, solid, n.o.s.

Amendments to the Column (2) Hazardous Materials Descriptions and Proper Shipping Names

The proper shipping name for the entry "Detonator, assemblies, non-electric, *for blasting,* UN0500," is revised by removing the comma after "Detonator" to read "Detonator assemblies, non-electric, *for blasting.*" This revision appears as a "Remove/Add" in this rulemaking.

The proper shipping name for the entry "Engines, internal combustion, *flammable gas powered,* UN3166," is revised to read "Engines, internal combustion *or* Engines, fuel cell, *flammable gas powered.*" This revision appears as a "Remove/Add" in this rulemaking.

One commenter (IATA) suggests that we revise this proper shipping name to the singular "engine" in alignment with use of the singular form for the entries in the UN Model Regulations. We disagree. As indicated by the commenter, § 172.101(c)(1) authorizes use of proper shipping names in the singular or plural form. Therefore, we believe it is not necessary to revise the proper shipping name to the singular "engine" when the shipper is authorized to modify the proper shipping name between singular and plural forms.

The proper shipping name for the entry "Engines, internal combustion, *flammable liquid powered,* UN3166," is revised to read "Engines, internal combustion *or* Engines, fuel cell, *flammable liquid powered.*" This revision appears as a "Remove/Add" in this rulemaking.

One commenter (IATA) suggests that we revise this proper shipping name to the singular "engine" in alignment with use of the singular form for the entries in the UN Model Regulations. We disagree. As indicated by the commenter, § 172.101(c)(1) authorizes use of proper shipping names in the singular or plural form. Therefore, we believe it is not necessary to revise the proper shipping name to the singular "engine."

The proper shipping names "Formaldehyde, solutions, flammable, UN1198" and "Formaldehyde, solutions, *with not less than 25 percent formaldehyde,* UN2209" are revised to remove an errant comma between the words "Formaldehyde" and "solutions." This revision appears as a "Remove/Add" in this rulemaking.

The proper shipping name for the entry "1-Hydroxybenzotriazole, anhydrous, wetted *with not less than 20 percent water, by mass,* UN3474" is revised to read "1-Hydroxybenzotriazole, monohydrate." This revision appears as a "Remove/Add" in this rulemaking.

The proper shipping name for the PG II entry for Lithium hypochlorite, dry *with more than 39% available chlorine (8.8% available oxygen) or* Lithium hypochlorite mixture, dry *with more than 39% available chlorine (8.8% available oxygen),* UN1471" is revised to read "Lithium hypochlorite, dry *or* Lithium hypochlorite mixture" to conform with the addition of the new PG III entry and international use of this proper shipping name. This revision appears as a "Remove/Add" in this rulemaking.

The proper shipping name for the entry "Nitric acid *other than red fuming, with less than 65 percent nitric acid,* UN2031" is revised to read "Nitric acid *other than red fuming, with more than 20 percent and less than 65 percent nitric acid,* UN2031." The proper shipping name for the Packing Group I entry "Nitric acid *other than red fuming, with more than 70 percent nitric acid,* UN2031" is added to the HMT. In a final rule published on January 14, 2009 (HM–215J; 74 FR 2200), errors were made to both nitric acid entries and in this final rule, PHMSA aligns them correctly in accordance with the various international standards. Additionally, we are removing the outdated Packing Group II entry "Nitric acid *other than red fuming, with not more than 70 percent nitric acid,* UN2031" that should have been removed from the HMT in the same final rule.

The proper shipping name for the entry "Tars, liquid *including road asphalt and oils, bitumen and cut backs,* UN1999" is revised to read "Tars, liquid *including road oils and cutback bitumens.*" The entries in the HMT applicable to transport of bitumen may cause confusion with respect to the proper classification of the material. The entries include "Combustible liquid, n.o.s., NA1993, combustible liquid" and "Tars, liquid *including road asphalt and oils, bitumen and cut backs,* UN1999, 3," and the entries "Elevated temperature liquid, flammable, n.o.s., UN3256, 3" and "Elevated temperature liquid, n.o.s., UN3257, 9," when the material is heated and offered for transport. Bitumen is a hydrocarbon material derived from crude oil having a flashpoint of 160 °C or greater. Bitumens typically do not meet the classification for a Class 3 flammable

liquid except for cutback bitumens which are blended with a flammable material such as kerosene. Also, road asphalt is bitumen mixed with sand and fillers which also does not meet the classification for a Class 3 flammable liquid. Therefore, we are revising the proper shipping name "Tars, liquid *including road asphalt and oils, bitumen and cut backs*" by removing reference to asphalt and clarifying applicability to cutback bitumens to read "Tars, liquid *including road oils and cutback bitumens*." This revision appears as a "Remove/Add" in this rulemaking.

The proper shipping name for the entry "Trinitro-meta-cresol, UN0216" is revised to read "Trinitro-m-cresol." This revision appears as a "Remove/Add" in this rulemaking.

The proper shipping name for the entry "Vehicle, flammable gas powered, UN3166," is revised to read "Vehicle, flammable gas powered *or* Vehicle, fuel cell, flammable gas powered." This revision appears as a "Remove/Add" in this rulemaking.

The proper shipping name for the entry "Vehicle, flammable liquid powered, UN3166," is revised to read "Vehicle, flammable liquid powered *or* Vehicle, fuel cell, flammable liquid powered." This revision appears as a "Remove/Add" in this rulemaking.

Amendments to the Column (3) Hazard Class or Division

PHMSA is revising the classification of a number of entries to Division 6.1 poisonous primary hazards for consistency with the adoption of classification changes into the sixteenth revised edition of the UN Model Regulations. The changes are based on data provided from a thorough review of literature on toxic-by-inhalation materials. The review of literature is provided in Informal Document UN/SCETDG/33/INF.8 submitted to the 33rd session of the UN Sub-Committee of Experts on the Transport of Dangerous Goods which is available at *http://www.unece.org/trans/main/dgdb/dgsubc/c3inf33.html*.

For the entry "Tetranitromethane, UN1510," the Class 5 (oxidizer) material's primary hazard is revised to a Division 6.1 (poisonous) material primary hazard.

For the following Class 3 (flammable liquid) materials, the Class 3 primary hazard is revised to a Division 6.1 (poisonous) material primary hazard.

UN2481	Ethyl isocyanate.
UN2486	Isobutyl isocyanate.
UN2483	Isopropyl isocyanate.
UN3079	Methacrylonitrile, stabilized.
UN2605	Methoxymethyl isocyanate.

For the following Class 8 (corrosive) materials, the Class 8 primary hazard is revised to a Division 6.1 (poisonous) material primary hazard.

UN1810	Phosphorous oxychloride.
UN1834	Sulfur chloride.
UN1838	Titanium tetrachloride.

Amendments to the Column (5) Packing Group (PG)

The entry "Carbon dioxide, solid *or* Dry ice, UN1845" is revised by deleting the PG III designation. In general, the PG assigned to a material identifies the degree of hazard the material represents and determines the performance level of the packaging required for the material. For example, a PG II material (*i.e.,* a moderate hazard material) is considered more hazardous and requires more stringent packaging than a PG III material (*i.e.,* a low hazard material). Dry ice presents minimal risk during transport except where concentrations may build up in a confined space. Therefore, in this final rule, PHMSA is deleting the PG III designation from the entry.

For the following Division 6.1 poisonous materials, the PG is revised to read PG I.

UN2668	Chloroacetonitrile.
UN1810	Phosphorous oxychloride.
UN2474	Thiophosgene.
UN1838	Titanium tetrachloride.

PHMSA is making this revision to the PG assignment for these entries for consistency with the adoption of changes into the sixteenth revised edition of the UN Model Regulations. The changes are based on data provided from a thorough review of literature on toxic-by-inhalation materials. The review of literature is provided in Informal Document UN/SCETDG/33/INF.8 submitted to the 33rd session of the UN Sub-Committee of Experts on the Transport of Dangerous Goods which is available at *http://www.unece.org/trans/main/dgdb/dgsubc/c3inf33.html*.

Amendments to the Column (6) Label(s)

For the following hazardous material entries, PHMSA is revising the label requirements for consistency with changes made to the classification of these materials under amendments to Column (3) (*see* above). The Class 3 (flammable liquid), Class 8 (corrosive), or Division 5.1 (oxidizer) primary hazard labels, as appropriate, and the Division 6.1 (poisonous) subsidiary hazard label are revised to a Division 6.1 (poisonous) material primary hazard label and Class 3, Class 8, or Division 5.1 subsidiary hazard label to read "6.1, 3," "6.1, 8," or "6.1, 5.1," as appropriate.

UN2481	Ethyl isocyanate.
UN2486	Isobutyl isocyanate.
UN2483	Isopropyl isocyanate.
UN3079	Methacrylonitrile, stabilized.

UN2605	Methoxymethyl isocyanate.
UN1810	Phosphorous oxychloride.
UN1834	Sulfur chloride.
UN1838	Titanium tetrachloride.

The entry "Chlorosilanes, toxic, corrosive, flammable, n.o.s., UN3362" is revised by correctly ordering the sequence of labeling hazards to reflect the proper shipping name to read "6.1, 8, 3."

Amendments to the Column (7) Special Provisions

The entry "Chloropicrin, UN1580" is revised by replacing the portable tank instruction T Code T14 with T22. The UN Committee of Experts on the Transport of Dangerous Goods revised the T Code assignment for a number of Division 6.1 (toxic-by-inhalation) materials from T14 to T22. Assigning T22 requires a higher pressure for the periodic hydrostatic test (6 bar to 10 bar) and a thicker minimum shell thickness (6 mm to 10 mm). Therefore, for consistency with revisions made to the T Code assignments under the sixteenth revised edition of the UN Model Regulations, we are revising the T Code to read T22.

The entry "Compressed gas, n.o.s., UN1956" is revised by deleting special provision 77 which authorizes the use of this entry for mixtures of gases with less than 23.5% oxygen when no other oxidizing gases are present. Because we are modifying the definition of oxidizing gas in § 171.8 of the HMR to indicate that "a gas which may, by providing oxygen, cause or contribute to the combustion of other material more than air does means pure gases or gas mixtures with an oxidizing power greater than 23.5% oxygen" and because the entry "Compressed gas, oxidizing, n.o.s., UN3156" is currently available in the HMT, the special provision is redundant and no longer necessary.

The entry "Environmentally hazardous substance, solid, UN3077" is revised by adding new special provision A112 authorizing the transportation of certain IBCs containing this material up to a maximum net quantity of 1,000 kg by passenger or cargo-only aircraft.

The entry "Ethylene oxide *or* Ethylene oxide with nitrogen *up to a total pressure of 1 MPa (10 bar) at 50 degrees C,* UN1040 is revised by deleting special provision A59 and adding new special provision 342. The provisions in A59 applied only to air transport but they now apply to all modes under new Special provision 342. *See* Section 172.102 special provisions for a discussion of new special provision 342.

The entry "1-Hydroxybenzotriazole, monohydrate, UN3474" is revised by deleting special provision 162. Special provision 162 requires that for the material to be transported as a Division 4.1 desensitized material, it must be transported in such a manner that at no time during the course of transportation does the percentage concentration of water fall below 20%. Anhydrous hydroxybenzotriazole rapidly converts to the monohydrate form in the presence of water, that is, the thermally stable form of the substance. Additionally, tests have indicated that the monohydrate maintains its water content under temperature conditions encountered in storage and transport over extended periods of time. This conforms to the intent of the provisions specified in special provision 162 and therefore, we are deleting special provision 162 from the entry.

The entry "Motor fuel anti-knock mixtures, UN1649" is revised by deleting special provision 151. Special provision 151 requires that if this material also meets the definition of a Class 3 (flammable) liquid under § 173.120 of the HMR, a FLAMMABLE LIQUID label is required and the basic description on the shipping paper must indicate the Class 3 subsidiary hazard. However, because of the addition of the new entry "Motor fuel anti-knock mixtures, flammable, UN3483" which indicates a Class 3 subsidiary hazard, we believe it is no longer necessary to assign special provision 151 to this entry.

The entry "Nitrogen, refrigerated liquid cryogenic liquid, UN1977" is revised by adding new special provisions 345 and 346. *See* Section 172.102 special provisions for a discussion of new special provisions 345 and 346.

The entry "Oxygen, compressed, UN1072" is revised by adding special provision 110 authorizing an actuating cartridge (*e.g.,* power device cartridges of Division 1.4, compatibility groups C and S) to be installed on a cylinder containing oxygen without changing the classification of Division 2.2. *See* Section 172.102 special provisions for a discussion of our revision to special provision 110.

The entry "Pentaerythrite tetranitrate *or* Pentaerythritol tetranitrate *or* PETN, *with not less than 7 percent wax by mass,* 0411)" is revised by assigning special provision 120 to the entry. A final rule published in the **Federal Register** under Docket HM–215B (62 FR 24689, May 6, 1997), added special provision 120 to § 172.102(c)(1) of the HMR and assigned it to one of the phlegmatized HMT entries for PETN (UN0411). In this final rule, PHMSA is reassigning special provision 120 to UN0411 in Column (7) of the HMT because it never appeared in the subsequent printing of the HMR but the requirement remains valid.

The entry "Petroleum crude oil, UN1267" is revised by adding new special provision 357 instructing a shipper, if applicable, to use the entry "Petroleum sour crude oil, flammable, toxic, UN3494" for petroleum crude oil containing hydrogen sulfide in sufficient concentration that vapors evolved from the crude oil can present an inhalation hazard when this material is offered for transportation internationally. *See* Section 172.102 Special provisions for a discussion of special provision 357.

The entry "Zinc ammonium nitrate, UN1512" is revised by deleting special provision IP2 which requires IBCs other than metal or rigid plastic IBCs to be offered for transportation in a closed freight container or a closed transport vehicle.

The following Division 1.4, Compatibility Group S (1.4S) explosive article entries in the HMT are revised by adding new special provision 347 which limits the use of the entries to only those articles that have successfully passed Test series 6(d) of Part I of the UN Manual of Tests and Criteria. For clarity, we are also adding the special provision to the entry "Cartridges, power device (used to project fastening devices), ORM–D" to indicate that the requirements for special provision 347 also apply to Division 1.4S articles that may be reclassed as ORM–D. *See* Section 172.102 Special Provisions for a discussion of new special provision 347.

UN0323	Cartridges, power device.
UN0460	Charges, bursting, plastics bonded.
UN0445	Charges, explosive, commercial *without detonator.*

UN0441	Charges, shaped *without detonator*.
UN0500	Detonator assemblies, non-electric *for blasting*.
UN0456	Detonators, electric *for blasting*.
UN0366	Detonators for ammunition.
UN0455	Detonators, non-electric *for blasting*.

The following Division 6.1 (toxic-by-inhalation) materials entries are revised by replacing the portable tank instruction T Code T22 with T20. The UN Committee of Experts on the Transport of Dangerous Goods revised the T Code assignment for a number of Division 6.1 (toxic-by-inhalation) materials from T14 to T20. Assigning T20 requires a higher pressure for the periodic hydrostatic test (6 bar to 10 bar) and a thicker minimum shell thickness (6 mm to 8 mm). This change is consistent with the T Code assigned to the same materials in the HMT. However, for the materials listed below, we assigned a T Code T22 which requires a minimum shell thickness of 10 mm. We do not believe there would be a safety risk in reducing the minimum shell thickness for portable tanks containing these materials from 10 mm to 8 mm. Therefore, for consistency with revisions made to the T Code assignments under the sixteenth revised edition of the UN Model Regulations as well as consistency with the current assignment of T20 to a number of other Division 6.1 (toxic-by-inhalation material) entries, the T Code T20 would be assigned for the following materials.

UN2484	tert-Butyl isocyanate.
UN2481	Ethyl isocyanate.
UN2486	Isobutyl isocyanate.
UN2483	Isopropyl isocyanate.
UN2605	Methoxymethyl isocyanate.
UN2482	n-Propyl isocyanate.

The following Division 6.1 (toxic-by-inhalation) material entries are revised by adding the portable tank special provision TP13 as a conforming amendment to the changes to the PG assignment for these materials (*see Amendments to Column (5)* above). Special provision TP13 requires the use of self-contained breathing apparatus when the hazardous material is transported by vessel.

UN2668	Chloroacetonitrile.
UN1810	Phosphorous oxychloride.
UN1834	Sulfur chloride.
UN2474	Thiophosgene.

The following organometallic substance entries are revised by adding portable tank special provision TP36 which authorizes use of fusible elements in the vapor space on portable tanks transporting these materials. *See* Section 178.275 for a discussion of the authorized use of fusible elements on portable tanks.

UN3392	Organometallic substance, liquid, pyrophoric.
UN3394	Organometallic substance, liquid, pyrophoric, water-reactive.
UN3398	Organometallic substance, liquid, water-reactive.
UN3399	Organometallic substance, liquid, water-reactive, flammable.
UN3391	Organometallic substance, solid, pyrophoric.
UN3393	Organometallic substance, solid, pyrophoric, water-reactive.
UN3400	Organometallic substance, solid, self-heating.
UN3395	Organometallic substance, solid, water-reactive.
UN3396	Organometallic substance, solid, water-reactive, flammable.
UN3397	Organometallic substance, solid, water-reactive, self-heating.

The following Division 5.1 (oxidizer) substance entries are revised by adding new special provision W1. Special provision W1 excepts these substances from the HMR for vessel transport when transported in non-friable prill or granule form provided the substance has been successfully tested in accordance with the UN Manual of Tests and Criteria.

UN1486	Potassium nitrate.
UN1498	Sodium nitrate.
UN1499	Sodium nitrate and potassium nitrate mixtures.

Amendments to the Column (8) Packaging Authorizations

The four flammable liquid entries "Alcohols, n.o.s., UN1987," "Ethanol, UN1170," "Formaldehyde solutions, flammable, UN1198" and "Isopropanol, UN1219" are revised in Column (8A) by adding reference to § 173.4b for additional exceptions for these materials. Section 173.4b prescribes the requirements for *de minimis* quantities of hazardous materials offered for transportation and transported by all modes, domestic or international. We

are adding a new paragraph (b) to except non-infectious specimens (*e.g.,* museum specimens) preserved with small amounts of certain Class 3 materials from the HMR as recently adopted in the international standards. This amendment is consistent with previous interpretations we have issued on this matter.

The entry "Hydrogen in a metal hydride storage system *or* Hydrogen in a metal hydride storage system contained in equipment *or* Hydrogen in a metal hydride storage system packed with equipment, UN3468" is revised in Column (8B) by deleting the reference to § 173.214 for authorized non-bulk packaging and adding new section reference § 173.311. *See* Section 173.311 for a discussion of authorized packaging provisions for hydrogen in a metal hydride storage system.

The entry "Polyester resin kit, UN3269" is revised by amending Columns (8A) and (8B) to read 165 in reference to packaging provisions in § 173.165. Column (8A) previously referred to § 173.152 and Column (8B) referred to § 173.225 for authorized packaging. For clarity and consistency, such articles are now subject to packaging provisions incorporated into the HMR specific to these articles.

Amendments to the Column (9) Quantity Limitations

We received three comments (3M, IATA, UPS) requesting that PHMSA harmonize with ICAO Technical Instructions amendments that forbid the transport of certain chlorosilane materials in passenger aircraft (UN1818, UN2434, UN2437, UN2986, and UN2987).

We agree. Our original intent was to incorporate these amendments in the August 2010 proposed rule. Therefore, based on our intent and comments received, the following entries are revised by amending the Column (9A) package quantity limitations for passenger air and rail to read "Forbidden," consistent with the 2011–2012 ICAO Technical Instructions:

UN1818	Silicon tetrachloride.
UN2434	Diphenyldichlorosilane.
UN2437	Methylphenyldichlorosilane.
UN2986	Chlorosilanes, corrosive, flammable, n.o.s.
UN2987	Chlorosilanes, corrosive, n.o.s.

The entries "Medicine, liquid, flammable, toxic, n.o.s., UN3248," "Medicine, liquid, toxic, n.o.s., UN1851," and "Medicine, solid, toxic, n.o.s., UN3249" are revised in the Column (9A) and (9B) package quantity limitations authorizing a greater maximum quantity per package consistent an changes made to the 2011–2012 ICAO TI.

Amendments to the Column (10) Vessel Stowage Requirements

Vessel stowage location (10A). For the following materials, we are revising the authorized stowage locations in Column (10A) by revising the stowage category to read D. Assignment of stowage category D means the material must be stowed "on deck only" on a cargo vessel and on a passenger vessel carrying a number of passengers limited to not more than the larger of 25 passengers or one passenger per each 3 meters of overall vessel length. The material is prohibited on passenger vessels in which the limiting number is exceeded.

UN1951	Argon, refrigerated liquid *(cryogenic liquid)*.
UN2187	Carbon dioxide, refrigerated liquid.
UN1143	Crotonaldehyde *or* Crotonaldehyde, stabilized.
UN1963	Helium, refrigerated liquid *(cryogenic liquid)*.
UN1970	Krypton, refrigerated liquid *(cryogenic liquid)*.
UN1647	Methyl bromide and ethylene dibromide mixtures, liquid.
UN2644	Methyl iodide.
UN2477	Methyl isothiocyanate.
UN2606	Methyl orthosilicate.
UN1913	Neon, refrigerated liquid *(cryogenic liquid)*.
UN2201	Nitrous oxide, refrigerated liquid.
UN2337	Phenyl mercaptan.
UN1810	Phosphorous oxychloride.
UN1834	Sulfur chloride.
UN2474	Thiophosgene.
UN1838	Titanium tetrachloride.
UN2591	Xenon, refrigerated liquid *(cryogenic liquids)*.

Vessel stowage codes (10B). For the following hazardous materials, we are removing from Column (10B) stowage code 18 (stowage code 143 for UN3392), which prohibits the material from being transported on any vessel carrying explosives (except Division 1.4S explosives), and we are adding in its place stowage code 78, which requires the materials to be stowed "separated longitudinally by an intervening complete compartment or hold from" explosives.

UN1131	Carbon disulfide.
UN1259	Nickel carbonyl.
UN3392	Organometallic substance, liquid, pyrophoric.
UN3394	Organometallic substance, liquid, pyrophoric, water-reactive.
UN3194	Pyrophoric liquid, inorganic, n.o.s.
UN2845	Pyrophoric liquids, organic, n.o.s.

Section 172.102 Special Provisions

Section 172.102 lists special provisions applicable to the transportation of specific hazardous materials. Special provisions contain packaging requirements, prohibitions, and exceptions applicable to particular quantities or forms of hazardous materials. PHMSA is adopting the following revisions to § 172.102, special provisions.

Special provision 15 is revised by removing redundant regulatory text applicable to "Chemical kits, UN3316" and "First aid kits, UN3316."

Special provision 40 is revised to indicate that "Polyester resin kit, UN3269" requires specification outer packaging based on the PG assigned to the base (Class 3) material unless excepted as a limited or excepted quantity material. This revision is a clarification of the existing requirement.

Special provision 77 is deleted. Special provision 77 allows use of the entry "Compressed gas, n.o.s., UN1956" for mixtures of gases with less than 23.5% oxygen when no other oxidizing gases are present. PHMSA is modifying the definition of oxidizing gas in § 171.8 to state that "a gas which may, by providing oxygen, cause or contribute to the combustion of other material more than air does," meaning, pure gases or gas mixtures with an oxidizing power greater than 23.5% oxygen. Because of the availability of the entry "Compressed gas, oxidizing, n.o.s., UN3156" in the HMT, we believe special provision 77 is no longer necessary.

Special provision 78 is revised to direct shippers to use the entry "Compressed gas, oxidizing, n.o.s., UN3156" to describe compressed air that contains pure gases or gas mixtures with an oxidizing power greater than 23.5% oxygen. PHMSA is modifying the definition of oxidizing gas in § 171.8 of the HMR to indicate that "a gas which may, by providing oxygen, cause or contribute to the combustion of other material more than air does," meaning, pure gases or gas mixtures with an oxidizing power greater than 23.5% oxygen. Therefore, we are revising this special provision to emphasize the revised definition and use of the proper shipping description.

Special provision 110 is revised to include oxygen cylinders for emergency use. Fire extinguishers (UN1044) are assigned special provision 110, which authorizes the installation of a cartridge power device (of Divisions 1.4C and S) on the fire extinguisher without changing its classification from Division 2.2, provided the actuating cartridge does not contain deflagrating (propellant) explosives exceeding 3.2 g. Many of these types of fire extinguishers are used in commercial aircraft applications where the actuating cartridge is necessary for remote activation to discharge the fire suppressant contained in the cylinder. Similarly, commercial aircraft are being designed to incorporate small oxygen cylinders in the overhead panels above passenger seats to provide emergency oxygen in the event of a depressurization. The design of the system is that a small actuating cartridge attached to each cylinder will be initiated once the passenger starts breathing into the mask, which will allow the flow of oxygen from these cylinders. In connection with the manufacturing and maintenance of the aircraft, it is necessary for these small cylinders to be transported with the actuator installed. The principal hazard presented by these oxygen cylinders remains that of Division 2.2, and not the Division 1.4 explosive hazard of the actuating cartridge. Therefore, in this final rule PHMSA is authorizing the transport of oxygen cylinders for emergency use with an installed actuating cartridge without changing the classification of Division 2.2 provided that the total quantity of deflagrating (propellant) explosives does not exceed 3.2 g per oxygen cylinder, and further provided that the cylinders have an effective means of preventing inadvertent activation.

Special provision 130 is revised in conformance with adoption of new special provision 340 and new § 172.101 HMT entry, "Batteries, nickel-metal hydride, UN3496," applicable to nickel-metal hydride batteries transported by vessel. Two commenters (PRBA, Saft) requested a revision to clarify the appropriate use of this special provision for the transport of nickel-metal hydride batteries. We agree that special provision 130 should be clarified to avoid confusion over appropriate use of entries applying to nickel-metal hydride batteries. Because these batteries are dry batteries, they are subject to conditions in special provision 130, which outlines that the provision applies to dry batteries when not specifically covered by another entry in the HMT. Because there is now another entry for nickel-metal hydride batteries that is modal specific, there is potential for confusion. We are therefore adding language to special provision 130 clarifying that, except for nickel-hydride batteries shipped under conditions specified in special provision 340 for vessel transportation, nickel-metal hydride batteries are covered by the entry "Batteries, dry, sealed, n.o.s."

In addition, one commenter (PRBA) suggested that we codify guidance offered in several recently issued letters of interpretation (*e.g.,* Ref. No. 09–0194) indicating our determination that spent or used dry batteries of not more than 9 volts are not likely to generate a dangerous quantity of heat, short circuit, or create sparks during the normal course of transportation and thus, are not subject to the HMR when transported for purposes of recycling, reconditioning, or disposal. We agree. Therefore, in this final rule we are revising special provision 130 by adding a conditional exception for the ground transportation of spent or used dry batteries.

For conformance with the addition of new proper shipping names for UN3166, special provision 134 is revised to specify that a battery-powered vehicle or equipment that also contains an internal combustion engine must be consigned under the entry "Engine, internal combustion, flammable gas powered" or "Engine, internal combustion, flammable liquid powered" or "Vehicle, flammable gas powered" or "Vehicle, flammable liquid powered," as appropriate. These entries include hybrid electric vehicles powered by both an internal combustion engine and batteries. Furthermore, a battery-powered vehicle or equipment that contains a fuel cell-powered engine must be consigned under the entry "Engine, fuel cell, flammable gas powered" or "Engine, fuel cell, flammable liquid powered" or "Vehicle, fuel cell, flammable gas powered" or "Vehicle, fuel cell, flammable liquid powered," as appropriate. These entries include hybrid electric vehicles powered by a fuel cell, an internal combustion engine, and batteries.

Special provision 135 is revised to specify that an internal combustion engine installed in a vehicle must be consigned to the entry "Vehicle, flammable gas powered" or "Vehicle, flammable liquid powered," as appropriate. These entries include hybrid electric vehicles powered by both an internal combustion engine and installed wet, sodium or lithium batteries. If a fuel cell-powered engine is installed in a vehicle, the vehicle must be consigned using the entry "Vehicle, fuel cell, flammable gas powered" or "Vehicle, fuel cell, flammable liquid powered," as appropriate. These entries include hybrid electric vehicles powered by a fuel cell, an internal combustion engine, and batteries.

Special provision 149 is revised to indicate the exception provided may not

be used for transportation by aircraft. This special provision authorizes an increased amount of certain Class 3 (flammable liquid) materials in PG II that are also consumer commodities. We received one comment, from Safety Specialists, Inc. (SSI), opposing the elimination of air eligibility for use of the exception provided in the special provision. SSI asserts that because the materials currently authorized to use the packaging exception provided by special provision 149 are not "extremely" hazardous materials, they should continue to be authorized in air transportation in far greater quantities per inner packaging than are limited quantities packaged under the ICAO Technical Instructions. We disagree. Standardization in today's safety culture enhances safety, lowers training costs and facilitates commerce through greater productivity. PHMSA has made concessions in this final rule, such as lifting the § 175.75 cargo compartment loading restriction on packages of limited quantity materials, to offset per inner and outer packaging limitations adopted through harmonization with the ICAO Technical Instructions. We will also vigorously advocate for change at the international level when warranted.

Special provision 157 is deleted because the language of this provision has been combined with the language of revised special provision 135. Special provision 157 was assigned to the entries "Vehicle, flammable gas powered" and "Vehicle, flammable liquid powered" and instructed shippers that these entries include hybrid electric vehicles powered by both internal combustion engines and installed wet, sodium or lithium batteries. This language is now in special provision 135.

Special provision 167 is revised to require a metal hydride storage system installed in conveyances, to be approved by the Associate Administrator before acceptance for transport. Special provision 167 is also applicable, where appropriate, to UN3166 entries powered by fuel cells.

Special provision 198 is revised to include "Perfumery products, UN1266" among the list of products that nitrocellulose solutions containing not more than 20% nitrocellulose can be transported as. PHMSA is also revising this provision to clarify that the nitrocellulose may not contain more that 12.6% nitrogen by dry mass.

A new special provision 340 is added to provide special instruction for the vessel transport of nickel-metal hydride batteries (including cells). Except for nickel-metal hydride button cells or nickel-metal hydride cells or batteries packed with or contained in equipment, when nickel-metal hydride batteries are loaded in a vessel cargo transport unit in a total quantity of 100 kg gross mass or more, shipment of the nickel-metal hydride batteries is subject to the shipping paper, dangerous cargo manifest requirements under § 176.30, and stowage conditions assigned to the "Batteries, nickel-metal hydride, UN3496" entry in the § 172.101 HMT. Additionally, the nickel-metal hydride batteries are required to be securely packed and protected against a dangerous evolution of heat, short circuits and damage to terminals.

A new special provision 342 is added to be consistent with the adoption of the same provisions in the UN Model Regulations and the IMDG Code as well as amendments made to special provision A131 in the ICAO Technical Instructions. The special provision allows sterilization devices containing ethylene oxide conforming to the conditions in the special provision and packaged in accordance with § 173.4a of the HMR to be offered for transportation and transported by all modes even though Column (9A) of the § 172.101 HMT lists the material as forbidden by passenger aircraft. The addition of this special provision coincides with the deletion of special provision A59 which restricted the applicability of the special provision to air transport. *See* Special provision A59 for additional discussion of this amendment.

A new special provision 343 is added and assigned to the new HMT entry "Petroleum sour crude oil, flammable, toxic, UN3494," indicating that for international transportation, this entry in the HMT must be used for petroleum crude oil containing hydrogen sulfide in sufficient concentration that vapors evolved from the crude oil can present an inhalation hazard. However, any bulk packaging used for the domestic transport of petroleum crude oil would be required to be marked in accordance with the new markings prescribed in § 172.327 of the HMR to provide warning of the potential hazard from inhalation of hydrogen sulfide vapors.

A new special provision 345 is added excepting from the requirements of the HMR "Nitrogen, refrigerated liquid *cryogenic liquid,* UN1977" transported in open cryogenic receptacles with a maximum capacity of 1 L. The receptacles must be constructed with glass double walls having the space between the walls vacuum insulated and each receptacle must be transported in an outer packaging with sufficient cushioning and absorbent materials to protect the receptacle from damage.

A new special provision 346 is added excepting from the requirements of the HMR "Nitrogen, refrigerated liquid *cryogenic liquid,* UN1977" transported in accordance with the requirements for open cryogenic receptacles in § 173.320 of the HMR. The receptacle must contain no hazardous materials other than the liquid nitrogen which must be fully absorbed in a porous material in the receptacle.

A new special provision 347 is added restricting the use of certain HMT entries classed as Division 1.4S explosive materials to those articles successfully passing Test series 6(d) of Part I of the UN Manual of Tests and Criteria. *See* Section 172.101 Hazardous Materials Table (HMT) for the list of proper shipping names that are assigned special provision 347. A Division 1.4 explosive is defined as an explosive that presents a minor explosion hazard such that hazardous effects are confined to a package and no projection of fragments of appreciable size or range are expected; and that an external fire must not cause virtually instantaneous explosion of almost the entire contents of a package containing a Division 1.4 explosive. Under § 173.58 of the HMR, an explosive article or substance is subjected to Test Series 6(a), 6(b), and 6(c) for assignment to an appropriate division (*e.g.* Division 1.4). Explosive articles or substances are assigned to Division 1.4, Compatibility Group S (1.4S) if hazardous effects are confined within a package or the blast and projection effects do not significantly hinder emergency response efforts. Test Series 6(a), 6(b), and 6(c) address hazard effects from exposure of the package to a fire but do not address whether hazardous effects from functioning of the articles or substances is confined within the package. PHMSA is concerned that there is a possibility that products classified as Division 1.4S based on behavior in a fire according to test procedures of Type 6(c) may still produce a hazardous effect that, when initiated, is not confined to a package. Initiation or ignition as a result of fire, after the package is degraded, may produce different results from functioning with the intended means of ignition or initiation. Knowledge of the behavior of the article or substance in both cases is needed to allow proper classification.

As discussed in the comment summary in response to the NPRM, PHMSA is requiring the Type 6(d) test as prescribed in Section 16.7 of the fifth revised edition of the UN Manual of Tests and Criteria in the new special provision 347. For affected articles intended for transportation by aircraft,

the compliance date of this new requirement is July 1, 2011. If a manufacturer or approval holder of affected articles previously classed and approved as Division 1.4S chooses to continue offering such shipments as Division 1.4S material by aircraft, the articles must be successfully tested under Test Series 6(d) and a new approval obtained from PHMSA. Additionally, a previously classed and approved Division 1.4S article that is not successfully tested under Test Series 6(d) must be assigned to a compatibility group other than S (*e.g.,* B, C, or D) prior to being transported by aircraft. Based on knowledge that an article or substance will not pass the Type 6(d) test, a manufacturer or approval holder may choose to have a previously approved Division 1.4S explosive reassigned to a different compatibility group based on existing data and recommendation by a PHMSA-approved explosives testing and examination facility in lieu of conducting the Type 6(d) test. For new Division 1.4S articles approved prior to January 1, 2012 intended for domestic highway or rail transportation only, the compliance date for testing to maintain Division 1.4S classification or reassignment to a higher compatibility group other than S is January 1, 2014. For international highway, rail and vessel transportation and domestic vessel transportation, the compliance date for Type 6(d) testing or reassignment for new and previously produced affected articles is January 1, 2012.

A new special provision 349 is added and assigned to "Hypochlorites, inorganic, n.o.s., UN3212" to specify that transport of mixtures of hypochlorite and an ammonium salt is forbidden.

A new special provision 350 is added and assigned to "Bromates, inorganic, n.o.s., UN1450" and "Bromates, inorganic, aqueous solution, n.o.s., UN3213" to specify that transport of ammonium bromate and its aqueous solutions and mixtures of a bromate and an ammonium salt is forbidden.

A new special provision 351 is added and assigned to "Chlorates, inorganic, n.o.s., UN1461" and "Chlorates, inorganic, aqueous solution, n.o.s., UN3210" to specify that transport of ammonium chlorate and its aqueous solutions and mixtures of a chlorate and an ammonium salt is forbidden.

A new special provision 352 is added and assigned to "Chlorites, inorganic, n.o.s., UN1462" to specify that transport of ammonium chlorite and its aqueous solutions and mixtures of a chlorite and an ammonium salt is forbidden.

A new special provision 353 is added and assigned to "Permanganates, inorganic, n.o.s., UN1482" and "Permanganates, inorganic, aqueous solution, n.o.s., UN3214" to specify that transport of ammonium permanganate and its aqueous solutions and mixtures of a permanganate and an ammonium salt is forbidden.

A new special provision 357 is added and assigned to the entry "Petroleum crude oil, UN1267" to clarify that when transported internationally, petroleum crude oil containing hydrogen sulfide in sufficient concentration that vapors evolved from the crude oil can present an inhalation hazard must be transported under the entry "Petroleum sour crude oil, flammable, toxic, UN3494." As discussed in detail in response to comments submitted to the ANPRM, for domestic transportation, use of the toxic description is not required; however, a bulk package is required to be marked in accordance with the requirement of new § 172.327 of the HMR. *See* Section 173.327 for a discussion of the marking requirement.

In the August 2010 NPRM, PHMSA proposed to revise special provision A59 for consistency with amendments made to special provision A131 of the 2011–2012 ICAO Technical Instructions. Special provision A59 allows sterilization devices containing ethylene oxide to be offered for transportation and transported by air under the excepted quantity provisions of § 173.4a of the HMR. One commenter (Andersen) supported the amendments to A59 but noted that the special provision originally appearing in the ICAO Technical Instructions (as special provision A131) applicable to air transport has been adopted in the UN Model Regulations as special provision 342 for use by other modes of transport. Additionally, special provision 342 is also to be incorporated into the IMDG Code. The commenter questioned the appropriateness of adopting an "A" prefix special provision which limits the special provision, to air transport only. Andersen stated:

> In the preamble to the [NPRM], on page 53085, PHMSA observes that "Special provision A59 allows for sterilization devices containing ethylene oxide to be offered for transportation and transported by air (*and thereby all modes*) under the excepted quantity provisions of § 173.4a" (emphasis added) * * * notwithstanding PHMSA's statement in regard to the multi-modal applicability of this special provision, it is not at all clear from the wording of § 172.102(c)(2) [A59] * * * that this special provision extends to all modes of transport.

The commenter suggested that, in order to achieve complete harmonization and for greater clarity of the applicability of the special provision, PHMSA revise the applicability of the special provision to all modes and not restrict the special provision to air transport through the use of the "A" prefix as currently implemented.

We agree. Therefore, in this final rule we are deleting Special provision A59 and adopting new Special provision 342 which applies conditions for transportation of sterilization devices containing ethylene oxide to all modes of transportation.

A new Special provision A112 is added authorizing the transportation of certain IBCs by passenger and cargo-only aircraft that contain up to a maximum net quantity of 1,000 kg of an "Environmentally hazardous substance, solid, n.o.s. UN3077." This amendment is consistent with the authorization in the 2011–2012 ICAO Technical Instructions.

In paragraph (c)(4), the Table 1 (IBC Codes) are editorially revised to remove UN Specifications 31A, 31B and 31N from IBC Codes IB4, IB5, IB6, IB7, and IB8. This revision is consistent with amendments to international standards and removes the specifications from the indicated codes in the table because IBC Codes IB4 through IB8 are assigned to solids, whereas, UN Specifications 31A, 31B, and 31N are authorized for transportation of liquids in IBC Codes IB1 through IB3 which are assigned to liquid materials only.

Paragraph (c)(7) outlines provisions that apply to the transportation of hazardous materials in UN portable tanks. Two commenters (DGAC, PSA) requested that PHMSA revise § 172.102(c)(7) to allow shipment of solid materials in certain portable tanks using bottom outlets. PSA stated:

> At the recommendation of the United States, new provisions governing the use of bottom outlets on portable tanks were adopted in the [UN] Model Regulations * * * However, the United States does not follow its own recommendation in the Proposed Rule * * * To date * * * the HMRs flatly prohibit the use of bottom outlets for solids referenced in the American proposal to the U.N. In the Table of Portable Tank T Codes T1–22, which appears in 49 C.F.R. § 172.102(c)(7), instructions T9 and T21 indicate "prohibited" in the column designated "bottom outlet requirements." The text of § 172.101(c)(7)(ii) explains that the word "prohibited" in that column of the Table "means bottom openings are prohibited." In the Proposed Rule, and without explanation, the agency did not propose to adopt its own bottom outlet provision.

In the interest of harmonization with specific regard to the January 1, 2011

effective date for international regulations, the commenters urged PHMSA to adopt the provisions we successfully persuaded international organizations to adopt.

We agree. In the paper submitted to the UN Sub-Committee of Experts (UNSCOE) on the Transport of Dangerous Goods (*see* UN document ST/SG/AC.10/C.3/2007/24 available at *http://www.unece.org/trans/main/dgdb/dgsubc/c32007.html*), the U.S. successfully persuaded UNSCOE to adopt provisions authorizing the use of bottom outlets on portable tanks used to transport PG I solid material on the basis that (1) transport of these materials in portable tanks without bottom openings is impractical and it is virtually impossible to unload the material from the portable tank through top openings; and (2) there is no compelling safety reason to prohibit bottom openings in portable tanks suitable for such material when the authorized portable tanks afford a level of safety in transport substantially greater than that afforded by other packagings authorized for the material (*e.g.,* UN1A2 removable head steel drums). Although PHMSA did not propose this amendment in the August 2010 NPRM, based on comments received and the relief provided to industry by authorizing an alternative method of unloading PG I solid material without a reduction in packaging safety, in this final rule we are revising § 172.101(c)(7) by revising T Codes T9 and T21 to prohibit bottom openings for liquid only and specify applicable requirements for the bottom openings. The revision includes adding clarifying language to § 172.101(c)(7)(ii) to specify the meaning of "prohibited" for liquids in the appropriate context. With regard to PSA's suggested revised regulatory text, we do not believe it is necessary to add language specifying that the bottom outlets must conform to 6.7.2.6.2 of the UN Model Regulations (bottom opening requirements for portable tanks used for solid material) because these provisions are dealt with under § 178.275(d)(2), which we are referencing in the revised entries for portable tank T Codes T9 and T22.

A new portable tank special provision TP36 is added authorizing the use of fusible elements in the vapor space of portable tanks with a gauge test pressure that exceeds 265 kPa (38.4 psig/2.65 bar). *See* Section 178.275 for a detailed discussion. *See* Section 172.101 Hazardous Materials Table for a listing of materials assigned this special provision.

A new special provision W1 is added indicating that the hazardous materials "Potassium nitrate, UN1486," "Sodium nitrate, UN1498," and "Sodium nitrate and Potassium nitrate mixtures, UN1499" are not subject to the HMR when transported by vessel in non-friable prills or granules form. The material must be accompanied by a certificate from an accredited laboratory stating that the product has been properly sampled and tested by the laboratory according to the UN Manual of Tests and Criteria.

Section 172.200

Section 172.200 prescribes the applicability of shipping paper requirements for the transportation of hazardous materials. Paragraph (b)(3) is revised to remove the exceptions for ORM–D material in conformance with the changes made to the limited quantities requirements under this final rule.

Section 172.203

Section 172.203 specifies additional hazardous materials description requirements on shipping papers. Paragraph (b) is revised to indicate that when a shipping paper is required, a limited quantity must be indicated as such. This revision is necessary due to the shipping paper exception adopted in this final rule for limited quantities intended for transportation by highway or rail.

Section 172.300

Section 172.300 prescribes the applicability of the HMR marking requirements incorporated in subpart D of Part 172. Paragraph (l)(1)(ii) of § 172.101 authorizes up to a one-year transition period for continued use of stock of pre-printed packaging marked with proper shipping names revised in the HMT under a rulemaking. Consistent with the transition period authorized in § 172.101(l)(1)(ii), in this final rule we are amending § 172.300 of the HMR to authorize the continued use of stock of preprinted packaging for one year from the date of compliance or until depleted (whichever is less) for a revision to a required marking. This amendment allows the continued use of preprinted packaging stock that is marked in accordance with the manner previously authorized.

Section 172.301

Section 172.301 prescribes general marking requirements for non-bulk packagings. In this final rule, PHMSA is amending paragraph (a) to clarify that a proper shipping name and identification number is not required to be marked on package containing only limited quantity material marked in accordance with § 172.315(a). Additionally, it is amended by adding that until January 1, 2014 (January 1, 2013 if intended for transportation by aircraft), an identification number is not required to be marked on package containing only a Consumer commodity, ORM–D or ORM–D–AIR material, as defined in § 171.8 of this subchapter in effect on October 1, 2010, provided the package is marked in accordance with § 172.316.

Section 172.312

Section 172.312 prescribes the required orientation markings for non-bulk packages containing liquids. PHMSA is amending paragraph (c)(5) to clarify that the exception applies only to a hermetically sealed inner packaging or receptacle not exceeding 500 mL each.

Section 172.315

Section 172.315 specifies the markings required on a package containing limited quantities of hazardous materials. These new markings are consistent with the UN Model Regulations, ICAO TI and IMDG Code and are required on packages of limited quantities offered for transportation by highway, rail, air and vessel. Additionally, PHMSA received positive comments submitted in response to the ANPRM concerning the new marking because the requirement specifies minimum dimensions on each side (100 mm) that substantially increases the visibility of the marking when compared with the current ORM–D marking prescribed in § 172.316 of the HMR. Commenters stated that increased visibility of the mark will enhance safety while reducing regulatory burden.

For limited quantities intended for transportation by vessel, this new marking with minimum dimensions of 250 mm on each side is required on cargo transport units containing limited quantities and no other hazardous materials. For limited quantities intended for transportation by aircraft, the marking requirements are consistent with the 2011–2012 ICAO TI (*i.e.,* "Y" mark on a white square on point) in addition to any required labels.

Section 172.316

Section 172.316 prescribes marking requirements for packages containing materials classed as ORM–D and ORM–D–AIR. The marking prescribed in this section will no longer be authorized for limited quantities effective January 1, 2014.

Section 172.322

Section 172.322 prescribes marking requirements for packages containing marine pollutants. PHMSA is adding an

exception from the marking requirement in new paragraph (d)(4) for packages of limited quantities marked in accordance with § 172.315.

Section 172.324

Section 172.324 prescribes marking requirements for packages containing hazardous substances in non-bulk packagings. PHMSA is revising paragraph (b) for packages containing hazardous substances marked in accordance with the limited quantity marking prescribed in § 172.315.

Section 172.326

Section 172.326 prescribes the marking requirements for portable tanks. In this final rule, we are revising paragraph (a) to align with the IMDG Code the minimum height for a proper shipping name marked on a portable tank to 65 mm when offered for transportation and transported by vessel. This amendment is in response to a revision made in Amendment 35–10 of the IMDG Code.

One commenter (Arkema) requests that we allow a one year transition period from the publication of the final rule to allow for depletion of label inventory and/or restenciling of portable tanks. We agree that there should be a transition period and note that, in this final rule, we are implementing a delayed compliance date of January 1, 2012, which is one year from the effective date of the rule, unless otherwise specified in provisions adopted or revised in this final rule.

Section 172.327

New section 172.327 specifies the marking required for a bulk packaging containing petroleum crude oil to warn of the potential toxic inhalation hazard from vapors evolved from hydrogen sulfide present in the crude oil. PHMSA proposed to require placement of the marking used for toxic materials under the Globally Harmonized System of Classification and Labeling of Chemicals (GHS) in the immediate vicinity of any location on a bulk packaging that could pose a health risk to transportation workers if exposed to hydrogen sulfide vapors emitted from that location, such as loading heads and manholes. This proposed hazard communication marking requirement is applicable to bulk packagings in domestic transportation only. The new hazardous materials description for "Petroleum sour crude oil, flammable, toxic, UN3494" added to the HMT must be used for international transportation of petroleum crude oil with hydrogen sulfide in sufficient concentration that vapors evolved from the crude oil present an inhalation hazard (for both bulk and non-bulk packagings).

One commenter (AAR) expressed concern that this new marking requirement would place an undue burden on rail carriers with regard to inspection requirements under § 174.9 of the HMR. The commenter had concerns regarding the safety of rail carrier employees having to climb tank cars to determine whether markings are present or correct. AAR stated:

> [We] we would not oppose the proposed marking if it were made clear that railroads have no obligation to inspect for markings. Accordingly, [we suggest] amending [§ 173.127 to indicate] carrier personnel are not required to inspect for markings that would not be visible or legible from the ground.

We agree, although we do not believe a regulatory revision is warranted. Section 174.9 requires a rail carrier to inspect each rail car containing a hazardous material, at ground level, for required markings, labels, and placards, *etc.* This requirement already limits the inspection to ground level and predisposes the carrier from having to climb onto a rail car to inspect for hazard communications. As indicated in the comments by AAR, the intent of this marking is to alert hazmat employees who may be exposed to hydrogen sulfide vapors during a loading or unloading operation to a potential hazard and not to communicate the hazard for emergency response purposes. Thus, carriers will not be obligated to inspect for markings placed in the vicinity of tank car openings on a rail car that are not readily visible or legible from ground level.

Based on comments received, we are revising our proposed requirements to authorize an alternative marking to the GHS toxic material pictogram. *See* the Sections II.C and III.A.7 discussion of the classification of petroleum sour crude oil.

Section 172.500

Section 172.500 specifies the applicability of placarding requirements to certain materials. PHMSA is amending paragraph (b)(3) to clarify that limited quantities marked in accordance with revised § 172.315 of the HMR are not subject to placarding requirements.

Section 172.502

Section 172.502 specifies prohibited and permissive placarding requirements. In this final rule, PHMSA is revising the exceptions provided in paragraph (b)(2) to include the petroleum sour crude oil marking and the limited quantity marking in §§ 172.315 and 172.327 of the HMR, respectively.

Part 173

Section 173.4

Section 173.4 prescribes the requirements for small quantities of hazardous materials offered for transportation and transported by domestic highway or rail. PHMSA is revising paragraph (a) and adding new paragraph (a)(1)(v) to allow Division 2.2 (non-flammable, non-poisonous, compressed gas) material without a subsidiary hazard (except for aerosols) without applying for an approval from the Associate Administrator as prescribed under paragraph (c) of this section. Other Class 2 materials, including Division 2.2 aerosols, will still require approval under § 173.4(c) of the HMR. These amendments are consistent with the authorization under § 173.4a(b)(1) for Division 2.2 gases without a subsidiary hazard in addition to the new restriction to exclude aerosols from authorized materials in § 173.4a of the HMR. *See* Section 173.4a for a discussion of revisions for excepted quantities of hazardous materials.

Section 173.4a

Section 173.4a prescribes the requirements for excepted quantities of hazardous materials offered for transportation and transported by all modes, domestic or international. PHMSA is amending paragraph (a) by adding a new paragraph (a)(4) regarding pressure differential capability for packages intended for transportation by aircraft in accordance with § 173.27(c) of the HMR. PHMSA is also amending paragraph (b)(1) to clarify that the authorization for Division 2.2 (non-flammable, non-poisonous, compressed gas) excludes aerosols as an excepted quantity material. Such articles are authorized as a limited quantity under both domestic and international standards. Additionally, PHMSA is revising paragraph (b)(5) to add polyester resin kits to the types of Division 5.2 (organic peroxide) material authorized as an excepted quantity and is revising paragraph (d)(3) by correcting the outer packaging aggregate quantity limit for Division 5.2 liquids from 250 mL to 500 mL. Lastly, PHMSA is adding a new paragraph (g)(3) that requires when packages of excepted quantities (*see* the Section 173.25 discussion) are contained in an overpack, and the package markings required by this section are not visible inside the overpack, the excepted quantities marking must also be placed on the

overpack. Additionally, an overpack containing packages of excepted quantities is not required to be marked with the word "OVERPACK."

Section 173.4b

Section 173.4b prescribes the requirements for *de minimis* quantities of hazardous materials offered for transportation and transported by all modes, domestic or international. Consistent with the international standards, PHMSA is adding a new paragraph (b) to except non-infectious specimens (*e.g.,* museum specimens) preserved with small amounts of certain Class 3 (flammable liquid) materials for scientific purposes from the requirements of the HMR. This amendment is consistent with previous interpretations we have issued on this matter indicating these specimens do not pose a risk to safety during the course of transportations.

One commenter (AVMA) expressed support for the adoption of this exception as essential to the conduct of professional work of veterinarians. Therefore, in this final rule, we are adopting the exception from full regulation under the HMR for non-infectious specimens preserved with small amounts of certain Class 3 (flammable liquid) material for scientific purposes.

Section 173.25

Section 173.25 prescribes the requirements for certain authorized packagings and overpacks. Consistent with the international standards, PHMSA is requiring an overpack containing packages of limited quantity material marked with the new limited quantities marking required by this final rule (*see* the Section 172.315 discussion) to be marked with the word "OVERPACK" if the markings are not visible, in addition to all other required package markings. This mark is an indication that the packages contained within the overpack are in accordance with the HMR. Additionally, for excepted quantities (*see* the Section 173.4a discussion) where the required package markings are not visible inside an overpack, the excepted quantities marking must also be placed on the overpack. An overpack containing packages of excepted quantities is not required to be marked with the word "OVERPACK."

Section 173.27

Section 173.27 prescribes the general requirements for packaging offered or intended for air transportation. In this final rule, PHMSA is amending paragraph (f) by adding a new Table 3 that outlines the requirements for limited quantities intended for air transportation consistent with the 2011–2012 ICAO Technical Instructions, where appropriate. *See* the limited quantity, consumer commodity and ICAO Technical Instructions alignment NPRM comment discussion in Section III.A.5 of this rule.

Section 173.40

Section 173.40 specifies the general packaging requirements for toxic materials packaged in cylinders. PHMSA is amending paragraph (c)(1) concerning closure requirements by requiring the valve connections on UN Specification cylinders to be made by a taper thread or some other means in accordance with ISO Standard 10692–2:2001.

Section 173.58

Section 173.58 outlines the assignment of class and division for new explosives. Based on a recommendation from comments provided by IME, we are revising paragraph (a)(5) to include a reference to the Type 6(d) test for determination of Division 1.4S classification for consistency with the adoption of the new test.

Section 173.59

Section 173.59 provides definitions of explosive terms that are intended for information only. The UN Committee of Experts (COE) recently defined the term "phlegmatized" to meaning the addition of a substance to an explosive to enhance its safety in handling and transport. One commenter indicated support for adoption of the proposed definition of "phlegmatized," therefore, in this final rule PHMSA is adopting the definition in the HMR as proposed.

Section 173.63

Section 173.63 specifies packaging exceptions for limited quantities of certain Division 1.4S explosive articles authorized for reclassification and transport as ORM–D material. Prior to offering for transportation by aircraft, "Cartridges, power devices, ORM–D–AIR" (UN0323), must have been successfully tested in accordance with the new UN Test Series Type 6(d) test beginning July 1, 2011. *See* the Section 172.102, Special Provision 347 discussion. This requirement is a condition for the continuation of a Division 1.4S classification and for reclassification to ORM–D for limited quantities of such articles intended for transportation by international highway, rail and vessel and domestic vessel effective January 1, 2012. Limited quantities of such articles approved as Division 1.4S prior to January 1, 2012, may continue to be reclassed as ORM–D and offered for domestic highway and rail transportation only until January 1, 2014.

Section 173.120

Section 173.120 defines Class 3 (flammable liquid) material. PHMSA is revising paragraph (c) to add new testing methods for determining the flash point of a liquid. *See* Section 171.7 for a listing of materials incorporated by reference pertaining to § 173.120.

Section 173.121

Section 173.121 prescribes the packing group assignment for flammable liquids. The HMR do not specify a test method for determining the boiling point of a liquid which may be necessary for liquids with very low flash points. PHMSA is revising paragraph (a) to add new testing methods for determining the boiling point of a liquid. *See* Section 171.7 for a listing of materials incorporated by reference pertaining to § 173.121.

Section 173.124

Section 173.124 defines Class 4 material. For consistency with a revision adopted in the UN Model Regulations, PHMSA is amending the definition of "self-heating" in § 173.124(b)(2) of the HMR to read: "Self-heating of a substance is a process where the gradual reaction of that substance with oxygen (in air) generates heat. If the rate of heat production exceeds the rate of heat loss, then the temperature of the substance will rise which, after an induction time, may lead to self-ignition and combustion."

Section 173.137

Section 173.137 establishes test criteria and packing group assignments for Class 8 (corrosive) material. Since 1993, PHMSA has authorized under the terms of a special permit (*i.e.,* DOT–SP 10904) an *in vitro* test method (available commercially as Corrositex®) as an alternative form of testing to that specified in the HMR, which is based on live animal test results, to determine the corrosivity of certain materials. Materials authorized for analysis using the alternative test method include acids (and their derivatives), acyl halides, alkylamines and polyalkylamines, bases, chlorosilanes, metal halides, and oxyhalides.

The UN COE recently recognized and adopted *in vitro* test methods in the UN Model Regulations as an alternative form of testing to that specified in OECD Guideline for Testing of Chemicals, Number 404, "Acute Dermal Irritation/

Corrosion." The following alternative *in vitro* test methods include OECD Guidelines for the Testing of Chemicals:

- No. 430, "*In Vitro* Skin Corrosion: Transcutaneous Electrical Resistance Test (TER)" (2004);
- No. 431, "*In Vitro* Skin Corrosion: Human Skin Model Test" (2004); and
- No. 435, "*In Vitro* Membrane Barrier Test Method for Skin Corrosion" (2006).

A positive test result under *in vitro* methods 430 and 431 may be used to determine corrosivity for transportation purposes but cannot be used to determine the PG assignment. A negative result for corrosivity under *in vitro* methods 430 and 431 can preclude further testing to determine PG assignment using method 404, the current OECD Guideline involving *in vivo* testing, or method 435, the newly adopted OECD Guideline involving *in vitro* testing.

Based on the adoption of three new OECD guidelines for the *in vitro* testing of materials for corrosivity in the UN Model Regulations and through encouragement from PETA to adopt these new test methods in a petition for rulemaking (P–1550), we proposed to adopt such guidelines as matter incorporated by reference (IBR) in §§ 171.7 and 173.137 of the HMR.

In response to our proposal to incorporate several *in vitro* test methods for determination of corrosivity, PHMSA has received over 900 comments supporting the proposal, including a comment from PETA. We received no opposition. Therefore, we are adopting the OECD Guideline Test Nos. 430, 431, and 435, and revising Test No. 404 as proposed. Further, PETA urged PHMSA to facilitate access to DOT–SP 10904 through our Web site until such a time that this final rule becomes effective, and requested that PHMSA remove letters of interpretation that they believe recommend the use of *in vivo* testing even though alternative *in vitro* testing is available.

With regard to PETA's additional requests, they are beyond the scope of this rulemaking. However, we note that in prior correspondence with PETA, PHMSA has indicated that information about DOT–SP 10904 can be obtained by entering "Corrositex" in the search feature of the PHMSA Office of Hazmat Safety Web site. Also, the special permit may be accessed by entering "10904" in the search feature on our special permits Web site or by conducting a group number search.

We agree with PETA that non-live animal testing should be used where available and encourage shippers to use the *in vitro* test methods to determine the classification of a material as corrosive and assignment of a packing group. We also remind shippers that historical data may also be used to classify a material in accordance with § 173.136(c). Thus, in this final rule we are revising § 173.136(a) to codify the authorization to use *in vitro* test methods and to highlight the availability of classifying a material based on historical data.

Sections 173.150, 173.151, 173.152, 173.153, 173.154 and 173.155

Sections 173.150 through 173.155 prescribe the exceptions for certain Class 3, 8 and 9 and Division 4.1, 4.2, 4.3, 5.1, 5.2, 6.1 hazardous materials under the HMR. In this final rule, PHMSA is revising each of these sections to recognize the UN Model Regulations and IMDG Code package quantity limits for the highway, rail, and vessel transportation of limited quantities. No limited quantity limits decrease and two increase slightly to maintain alignment with the international standards for transport by other than aircraft. Additionally, the packaging provisions for "Polyester resin kits" are removed from § 173.152, as proposed, and placed in new § 173.165 for clarity.

When PHMSA lowered the quantity limits for Division 6.1 (poisonous) materials of PG II (primary or subsidiary) authorized as a limited quantity in a final rule published under Docket HM–215G (70 FR 34065, June 13, 2005), it did not authorize the labeling exception for such packages when intended for transportation by highway, rail and vessel, nor did it authorize renaming and reclassification as "Consumer commodity, ORM–D" for such materials. In this final rule, except for transportation by aircraft, we are authorizing the labeling exception for packages of limited quantity material with a Division 6.1, PG II primary or subsidiary hazard and, until December 31, 2013, we are authorizing renaming and reclassification as "Consumer commodity, ORM–D". Additionally, until December 31, 2012, a consumer commodity as defined in § 171.8 in effect on October 1, 2010 may continue to be packaged, reclassed and marked "ORM–D–AIR" either in accordance with the new Table 3 of § 173.27(f) or §§ 173.150 through 173.155 and 173.306, as applicable. PHMSA fully believes this eventual alignment with international standards will improve clarity, promote regulatory compliance, reduce employee training costs and enhance safety overall.

Section 173.161

Section 173.161 prescribes packaging requirements for chemical kits and first aid kits containing small amounts of hazardous materials. In this final rule, PHMSA is editorially revising the section. In addition, PHMSA is authorizing transport of dry ice in accordance with § 173.217 in packaging authorized under this section when used as a refrigerant for the contents of a kit.

Section 173.165

A new section 173.165 is added to prescribe packaging and other requirements for "Polyester resin kits, UN3269" formerly contained in § 172.102, special provision 40 and § 173.152(b)(4) of the HMR. This amendment is intended to provide clarification of existing requirements while also harmonizing the HMR with international standards.

Section 173.167

A new section 173.167 is added to indicate authorized materials and quantity limits for articles and substances that may be described as "ID8000, Consumer commodity," when intended for transportation by all modes of transport provided all or some of the transportation is by aircraft. Such articles and substances eligible for classification or reclassification to Class 9 are Class 2 materials (non-toxic aerosols only), Class 3 materials (Packing Group II and III only), Division 6.1 (Packing Group III only), UN/NA3077, UN/NA3082, and UN3175, provided such materials do not have a subsidiary risk and are authorized aboard a passenger-carrying aircraft. Inner and outer packaging quantity limits are based on Packing Instruction Y963 of the 2011–2012 ICAO TI. Specification outer packagings are not required under the conditions prescribed in this section. Additionally, the pressure differential capability of the inner packagings of a combination packaging intended to contain liquids is reduced from 95 kPa to 75 kPa for materials offered for transportation and transported by aircraft under the provisions of this section.

Section 173.220

Section 173.220 provides exceptions from regulation under the HMR for the transport of internal combustion engines, self-propelled vehicles, mechanical equipment containing internal combustion engines, and battery-powered vehicles or equipment. This section is revised to include engines, vehicles, and equipment powered by fuel cells consistent with

similar provisions under international standards.

Section 173.225

Section 173.225 specifies packaging requirements and other provisions for organic peroxides. When the § 172.101 HMT specifies this section, the organic peroxide must be packaged and offered for transportation in accordance with the provisions of this section. Each packaging must also conform to the general requirements of Subpart B of Part 173 and to the applicable requirements of Part 178 of the HMR. Specifically, organic peroxides that require temperature control are subject to § 173.21(f). When an IBC or bulk packaging is authorized and meets the requirements of paragraph (f) or (h) of § 173.225, respectively, lower control temperatures than those specified for non-bulk packaging may be required. An organic peroxide not identified in paragraph (c), (e), or (g) of § 173.225 by technical name, or not assigned to a generic type in accordance with paragraph (b)(3) of this section, must conform to the requirements in paragraph (c) of § 173.128.

The Organic Peroxides Table specifies by technical name those organic peroxides that are authorized for transportation and not subject to the approval provisions of § 173.128. An organic peroxide identified by technical name is authorized for transportation only if it conforms to all applicable provisions of the table. In this final rule, PHMSA is amending the Organic Peroxide Table in § 173.225(c)(8) by adding a new entry and revising current entries. We are revising an entry to the Organic Peroxide IBC Table in paragraph (e) of this section.

The following entries in the Organic Peroxide Table are being revised:

UN3106	Di-(2-tert-butylperoxyisopropyl) benzene(s).
Exempt	Di-(2-tert-butylperoxyisopropyl) benzene(s).
UN3105	2,5-Dimethyl-2, 5-di-(tert-butylperoxy) hexane.

The following entry is added to the Organic Peroxide Table:

UN3103	2,5-Dimethyl-2, 5-di-(tert-butylperoxy) hexane.

One commenter (Arkema) requested that PHMSA provide a packing method exception for domestic transportation of greater than 90% concentrations of this material based on a history of safe transportation. The proposed revision to this entry changed the packing method for this material in concentrations of 90–100% from OP7 to OP5, reducing the maximum quantity per package from 60 L to 30 L per package. Arkema stated:

> [We ship] a 97% solution in 100 pound drums. Since August 2005 we have shipped [approximately] 1,800,000 pounds. We have had only one incident in the 5 year time period. This incident was the result of a pallet nail puncture. We suggest that a note be added to column (8) for domestic shipments [that] OP7 is authorized.

We disagree. The UN Committee of Experts adopted the reclassification of 90–100% concentrations of 2, 5–Dimethyl-2, 5-di-(tert-butylperoxy) hexane, which entails the more conservative packing method OP5, based on a proposal submitted by the German competent authority. Available industry test data from results on this material at concentrations greater than 90% using the E1 Koenen test in the UN Manual of Tests and Criteria varies from 1.5–2.0 mm. Based on differences in industry test results, the German competent authority conducted a number of E1 Koenen tests on various concentrations of 2, 5-Dimethyl-2, 5-di-(tert-butylperoxy) hexane exceeding 90%. Their conclusion was that the limiting diameter is 2.0 mm at concentrations above 90%, and therefore, they proposed a reclassification from an "Organic Peroxide, Type D, liquid, UN3105" to an "Organic Peroxide, Type C, liquid, UN3103" for 90–100% concentrations of 2, 5–Dimethyl-2, 5-di-(tert-butylperoxy) hexane to the UNSCOE (*see* UN working document ST/SG/AC.10/C.3/2008/66 available on the UNSCOE Web site).

We applaud Arkema's safe record of transportation using packing method OP7 for a greater than 90% concentration of material. However, based on data provided by the German competent authority indicating a more conservative classification, in this final rule, we are keeping this entry as proposed. We invite Arkema to submit test results for their 97% solution of 2, 5-Dimethyl-2, 5-di-(tert-butylperoxy) hexane should the results indicate a classification that differs from the entry adopted in this final rule.

The following entry in the Organic Peroxide IBC Table is being revised to authorize a 31H2 freestanding, rigid plastic IBC:

UN3109	Peroxyacetic acid, stabilized, not more than 17%.

Section 173.230

Section 173.230 prescribes the requirements for fuel cells offered for transportation by all modes. In paragraph (g), PHMSA proposed to allow only those fuel cells containing flammable liquids and corrosive materials to be transported as a limited quantity by aircraft. In paragraph (h), PHMSA also proposed prohibiting the reclassification to "Consumer commodity, ORM–D–AIR" for transportation by aircraft. Several commenters (BIC, COSTHA, DGAC, IATA, LSI, Signa, Trulite, USFCC) expressed strong disapproval to not extending the limited quantity provisions to fuel cell cartridges containing either Division 2.1 (flammable) gas or water-reactive solids. They noted that the only difference between authorizing and not authorizing these materials as limited quantities is the required use of UN specification packaging and that PHMSA offers no safety rationale for this exclusion as the fuel cell cartridges themselves are subject to much more stringent construction, testing, and packaging requirements than for similar articles (*e.g.,* aerosols).

We agree. In this final rule, based on comments received, we are authorizing the transportation of flammable gas and water-reactive solid fuel cell cartridges as limited quantities in addition to authorizing their transport as consumer commodities (except for transportation

by aircraft) if all conditions for limited quantity provisions are met.

Section 173.301b

Section 173.301b prescribes general requirements for shipment of UN pressure receptacles. PHMSA is revising paragraph (c)(2)(iii) to indicate that valve protection requirements for metal hydride storage systems are specified in ISO 16111. Additionally, we are revising paragraph (e) regarding the integrity of UN pressure receptacles used for pyrophoric gases or flammable mixtures of gases containing more than 1% pyrophoric compounds in accordance with the sixteenth revised edition of the UN Model Regulations.

Section 173.306

Section 173.306 prescribes the requirements for limited quantities of compressed gases. PHMSA is revising paragraph (h) to clarify that, except for transportation by aircraft, lighter refills in the ORM–D hazard class are eligible for the exceptions in paragraph (i) of this section and in § 173.156. Additionally, PHMSA is revising paragraph (i) of the section to recognize the new marking for limited quantities of such materials and to provide a transitional period for the eventual elimination of the ORM–D hazard class. PHMSA is also editorially revising paragraph (l) for clarity.

Section 173.307

Section 173.307 establishes exceptions for compressed gases. In this final rule, PHMSA is adding certain types of light bulbs to the section provided they are packaged appropriately so that if a bulb ruptures all pieces are contained within the package.

Section 173.311

PHMSA is adding a new § 173.311 to prescribe the packaging requirements for "Metal hydride storage systems, UN3468" used for the transport of hydrogen as proposed. A metal hydride storage system is a single complete hydrogen storage system that includes a receptacle, metal hydride, a pressure relief device, a shut-off valve, service equipment and internal components.

The HMR do not prescribe specific packaging or shipping methods for metal hydride storage systems containing hydrogen. However, PHMSA has issued a number of special permits to allow the use of these systems for transport. The UN Model Regulations, in new Packing Instruction P205, prescribe standards for the construction, qualification, marking and requalification of such systems and are the basis for the new HMR requirements. Some amendments in new § 173.311 include:

- Application to transportable metal hydride storage systems with pressure receptacles not exceeding 150 liters in water capacity and having a maximum developed pressure not exceeding 25 MPa.
- Requirement that transportable metal hydride storage systems be designed, constructed, initially inspected and tested in accordance with ISO standard 16111:2008, "Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride," as authorized under § 178.71(f) (formerly reserved).
- Requirement that steel pressure receptacles or composite pressure receptacles with steel liners be marked in accordance with § 173.301b(f) of the HMR, which specifies that a steel UN pressure receptacle bearing an "H" mark must be used for hydrogen bearing gases or other gases that may cause hydrogen embrittlement.
- Requirement of a requalification interval of no more than five years as specified in § 180.207 of the HMR in accordance with the requalification procedures prescribed in ISO 16111.

Section 173.322

Section 173.322 prescribes various packaging methods for ethyl chloride. In this final rule, PHMSA is adopting the amended provisions from packaging instruction P200 of the UN Model Regulations for ethyl chloride in a new paragraph (e). This new packaging method authorizes ethyl chloride in capsules not exceeding 150 g of gas each, closed with a secondary means applied, and placed in a strong outer packaging not to exceed 75 kg gross mass.

Part 175

Section 175.8

Section 175.8 provides exceptions from certain regulations for air carrier operator equipment and items of replacement. PHMSA is revising paragraph (b)(3) to clarify that transportation of alcoholic beverages, perfumes, colognes, and liquefied gas lighters carried aboard a passenger-carrying aircraft by an operator must be for use or sale of those items on that specific aircraft.

Two commenters (AA, COSTHA) requested that PHMSA align paragraph (b)(3) with the ICAO TI to permit onboard use of aerosols. COSTHA noted:

> A number of carriers currently are required to obtain a special permit to transport aerosols in Division 2.2, specifically for the dispensing of whipped cream or other food products * * * We believe if this list was amended by including "aerosols" this issue would be resolved.

We agree. Therefore, in this final rule we are revising paragraph (b)(3) to authorize use of Division 2.2 aerosols to dispense food products.

Section 175.9

Section 175.9 prescribes the applicability of the HMR to special aircraft and rotocraft operations. This section also prescribes the conditions under which certain operations may be performed in accordance with 14 CFR and 49 CFR (*e.g.,* avalanche and weather control). In this final rule, PHMSA is emphasizing that rotocraft operations are fully subject to both sets of regulations.

One commenter suggested revising paragraph (b)(6) to provide clarity. IME stated:

> This suggested language is consistent with [§] 177.835(g), which addressed the identical compatibility issue between explosives and detonators that are transported on the same conveyance. In addition, use of the terms "dynamite" and "blasting caps" without the additional reference to Division 1.1, 1.2, and 1.3 material could lead to the unintentional misinterpretation or misapplication of the rule.

We agree. Based on the comment provided, we are revising § 173.59(b)(6) to provide clarification.

Section 175.10

Section 175.10 specifies the conditions for which passengers, crew members or an operator may carry hazardous materials aboard an aircraft. PHMSA is adding a new paragraph (a)(17) to permit a mobility aid such as a wheelchair, containing a lithium ion battery, to be transported in accordance with the exceptions provided in this section. A wheelchair or other mobility aid that contains a lithium metal battery is not permitted aboard a passenger-carrying aircraft. As a result of this amendment, current paragraph (a)(17) is redesignated as paragraph (a)(18) and current paragraph (a)(18) is redesignated as paragraph (a)(19).

Three commenters (IATA, PRBA, Scoot) supported our proposal to add a new paragraph providing an exception for wheelchairs or other mobility aids containing a lithium ion battery, but requested that for consistency, we further align with the ICAO TI and accommodate carriage of these items by disabled passengers by allowing carriage in the aircraft cabin. For instance, Scoot shared:

> Our mobility scooter [is] designed to fold up and be stowed in the passenger cabin

* * *. They are often small enough to fit in the overhead bin. [T]he lithium-ion batteries are removed and hand-carried by the passenger in the same manner as * * * lithium-ion batteries used for consumer electronics.

PRBA expressed disappointment that PHMSA did not address authorizing passenger transport of certain medical devices powered by lithium metal batteries in this final rulemaking. We recognize the need for persons with medical disabilities to be able to carry devices powered by lithium metal batteries aboard a passenger-carrying aircraft. However, such a provision will be addressed in a separate rulemaking.

Paragraph (a)(19) is being revised to allow passengers and crew members to place certain spare fuel cell cartridges in checked baggage. This exception currently does not apply to Divisions 2.1 or 4.3 materials contained in spare fuel cell cartridges. Although the ICAO TI only restricts spare fuel cell cartridges containing Division 4.3 liquid materials from checked baggage, PHMSA strongly believes that the restriction must also include spare cartridges containing Division 2.1 materials. Thus, PHMSA proposed to allow spare fuel cell cartridges containing flammable and corrosive liquids in checked baggage while continuing to require spare fuel cell cartridges containing Division 2.1 and 4.3 materials to be carried aboard an aircraft in carry-on baggage only.

One commenter (ALPA) supported our position while several commenters (COSTHA, DGAC, IATA, JEMA, PRBA, TAEC, Trulite, USFCC) voiced strong opposition to our proposal to limit fuel cell cartridges permitted in checked baggage to those with flammable liquid or corrosive liquid fuels. As several commenters indicated, PHMSA did not provide data or analysis supporting the proposal, while tests performed at the FAA Technical Center on fuel cell cartridges containing flammable liquid material indicated that in the case of a fire involving these materials, the fire can be readily extinguished with current fire suppression systems onboard an aircraft.

Because Division 2.1 flammable gases are generally prohibited in air transportation on a passenger-carrying aircraft as cargo and due to the questionable integrity of such articles when packed in a passenger's checked baggage, PHMSA is adopting the prohibition in checked baggage of fuel cell cartridges containing Division 2.1 flammable gases and Division 4.3 solid dangerous when wet materials as proposed.

Section 175.25

PHMSA currently requires operators to provide certain information to passengers regarding what hazardous materials they may check-in or carry-on a flight. Effective January 1, 2013, this information is to be provided at points of ticket sale and at automated or remote passenger check-in. Consistent with the ICAO TI, these amendments will require a passenger to acknowledge such limitations before a ticket purchase and automated or remote check-in can be finalized. PHMSA believes these amendments only clarify existing regulatory requirements in § 175.25 that have not been updated due to changing technologies used by air carriers to either sell tickets (Internet) or check-in passengers (automated kiosks). Additionally, these amendments provide air carriers greater flexibility in how the information they are required to provide passengers on hazardous materials is disseminated to them.

Section 175.30

Section 175.30 prescribes inspection procedures for operators. PHMSA is revising paragraph (e) regarding overpack marking requirements for packages of limited and excepted quantities offered for transportation by aircraft.

Section 175.75

Section 175.75 prescribes quantity limitations and cargo location requirements for hazardous materials transported by aircraft. PHMSA is revising paragraph (e) to correct an inadvertent cargo compartment restriction for passenger-authorized materials carried aboard a cargo-only aircraft published in a final rule under Docket HM–215J (74 FR 2267, January 14, 2009). PHMSA is also revising paragraph (f) Quantity and Loading Tables for clarity.

Several commenters (ALPA, COSTHA, PRBA, UPS) objected to our inclusion of limitations on the stowage of lithium batteries in § 175.75 of the HMR and strongly urged that the limitations be removed from this rulemaking and addressed in a separate lithium battery rulemaking such as HM–224F. We agree. All reference to lithium batteries in our revisions to § 175.75 are removed from this rulemaking.

One commenter (UPS) fully supported our proposed clarification of the use of the Class C cargo compartment for shipments of material eligible for passenger aircraft under § 175.75(d); however, UPS did recommend an additional revision for clarity. Therefore, in this final rule we are revising paragraph (d) further to incorporate a second note into the table to clarify that for cargo-only aircraft, packages required to be loaded in a position considered accessible include those loaded into a Class C cargo compartment.

Several commenters requested that PHMSA offer the same exception from the loading restrictions in § 175.75 for limited quantity packages as are currently authorized for Class 9 and ORM–D–AIR materials. We agree that such packages should be afforded the same exceptions from the loading restrictions of § 175.75 as ORM–D–AIR materials and are revising the section accordingly.

Section 175.78

Section 175.78 prescribes the stowage compatibility of hazardous materials offered for transportation by aircraft. PHMSA is revising paragraph (c)(4)(iii) to specify that, except as provided in paragraph (c)(4)(iv) of § 175.78, Division 1.4B explosive materials may only be stowed together with Division 1.4S explosive materials. This revision is in accordance with an amendment made in the 2011–2012 ICAO Technical Instructions.

Part 176

Section 176.2

Section 176.2 establishes definitions specific to the transportation of hazardous materials by vessel. PHMSA is revising the definition for "Cargo transport unit" to include a multiple-element gas container or MEGC.

Section 176.63

Section 176.63 sets forth and describes the basic physical requirements for authorized stowage locations of hazardous materials on board vessels. PHMSA is amending paragraph (f)(2) by removing reference to the specific year of SOLAS, Chapter II–2/Regulation 19 (*i.e.,* 1974, as amended) for consistency with the manner in which IBR material is indicated throughout the HMR in outlying sections.

Section 176.76

Section 176.76 prescribes certain requirements for transport vehicles, freight containers, and portable tanks containing hazardous materials transported by vessel. In this final rule, we are revising paragraph (a)(9) to require that when security devices, beacons or other tracking or monitoring equipment are used, they must be securely installed and must be of a certified safe type for the hazardous

materials that will be carried within the freight container or transport vehicle.

Section 176.84

Section 176.84 outlines additional requirements for stowage and segregation of hazardous materials transported by cargo and passenger vessels. In this final rule, PHMSA is removing the redundant stowage code 143. This provision is currently assigned to UN1259, UN2845, UN3194, UN3392, and UN3394, and prohibits the carriage of the materials aboard a vessel transporting Class 1 (explosive) material (except for explosives of Division 1.4S). *See* Section 172.101 Hazardous Materials Table for the amendment that adds stowage code 78 to the above materials of extreme flammability. Such materials are now required to be "separated longitudinally by an intervening complete compartment or hold from explosives" based on amendments adopted in the IMDG Code.

Section 176.142

Section 176.142 prescribes the requirements for hazardous materials of extreme flammability transported on the same vessel as Class 1 (explosive) materials. In this final rule, PHMSA is deleting this section as the restriction no longer exists. Hazardous materials of extreme flammability are no longer prohibited from stowage on the same vessel as explosives. For entries previously affected by this section, the most restrictive stowage requirements are required.

Section 176.905

Section 176.905 prescribes specific requirements for motor vehicles or mechanical equipment powered by internal combustion engines that are offered for transportation and transported by vessel. For consistency with Amendment 35–10 of the IMDG Code, PHMSA is removing the signage requirement for such articles in paragraph (a)(5) and the ignition key removal provisions from paragraph (a)(6). Additionally, we are revising this section to account for modern designs of vehicles and equipment that are powered by engines other than internal combustion engines (*e.g.,* electric engines powered by a fuel cell, hybrid vehicles). We are revising this section to include language applicable to address these new designs. We did not propose these changes in the August 24, 2010 NPRM, but we do not believe including language to account for new designs imposes new restrictions or any greater burdens than currently in the regulations.

Part 178

Section 178.71

Section 178.71 establishes the specifications for UN pressure receptacles. In this final rule, PHMSA is adopting the regulatory relief proposed in Docket HM–218F (75 FR 60017, 75 FR 60017) by revising the requirements in paragraph (c)(1) to allow the use of a proof pressure test in addition to the volumetric expansion test. The ISO 7866 and 9809 standards permit either the proof pressure test or volumetric expansion test to be used. The volumetric expansion test measures the cylinder's elastic expansion and assures the cylinder received a proper heat treatment. However, the ISO standards also require each cylinder be subjected to a hardness test and a comprehensive shear wave ultrasonic examination (UE). PHMSA believes the combination of the proof pressure test, hardness test, and UE should provide adequate assurance that each cylinder received a proper heat treatment. This limitation (*i.e.,* volumetric expansion test only) is also removed from the test pressure marking requirement in the redesignated paragraph (p)(6).

In this final rule, PHMSA is also amending the cylinder bundle marking requirements in § 178.71(e) by adding a new paragraph (e)(8) specifying that pressure vessel markings only apply to the pressure vessel itself and not to the assembly structure of the bundle. Additionally, we are adding new paragraphs (f) and (m) that establish the design and construction requirements for UN metal hydride storage systems and refillable welded cylinders, respectively. To accomplish this, we are redesignating paragraphs (m) through (r) as paragraphs (n) through (s), and revising paragraphs (q) and (s) accordingly to correct paragraph references. Further, we are adding three ISO standards to the IBR table in § 171.7 of the HMR for UN refillable welded cylinders (ISO 4706, 18172–1 and 20703). Lastly, we are requiring that transportable metal hydride storage systems (*see* § 173.311) be designed, constructed, initially inspected and tested in accordance with ISO 16111:2008, "Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride," as authorized under § 178.71(m).

Section 178.275

Section 178.275 prescribes requirements for UN portable tanks intended for transportation of liquid and solid hazardous materials. Section 178.275(h) prohibits the use of fusible elements on portable tanks with a test pressure which exceeds 2.65 bar (265 kPa). In § 172.102(c)(8), we are adding a new portable tank special provision TP36 authorizing the use of fusible elements in the vapor space of portable tanks with a gauge test pressure that exceeds 265 kPa (38.4 psig/2.65 bar) for certain organometallic substances. In this final rule, we are authorizing use of fusible elements based on a well-established history of safe transportation of these substances in portable tanks equipped with fusible elements capable of properly functioning at pressure of at least 1,000 kPa (145 psig/10 bar). Past experience of the use of fusible elements indicates reliability and a proper functioning even in the event of a release during loading or unloading. Additionally, for organometallic materials that are shipped in rigid portable tanks with a minimum test pressure of more than 265 kPa (38.4 psig/2.65 bar), the tanks are required to be equipped with a depressurizing system that releases the inside pressure to avoid rupturing the tank as a result of an inadvertent release or fire. Fusible elements are used by shippers as a secondary pressure relief device, in addition to a re-closing pressure relief device. Therefore, we are revising § 178.275(h) to reference special provision TP36 authorizing the use of fusible elements in the vapor space of a portable tank used for the transport of certain organometallic materials.

Section 178.347–1

Section 178.347–1 prescribes the general requirements for DOT Specification 407 cargo tank motor vehicles. Paragraph (d)(9) prescribes weld integrity, compliance and acceptance criteria for bulkheads.

The exception in § 178.347–1(d)(8) currently provides an unconditional exception from UW–12 for all joints. Section 178.347–1(d)(9) applies a condition to one particular joint configuration in a head. In petition P–1333, TTMA requested that we adopt a weld joint efficiency of 0.85 for head seams in bulkheads on DOT 407 cargo tanks. Based on review of the TTMA petition and additional information that was provided, we proposed in the HM–213 NPRM (66 FR 63095, December 4, 2001) that the strength of a weld seam in a bulkhead without radiographic examination of the weld must be 0.85 of the strength of the bulkhead. The welded seam must be a full penetration butt weld, no more than one seam may be used per bulkhead, and the welded seam must be completed before forming the dish radius and knuckle radius.

TTMA commented on the proposal stating, "[w]hile we agree with the

proposal to allow a provisional 85% weld joint efficiency for DOT 407 heads with butt-welded seams, we would like to see the requirements of UW–12 of the ASME Code specifically exempted for this welded joint. Even though this section implies an exemption, the exemption is not specific. We suggest the following wording, "[t]he strength of a weld seam in a bulkhead that has not been radiographically examined shall be 0.85 of the strength of the bulkhead and be exempted from the requirements of UW–12 of the ASME Code under the following condition".

In the HM–213 final rule, we agreed with TTMA's comment and agreed to make the change though the change occurred in a corrections document (68 FR 52363, September 3, 2003). The final rule stated: "[I]n its comments to the NPRM, TTMA agrees with the provisional 85% weld joint efficiency for DOT 407 heads with butt-welded seams. However, TTMA suggests that we include the requirements of Part UW–12 of the ASME Code to the list of excepted requirements in § 178.347–1(d)(8). We agree with TTMA. In this final rule, we are adding Part UW–12 of the ASME Code to the list of excepted requirements."

In October 2004, we added an exception from the radiography/joint efficiency requirements of ASME VIII section UW–12 for DOT 407 cargo tanks with MAWP of 35 psig and less in § 178.347–1(d)(8) and (9). The intent was to provide a conditional alternate means of determining a joint efficiency for certain head welds. Listing UW–12 in § 178.347–1(d)(8) instead of (9), however, results in an unconditional exception from UW–12 in all welds on these tanks. Therefore, because we believe the revision is appropriate, we are revising § 178.347–1(d)(9), as proposed, by adding a new subparagraph (i) and renumbering the section accordingly.

Section 178.603

Section 178.603 prescribes the drop test requirements for non-bulk packagings in the HMR. In this final rule, PHMSA is revising paragraph (f)(4) to amend the criteria for passing the tests. The HMR require only that there is no leakage of filling substance from the inner packaging. In this final rule, we are also requiring that inner receptacles, inner packagings and articles remain completely within the outer package when drop tested.

Section 178.703

Section 178.703 prescribes the marking requirements for IBCs. PHMSA is aligning paragraph (a)(1)(viii) with the UN Model Regulations by requiring the gross mass, in kilograms, to be marked on all IBC types. The HMR require a net mass to be marked on flexible IBCs which is inconsistent with international standards. PHMSA inadvertently did not revise the HMR under a previous harmonization rulemaking when the international standards were amended to specify that a maximum permissible gross mass be marked on all IBC types.

Section 178.955

Section 178.955 establishes definitions used with regard to subpart Q of part 178, which prescribes the design and testing criteria for Large Packagings. PHMSA is adding the following two new definitions, "Remanufactured Large Packaging" and "Reused Large Packaging," in new paragraphs (c)(6) and (c)(7), respectively. A "remanufactured" large packaging is defined as a metal or rigid plastic large packaging that is produced as a UN type from a non-UN type or is converted from one UN design type to another UN design type. Remanufactured large packagings are subject to the same HMR requirements that apply to a new large packaging. A "reused" large packaging is defined as a large packaging to be refilled that has been examined and found free of defects affecting the ability to withstand the performance tests. The term includes those that are refilled with the same or similar compatible contents and are transported within distribution chains controlled by the consignor of the product.

Part 180

Section 180.207

Section 180.207 prescribes the requirements for the requalification of UN pressure receptacles. In this final rule, PHMSA is requiring that metal hydride storage systems be requalified every five years in accordance with ISO 16111:2008 and that the records of that requalification be retained in accordance with § 180.215 of the HMR.

Section 180.350

Section 180.350 prescribes applicability and defines certain terms regarding the qualification and maintenance of IBCs. PHMSA is revising paragraph (b) to indicate that the replacement of the inner receptacle of a composite IBC with one from the original manufacturer is considered a repair. This revision is consistent with the recent change in the definition of "repair" in the UN Model Regulations.

V. Regulatory Analyses and Notices

A. Statutory/legal Authority for This Rulemaking

This final rule is published under the following statutory authorities:

1. 49 U.S.C. 5103(b) authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. This final rule amends regulations to maintain alignment with international standards by incorporating various amendments, including changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations and vessel stowage requirements. To this end, as discussed in detail above, the final rule amends the HMR to more fully align them with the biennial updates of the UN Model Regulations, the IMDG Code and the ICAO TI.

Harmonization serves to facilitate international commerce. At the same time, harmonization promotes the safety of people, property, and the environment by reducing the potential for confusion and misunderstanding that could result if shippers and transporters were required to comply with two or more conflicting sets of regulatory requirements. While the intent of this rulemaking is to align the HMR with international standards, we review and consider each amendment on its own merit based on its overall impact on transportation safety and the economic implications associated with its adoption into the HMR. Our goal is to harmonize without sacrificing the current HMR level of safety and without imposing undue burdens on the regulated public. Thus, as explained in the corresponding sections above, we are not harmonizing with certain specific provisions of the UN Model Regulations, the IMDG Code, and the ICAO TI. Moreover, we are maintaining a number of current exceptions for domestic transportation that should minimize the compliance burden on the regulated community.

2. 49 U.S.C. 5120(b) authorizes the Secretary of Transportation to ensure that, to the extent practicable, regulations governing the transportation of hazardous materials in commerce are consistent with standards adopted by international authorities. This rule amends the HMR to maintain alignment with international standards by incorporating various amendments to facilitate the transport of hazardous material in international commerce. To this end, as discussed in detail above,

PHMSA incorporates changes into the HMR based on the sixteenth revised edition of the UN Model Regulations and the 2011–2012 ICAO Technical Instructions, which become effective January 1, 2011, and Amendment 35–10 to the IMDG Code which becomes effective January 1, 2012. The continually increasing amount of hazardous materials transported in international commerce warrants the harmonization of domestic and international requirements to the greatest extent possible.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. The final rule is not considered a significant rule under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). This final rule applies to offerors and carriers of hazardous materials, such as chemical manufacturers, chemical users and suppliers, packaging manufacturers, distributors, radiopharmaceutical companies, and training companies. Benefits resulting from the adoption of the amendments in this final rule include enhanced transportation safety resulting from the consistency of domestic and international hazard communications and continued access to foreign markets by U.S. manufacturers of hazardous materials.

The majority of amendments in this final rule should result in cost savings and ease the regulatory compliance burden for shippers engaged in domestic and international commerce, including trans-border shipments within North America.

We authorize a one year transition period to allow for training of employees and to ease any burden on entities affected by the amendments. The total net increase in costs to businesses in implementing the final rule is considered to be minimal. Initial start-up and inventory costs will result from these changes. However, the costs are offset by greater long term savings of conformance with one set of regulations and a one-year transition period. A regulatory evaluation is available for review in the public docket for this rulemaking.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This final rule preempts State, local and Indian Tribe requirements but does not propose any regulation that has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The Federal hazardous material transportation law, 49 U.S.C. 5101–5128, contains an express preemption provision (49 U.S.C. 5125(b)) that preempts State, local and Indian Tribe requirements on certain covered subjects, as follows:

(1) The designation, description, and classification of hazardous material;

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous material;

(3) The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents;

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; and

(5) The design, manufacture, fabrication, inspection, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

This final rule addresses covered subject items (1), (2), (3), (4) and (5) above and preempts State, local, and Indian Tribe requirements not meeting the "substantively the same" standard. This final rule is necessary to incorporate changes adopted in international standards, effective January 1, 2011. If the changes in this final rule are not adopted into the HMR, U.S. companies, including numerous small entities competing in foreign markets, would be at an economic disadvantage. These companies would be forced to comply with a dual system of regulations. The changes in this final rulemaking are intended to avoid this result. Federal hazardous materials transportation law provides at 49 U.S.C. 5125(b)(2) that, if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date of Federal preemption is 90 days from publication of the final rule in this matter.

D. Executive Order 13175

This final rule was analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not have Tribal implications, does not impose substantial direct compliance costs, and is required by statute, the funding and consultation requirements of Executive Order 13175 do not apply.

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

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities, unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. This final rule facilitates the transportation of hazardous materials in international commerce by providing consistency with international standards. This final rule applies to offerors and carriers of hazardous materials, some of whom are small entities, such as chemical manufacturers, users and suppliers, packaging manufacturers, distributors and training companies. As discussed above, under Executive Order 12866, the majority of amendments in this final rule should result in cost savings and ease the regulatory compliance burden for shippers engaged in domestic and international commerce, including trans-border shipments within North America.

Many companies will realize economic benefits as a result of these amendments. Additionally, the changes effected by this final rule will relieve U.S. companies, including small entities competing in foreign markets, from the burden of complying with a dual system of regulations. Therefore, I certify that these amendments will not, if promulgated, have a significant economic impact on a substantial number of small entities.

This final rule has been developed in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

F. Paperwork Reduction Act

PHMSA currently has approved information collections under Office of Management and Budget (OMB) Control Number 2137–0034, "Hazardous Materials Shipping Papers and Emergency Response Information," with an expiration date of May 31, 2011, and OMB Control Number 2137–0557,

"Approvals for Hazardous Materials," with an expiration date of June 30, 2011. This final rule may result in a decrease in the annual burden and costs of OMB Control Number 2137–0034 due to amendments to the exceptions for shipping paper requirements for limited quantities of Class 3, Division 4.1, Division 4.2, Division 4.3, Division 5.1, Division 5.2, Division 6.1, Class 8, and Class 9 materials for those limited quantities that are defined as consumer commodities. This final rule may result in an increase in the annual burden and costs of OMB Control Number 2137–0557 due to amendments to the classification criteria for eight Division 1.4 explosive articles to add the Type 6(d) test as prescribed in the fifth revised edition of the UN Manual of Tests and Criteria.

Under the Paperwork Reduction Act of 1995, no person is required to respond to an information collection unless it has been approved by OMB and displays a valid OMB control number. Section 1320.8(d), Title 5, Code of Federal Regulations requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information and recordkeeping requests.

This final rule identifies revised information collection requests that PHMSA will submit to OMB for approval based on the requirements in this final rule. PHMSA has developed burden estimates to reflect changes in this final rule, and estimates the information collection and recordkeeping burden as proposed in this rule to be as follows:

OMB Control No.	2137–0034
Annual Decrease in Number of Respondents	75,000,000
Annual Decrease in Annual Number of Responses	75,000,000
Annual Decrease in Annual Burden Hours	1,875,000
Annual Decrease in Annual Burden Costs	$1,875,000.00
OMB Control No.	**2137–0557**
Annual Increase in Number of Respondents	465
Annual Increase in Annual Number of Responses	465
Annual Increase in Annual Burden Hours	2,325
Annual Increase in Annual Burden Costs	$58,125

PHMSA will submit the revised information collection and recordkeeping requirements to OMB for approval.

G. Regulation Identifier Number (RIN)

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

H. Unfunded Mandates Reform Act

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

I. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires that Federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations order Federal agencies to conduct an environmental review considering (1) the need for the proposed action, (2) alternatives to the proposed action, (3) probable environmental impacts of the proposed action and alternatives, and (4) the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b).

1. Purpose and Need

PHMSA proposed to amend the Hazardous Materials Regulations to maintain alignment with international standards by incorporating various amendments, including changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations, and vessel stowage requirements. These revisions are necessary to harmonize the Hazardous Materials Regulations with recent changes to the International Maritime Dangerous Goods Code, the International Civil Aviation Organization's Technical Instructions for the Transport of Dangerous Goods by Air, and the United Nations Recommendations on the Transport of Dangerous Goods. The amendments are intended to enhance the safety of international hazardous materials transportation through better understanding of the regulations, an increased level of industry compliance, the smooth flow of hazardous materials from their points of origin to their points of destination, and effective emergency response in the event of a hazardous materials incident.

The HMR regulate materials that meet the definition of a marine pollutant in all modes of transportation. The intended effect is to increase the level of safety associated with the transportation of substances hazardous to the marine environment by way of improved communication of their presence in transportation and establishing appropriate requirements for their packaging. The HMR uses a list-based system designed to help shippers determine if a material meets the definition of a marine pollutant. Recently, the IMO adopted a criteria based system for identification of materials hazardous to the marine environment based on the Globally Harmonized System of Classification and Labeling of Chemicals (GHS).

2. Alternatives

In developing this proposed rule, we considered three alternatives:

(1) Do nothing.

(2) Adopt the international standards in their entirety.

(3) Adopt most of the international standards, with certain modifications based on safety or economic considerations.

Alternative 1: Because our goal is to facilitate uniformity, compliance, commerce and safety in the transportation of hazardous materials, we rejected this alternative.

Alternative 2: By adopting the international standards in their entirety,

PHMSA could potentially adopt provisions that, in our view, do not provide an adequate safety level. Further, because we provide for domestic exceptions and extended compliance periods to minimize the potential economic impact of any revisions on the regulated community, this alternative was also rejected.

Alternative 3: Consistency between U.S. and international regulations helps to assure the safety of international hazardous materials transportation through better understanding of the regulations, an increased level of industry compliance, the smooth flow of hazardous materials from their points of origin to their points of destination, and effective emergency response in the event of a hazardous materials incident. Under Alternative 3, we would harmonize the HMR with international standards to the extent consistent with U.S. safety and economic goals.

Alternative 3 is the only alternative that addresses, in all respects, the purpose of this regulatory action, which is to facilitate the safe and efficient transportation of hazardous materials in international commerce. These actions will provide the greatest possible harmonization with international requirements without posing an undue increased cost burden on industry. For these reasons, Alternative 3 is our recommended alternative.

3. Analysis of Environmental Impacts

Hazardous materials are transported by aircraft, vessel, rail, and highway. The potential for environmental damage or contamination exists when packages of hazardous materials are involved in accidents or en route incidents resulting from cargo shifts, valve failures, package failures, or loading, unloading, or handling problems. The ecosystems that could be affected by a release include air, water, soil, and ecological resources (*e.g.,* wildlife habitats). The adverse environmental impacts associated with releases of most hazardous materials are short-term impacts that can be greatly reduced or eliminated through prompt clean-up of the accident scene. Most hazardous materials are not transported in quantities sufficient to cause significant, long-term environmental damage if they are released.

The hazardous material regulatory system is a risk-management system that is prevention-oriented and focused on identifying hazards and reducing the probability and quantity of a hazardous material release. Amending the HMR to maintain alignment with international standards enhances the safe transportation of hazardous materials in domestic and international commerce. When considering the adoption of international standards under the HMR, we review and consider each amendment on its own merit and assess its impact on transportation safety and the environment. Based on the lack of public comment on the issue, it is our conclusion that the amendments adopted in this final rule will have no adverse affect on the environment.

4. Consultations and Public Comment

On June 20, 2007, November 27, 2007, June 18, 2008, and November 19, 2008, PHMSA hosted public meetings with public and private stakeholders to discuss draft U.S. positions on the United Nation's Sub-Committee of Experts on the Transport of Dangerous Goods (UNSCOE) proposals for the sixteenth revised edition of the UN Recommendations on the Transport of Dangerous Goods Model Regulations. In addition, PHMSA and the U.S. Coast Guard hosted a public meeting on September 17, 2008, and hosted a second meeting on September 10, 2009, to discuss amendments to the IMDG Code. A public meeting was held on September 29, 2009 to discuss amendments to the ICAO Technical Instructions. During these public meetings, U.S. positions on proposed amendments to the UN Recommendations were considered and discussed. Positions were established based on input received during these meetings in conjunction with internal review, including thorough technical review.

We have identified a number of immediate and long-term actions that participants in the international community are taking or will take to enhance the safe transportation of hazardous materials. Through this integrated and cooperative approach, we believe we can be most successful in reducing incidents, enhancing safety, and protecting the public.

J. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://www.dot.gov/privacy.html*.

K. International Trade Analysis

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. PHMSA participates in the establishment of international standards to protect the safety of the American public, and we have assessed the effects of the proposed rule to ensure that it does not exclude imports that meet this objective. Accordingly, this rulemaking is consistent with PHMSA's obligations under the Trade Agreement Act, as amended.

List of Subjects

49 CFR Part 171

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

49 CFR Part 172

Education, Hazardous materials transportation, Hazardous waste, Incorporation by reference, Labeling, Markings, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

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

49 CFR Part 175

Air carriers, Hazardous materials transportation, Incorporation by reference, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 176

Hazardous materials transportation, Incorporation by reference, Maritime carriers, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 178

Hazardous materials transportation, Incorporation by reference, Motor vehicle safety, Packaging and

containers, Reporting and recordkeeping requirements.

49 CFR Part 180

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

■ In consideration of the foregoing, PHMSA amends 49 CFR Chapter I as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

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

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

■ 2. In § 171.7, the paragraph (a)(3) table is amended as follows:

■ a. Under the entry "American Society for Testing and Materials (ASTM)," the entries "ASTM D56–05", "ASTM D86–07a", "ASTM D93–08", "ASTM D1078–05", "ASTM D3278–96(2004)e1", and "ASTM D3828–07a" are added in alphanumerical order;

■ b. Under the entry "International Civil Aviation Organization (ICAO)", the entry "Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions)" is revised;

■ c. Under the entry "International Maritime Organization (IMO)", the entries "International Maritime Dangerous Goods Code (IMDG Code)" and "International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS)" are revised;

■ d. Under the entry "International Organization for Standardization (ISO)", the entries "ISO 2592—1973(E)"; "ISO 10297:1999" and "ISO 10461:2005" are revised; and the entries "ISO 1516:2002"; "ISO 1523:2002"; "ISO 2719:2002"; "ISO 3405:2000"; "ISO 3679:2004"; "ISO 3680:2004"; "ISO 3924:1999"; "ISO 4626:1980"; "ISO 4706:2008"; "ISO 10692–2:2001"; "ISO 13736:2008"; "ISO 16111:2008"; "ISO 18172–1:2007" and "ISO 20703:2006" are added in alphanumerical order;

■ e. Under the entry "Organization for Economic Cooperation and Development (OECD)", the entry "OECD Guideline for the Testing of Chemicals, Number 404, "Acute Dermal Irritation/Corrosion (1992)" is revised and the entries "OECD (2004), Test No. 430: *In Vitro* Skin Corrosion: Transcutaneous Electrical Resistance Test (TER), OECD Guidelines for the Testing of Chemicals, Section 4: Health Effects, OECD Publishing", "OECD (2004), Test No. 431: *In Vitro* Skin Corrosion: Human Skin Model Test, OECD Guidelines for the Testing of Chemicals, Section 4: Health Effects, OECD Publishing" and "OECD (2006), Test No. 435: *In Vitro* Membrane Barrier Test Method for Skin Corrosion, OECD Guidelines for the Testing of Chemicals, Section 4: Health Effects, OECD Publishing" are added in appropriate numerical order;

■ f. Under the entry for "Transport Canada," the entry "Transportation of Dangerous Goods Regulations (Transport Canada TDG Regulations)" is revised; and

■ g. Under the entry "United Nations", the entries "UN Recommendations on the Transport of Dangerous Goods, Model Regulations" and "UN Recommendations on the Transport of Dangerous Goods, Manual of Tests and Criteria" are revised.

The additions and revisions read as follows:

§ 171.7 Reference material.

(a) * * *

(3) * * *

Source and name of material	49 CFR reference
* * * * * * *	
American Society for Testing and Materials (ASTM)	
* * * * * * *	
ASTM D56–05, Standard Test Method for Flash Point by Tag Closed Cup Tester, approved May 1, 2005	173.120
ASTM D86–07a, Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure, approved April 1, 2007.	173.121
ASTM D93–08, Standard Test Methods for Flash Point by Pensky-Martens Closed Cup Tester, approved October 15, 2008.	173.120
ASTM D1078–05, Standard Test Method for Distillation Range of Volatile Organic Liquids, approved May 15, 2005	173.121
* * * * * * *	
ASTM D3278–96 (Reapproved 2004) E [1], Standard Test Methods for Flash Point of Liquids by Small Scale Closed-Cup Apparatus, approved November 1, 2004.	173.120
ASTM D3828–07a, Standard Test Methods for Flash Point by Small Scale Closed Cup Tester, approved July 15, 2007	173.120
* * * * * * *	
International Civil Aviation Organization (ICAO),	
* * * * * * *	
Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions), 2011–2012 Edition.	171.8; 171.22; 171.23; 171.24; 172.101; 172.202; 172.401; 172.512; 172.519; 172.602; 172.704; 173.1; 173.56; 173.320; 175.33; 178.3.
* * * * * * *	
International Maritime Organization (IMO),	
* * * * * * *	
International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS), Chapter II–2, Construction—Fire protection, fire detection and fire extinction, Regulation 19, Carriage of dangerous goods, Consolidated Edition 2009.	176.63, 176.84

Source and name of material	49 CFR reference
International Maritime Dangerous Goods Code (IMDG Code), 2010 Edition, Incorporating Amendment 35–10 (English Edition), Volumes 1 and 2.	171.22; 171.23; 171.25; 172.101 172.202; 172.203 172.401; 172.502; 172.519; 172.602; 172.704; 173.1; 173.21; 173.56; 173.320; 176.2; 176.5; 176.11; 176.27; 176.30; 176.83; 176.84; 176.140; 176.720; 178.3; 178.274.
International Organization for Standardization	
* * * * * * *	
ISO 1516:2002(E), Determination of flash/no flash—Closed cup equilibrium method, Third Edition, 2002–03–01	173.120.
ISO 1523:2002(E), Determination of flash point—Closed cup equilibrium method, Third Edition, 2002–03–01	173.120.
* * * * * * *	
ISO 2592:2000(E), Determination of flash and fire points—Cleveland open cup method, Second Edition, 2000–09–15 ..	173.120.
ISO 2719:2002(E), Determination of flash point—Pensky-Martens closed cup method, Third Edition, 2002–11–15	173.120.
* * * * * * *	
ISO 3405:2000(E), Petroleum products—Determination of distillation characteristics at atmospheric pressure, Third Edition, 2000–03–01.	173.121.
* * * * * * *	
ISO 3679:2004(E), Determination of flash point—Rapid equilibrium closed cup method, Third Edition, 2004–04–01	173.120.
ISO 3680:2004(E), Determination of flash/no flash—Rapid equilibrium closed cup method, Fourth Edition, 2004–04–01	173.120.
* * * * * * *	
ISO 3924:1999(E), Petroleum products—Determination of boiling range distribution—Gas chromatography method, Second Edition, 1999–08–01.	173.121.
* * * * * * *	
ISO 4626:1980(E), Volatile organic liquids—Determination of boiling range of organic solvents used as raw materials, First Edition, 1980–03–01.	173.121.
ISO 4706:2008(E), Gas cylinders—Refillable welded steel cylinders—Test pressure 60 bar and below, First Edition, 2008–04–15, Corrected Version, 2008–07–01.	178.71.
* * * * * * *	
ISO 10297:2006(E), Transportable gas cylinders—Cylinder valves—Specification and type testing, Second Edition, 2006–01–15.	173.301b; 178.71.
ISO 10461:2005(E), Gas cylinders—Seamless aluminum-alloy gas cylinders—Periodic inspection and testing, Second Edition, 2005–02–15 and Amendment 1, 2006–07–15.	180.207.
* * * * * * *	
ISO 10692–2:2001(E), Gas cylinders—Gas cylinder valve connections for use in the micro-electronics industry—Part 2: Specification and type testing for valve to cylinder connections, First Edition, 2001–08–01.	173.40.
* * * * * * *	
ISO 13736:2008(E), Determination of flash point—Abel closed-cup method, Second Edition, 2008–09–15	173.120.
ISO 16111:2008(E), Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride, First Edition, 2008–11–15.	173.301b; 173.311; 178.71.
ISO 18172–1:2007(E), Gas cylinders—Refillable welded stainless steel cylinders—Part 1: Test pressure 6 MPa and below, First Edition, 2007–03–01.	178.71.
ISO 20703:2006(E), Gas cylinders—Refillable welded aluminum-alloy cylinders—Design, construction and testing, First Edition, 2006–05–01.	178.71.
* * * * * * *	
Organization for Economic Cooperation and Development (OECD)	
* * * * * * *	
OECD (2002), Test No. 404: Acute Dermal Irritation/Corrosion, OECD Guidelines for the Testing of Chemicals, Section 4: Health Effects, OECD Publishing, adopted April 24, 2002.	173.137.
OECD (2004), Test No. 430: *In Vitro* Skin Corrosion: Transcutaneous Electrical Resistance Test (TER), OECD Guidelines for the Testing of Chemicals, Section 4: Health Effects, OECD Publishing, adopted April 13, 2004.	173.137.
OECD (2004), Test No. 431: *In Vitro* Skin Corrosion: Human Skin Model Test, OECD Guidelines for the Testing of Chemicals, Section 4: Health Effects, OECD Publishing, adopted April 13, 2004.	173.137.
OECD (2006), Test No. 435: *In Vitro* Membrane Barrier Test Method for Skin Corrosion, OECD Guidelines for the Testing of Chemicals, Section 4: Health Effects, OECD Publishing, adopted July 19, 2006.	173.137.

Source and name of material	49 CFR reference
* * * * * * *	
Transport Canada	
* * * * * * *	
Transportation of Dangerous Goods Regulations (Transport Canada TDG Regulations), August 2001 including Clear Language Amendments SOR 2001–286; SOR/2002–306 August 8, 2002; SOR/2003–273 July 24, 2003; SOR/2003–400 December 3, 2003; SOR/2005–216 July 13, 2005; SOR/2005–279 September 21, 2005; SOR/2008–34 February 7, 2008 and SOR/2007–179 July 31, 2007.	171.12; 171.22; 171.23; 172.401; 172.502; 172.519; 172.602; 173.31; 173.32; 173.33.
* * * * * * *	
United Nations	
* * * * * * *	
UN Recommendations on the Transport of Dangerous Goods, Model Regulations, sixteenth revised edition, Volumes I and II (2009).	171.8; 171.12; 172.202; 172.401; 172.407; 172.502; 173.1; 173.3; 173.22; 173.24; 173.24b; 173.40; 173.56; 173.192; 173.302b; 173.304b; 178.75; 178.274; 178.500; 178.700; 178.900.
UN Recommendations on the Transport of Dangerous Goods, Manual of Tests and Criteria, fifth revised edition (2009)	172.102; 173.21; 173.56; 173.57; 173.58; 173.60; 173.115; 173.124; 173.125; 173.127; 173.128; 173.137; 173.185; 173.220; Part 173, appendix H; 178.274.
* * * * * * *	

■ 3. In § 171.8, the definitions for "Metal hydride storage system" and "Open cryogenic receptacle" are added and the definitions for "Oxidizing gas" and "UN Recommendations" are revised to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

Metal hydride storage system means a single complete hydrogen storage system that includes a receptacle, metal hydride, pressure relief device, shut-off valve, service equipment and internal components used for the transportation of hydrogen only.

* * * * *

Open cryogenic receptacle means a transportable thermally insulated receptacle for refrigerated liquefied gases maintained at atmospheric pressure by continuous venting of the refrigerated gas.

* * * * *

Oxidizing gas means a gas that may, generally by providing oxygen, cause or contribute to the combustion of other material more than air does. Specifically, this means a pure gas or gas mixture with an oxidizing power greater than 23.5% as determined by a method specified in ISO 10156: or 10156–2: (IBR, *see* § 171.7 of this subchapter) (*see also* § 173.115(k)).

* * * * *

U.N. Recommendations means the U.N. Recommendations on the Transport of Dangerous Goods, Model Regulations (IBR, *see* § 171.7 of this subchapter).

* * * * *

§ 171.23 [Amended]

■ 4. In § 171.23, paragraph (b)(9) is removed and reserved.

■ 5. In § 171.25, the first sentence in paragraph (b)(1) is revised, paragraph (b)(4) is added, and paragraphs (c)(5) and (d)(3) are removed.

The revision and addition read as follows:

§ 171.25 Additional requirements for the use of the IMDG Code.

* * * * *

(b) * * *

(1) Unless specified otherwise in this subchapter, a shipment must conform to the requirements in part 176 of this subchapter. * * *

* * * * *

(4) Material consigned under UN3166 and UN3171 (*e.g.,* Engines, internal combustion, *etc.,* Vehicles, *etc.* and Battery-powered equipment) may be prepared in accordance with the IMDG Code or this subchapter.

* * * * *

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

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

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

■ 7. In § 172.101, the following amendments are made:

■ a. Paragraph (c)(10)(i) is revised;

■ b. Paragraph (e) is amended by adding a sentence at the end of the paragraph; and

■ c. The Hazardous Materials Table is amended by removing those entries under [REMOVE], adding entries under [ADD], and revising entries under [REVISE] as shown below.

The revisions and additions read as follows:

§ 172.101 Purpose and use of hazardous materials table.

* * * * *

(c) * * *

(10) * * *

(i) A mixture or solution not identified specifically by name, comprised of a single predominant hazardous material identified in the Table by technical name and one or more hazardous and/or non-hazardous material, must be described using the proper shipping name of the hazardous material and the qualifying word "mixture" or "solution", as appropriate, unless—

(A) Except as provided in § 172.101(i)(4) the packaging specified in Column 8 is inappropriate to the physical state of the material;

(B) The shipping description indicates that the proper shipping name applies only to the pure or technically pure hazardous material;

(C) The hazard class, packing group, or subsidiary hazard of the mixture or solution is different from that specified for the entry;

(D) There is a significant change in the measures to be taken in emergencies;

(E) The material is identified by special provision in Column 7 of the § 172.101 Table as a material poisonous by inhalation; however, it no longer meets the definition of poisonous by inhalation or it falls within a different hazard zone than that specified in the special provision; or

(F) The material can be appropriately described by a shipping name that describes its intended application, such as "Coating solution", "Extracts, flavoring" or "Compound, cleaning liquid."

* * * * *

(e) * * * Those preceded by the letters "ID" are associated with proper shipping names recognized by the ICAO Technical Instructions (IBR, *see* § 171.7 of this subchapter).

* * * * *

§ 172.101 HAZARDOUS MATERIALS TABLE

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification numbers	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations (*see* §§ 173.27 and 175.75)		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	[REMOVE].												
		*		*	*	*	*		*	*			
D	sec-Butyl chloroformate.	6.1	NA2742	I	6.1, 3, 8	2, B9, B14, B32, B74, T20, TP4, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	A	12, 13, 22, 25, 40, 48, 100
		*		*	*	*	*		*	*			
	Detonator, assemblies, non-electric, *for blasting*.	1.4S	UN0500	II	1.4S		63(f), 63(g)	62	None	25 kg	100 kg	05	
		*		*	*	*	*		*	*			
	Engines, internal combustion, *flammable gas powered*.	9	UN3166		9	135	220	220	220	Forbidden	No limit	A	
	Engines, internal combustion, *flammable liquid powered*.	9	UN3166		9	135	220	220	220	No limit	No limit	A	
		*		*	*	*	*		*	*			
	Formaldehyde, solutions, flammable.	3	UN1198	III	3, 8	B1, IB3, T4, TP1	150	203	242	5 L	60 L	A	40
	Formaldehyde, solutions, *with not less than 25 percent formaldehyde*.	8	UN2209	III	8	IB3, T4, TP1	154	203	241	5 L	60 L	A	
		*		*	*	*	*		*	*			
	1–Hydroxybenzotriazole, anhydrous, wetted *with not less than 20 percent water, by mass*.	4.1	UN3474	I	4.1	162, N90	None	211	None	0.5 kg	0.5 kg	D	28, 36
		*		*	*	*	*		*	*			
D	Isobutyl chloroformate	6.1	NA2742	I	6.1, 3, 8	2, B9, B14, B32, B74, T20, TP4, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	A	12, 13, 22, 25, 40, 48, 100
		*		*	*	*	*		*	*			
	Lithium hypochlorite, dry *with more than 39% available chlorine (8.8% available oxygen) or* Lithium hypochlorite mixtures, dry *with more than 39% available chlorine (8.8% available oxygen)*.	5.1	UN1471	II	5.1	A9, IB8, IP2, IP4, N34	152	212	240	5 kg	25 kg	A	4, 48, 52, 56, 58, 69, 106, 116

§ 172.101 HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification numbers	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations (*see* §§ 173.27 and 175.75)		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
		*		*	*	*	*		*	*			
	Nitric acid *other than red fuming, with less than 65 percent nitric acid.*	8	UN2031	II	8	A6, B2, B47, B53, IB2, IP15, T8, TP2.	None	158	242	Forbidden	30 L	D	44, 66, 74, 89, 90
		*		*	*	*	*		*	*			
	Nitric acid *other than red fuming, with not more than 70 percent nitric acid.*	8	UN2031	I	8, 5.1	A3, B47, B53, T10, TP2, TP12, TP13.	None	158	243	Forbidden	2.5 L	D	44, 66, 89, 90, 110, 111
		*		*	*	*	*		*	*			
	Tars, liquid *including road asphalt and oils, bitumen and cut backs.*	3	UN1999	II	3	149, B13, IB2, T3, TP3, TP29.	150	202	242	5 L	60 L	B	
				III	3	B1, B13, IB3, T1, TP3	150	203	242	60 L	220 L	A	
		*		*	*	*	*		*	*			
	Trinitro-meta-cresol	1.1D	UN0216	II	1.1D		None	62	None	Forbidden	Forbidden	10	5E
		*		*	*	*	*		*	*			
	Vehicle, flammable gas powered.	9	UN3166		9	135, 157	220	220	220	Forbidden	No limit	A	
	Vehicle, flammable liquid powered.	9	UN3166		9	135, 157	220	220	220	No limit	No limit	A	
		*		*	*	*	*		*	*			
	[ADD].												
		*		*	*	*	*		*	*			
	Alkali metal dispersions, flammable *or* Alkaline earth metal dispersions, flammable.	4.3	UN3482	I	4.3, 3	A2, A3, A7	None	201	244	Forbidden	1 L	D	52
		*		*	*	*	*		*	*			
W	Batteries, nickel-metal hydride see Batteries, dry, sealed, n.o.s. *for nickel-metal hydride batteries transported by modes other than vessel.*	9	UN3496		9	340						A	48

*	*	*	*	*	*	*	*	*					
Calcium hypochlorite, dry, corrosive *or* Calcium hypochlorite mixtures, dry, corrosive *with more than 39% available chlorine (8.8% available oxygen).*	5.1	UN3485	II	5.1, 8	165, 166, A7, A9, IB8, IP2, IP4, IP13, N34, W9.	152	212	None	5 kg	25 kg	D	4, 48, 52, 56, 58, 69, 142	
*	*	*	*	*	*	*	*	*					
Calcium hypochlorite, hydrated, corrosive *or* Calcium hypochlorite, hydrated mixture, corrosive *with not less than 5.5% but not more than 16% water.*	5.1	UN3487	II	5.1, 8	165, IB8, IP2, IP4, IP13, W9.	152	212	240	5 kg	25 kg	D	4, 48, 52, 56, 58, 69, 142	
			III	5.1, 8	165, IB8, IP4, W9	152	213	240	25 kg	100 kg	D	4, 48, 52, 56, 58, 69, 142	
*	*	*	*	*	*	*	*	*					
Calcium hypochlorite mixture, dry, corrosive *with more than 10% but not more than 39% available chlorine.*	5.1	UN3486	III	5.1, 8	165, A1, A29, IB8, IP3, IP13, N34, W9.	152	213	240	5 kg	25 kg	D	4,48, 52, 56, 58, 69, 142	
*	*	*	*	*	*	*	*	*					
Consumer commodity	9	ID8000		9		167	167	None	30 kg gross	30 kg gross			
*	*	*	*	*	*	*	*	*					
Detonator assemblies, non-electric, *for blasting.*	1.4S	UN0500	II	1.4S	347	63(f), 63(g)	62	None	25 kg	100 kg	05		
*	*	*	*	*	*	*	*	*					
Engines, internal combustion, *or* Engines, fuel cell, *flammable gas powered.*	9	UN3166		9	135	220	220	220	Forbidden	No limit	A		
Engines internal combustion, *or* Engines, fuel cell, *flammable liquid powered.*	9	UN3166		9	135	220	220	220	No limit	No limit	A		
*	*	*	*	*	*	*	*	*					
Formaldehyde solutions, flammable.	3	UN1198	III	3, 8	B1, IB3, T4, TP1	4b, 150	203	242	5 L	60 L	A	40	
Formaldehyde solutions, *with not less than 25 percent formaldehyde.*	8	UN2209	III	8	IB3, T4, TP1	154	203	241	5 L	60 L	A		
*	*	*	*	*	*	*	*	*					
Hydrazine aqueous solution, flammable *with more than 37% hydrazine, by mass.*	8	UN3484	I	8, 3, 6.1	B16, B53, T10, TP2, TP13.	None	201	243	Forbidden	2.5 L	D	40, 52, 125	

§ 172.101 HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification numbers	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations (*see* §§ 173.27 and 175.75)		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
		*		*	*	*	*		*	*			
	1–Hydroxybenzotriazole, monohydrate.	4.1	UN3474	I	4.1	N90	None	211	None	0.5 kg	0.5 kg	D	28, 36
		*		*	*	*	*		*	*			
+	Iodine	8	UN3495	III	8, 6.1	IB8, IP3, T1, TP33	154	213	240	25 kg	100 kg	B	40, 55
		*		*	*	*	*		*	*			
	Lithium hypochlorite, dry or Lithium hypochlorite mixture.	5.1	UN1471	II	5.1	A9, IB8, IP2, IP4, N34, T3, TP33.	152	212	240	5 kg	25 kg	A	4, 48, 52, 56, 58, 69, 106, 116
				III	5.1	IB8, IP3, N34, T1, TP33.	152	213	240	25 kg	100 kg	A	4, 48, 52, 56, 58, 69, 106, 116
		*		*	*	*	*		*	*			
+	Motor fuel anti-knock mixture, flammable.	6.1	UN3483	I	6.1, 3	14, T14, TP2, TP13	None	201	244	Forbidden	Forbidden	D	25, 40
		*		*	*	*	*		*	*			
	Nitric acid *other than red fuming, with more than 20 percent and less than 65 percent nitric acid.*	8	UN2031	II	8	A6, B2, B47, B53, IB2, IP15, T8, TP2.	None	158	242	Forbidden	30 L	D	44, 66, 74, 89, 90
		*		*	*	*	*		*	*			
	Nitric acid *other than red fuming, with more than 70 percent nitric acid.*	8	UN2031	I	8, 5.1	A3, B47, B53, T10, TP2, TP12, TP13.	None	158	243	Forbidden	2.5 L	D	44, 66, 89, 90, 110, 111
		*		*	*	*	*		*	*			
I	Petroleum sour crude oil, flammable, toxic.	3	UN3494	I	3, 6.1	343, T14, TP2, TP13	None	201	243	Forbidden	30 L	D	40
				II	3, 6.1	343, IB2, T7, TP2	150	202	243	1 L	60 L	D	40
				III	3, 6.1	343, IB3, T4, TP1	150	203	242	60 L	220 L	C	40
		*		*	*	*	*		*	*			
	Tars, liquid *including road oils and cutback bitumens.*	3	UN1999	II	3	149, B13, IB2, T3, TP3, TP29.	150	202	242	5 L	60 L	B	
				III	3	B1, B13, IB3, T1, TP3	150	203	242	60 L	220 L	A	

		*		*	*	*	*		*	*				
G	Toxic by inhalation liquid, corrosive, flammable, n.o.s. *with an inhalation toxicity lower than or equal to 200 ml/m3 and saturated vapor concentration greater than or equal to 500 LC50.*	6.1	UN3492	I	6.1, 8, 3	1, B9, B14, B30, B72, T22, TP2, TP13, TP27, TP38, TP44.	None	226	244	Forbidden	Forbidden	D	40, 125
G	Toxic by inhalation liquid, corrosive, flammable, n.o.s. *with an inhalation toxicity lower than or equal to 1000 ml/m3 and saturated vapor concentration greater than or equal to 10 LC50.*	6.1	UN3493	I	6.1, 8, 3	2, B9, B14, B32, B74, T20, TP2, TP13, TP27, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	40, 125
		*		*	*	*	*		*	*				
G	Toxic by inhalation liquid, flammable, corrosive, n.o.s. *with an inhalation toxicity lower than or equal to 200 ml/m3 and saturated vapor concentration greater than or equal to 500 LC50.*	6.1	UN3488	I	6.1, 3, 8	1, B9, B14, B30, B72, T22, TP2, TP13, TP27, TP38, TP44.	None	226	244	Forbidden	Forbidden	D	40, 125
G	Toxic by inhalation liquid, flammable, corrosive, n.o.s. *with an inhalation toxicity lower than or equal to 1000 ml/m3 and saturated vapor concentration greater than or equal to 10 LC50.*	6.1	UN3489	I	6.1, 3, 8	2, B9, B14, B32, B74, T20, TP2, TP13, TP27, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	40, 125
		*		*	*	*	*		*	*				
G	Toxic by inhalation liquid, water-reactive, flammable, n.o.s. *with an inhalation toxicity lower than or equal to 200 ml/m3 and saturated vapor concentration greater than or equal to 500 LC50.*	6.1	UN3490	I	6.1, 4.3, 3	1, B9, B14, B30, B72, T22, TP2, TP13, TP27, TP38, TP44.	None	226	244	Forbidden	Forbidden	D	21, 28, 40, 49
G	Toxic by inhalation liquid, water-reactive, flammable, n.o.s. *with an inhalation toxicity lower than or equal to 1000 ml/m3 and saturated vapor concentration greater than or equal to 10 LC50.*	6.1	UN3491	I	6.1, 4.3, 3	2, B9, B14, B32, B74, T20, TP2, TP13, TP27, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	21, 28, 40, 49

§ 172.101 HAZARDOUS MATERIALS TABLE

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification numbers	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***) Exceptions	Non-bulk	Bulk	(9) Quantity limitations (*see* §§ 173.27 and 175.75) Passenger aircraft/rail	Cargo aircraft only	(10) Vessel stowage Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
		*		*	*	*	*		*	*			
	Trinitro-m-cresol	1.1D	UN0216	II	1.1D		None	62	None	Forbidden	Forbidden	10	5E
		*		*	*	*	*		*	*			
	Vehicle, flammable gas powered *or* Vehicle, fuel cell, flammable gas powered.	9	UN3166		9	135	220	220	220	Forbidden	No limit	A	
	Vehicle, flammable liquid powered *or* Vehicle, fuel cell, flammable liquid powered.	9	UN3166		9	135	220	220	220	No limit	No limit	A	
		*		*	*	*	*		*	*			
	[REVISE].												
		*		*	*	*	*		*	*			
	Alcohols, n.o.s.	3	UN1987	I	3	172, T11, TP1, TP8, TP27.	4b	201	243	1 L	30 L	E	
				II	3	172, IB2, T7, TP1, TP8, TP28.	4b, 150	202	242	5 L	60 L	B	
				III	3	172, B1, IB3, T4, TP1, TP29.	4b, 150	203	242	60 L	220 L	A	
		*		*	*	*	*		*	*			
G	Antimony compounds, inorganic, liquid, n.o.s.	6.1	UN3141	III	6.1	35, IB3, T7, TP1, TP28	153	203	241	60 L	220 L	A	
G	Antimony compounds, inorganic, solid, n.o.s.	6.1	UN1549	III	6.1	35, IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
		*		*	*	*	*		*	*			
	Argon, refrigerated liquid *(cryogenic liquid).*	2.2	UN1951		2.2	T75, TP5	320	316	318	50 kg	500 kg	D	
		*		*	*	*	*		*	*			
G	Arsenic compounds, liquid, n.o.s. *inorganic, including arsenates, n.o.s.; arsenites, n.o.s.; arsenic sulfides, n.o.s.; and organic compounds of arsenic, n.o.s.*	6.1	UN1556	I	6.1	T14, TP2, TP13, TP27	None	201	243	1 L	30 L	B	40, 137
				II	6.1	IB2, T11, TP2, TP13, TP27.	153	202	243	5 L	60 L	B	40, 137
				III	6.1	IB3, T7, TP2, TP28	153	203	241	60 L	220 L	B	40, 137

G	Arsenic compounds, solid, n.o.s. *inorganic, including arsenates, n.o.s.; arsenites, n.o.s.; arsenic sulfides, n.o.s.; and organic compounds of arsenic, n.o.s.*	6.1	UN1557	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	A	137
				II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	A	137
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	137
		*		*	*	*	*		*	*			
G	Barium compounds, n.o.s.	6.1	UN1564	II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	A	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
		*		*	*	*	*		*	*			
G	Beryllium compounds, n.o.s.	6.1	UN1566	II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	A	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
		*		*	*	*	*		*	*			
G	Bromates, inorganic, aqueous solution, n.o.s.	5.1	UN3213	II	5.1	350, IB2, T4, TP1	152	202	242	1 L	5 L	B	56, 58, 133
				III	5.1	350, IB2, T4, TP1	152	203	241	2.5 L	30 L	B	56, 58, 133
G	Bromates, inorganic, n.o.s.	5.1	UN1450	II	5.1	350, IB8, IP2, IP4, T3, TP33.	152	212	242	5 kg	25 kg	A	56, 58
		*		*	*	*	*		*	*			
	tert-Butyl isocyanate	6.1	UN2484	I	6.1, 3	1, B9, B14, B30, B72, T20, TP2, TP13, TP38, TP44.	None	226	244	Forbidden	Forbidden	D	40
		*		*	*	*	*		*	*			
G	Cadmium compounds	6.1	UN2570	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	A	
				II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	A	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
		*		*	*	*	*		*	*			
	Carbon dioxide, refrigerated liquid.	2.2	UN2187		2.2	T75, TP5	306	304	314, 315	50 kg	500 kg	D	
A W	Carbon dioxide, solid *or* Dry ice.	9	UN1845		None		217	217	240	200 kg	200 kg	C	40
	Carbon disulfide	3	UN1131	I	3, 6.1	B16, T14, TP2, TP7, TP13.	None	201	243	Forbidden	Forbidden	D	40, 78, 115
		*		*	*	*	*		*	*			
	Cartridges, power device.	1.4S	UN0323	II	1.4S	110, 347	63	62	62	25 kg	100kg	05	
		*		*	*	*	*		*	*			
D	Cartridges power device *(used to project fastening devices)*..	ORM–D	None		None	347	63	None	None	30 kg gross	30 kg gross	A	
		*		*	*	*	*		*	*			
	Charges, bursting, plastics bonded.	1.4S	UN0460	II	1.4S	347	None	62	None	25 kg	100 kg	05	

§ 172.101 HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification numbers	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***) Exceptions	Non-bulk	Bulk	(9) Quantity limitations (*see* §§ 173.27 and 175.75) Passenger aircraft/rail	Cargo aircraft only	(10) Vessel stowage Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
		*		*	*	*	*		*	*			
	Charges, explosive, commercial *without detonator.*	1.4S	UN0445	II	1.4S	347	None	62	None	25 kg	100 kg	05	
		*		*	*	*	*		*	*			
	Charges, shaped, *without detonator.*	1.4S	UN0441	II	1.4S	347	None	62	None	25 kg	100 kg	05	
		*		*	*	*	*		*	*			
G	Chlorates, inorganic, aqueous solution, n.o.s.	5.1	UN3210	II	5.1	351, IB2, T4, TP1	152	202	242	1 L	5 L	B	56, 58, 133
				III	5.1	351, IB2, T4, TP1	152	203	241	2.5 L	30 L	B	56, 58, 133
G	Chlorates, inorganic, n.o.s.	5.1	UN1461	II	5.1	351, A9, IB6, IP2, N34, T3, TP33.	152	212	242	5 kg	25 kg	A	56, 58
		*		*	*	*	*		*	*			
G	Chlorites, inorganic, n.o.s.	5.1	UN1462	II	5.1	352, A7, IB6, IP2, N34, T3, TP33.	152	212	242	5 kg	25 kg	A	56, 58
		*		*	*	*	*		*	*			
+	Chloroacetonitrile	6.1	UN2668	I	6.1, 3	2, B9, B14, B32, IB9, T20, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	A	12, 40, 52
		*		*	*	*	*		*	*			
+	Chloropicrin	6.1	UN1580	I	6.1	2, B7, B9, B14, B32, B46, T22, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	40
		*		*	*	*	*		*	*			
G	Chloropicrin mixtures, n.o.s.	6.1	UN1583	I	6.1	5	None	201	243	Forbidden	Forbidden	C	40
				II	6.1	IB2	153	202	243	Forbidden	Forbidden	C	40
				III	6.1	IB3	153	203	241	Forbidden	Forbidden	C	40
		*		*	*	*	*		*	*			
	Chlorosilanes, corrosive, flammable, n.o.s.	8	UN2986	II	8, 3	T14, TP2, TP7, TP13, TP27.	None	206	243	Forbidden	30 L	C	40
	Chlorosilanes, corrosive, n.o.s.	8	UN2987	II	8	B2, T14, TP2, TP7, TP13, TP27.	None	206	242	Forbidden	30 L	C	40
		*		*	*	*	*		*	*			
G	Chlorosilanes, toxic, corrosive, flammable, n.o.s.	6.1	UN3362	II	6.1, 3, 8	T14, TP2, TP7, TP13, TP27.	None	206	243	1 L	30 L	C	40, 125
G	Chlorosilanes, toxic, corrosive, n.o.s.	6.1	UN3361	II	6.1, 8	T14, TP2, TP7, TP13, TP27.	None	206	243	1 L	30 L	C	40
		*		*	*	*	*		*	*			
G	Compressed gas, n.o.s	2.2	UN1956		2.2		306, 307	302, 305	314, 315	75 kg	150 kg	A	

		*		*	*	*	*	*	*	*				
	Crotonaldehyde *or* Crotonaldehyde, stabilized.	6.1	UN1143	I	6.1, 3	2, 175, B9, B14, B32, B77, T20, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	40
		*		*	*	*	*	*	*	*				
G	Cyanide solutions, n.o.s.	6.1	UN1935	I	6.1	B37, T14, TP2, TP13, TP27.	None	201	243	1 L	30 L	B	40, 52
				II	6.1	IB2, T11, TP2, TP13, TP27.	153	202	243	5 L	60 L	A	40, 52
				III	6.1	IB3, T7, TP2, TP13, TP28.	153	203	241	60 L	220 L	A	40, 52
		*		*	*	*	*	*	*	*				
	Detonators, electric *for blasting.*	1.4S	UN0456	II	1.4S	347	63(f), 63(g)	62	None	25 kg	100 kg	05	
		*		*	*	*	*	*	*	*				
	Detonators for ammunition.	1.4S	UN0366	II	1.4S	347	None	62	None	25 kg	100 kg	05	
		*		*	*	*	*	*	*	*				
	Detonators, non-electric *for blasting.*	1.4S	UN0455	II	1.4S	347	63(f), 63(g)	62	None	25 kg	100 kg	05	
		*		*	*	*	*	*	*	*				
	Dibenzyldichlorosilane	8	UN2434	II	8	B2, T10, TP2, TP7, TP13.	154	206	242	Forbidden	30 L	C	40
		*		*	*	*	*	*	*	*				
G	Elevated temperature liquid, flammable, n.o.s., *with flash point above 37.8 C, at or above its flash point.*	3	UN3256	III	3	IB1, T3, TP3, TP29	None	None	247	Forbidden	Forbidden	A	
G	Elevated temperature liquid, n.o.s., *at or above 100 C and below its flash point (including molten metals, molten salts, etc.).*	9	UN3257	III	9	IB1, T3, TP3, TP29	None	None	247	Forbidden	Forbidden	A	85
G	Elevated temperature solid, n.o.s., *at or above 240 C, see § 173.247(h)(4).*	9	UN3258	III	9		247(h)(4)	None	247	Forbidden	Forbidden	A	85
		*		*	*	*	*	*	*	*				
G	Environmentally hazardous substance, solid, n.o.s.	9	UN3077	III	9	8, 146, 335, A112, B54, IB8, IP3, N20, T1, TP33.	155	213	240	No limit	No limit	A	
		*		*	*	*	*	*	*	*				
	Ethanol *or* Ethyl alcohol *or* Ethanol solutions *or* Ethyl alcohol solutions.	3	UN1170	II	3	24, IB2, T4, TP1	4b, 150	202	242	5 L	60 L	A	
				III	3	24, B1, IB3, T2, TP1	4b, 150	203	242	60 L	220 L	A	
		*		*	*	*	*	*	*	*				
+	Ethyl isocyanate	6.1	UN2481	I	6.1, 3	1, B9, B14, B30, T20, TP2, TP13, TP38, TP44.	None	226	244	Forbidden	Forbidden	D	40, 52

§ 172.101 HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification numbers	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations (*see* §§ 173.27 and 175.75)		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
		*		*	*	*	*		*	*			
	Ethylene oxide *or* Ethylene oxide with nitrogen *up to a total pressure of 1 MPa (10 bar) at 50 degrees C.*	2.3	UN1040		2.3, 2.1	4, 342, T50, TP20	None	323	323	Forbidden	Forbidden	D	40
		*		*	*	*	*		*	*			
G	Fluorosilicates, n.o.s	6.1	UN2856	III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	52
		*		*	*	*	*		*	*			
	Helium, refrigerated liquid *(cryogenic liquid).*	2.2	UN1963		2.2	T75, TP5	320	316	318	50 kg	500 kg	D	
		*		*	*	*	*		*	*			
	Hydrogen in a metal hydride storage system *or* Hydrogen in a metal hydride storage system contained in equipment *or* Hydrogen in a metal hydride storage system packed with equipment.	2.1	UN3468		2.1	167	None	311	None	Forbidden	100 kg gross.	D	
		*		*	*	*	*		*	*			
G	Hypochlorites, inorganic, n.o.s.	5.1	UN3212	II	5.1	349, A9, IB8, IP2, IP4, T3, TP33.	152	212	240	5 kg	25 kg	D	4, 48, 52, 56, 58, 69, 106, 116, 118
		*		*	*	*	*		*	*			
+	Isobutyl isocyanate	6.1	UN2486	I	6.1, 3	1, B9, B14, B30, T20, TP2, TP13, TP27.	None	226	244	Forbidden	Forbidden	D	40
		*		*	*	*	*		*	*			
	Isopropanol *or* Isopropyl alcohol.	3	UN1219	II	3	IB2, T4, TP1	4b, 150	202	242	5 L	60 L	B	
		*		*	*	*	*		*	*			
+	Isopropyl isocyanate	6.1	UN2483	I	6.1, 3	1, B9, B14, B30, T20, TP2, TP13, TP38, TP44.	None	226	244	Forbidden	Forbidden	D	40
		*		*	*	*	*		*	*			
	Krypton, refrigerated liquid *(cryogenic liquid).*	2.2	UN1970		2.2	T75, TP5	320	None	None	50 kg	500 kg	D	
		*		*	*	*	*		*	*			
G	Lead compounds, soluble, n.o.s.	6.1	UN2291	III	6.1	138, IB8, IP3, T1, TP33.	153	213	240	100 kg	200 kg	A	

		*		*	*	*	*	*	*	*					
	Medicine, liquid, flammable, toxic, n.o.s.	3	UN3248	II	3, 6.1	IB2	150	202	243	1 L	60 L	B	40
				III	3, 6.1	IB3	150	203	242	60 L	220 L	A	
	Medicine, liquid, toxic, n.o.s.	6.1	UN1851	II	6.1		153	202	243	5 L	60 L	C	40
				III	6.1		153	203	241	60 L	220 L	C	40
	Medicine, solid, toxic, n.o.s.	6.1	UN3249	II	6.1	T3, TP33	153	212	242	25 kg	100 kg	C	40
				III	6.1	T3, TP33	153	213	240	100 kg	200 kg	C	40
		*		*	*	*	*	*	*	*					
G	Mercury compound, liquid, n.o.s.	6.1	UN2024	I	6.1		None	201	243	1 L	30 L	B	40
				II	6.1	IB2	153	202	243	5 L	60 L	B	40
				III	6.1	IB3	153	203	241	60 L	220 L	B	40
G	Mercury compound, solid, n.o.s.	6.1	UN2025	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	A	
				II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	A	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
		*		*	*	*	*	*	*					
G	Metal catalyst, dry	4.2	UN2881	I	4.2	N34, T21, TP7, TP33	None	187	None	Forbidden	Forbidden	C	
				II	4.2	IB6, IP2, N34, T3, TP33.	None	187	242	Forbidden	50 kg	C	
				III	4.2	IB8, IP3, N34, T1, TP33.	None	187	241	25 kg	100 kg	C	
G	Metal catalyst, wetted *with a visible excess of liquid.*	4.2	UN1378	II	4.2	A2, A8, IB1, N34, T3, TP33.	None	212	None	Forbidden	50 kg	C	
		*		*	*	*	*	*	*					
+	Methacrylonitrile, stabilized.	6.1	UN3079	I	6.1, 3	2, B9, B14, B32, T20, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	12, 40, 48
		*		*	*	*	*	*	*					
+	Methoxymethyl isocyanate.	6.1	UN2605	I	6.1, 3	1, B9, B14, B30, T20, TP2, TP13, TP38, TP44.	None	226	244	Forbidden	Forbidden	D	40
		*		*	*	*	*	*	*					
	Methyl bromide and ethylene dibromide mixtures, liquid.	6.1	UN1647	I	6.1	2, B9, B14, B32, N65, T20, TP2, TP13, TP38, TP44.	None	227	244	Forbidden	Forbidden	D	40
		*		*	*	*	*	*	*					
	Methyl iodide	6.1	UN2644	I	6.1	2, B9, B14, B32, T20, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	12, 40
		*		*	*	*	*	*	*					
	Methyl isothiocyanate	6.1	UN2477	I	6.1, 3	2, B9, B14, B32, T20, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	40
		*		*	*	*	*	*	*					
	Methyl orthosilicate	6.1	UN2606	I	6.1, 3	2, B9, B14, B32, T20, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	40
		*		*	*	*	*	*	*					
	Methylphenyldichlorosilane.	8	UN2437	II	8	T10, TP2, TP7, TP13	None	206	242	Forbidden	30 L	C	40

§ 172.101 HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification numbers	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***) Exceptions	Non-bulk	Bulk	(9) Quantity limitations (*see* §§ 173.27 and 175.75) Passenger aircraft/rail	Cargo aircraft only	(10) Vessel stowage Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
		*		*	*	*	*		*	*			
+	Motor fuel anti-knock mixtures.	6.1	UN1649	I	6.1	14, B9, B90, T14, TP2, TP13.	None	201	244	Forbidden	30 L	D	25, 40
		*		*	*	*	*		*	*			
	Neon, refrigerated liquid *(cryogenic liquid).*	2.2	UN1913		2.2	T75, TP5	320	316	None	50 kg	500 kg	D	
		*		*	*	*	*		*	*			
	Nickel carbonyl	6.1	UN1259	I	6.1, 3	1	None	198	None	Forbidden	Forbidden	D	40, 78
		*		*	*	*	*		*	*			
G	Nicotine compounds, liquid, n.o.s. *or* Nicotine preparations, liquid, n.o.s.	6.1	UN3144	I	6.1	A4	None	201	243	1 L	30 L	B	40
				II	6.1	IB2, T11, TP2, TP27	153	202	243	5 L	60 L	B	40
				III	6.1	IB3, T7, TP1, TP28	153	203	241	60 L	220 L	B	40
G	Nicotine compounds, solid, n.o.s. *or* Nicotine preparations, solid, n.o.s.	6.1	UN1655	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	B	
				II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	A	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
		*		*	*	*	*		*	*			
G	Nitrites, inorganic, aqueous solution, n.o.s.	5.1	UN3219	II	5.1	IB1, T4, TP1	152	202	242	1 L	5 L	B	46, 56, 58, 133
				III	5.1	IB2, T4, TP1	152	203	241	2.5 L	30 L	B	46, 56, 58, 133
G	Nitrites, inorganic, n.o.s.	5.1	UN2627	II	5.1	33, IB8, IP2, IP4, T3, TP33.	152	212	None	5 kg	25 kg	A	46, 56, 58, 133
		*		*	*	*	*		*	*			
	Nitrogen, refrigerated liquid *cryogenic liquid.*	2.2	UN1977		2.2	345, 346, T75, TP5	320	316	318	50 kg	500 kg	D	
		*		*	*	*	*		*	*			
	Nitrous oxide, refrigerated liquid.	2.2	UN2201		2.2, 5.1	B6, T75, TP5, TP22	None	304	314, 315	Forbidden	Forbidden	D	40
		*		*	*	*	*		*	*			
G	Organometallic substance, liquid, pyrophoric.	4.2	UN3392	I	4.2	B11, T21, TP2, TP7, TP36.	None	181	244	Forbidden	Forbidden	D	78
G	Organometallic substance, liquid, pyrophoric, water-reactive.	4.2	UN3394	I	4.2, 4.3	B11, T21, TP2, TP7, TP36.	None	181	244	Forbidden	Forbidden	D	78
G	Organometallic substance, liquid, water-reactive.	4.3	UN3398	I	4.3	T13, TP2, TP7, TP36	None	201	244	Forbidden	1 L	E	40, 52

				II	4.3	IB1, T7, TP2, TP7, TP36.	None	202	243	1 L	5 L	E	40, 52
				III	4.3	IB2, T7, TP2, TP7, TP36.	None	203	242	5 L	60 L	E	40, 52
G	Organometallic substance, liquid, water-reactive, flammable.	4.3	UN3399	I	4.3, 3	T13, TP2, TP7, TP36	None	201	244	Forbidden	1 L	D	40, 52
				II	4.3, 3	IB1, IP2, T7, TP2, TP7, TP36.	None	202	243	1 L	5 L	D	40, 52
				III	4.3, 3	IB2, IP4, T7, TP2, TP7, TP36.	None	203	242	5 L	60 L	E	40, 52
G	Organometallic substance, solid, pyrophoric.	4.2	UN3391	I	4.2	T21, TP7, TP33, TP36	None	187	244	Forbidden	Forbidden	D	
G	Organometallic substance, solid, pyrophoric, water-reactive.	4.2	UN3393	I	4.2, 4.3	B11, T21, TP7, TP33, TP36.	None	187	244	Forbidden	Forbidden	D	52
G	Organometallic substance, solid, self-heating.	4.2	UN3400	II	4.2	IB6, T3, TP33, TP36	None	212	242	15 kg	50 kg	C	
				III	4.2	IB8, T1, TP33, TP36	None	213	242	25 kg	100 kg	C	
G	Organometallic substance, solid, water-reactive.	4.3	UN3395	I	4.3	N40, T9, TP7, TP33, TP36.	None	211	242	Forbidden	15 kg	E	40, 52
				II	4.3	IB4, T3, TP33, TP36	151	212	242	15 kg	50 kg	E	40, 52
				III	4.3	IB6, T1, TP33, TP36	151	213	241	25 kg	100 kg	E	40, 52
G	Organometallic substance, solid, water-reactive, flammable.	4.3	UN3396	I	4.3, 4.1	N40, T9, TP7, TP33, TP36.	None	211	242	Forbidden	15 kg	E	40, 52
				II	4.3, 4.1	IB4, T3, TP33, TP36	151	212	242	15 kg	50 kg	E	40, 52
				III	4.3, 4.1	IB6, T1, TP33, TP36	151	213	241	25 kg	100 kg	E	40, 52
G	Organometallic substance, solid, water-reactive, self-heating.	4.3	UN3397	I	4.3, 4.2	N40, T9, TP7, TP33, TP36.	None	211	242	Forbidden	15 kg	E	40, 52
				II	4.3, 4.2	IB4, T3, TP33, TP36	None	212	242	15 kg	50 kg	E	40, 52
				III	4.3, 4.2	IB6, T1, TP33, TP36	None	213	241	25 kg	100 kg	E	40, 52
	*		*	*	*	*	*	*	*				
	Oxygen, compressed	2.2	UN1072		2.2, 5.1	110, A14	306	302	314, 315	75 kg	150 kg	A	
	*		*	*	*	*	*	*	*				
G	Permanganates, inorganic, aqueous solution, n.o.s.	5.1	UN3214	II	5.1	26, 353, IB2, T4, TP1	152	202	242	1 L	5 L	D	56, 58, 133, 138
G	Permanganates, inorganic, n.o.s.	5.1	UN1482	II	5.1	26, 353, A30, IB6, IP2, T3, TP33.	152	212	242	5 kg	25 kg	D	56, 58, 138
				III	5.1	26, 353, A30, IB8, IP3, T1, TP33.	152	213	240	25 kg	100 kg	D	56, 58, 138
	*		*	*	*	*	*	*	*				
	Pentaerythrite tetranitrate *or* Pentaerythritol tetranitrate *or* PETN, *with not less than 7 percent wax by mass.*	1.1D	UN0411	II	1.1D	120	None	62	None	Forbidden	Forbidden	10	
	*		*	*	*	*	*	*	*				
	Petroleum crude oil	3	UN1267	I	3	144, 357, T11, TP1, TP8.	150	201	243	1 L	30 L	E	
				II	3	144, 357, IB2, T4, TP1, TP8.	150	202	242	5 L	60 L	B	
				III	3	144, 357, B1, IB3, T2, TP1.	150	203	242	60 L	220 L	A	

§ 172.101 HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification numbers	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations (*see* §§ 173.27 and 175.75)		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	*	*	*	*	*	*	*	*	*	*	*	*	*
	Phenyl mercaptan	6.1	UN2337	I	6.1, 3	2, B9, B14, B32, B77, T20, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	40, 52
G	Phenylmercuric compounds, n.o.s.	6.1	UN2026	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	A	
				II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	A	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
	*	*	*	*	*	*	*	*	*	*	*	*	*
+	Phosphorous oxychloride.	6.1	UN1810	I	6.1, 8	2, B9, B14, B32, B77, N34, T20, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	40
	*	*	*	*	*	*	*	*	*	*	*	*	*
	Polyester resin kit	3	UN3269		3	40, 149	165	165	None	5 kg	5 kg	B	
	*	*	*	*	*	*	*	*	*	*	*	*	*
	Potassium nitrate	5.1	UN1486	III	5.1	A1, A29, IB8, IP3, T1, TP33, W1.	152	213	240	25 kg	100 kg	A	
	*	*	*	*	*	*	*	*	*	*	*	*	*
	Powder, smokeless	1.4C	UN0509		1.4C		None	62	None	Forbidden	75 kg	06	
	*	*	*	*	*	*	*	*	*	*	*	*	*
	n-Propyl isocyanate	6.1	UN2482	I	6.1, 3	1, B9, B14, B30, T20, TP2, TP13, TP38, TP44.	None	226	244	Forbidden	Forbidden	D	40
	*	*	*	*	*	*	*	*	*	*	*	*	*
G	Pyrophoric liquid, inorganic, n.o.s.	4.2	UN3194	I	4.2		None	181	244	Forbidden	Forbidden	D	78
G	Pyrophoric liquids, organic, n.o.s.	4.2	UN2845	I	4.2	B11, T22, TP2, TP7	None	181	244	Forbidden	Forbidden	D	78
	*	*	*	*	*	*	*	*	*	*	*	*	*
G	Selenates *or* Selenites	6.1	UN2630	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	E	
	*	*	*	*	*	*	*	*	*	*	*	*	*
G	Selenium compound, liquid, n.o.s.	6.1	UN3440	I	6.1	T14, TP2, TP27	None	201	243	1 L	30 L	B	
				II	6.1	IB2, T11, TP2, TP27	153	202	243	5 L	60 L	B	
				III	6.1	IB3, T7, TP1, TP28	153	203	241	60 L	220 L	A	
G	Selenium compound, solid, n.o.s.	6.1	UN3283	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	B	
				II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	B	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
	*	*	*	*	*	*	*	*	*	*	*	*	*
	Silicon tetrachloride	8	UN1818	II	8	A3, A6, B2, B6, T10, TP2, TP7, TP13.	None	202	242	Forbidden	30 L	C	40

		*		*	*	*	*	*	*	*					
	Sodium nitrate	5.1	UN1498	III	5.1	A1, A29, IB8, IP3, T1, TP33, W1.	152	213	240	25 kg	100 kg	A	
	Sodium nitrate and potassium nitrate mixtures.	5.1	UN1499	III	5.1	A1, A29, IB8, IP3, T1, TP33, W1.	152	213	240	25 kg	100 kg	A	
		*		*	*	*	*	*	*	*					
+	Sulfuryl chloride	6.1	UN1834	I	6.1, 8	1, B6, B9, B10, B14, B30, B77, N34, T22, TP2, TP13, TP38, TP44.	None	226	244	Forbidden	Forbidden	D	40
		*		*	*	*	*	*	*	*					
G	Tellurium compound, solid, n.o.s.	6.1	UN3284	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	B	
				II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	B	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
		*		*	*	*	*	*	*	*					
+	Tetranitromethane	6.1	UN1510	I	6.1, 5.1	2, B32, T20, TP2, TP13, TP38, TP44.	None	227	None	Forbidden	Forbidden	D	40, 66
		*		*	*	*	*	*	*	*					
+	Thiophosgene	6.1	UN2474	I	6.1	2, B9, B14, B32, N33, N34, T20, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	40, 52
		*		*	*	*	*	*	*	*					
+	Titanium tetrachloride	6.1	UN1838	I	6.1, 8	2, B7, B9, B14, B32, B77, T20, TP2, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	D	40
		*		*	*	*	*	*	*	*					
G	Vanadium compound, n.o.s.	6.1	UN3285	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	B	
				II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	B	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
		*		*	*	*	*	*	*	*					
	Xenon, refrigerated liquid *(cryogenic liquids)*.	2.2	UN2591		2.2	T75, TP5	320	None	None	50 kg	500 kg	D	
		*		*	*	*	*	*	*	*					
	Zinc ammonium nitrite	5.1	UN1512	II	5.1	IB8, IP4, T3, TP33	None	212	242	5 kg	25 kg	E	
		*		*	*	*	*	*	*	*					

* * * * *

■ 8. In § 172.102, the following amendments are made:

■ a. In paragraph (c)(1), special provisions 77 and 157 are removed; special provisions 15, 40, 78, 110, 130, 134, 135, 149, 167 and 198 are revised; and special provisions 340, 342, 343, 345, 346, 347, 349, 350, 351, 352, 353, and 357 are added;

■ b. In paragraph (c)(2), special provision A59 is removed and special provision A112 is added;

■ c. In paragraph (c)(4), Table 1—IB Codes (IBC Codes) is revised;

■ d. Paragraph (c)(7)(ii) is revised and entries for "T9" and "T21" in the "Table of Portable Tank T Codes T1–T22" are revised;

■ d. In paragraph (c)(8), special provision TP36 is added; and

■ e. In paragraph (c)(9), special provision W1 is added.

The revisions and additions read as follows:

§ 172.102 Special provisions.

* * * * *

(c) * * *

(1) * * *

Code/Special Provisions

* * * * *

15 This entry applies to "Chemical kits" and "First aid kits" containing one or more compatible items of hazardous materials in boxes, cases, *etc.* that, for example, are used for medical, analytical, diagnostic, testing, or repair purposes. Kits that are carried on board transport vehicles for first aid or operating purposes are not subject to the requirements of this subchapter.

* * * * *

40 Polyester resin kits consist of two components: A base material (Class 3, Packing Group II or III) and an activator (organic peroxide), each separately packed in an inner packaging. The organic peroxide must be type D, E, or F, not requiring temperature control. The components may be placed in the same outer packaging provided they will not interact dangerously in the event of leakage. The Packing Group assigned will be II or III, according to the classification criteria for Class 3, applied to the base material. Additionally, unless otherwise excepted in this subchapter, polyester resin kits must be packaged in specification combination packagings based on the performance level of the base material contained within the kit.

* * * * *

78 This entry may not be used to describe compressed air which contains more than 23.5 percent oxygen. Compressed air containing greater than 23.5 percent oxygen must be shipped using the description "Compressed gas, oxidizing, n.o.s., UN3156."

* * * * *

110 Fire extinguishers transported under UN1044 and oxygen cylinders transported for emergency use under UN1072 may include installed actuating cartridges (cartridges, power device of Division 1.4C or 1.4S), without changing the classification of Division 2.2, provided the aggregate quantity of deflagrating (propellant) explosives does not exceed 3.2 grams per cylinder. Oxygen cylinders with installed actuating cartridges as prepared for transportation must have an effective means of preventing inadvertent activation.

* * * * *

130 "Batteries, dry, sealed, n.o.s.," commonly referred to as dry batteries, are hermetically sealed and generally utilize metals (other than lead) and/or carbon as electrodes. These batteries are typically used for portable power applications. The rechargeable (and some non-rechargeable) types have gelled alkaline electrolytes (rather than acidic) making it difficult for them to generate hydrogen or oxygen when overcharged and therefore, differentiating them from non-spillable batteries. Dry batteries specifically covered by another entry in the § 172.101 Table must be transported in accordance with the requirements applicable to that entry. For example, nickel-metal hydride batteries transported by vessel in certain quantities are covered by another entry (*see* Batteries, nickel-metal hydride, UN3496). Dry batteries not specifically covered by another entry in the § 172.101 Table are covered by this entry (*i.e.,* Batteries, dry, sealed, n.o.s.) and are not subject to requirements of this subchapter except for the following:

(a) *Incident reporting.* For transportation by aircraft, a telephone report in accordance with § 171.15(a) is required if a fire, violent rupture, explosion or dangerous evolution of heat (*i.e.,* an amount of heat sufficient to be dangerous to packaging or personal safety to include charring of packaging, melting of packaging, scorching of packaging, or other evidence) occurs as a direct result of a dry battery. For all modes of transportation, a written report submitted, retained, and updated in accordance with § 171.16 is required if a fire, violent rupture, explosion or dangerous evolution of heat occurs as a direct result of a dry battery or battery-powered device.

(b) *Preparation for transport.* Batteries and battery-powered device(s) containing batteries must be prepared and packaged for transport in a manner to prevent:

(1) A dangerous evolution of heat;

(2) Short circuits, including but not limited to the following methods:

(i) Packaging each battery or each battery-powered device when practicable, in fully enclosed inner packagings made of non-conductive material;

(ii) Separating or packaging batteries in a manner to prevent contact with other batteries, devices or conductive materials (*e.g.,* metal) in the packagings; or

(iii) Ensuring exposed terminals or connectors are protected with non-conductive caps, non-conductive tape, or by other appropriate means; and

(3) Damage to terminals. If not impact resistant, the outer packaging should not be used as the sole means of protecting the battery terminals from damage or short circuiting. Batteries must be securely cushioned and packed to prevent shifting which could loosen terminal caps or reorient the terminals to produce short circuits. Batteries contained in devices must be securely installed. Terminal protection methods include but are not limited to the following:

(i) Securely attaching covers of sufficient strength to protect the terminals;

(ii) Packaging the battery in a rigid plastic packaging; or

(iii) Constructing the battery with terminals that are recessed or otherwise protected so that the terminals will not be subjected to damage if the package is dropped.

(c) *Additional air transport requirements.* For a battery whose voltage (electrical potential) exceeds 9 volts—

(1) When contained in a device, the device must be packaged in a manner that prevents unintentional activation or must have an independent means of preventing unintentional activation (*e.g.,* packaging restricts access to activation switch, switch caps or locks, recessed switches, trigger locks, temperature sensitive circuit breakers, *etc.*); and

(2) An indication of compliance with this special provision must be provided by marking each package with the words "not restricted" or by including the words "not restricted" on a transport document such as an air waybill accompanying the shipment.

(d) *Used or spent battery exception.* Used or spent dry batteries of both non-rechargeable and rechargeable designs, with a marked rating up to 9-volt that are combined in the same package and

transported by highway or rail for recycling, reconditioning, or disposal are not subject to this special provision or any other requirement of the HMR. Note that batteries utilizing different chemistries (*i.e.,* those battery chemistries specifically covered by another entry in the § 172.101 Table) as well as dry batteries with a marked rating greater than 9-volt may not be combined with used or spent batteries in the same package. Note also that this exception does not apply to batteries that have been reconditioned for reuse.

* * * * *

134 This entry only applies to vehicles, machinery and equipment powered by wet batteries, sodium batteries, or lithium batteries that are transported with these batteries installed. Examples of such items are electrically-powered cars, lawn mowers, wheelchairs, and other mobility aids. Self-propelled vehicles or equipment that also contain an internal combustion engine must be consigned under the entry "Engine, internal combustion, flammable gas powered" or "Engine, internal combustion, flammable liquid powered" or "Vehicle, flammable gas powered" or "Vehicle, flammable liquid powered," as appropriate. These entries include hybrid electric vehicles powered by both an internal combustion engine and batteries. Additionally, self-propelled vehicles or equipment that contain a fuel cell engine must be consigned under the entries "Engine, fuel cell, flammable gas powered" or "Engine, fuel cell, flammable liquid powered" or "Vehicle, fuel cell, flammable gas powered" or "Vehicle, fuel cell, flammable liquid powered," as appropriate. These entries include hybrid electric vehicles powered by a fuel cell engine, an internal combustion engine, and batteries.

135 Internal combustion engines installed in a vehicle must be consigned under the entries "Vehicle, flammable gas powered" or "Vehicle, flammable liquid powered," as appropriate. These entries include hybrid electric vehicles powered by both an internal combustion engine and wet, sodium or lithium batteries installed. If a fuel cell engine is installed in a vehicle, the vehicle must be consigned using the entries "Vehicle, fuel cell, flammable gas powered" or "Vehicle, fuel cell, flammable liquid powered," as appropriate. These entries include hybrid electric vehicles powered by a fuel cell, an internal combustion engine, and wet, sodium or lithium batteries installed.

* * * * *

149 Except for transportation by aircraft, when transported as a limited quantity or a consumer commodity, the maximum net capacity specified in § 173.150(b)(2) of this subchapter for inner packagings may be increased to 5 L (1.3 gallons).

* * * * *

167 These storage systems must always be considered as containing hydrogen. A metal hydride storage system installed in or intended to be installed in a vehicle or equipment or in vehicle or equipment components must be approved for transport by the Associate Administrator. A copy of the approval must accompany each shipment.

* * * * *

198 Nitrocellulose solutions containing not more than 20% nitrocellulose may be transported as paint, perfumery products, or printing ink, as applicable, provided the nitrocellulose contains no more 12.6% nitrogen (by dry mass). *See* UN1210, UN1263, UN1266, UN3066, UN3469, and UN3470.

* * * * *

340 This entry applies only to the vessel transportation of nickel-metal hydride batteries as cargo. Nickel-metal hydride button cells or nickel-metal hydride cells or batteries packed with or contained in battery-powered devices transported by vessel are not subject to the requirements of this special provision. *See* "Batteries, dry, sealed, n.o.s." in the § 172.101 Hazardous Materials Table (HMT) of this part for transportation requirements for nickel-metal hydride batteries transported by other modes and for nickel-metal hydride button cells or nickel-metal hydride cells or batteries packed with or contained in battery-powered devices transported by vessel. Nickel-metal hydride batteries subject to this special provision are subject only to the following requirements: (1) The batteries must be prepared and packaged for transport in a manner to prevent a dangerous evolution of heat, short circuits, and damage to terminals; and are subject to the incident reporting in accordance with § 171.16 of this subchapter if a fire, violent rupture, explosion or dangerous evolution of heat (*i.e.,* an amount of heat sufficient to be dangerous to packaging or personal safety to include charring of packaging, melting of packaging, scorching of packaging, or other evidence) occurs as a direct result of a nickel metal hydride battery; and (2) when loaded in a cargo transport unit in a total quantity of 100 kg gross mass or more, the shipping paper requirements of Subpart C of this part, the manifest requirements of § 176.30 of this subchapter, and the vessel stowage requirements assigned to this entry in Column (10) of the § 172.101 Hazardous Materials Table.

* * * * *

342 Glass inner packagings (such as ampoules or capsules) intended only for use in sterilization devices, when containing less than 30 mL of ethylene oxide per inner packaging with not more than 300 mL per outer packaging, may be transported in accordance with § 173.4a of this subchapter, irrespective of the restriction of § 173.4a(b) provided that:

a. After filling, each glass inner packaging must be determined to be leak-tight by placing the glass inner packaging in a hot water bath at a temperature and for a period of time sufficient to ensure that an internal pressure equal to the vapor pressure of ethylene oxide at 55 °C is achieved. Any glass inner packaging showing evidence of leakage, distortion or other defect under this test must not be transported under the terms of this special provision;

b. In addition to the packaging required in § 173.4a, each glass inner packaging must be placed in a sealed plastic bag compatible with ethylene oxide and capable of containing the contents in the event of breakage or leakage of the glass inner packaging; and

c. Each glass inner packaging is protected by a means of preventing puncture of the plastic bag (*e.g.,* sleeves or cushioning) in the event of damage to the packaging (*e.g.,* by crushing).

343 A bulk packaging that emits hydrogen sulfide in sufficient concentration that vapors evolved from the crude oil can present an inhalation hazard must be marked as specified in § 172.327of this part.

345 "Nitrogen, refrigerated liquid (*cryogenic liquid*), UN1977" transported in open cryogenic receptacles with a maximum capacity of 1 L are not subject to the requirements of this subchapter. The receptacles must be constructed with glass double walls having the space between the walls vacuum insulated and each receptacle must be transported in an outer packaging with sufficient cushioning and absorbent materials to protect the receptacle from damage.

346 "Nitrogen, refrigerated liquid (*cryogenic liquid*), UN1977" transported in accordance with the requirements for open cryogenic receptacles in § 173.320 and this special provision are not subject to any other requirements of this subchapter. The receptacle must contain no hazardous materials other than the

liquid nitrogen which must be fully absorbed in a porous material in the receptacle.

347 Effective July 1, 2011, for transportation by aircraft, this entry may only be used if the results of Test series 6(d) of Part I of the UN Manual of Tests and Criteria (IBR, *see* § 171.7 of this subchapter) have demonstrated that any hazardous effects from accidental functioning are confined to within the package. Effective January 1, 2012, for transportation by vessel, this entry may only be used if the results of Test Series 6(d) of Part I of the UN Manual of Tests and Criteria (IBR, *see* § 171.7 of this subchapter) have demonstrated that any hazardous effects from accidental functioning are confined to within the package. Effective January 1, 2014, for transportation domestically by highway or rail, this entry may only be used if the results of Test Series 6(d) of Part I of the UN Manual of Tests and Criteria (IBR, *see* § 171.7 of this subchapter) have demonstrated that any hazardous effects from accidental functioning are confined to within the package. Testing must be performed or witnessed by a person who is approved by the Associate Administrator (*see* § 173.56(b) of this subchapter). All successfully conducted tests or reassignment to another compatibility group require the issuance of a new or revised approval by the Associate Administrator prior to transportation on or after the dates specified for each authorized mode of transport in this special provision.

349 Mixtures of hypochlorite with an ammonium salt are forbidden for transport. A hypochlorite solution, UN1791, is a Class 8 corrosive material.

350 Ammonium bromate, ammonium bromate aqueous solutions, and mixtures of a bromate with an ammonium salt are forbidden for transport.

351 Ammonium chlorate, ammonium chlorate aqueous solutions, and mixtures of a chlorate with an ammonium salt are forbidden for transport.

352 Ammonium chlorite, ammonium chlorite aqueous solutions, and mixtures of a chlorite with an ammonium salt are forbidden for transport.

353 Ammonium permanganate, ammonium permanganate aqueous solutions, and mixtures of a permanganate with an ammonium salt are forbidden for transport.

357 A bulk packaging that emits hydrogen sulfide in sufficient concentration that vapors evolved from the crude oil can present an inhalation hazard must be marked as specified in § 172.327 of this part.

(2) * * *

Code/Special Provisions

* * * * *

A112 Notwithstanding the quantity limits shown in Column (9A) and (9B) for this entry, the following IBCs are authorized for transportation aboard passenger and cargo-only aircraft. Each IBC may not exceed a maximum net quantity of 1,000 kg:

a. Metal: 11A, 11B, 11N, 21A, 21B and 21N

b. Rigid plastics: 11H1, 11H2, 21H1 and 21H2

c. Composite with plastic inner receptacle: 11HZ1, 11HZ2, 21HZ1 and 21HZ2

d. Fiberboard: 11G

e. Wooden: 11C, 11D and 11F (with inner liners)

f. Flexible: 13H2, 13H3, 13H4, 13H5, 13L2, 13L3, 13L4, 13M1 and 13M2 (flexible IBCs must be sift-proof and water resistant or must be fitted with a sift-proof and water resistant liner).

* * * * *

(4) * * *

TABLE 1—IB CODES (IBC CODES)

IBC code	Authorized IBCs
IB1	*Authorized IBCs:* Metal (31A, 31B and 31N). *Additional Requirement:* Only liquids with a vapor pressure less than or equal to 110 kPa at 50 °C (1.1 bar at 122 °F), or 130 kPa at 55 °C (1.3 bar at 131 °F) are authorized.
IB2	*Authorized IBCs:* Metal (31A, 31B and 31N); Rigid plastics (31H1 and 31H2); Composite (31HZ1). *Additional Requirement:* Only liquids with a vapor pressure less than or equal to 110 kPa at 50 °C (1.1 bar at 122 °F), or 130 kPa at 55 °C (1.3 bar at 131 °F) are authorized.
IB3	*Authorized IBCs:* Metal (31A, 31B and 31N); Rigid plastics (31H1 and 31H2); Composite (31HZ1 and 31HA2, 31HB2, 31HN2, 31HD2 and 31HH2). *Additional Requirement:* Only liquids with a vapor pressure less than or equal to 110 kPa at 50 °C (1.1 bar at 122 °F), or 130 kPa at 55 °C (1.3 bar at 131 °F) are authorized, except for UN2672 (also *see* Special Provision IP8 in Table 2 for UN2672).
IB4	*Authorized IBCs:* Metal (11A, 11B, 11N, 21A, 21B and 21N).
IB5	*Authorized IBCs:* Metal (11A, 11B, 11N, 21A, 21B and 21N); Rigid plastics (11H1, 11H2, 21H1, 21H2, 31H1 and 31H2); Composite (11HZ1, 21HZ1 and 31HZ1).
IB6	*Authorized IBCs:* Metal (11A, 11B, 11N, 21A, 21B and 21N); Rigid plastics (11H1, 11H2, 21H1, 21H2, 31H1 and 31H2); Composite (11HZ1, 11HZ2, 21HZ1, 21HZ2, 31HZ1 and 31HZ2). *Additional Requirement:* Composite IBCs 11HZ2 and 21HZ2 may not be used when the hazardous materials being transported may become liquid during transport.
IB7	*Authorized IBCs:* Metal (11A, 11B, 11N, 21A, 21B and 21N); Rigid plastics (11H1, 11H2, 21H1, 21H2, 31H1 and 31H2); Composite (11HZ1, 11HZ2, 21HZ1, 21HZ2, 31HZ1 and 31HZ2); Wooden (11C, 11D and 11F). *Additional Requirement:* Liners of wooden IBCs must be sift-proof.
IB8	*Authorized IBCs:* Metal (11A, 11B, 11N, 21A, 21B and 21N); Rigid plastics (11H1, 11H2, 21H1, 21H2, 31H1 and 31H2); Composite (11HZ1, 11HZ2, 21HZ1, 21HZ2, 31HZ1 and 31HZ2); Fiberboard (11G); Wooden (11C, 11D and 11F); Flexible (13H1, 13H2, 13H3, 13H4, 13H5, 13L1, 13L2, 13L3, 13L4, 13M1 or 13M2).
IB9	IBCs are only authorized if approved by the Associate Administrator.

* * * * *

(7) * * *

(ii) The following table specifies the portable tank requirements applicable to "T" Codes T1 through T22. Column 1 specifies the "T" Code. Column 2 specifies the minimum test pressure, in bar (1 bar = 14.5 psig), at which the periodic hydrostatic testing required by § 180.605 of this subchapter must be conducted. Column 3 specifies the section reference for minimum shell thickness or, alternatively, the minimum shell thickness value. Column 4 specifies the applicability of § 178.275(g)(3) of this subchapter for the pressure relief devices. When the word "Normal" is indicated, § 178.275(g)(3) of this subchapter does not apply. Column 5 references applicable requirements for bottom openings in part 178 of this

subchapter. "Prohibited" means bottom openings are prohibited, and "Prohibited for liquids" means bottom openings are authorized for solid material only. The table follows:

TABLE OF PORTABLE TANK T CODES T1–T22

[Portable tank codes T1–T22 apply to liquid and solid hazardous materials of Classes 3 through 9 which are transported in portable tanks.]

Portable tank instruction	Minimum test pressure (bar)	Minimum shell thickness (in mm-reference steel) (*See* § 178.274(d))	Pressure relief requirements (*See* § 178.275(g))	Bottom opening requirements (*See* § 178.275(d))
(1)	(2)	(3)	(4)	(5)
*	*	*	*	*
T9	4	6 mm	Normal	Prohibited for liquids. § 178.275(d)(2)
*	*	*	*	*
T21	10	10 mm	Normal	Prohibited for liquids. § 178.275(d)(2)
*	*	*	*	*

* * * * *

(8) * * *

Code/Special Provisions

* * * * *

TP36 For material assigned this portable tank special provision, portable tanks used to transport such material may be equipped with fusible elements in the vapor space of the portable tank.

* * * * *

(9) * * *

Code/Special Provisions

W1 This substance in a non friable prill or granule form is not subject to the requirements of this subchapter when tested in accordance with the UN Manual of Test and Criteria (IBR, *see* § 171.7 of this subchapter) and is found to not meet the definition or criteria for inclusion in Division 5.1.

* * * * *

■ 9. In § 172.200, paragraph (b)(3) is revised to read as follows:

§ 172.200 Applicability.

* * * * *

(b) * * *

(3) A limited quantity package unless the material is offered or intended for transportation by air or vessel and, until December 31, 2013, a package of ORM–D material authorized by this subchapter in effect on October 1, 2010 when offered for transportation by highway or rail.

* * * * *

■ 10. In § 172.203, paragraph (b) is revised to read as follows:

§ 172.203 Additional description requirements.

* * * * *

(b) *Limited quantities.* When a shipping paper is required by this subchapter, the description for a material offered for transportation as "limited quantity," as authorized by this subchapter, must include the words "Limited Quantity" or "Ltd Qty" following the basic description.

* * * * *

■ 11. In § 172.300, paragraph (c) is added to read as follows:

§ 172.300 Applicability.

* * * * *

(c) Unless otherwise provided in a specific rule, stocks of preprinted packagings marked in accordance with this subpart prior to the effective date of a final rule may be continued in use, in the manner previously authorized, until depleted or for a one-year period subsequent to the compliance date of the marking amendment, whichever is less.

■ 12. In § 172.301, paragraph (a)(1) is revised to read as follows:

§ 172.301 General marking requirements for non-bulk packagings.

(a) *Proper shipping name and identification number.* (1) Except as otherwise provided by this subchapter, each person who offers a hazardous material for transportation in a non-bulk packaging must mark the package with the proper shipping name and identification number (preceded by "UN", "NA" or "ID," as appropriate) for the material as shown in the § 172.101 Table.

* * * * *

■ 13. In § 172.312, paragraph (c)(5) is revised to read as follows:

§ 172.312 Liquid hazardous materials in non-bulk packagings.

* * * * *

(c) * * *

(5) A non-bulk package with hermetically sealed inner packagings not exceeding 500 mL each.

* * * * *

■ 14. Section 172.315 is revised to read as follows:

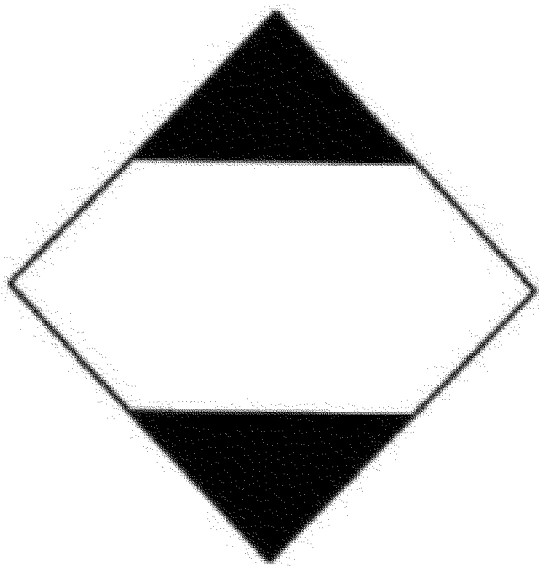
§ 172.315 Limited quantities.

(a) Except for transportation by aircraft or as otherwise provided in this subchapter, a package containing a limited quantity of hazardous material is not required to be marked with the proper shipping name and identification (ID) number when marked in accordance with the white square-on-point limited quantity marking as follows:

(1) The limited quantity marking must be durable, legible and of a size relative to the package that is readily visible. The marking must be applied on at least one side or one end of the outer packaging. The width of the border forming the square-on-point must be at least 2 mm and the minimum dimension of each side must be 100 mm unless the package size requires a reduced size marking that must be no less than 50 mm on each side. When intended for transportation by vessel, a cargo transport unit (*see* § 176.2 of this

subchapter) containing only limited quantity material must be suitably marked on one side or end of the exterior of the unit with an identical mark except that it must have minimum dimensions of 250 mm on each side.

(2) The top and bottom portions of the square-on-point and the border forming the square-on-point must be black and the center white or of a suitable contrasting background as follows:



(b) For transportation by aircraft, a limited quantity package conforming to Table 3 of § 173.27(f) of this subchapter must be marked as follows:

(1) The marking must be durable, legible and of a size relative to the package as to be readily visible. The marking must be applied on at least one side or one end of the outer packaging. The width of the border forming the square-on-point must be at least 2 mm and the minimum dimension of each side must be 100 mm unless the package size requires a reduced size marking that must be no less than 50 mm on each side.

(2) The top and bottom portions of the square-on-point and the border forming the square-on-point must be black and the center white or of a suitable contrasting background and the symbol "Y" must be black and located in the center of the square-on-point and be clearly visible as follows:

(c) As applicable, package markings required by this subpart (*e.g.,* technical name, "RQ") must be in association with the marking required by paragraph (a) or (b) of this section.

(d) *Transitional exception.* Except for transportation by aircraft, until December 31, 2013, a package properly marked in accordance with § 172.316 is not required to be marked with the limited quantity marking required by this section. For transportation by aircraft, until December 31, 2012, a package properly marked in accordance with § 172.316 is not required to be marked with the limited quantity marking required by this section.

■ 15. In § 172.316, paragraphs (a)(1) and (2) are revised to read as follows:

§ 172.316 Packagings containing materials classed as ORM–D.

(a) * * *

(1) Until December 31, 2012, ORM–D–AIR for an ORM–D that is prepared for air shipment and packaged in accordance with §§ 173.63, 173.150 through 173.155, 173.306 and the applicable requirements in § 173.27.

(2) Until December 31, 2013, ORM–D for an ORM–D that is packaged in accordance with §§ 173.63, 173.150 through 173.155 and 173.306.

* * * * *

■ 16. In § 172.322, paragraph (d)(4) is added to read as follows:

§ 172.322 Marine pollutants.

* * * * *

(d) * * *

(4) On a package of limited quantity material marked in accordance with § 172.315 of this part.

* * * * *

■ 17. In § 172.324,

■ a. The first sentence in paragraph (a) is revised;

■ b. Paragraph (b) is revised; and

■ c. Paragraph (c) is added.

The revisions and addition read as follows:

§ 172.324 Hazardous substances in non-bulk packagings.

* * * * *

(a) Except for packages of radioactive material labeled in accordance with § 172.403, if the proper shipping name of a material that is a hazardous substance does not identify the hazardous substance by name, the name of the hazardous substance must be marked on the package, in parentheses, in association with the proper shipping name. * * *

(b) The letters "RQ" must be marked on the package in association with the proper shipping name.

(c) A package of limited quantity material marked in accordance with § 172.315 must also be marked in accordance with the applicable requirements of this section.

■ 18. In § 172.326, in paragraph (a), a second sentence is added to read as follows:

§ 172.326 Portable tanks.

(a) *Shipping name.* * * * For transportation by vessel, the minimum height for a proper shipping name marked on a portable tank is 65 mm (2.5 inches).

* * * * *

■ 19. In Subpart D, § 172.327 is added to read as follows:

§ 172.327 Petroleum sour crude oil in bulk packaging.

A Bulk packaging used to transport petroleum crude oil containing hydrogen sulfide (*i.e.,* sour crude oil) in sufficient concentration that vapors evolved from the crude oil may present an inhalation hazard must include a marking, label, tag, or sign to warn of the toxic hazard as follows:

(a) The marking must be durable, legible and of a size relative to the package as to be readily visible and similar to the illustration shown in this paragraph with the minimum dimension of each side of the marking at least 100 mm (3.9 inches). The width of the border forming the square-on-point marking must be at least 5 mm. The marking must be displayed at each location (*e.g.,* manhole, loading head) where exposure to hydrogen sulfide vapors may occur.

(b) The border of the square-on-point must be black or red on a white or other suitable contrasting background. The symbol must be black and located in the center of the square-on-point and be clearly visible as follows:

(c) As an alternative to the marking required in (a) and (b) of this section, a label, tag, or sign may be displayed at each location (*e.g.,* manhole, loading head) where exposure to hydrogen sulfide vapors may occur. The label, tag, or sign must be durable, in English, and printed legibly and of a size relative to the package with a warning statement such as "Danger, Possible Hydrogen Sulfide Inhalation Hazard" to communicate the possible risk of exposure to harmful concentrations of hydrogen sulfide gas.

■ 20. In § 172.500, paragraph (b)(3) is revised to read as follows:

§ 172.500 Applicability of placarding requirements.

* * * * *

(b) * * *

(3) Hazardous materials authorized by this subchapter to be offered for transportation as a limited quantity when identified as such on a shipping paper in accordance with § 172.203(b) or when marked as such in accordance with § 172.315.

■ 21. In § 172.502, paragraph (b)(2) is revised to read as follows:

§ 172.502 Prohibited and permissive placarding.

* * * * *

(b) * * *

(2) The restrictions of paragraph (a) of this section do not apply to the display of a BIOHAZARD marking, a "HOT"

marking, a sour crude oil hazard marking, or an identification number on a white square-on-point configuration in accordance with §§ 172.323(c), 172.325(c), 172.327(a), or 172.336(b) of this part, respectively.

* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

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

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

■ 23. In § 173.4, paragraphs (a) introductory text and (c) are revised and paragraph (a)(1)(v) is added to read as follows:

§ 173.4 Small quantities for highway and rail.

(a) When transported domestically by highway or rail in conformance with this section, quantities of Division 2.2 (except aerosols with no subsidiary hazard), Class 3, Division 4.1, Division 4.2 (PG II and III), Division 4.3 (PG II and III), Division 5.1, Division 5.2, Division 6.1, Class 7, Class 8, and Class 9 materials are not subject to any other requirements when—

(1) * * *

(v) Thirty (30) mL water capacity (1.8 cubic inches) for authorized Division 2.2 materials.

* * * * *

(c) Packages which contain a Class 2 (other than those authorized in paragraph (a) of this section), Division 4.2 (PG I), or Division 4.3 (PG I) material conforming to paragraphs (a)(1) through (10) of this section may be offered for transportation or transported if approved by the Associate Administrator.

* * * * *

■ 24. In § 173.4a, paragraphs (a)(4) and (g)(3) are added and paragraphs (b)(1), (b)(5), and (d)(3) are revised to read as follows:

§ 173.4a Excepted quantities.

(a) * * *

(4) Packagings for which retention of liquid is a basic function must be capable of withstanding without leakage the pressure differential specified in § 173.27(c) of this part.

(b) * * *

(1) Division 2.2 material with no subsidiary hazard. An aerosol is not included as authorized Division 2.2 material;

* * * * *

(5) Division 5.2 materials only when contained in a chemical kit, first aid kit or a polyester resin kit;

* * * * *

(d) * * *

(3) For Division 5.2 material, 500 g (1.1 pounds) for solids or 500 mL (0.1 gallons) for liquids.

* * * * *

(g) * * *

(3) When packages of excepted quantities are contained in an overpack, and the package marking required by this section is not visible inside the overpack, the excepted quantities marking must also be placed on the overpack. Additionally, an overpack containing packages of excepted quantities is not required to be marked with the word "OVERPACK."

* * * * *

■ 25. In § 173.4b, paragraph (b) is added to read as follows:

§ 173.4b De minimis exceptions.

* * * * *

(b) Non-infectious specimens, such as specimens of mammals, birds, amphibians, reptiles, fish, insects and other invertebrates containing small quantities of Ethanol (UN1170), Formaldehyde solution, flammable (UN1198), Alcohols, n.o.s. (UN1987) and Isopropanol (UN1219) are not subject to the requirements of this subchapter provided the following packaging, marking and documentation provisions, as applicable, are met:

(1) The specimens are:

(i) Wrapped in a paper towel or cheesecloth moistened with alcohol or an alcohol solution and placed in a plastic bag that is heat-sealed. Any free liquid in the bag must not exceed 30 mL; or

(ii) Placed in vials or other rigid containers with no more than 30 mL of alcohol or alcohol solution. The containers are placed in a plastic bag that is heat-sealed;

(2) The bagged specimens are placed in another plastic bag with sufficient absorbent material to absorb the entire liquid contents inside the primary receptacle. The outer plastic bag is then heat-sealed;

(3) The completed bag is placed in a strong outer packaging with sufficient cushioning material that conforms to subpart B of part 173;

(4) The aggregate net quantity of flammable liquid in one outer packaging may not exceed 1 L; and

(5) The outer package must be legibly marked "Scientific research specimens, 49 CFR 173.4b applies."

(6) *Documentation.* (i) For transportation by highway or rail, no shipping paper is required.

(ii) For transport by air, a shipping paper is not required, except that, if a document such as an air waybill accompanies a shipment of specimens containing hazardous materials excepted under the terms of this section, the document must include the statement "Scientific research specimens, 49 CFR 173.4b applies" and the number of packages indicated.

(iii) For transport by vessel, a shipping paper is not required; however, the Dangerous Cargo Manifest must include the statement "Scientific research specimens, 49 CFR 173.4b applies" and the number of packages indicated. Vessel stowage is the same as for hazardous materials in excepted quantities.

(7) *Training.* Each person who offers or transports excepted quantities of hazardous materials must know about the requirements of this section.

(8) *Restrictions.* For transportation by aircraft, hazardous material packaged in accordance with this section may not be carried in checked or carry-on baggage by a passenger or crew member.

■ 26. In § 173.25, paragraph (a)(6) is added to read as follows:

§ 173.25 Authorized packagings and overpacks.

(a) * * *

(6) Where packages of limited quantity materials are overpacked and, until December 31, 2012 or December 31, 2013, packages bearing the ORM–D AIR or ORM–D marking, respectively, must be marked "OVERPACK" unless all marking required by this section are visible. Where packages of excepted quantities (*see* § 173.4a of this part) are overpacked and all required markings are not visible through the overpack, they must be repeated on the overpack. An overpack containing packages of excepted quantities is not required to be marked "OVERPACK."

* * * * *

■ 27. In § 173.27, remove paragraph (f) introductory text and add paragraphs (f)(1) through (3) and table 3 to read as follows:

§ 173.27 General requirements for transportation by aircraft.

* * * * *

(f) *Combination packagings.* (1) *Excepted quantities.* For authorized materials and inner and outer package quantity limits for combination packages of *excepted quantities* intended for transportation by aircraft, *see* § 173.4a of this part. Unless otherwise specified in this part, or in Subpart C of part 171 of this subchapter, when combination packagings are intended for transportation aboard an

aircraft, inner packagings must conform to the quantity limitations set forth in table 1 of this paragraph for transport aboard passenger-carrying aircraft and table 2 of this paragraph for transport aboard cargo-only aircraft.

(2) *Limited quantities.* (i) Unless otherwise specified in this part, or in Subpart C of Part 171 of this subchapter, when a limited quantity of authorized hazardous material packaged in a combination packaging is intended for transportation aboard an aircraft, the inner packagings must conform to the quantity limitations set forth in table 3 of this paragraph. Materials must be authorized for transportation aboard a passenger-carrying aircraft (*see* Column (9A) of the § 172.101 Hazardous Materials Table). Substances or articles *not* authorized as limited quantity by aircraft are:

(A) Those in Packing Group I;

(B) Class 1 (explosive) and Class 7 (radioactive) material;

(C) Divisions 2.1 (flammable gas) (except Aerosols (UN1950) and Receptacles, small (UN2037) without subsidiary risk) and Division 2.3 (toxic gas);

(D) Divisions 4.1 (self-reactive), 4.2 (spontaneously combustible) (primary or subsidiary risk), and 4.3 (dangerous when wet) (liquids);

(E) Division 5.2 (organic peroxide) (except when contained in a Chemical or First aid kit (UN3316) or Polyester resin kit (UN3269) (Types D, E and F non-temperature controlled only));

(F) Class 8 (corrosive) materials UN2794, UN2795, UN2803, UN2809, 3028; and

(G) All Class 9 (miscellaneous) materials *except for* UN1941, UN1990, UN2071, UN3077, UN3082, UN3316.

(ii) Effective January 1, 2012, packages must be marked with the limited quantity "Y" mark as prescribed in § 172.315 of this part when conforming to Table 3 of this paragraph. Until December 31, 2012, a package may instead be marked with the proper shipping name "Consumer commodity" and "ORM–D–AIR" (including "Charcoal, NA1361) if it contains a consumer commodity, as authorized by this subchapter in effect on October 1, 2010.

(iii) Strong outer packagings are required and a completed package may not exceed 30 kg (66 lbs) gross weight.

(iv) A secondary means of closure required for all liquids contained in inner packagings. If this requirement cannot be satisfied, the use of an intermediate and leakproof form of containment, such as a liner, is required.

(v) Packages must be capable of passing a 1.2 m drop test on to a rigid, non-resilient, flat and horizontal surface, in the position most likely to cause damage. The criteria for passing the test is that the outer packaging must not exhibit any damage affecting safety in transport and there must be no leakage from the inner packagings.

(vi) Each package must be capable of withstanding, without breakage or leakage of any inner packaging, a force applied to the top surface for a duration of 24 hours equivalent to the total weight of identical packages if stacked to a height of 3 m (including the test sample).

(vii) Except for UN3082, inner packagings of combination packagings containing liquids must be capable of passing the appropriate pressure differential test prescribed in paragraph (c) of this section.

(3) The tables are as follows:

* * * * *

TABLE 3—MAXIMUM NET QUANTITY OF EACH INNER PACKAGING FOR MATERIALS AUTHORIZED FOR TRANSPORTATION AS LIMITED QUANTITY BY AIRCRAFT

Hazard class or division	Maximum authorized net quantity *of each inner packaging*		Maximum authorized net quantity *of each outer package*	Notes
	Glass, earthenware or fiber inner packagings	Metal or plastic inner packagings		
Class 1				Forbidden. *See* § 173.63.
Class 2			30 kg Gross	*Authorized materials:* Aerosols (UN1950) in Divisions 2.1 and 2.2, and Receptacles, small (UN2037) in Divisions 2.1 and 2.2 without subsidiary risk and Fuel cells cartridges (UN3478, UN3479), *see* § 173.230 of this part.
Class 3	PG I: Forbidden.			
	PG II: 0.5L	PG II: 0.5L	PG II: 1L*	*Maximum net quantity per outer package with corrosive subsidiary risk (*e.g.,* UN2924, UN3286) is 0.5L. For Class 3 materials contained in a Polyester resin kit (UN3269), *see* § 173.165 of this part. For Fuel cell cartridges *containing flammable liquids* (UN3473), *see* § 173.230 of this part.
	PG III: 2.5L* *Corrosive subsidiary risk (*e.g.,* UN2924) or toxic (*e.g.,* UN1992) is 1L.	PG III: 5.0L* *Corrosive subsidiary risk (*e.g.,* UN2924) or toxic (*e.g.,* UN1992) is 1L.	PG III: 10L*	*Maximum net quantity per outer package with corrosive subsidiary risk (*e.g.,* UN2924) is 1L and toxic subsidiary risk (*e.g.,* UN1992) is 2L.
Division 4.1 (does not include self-reactive material).	PG I: Forbidden.			
	PG II: 0.5 kg	PG II: 0.5 kg	PG II: 5 kg*	*Maximum net quantity per outer package with toxic subsidiary risk (*e.g.,* UN3179) is 1 kg.
	PG III: 1 kg	PG III: 1 kg	PG III: 10 kg*	*Maximum net quantity per outer package with corrosive subsidiary risk (*e.g.,* UN3180) is 5 kg.

TABLE 3—MAXIMUM NET QUANTITY OF EACH INNER PACKAGING FOR MATERIALS AUTHORIZED FOR TRANSPORTATION AS LIMITED QUANTITY BY AIRCRAFT—Continued

Hazard class or division	Maximum authorized net quantity *of each inner packaging*		Maximum authorized net quantity *of each outer package*	Notes
	Glass, earthenware or fiber inner packagings	Metal or plastic inner packagings		
Division 4.2 (Primary or subsidiary).	Forbidden*		25 kg (net mass)*	*Until December 31, 2012, Charcoal (NA1361), PG III, may be transported as a limited quantity and may be renamed Consumer commodity and reclassed ORM–D–AIR, if eligible.
Division 4.3 (solid material only).	PG I solids and all liquids regardless of Packing Group: Forbidden.			
	PG II: 0.5 kg	PG II: 0.5 kg	PG II: 5 kg*	*Maximum net quantity per outer package with toxic subsidiary risk (*e.g.,* UN3134) is 1 kg. For fuel cell cartridges *containing water reactive substances* (UN3476), *see* § 173.230 of this part.
	PG III: 1 kg	PG III: 1 kg	PG III: 10 kg*	*Maximum net quantity per outer package with corrosive or flammable subsidiary risk (*e.g.,* UN3131 or UN3132, respectively) is 5 kg.
Division 5.1 (Liquid or solid material).	PG I: Forbidden.			
Division 5.1 (liquid material).	PG II: 0.1L	PG II: 0.1L	PG II: 0.5L.	
	PG III: 0.5L	PGIII: 0.5L	PG III: 1.0L.	
Division 5.1 (solid material).	PG II: 0.5 kg	PG II: 0.5 kg	PG II: 2.5 kg*	*Maximum net quantity per outer package with toxic subsidiary risk (*e.g.,* UN3087) is 1 kg.
	PG III: 1.0 kg	PG III: 1.0 kg	PG III: 10 kg*	*Maximum net quantity per outer package with corrosive subsidiary risk (*e.g.,* UN3085) is 1 kg.
Division 5.2 (liquid material).	30 mL	30 mL	1 kg	*Authorized materials:* Types D, E and F are authorized only as part of a Chemical or First aid kit (UN3316) in accordance with § 173.161 of this part or a Polyester resin kit (UN3269) in accordance with § 173.165 of this part.
Division 5.2 (solid material).	100g	100g	1 kg.	
Division 6.1	PG I (Inhalation or otherwise): Forbidden.			
Division 6.1 (liquid material).	PG II: 0.1L	PG II: 0.1L	PG II: 1.0L*	*Maximum net quantity per outer package with corrosive subsidiary risk (*e.g.,* UN3289) is 0.5L.
	PG III: 0.5L	PGIII: 0.5L	PG III: 2.0L.	
Division 6.1 (solid material).	PG II: 0.5 kg	PG II: 0.5 kg	PG II: 1.0 kg.	
	PG III: 1.0 kg	PG III: 1.0 kg	PG III: 10 kg.	
Class 7	Forbidden.			
Class 8	PG I: Forbidden.			
Class 8 (liquid material).	PG II: 0.1L	PG II: 0.1L	PG II: 0.5L	For "Fuel cell cartridges *containing corrosive substances*" (UN3477), *see* § 173.230 of this part.
	PG III: 0.5L	PGIII: 0.5L	PG III: 1.0L.	
Class 8 (solid material).	PG II: 0.5 kg	PG II: 0.5 kg	PG II: 5.0 kg*	*Maximum net quantity per outer package for UN2430 is 1.0 kg. UN2794, UN2795, UN2803, UN2809, UN3028 are not authorized as limited quantity.
	PG III: 1.0 kg	PG III: 1.0 kg	PG III: 5.0 kg.	
Class 9 (liquid material).	30 mL (UN3316); 5.0L (UN1941, UN1990, UN3082) 100 g (UN3316); 5.0 kg (UN2071, UN3077).	30 mL (UN3316); 5.0L (UN1941, UN1990, UN3082) 100 g (UN3316); 5.0 kg (UN2071, UN3077).	1 kg (UN3316); 30 kg (all other authorized Class 9 material).	*Authorized materials:* UN1941, UN1990, UN2071, UN3077, UN3082, and UN3316 only. Additionally, Consumer commodity (ID8000) in accordance with § 173.167 of this part and Chemical kit or First aid kit (UN3316) in accordance with § 173.161of this part are authorized.

TABLE 3—MAXIMUM NET QUANTITY OF EACH INNER PACKAGING FOR MATERIALS AUTHORIZED FOR TRANSPORTATION AS LIMITED QUANTITY BY AIRCRAFT—Continued

Hazard class or division	Maximum authorized net quantity *of each inner packaging*		Maximum authorized net quantity *of each outer package*	Notes
	Glass, earthenware or fiber inner packagings	Metal or plastic inner packagings		
Class 9 (solid material).	100 g (UN3316); 5.0 kg (UN2071, UN3077).	100 g (UN3316); 5.0 kg (UN2071, UN3077).		

* * * * *

■ 28. In § 173.40, in paragraph (c)(1), a second sentence is added to read as follows:

§ 173.40 General packaging requirements for toxic materials packaged in cylinders.

* * * * *

(c) * * *

(1) * * * For UN pressure receptacles, each valve must be capable of withstanding the test pressure of the pressure receptacle and be connected directly to the pressure receptacle by either a taper thread or other means which meets the requirements of ISO 10692–2: (IBR, *see* § 171.7 of this subchapter).

* * * * *

■ 29. In § 173.58, paragraph (a)(5) is revised to read as follows:

§ 173.58 Assignment of class and division for new explosives.

(a) * * *

(5) Division 1.4 Compatibility Group S (1.4S) if the hazardous effects are confined within the package or the blast and projection effects do not significantly hinder emergency response efforts. The UN Test Type 6(d) is used to determine whether a Division 1.4S classification is appropriate for an item assigned a proper shipping name to which special provision 347 (*see* § 172.102 of this subchapter) applies; or

* * * * *

■ 30. In § 173.59, a definition for "Phlegmatized" is added in alphabetical order to read as follows:

§ 173.59 Description of terms for explosives.

* * * * *

Phlegmatized. The term means that a substance (or "phlegmatizer") has been added to an explosive to enhance its safety in handling and transport. The phlegmatizer renders the explosive insensitive, or less sensitive, to the following actions: heat, shock, impact, percussion or friction. Typical phlegmatizing agents include, but are not limited to: wax, paper, water, polymers (such as chlorofluoropolymers), alcohol and oils (such as petroleum jelly and paraffin).

* * * * *

■ 31. In § 173.63, paragraph (b) is revised to read as follows:

§ 173.63 Packaging exceptions.

* * * * *

(b) *Limited quantities of Cartridges, small arms, and cartridges power devices.* (1)(i) Cartridges, small arms, and Cartridges power device (used to project fastening devices), that have been classed as Division 1.4S explosive may be offered for transportation and transported as limited quantities when packaged in accordance with paragraph (b)(2) of this section. For transportation by aircraft, the package must conform to the applicable requirements of § 173.27 of this part and, effective July 1, 2011, Cartridge, power devices must be successfully tested under the UN Test Series 6(d) criteria for reclassification as limited quantity material. Effective January 1, 2012, Cartridge, power devices must be successfully tested under the UN Test Series 6(d) criteria for reclassification as limited quantity material for transportation by highway, rail or vessel. Packages containing such articles must be marked as prescribed in § 172.315. Packages containing such articles are not subject to the shipping paper requirements of subpart C of part 172 of this subchapter unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, or is offered for transportation and transported by aircraft or vessel. Additionally, packages containing these articles are excepted from the requirements of subparts E (Labeling) and F (Placarding) of part 172 of this subchapter.

(ii) Until December 31, 2012, a package containing such articles may be marked with the proper shipping name "Cartridges, small arms" or "Cartridges, power device *(used to project fastening devices)*" and reclassed as "ORM–D–AIR" material if it contains properly packaged articles as authorized by this subchapter on October 1, 2010. Additionally, for transportation by aircraft, Cartridge, power devices must be successfully tested under the UN Test Series 6(d) criteria for reclassification as ORM–D–AIR material effective July 1, 2011. Until December 31, 2013, a package containing such articles may be marked with the proper shipping name "Cartridges, small arms" or "Cartridges, power device *(used to project fastening devices)*" and reclassed as "ORM–D" material if it contains properly packaged articles as authorized by this subchapter on October 1, 2010.

(iii) Cartridges, small arms and Cartridges power devices that may be shipped as a limited quantity or ORM–D material are as follows:

(A) Ammunition for rifle, pistol or shotgun;

(B) Ammunition with inert projectiles or blank ammunition;

(C) Ammunition having no tear gas, incendiary, or detonating explosive projectiles;

(D) Ammunition not exceeding 12.7 mm (50 caliber or 0.5 inch) for rifle or pistol, cartridges or 8 gauge for shotshells; and

(E) Cartridges, power devices which are used to project fastening devices.

(2) Packaging for Cartridges, small arms and eligible Cartridge, power devices as limited quantity or ORM–D material must be as follows:

(i) Ammunition must be packed in inside boxes, or in partitions which fit snugly in the outside packaging, or in metal clips;

(ii) Primers must be protected from accidental initiation;

(iii) Inside boxes, partitions or metal clips must be packed in securely-closed strong outside packagings;

(iv) Maximum gross weight is limited to 30 kg (66 pounds) per package; and

(v) Cartridges, power devices which are used to project fastening devices and 22 caliber rim-fire cartridges may be packaged loose in strong outside packagings.

* * * * *

■ 32. In § 173.120, paragraphs (c)(1)(i) and (ii) are revised to read as follows:

§ 173.120 Class 3—Definitions.

* * * * *

(c) * * *

(1) * * *

(i) For a homogeneous, single-phase, liquid having a viscosity less than 45 S.U.S. at 38 °C (100 °F) that does not form a surface film while under test, one of the following test procedures shall be used:

(A) Standard Method of Test for Flash Point by Tag Closed Cup Tester, (ASTM D 56) (IBR; *see* § 171.7 of this subchapter);

(B) Standard Test Methods for Flash Point of Liquids by Small Scale Closed-Cup Apparatus, (ASTM D 3278) (IBR; *see* § 171.7 of this subchapter); or

(C) Standard Test Methods for Flash Point by Small Scale Closed Tester, (ASTM D 3828) (IBR; *see* § 171.7 of this subchapter).

(ii) For a liquid other than one meeting all the criteria of paragraph (c)(1)(i) of this section, one of the following test procedures must be used:

(A) Standard Test Methods for Flash Point by Pensky-Martens Closed Cup Tester, (ASTM D 93) (IBR; *see* § 171.7 of this subchapter). For cutback asphalt, use Method B of ASTM D 93 or alternative tests authorized in this standard;

(B) Standard Test Methods for Flash Point of Liquids by Small Scale Closed-Cup Apparatus (ASTM D 3278) (IBR; *see* § 171.7 of this subchapter);

(C) Determination of Flash/No Flash—Closed Cup Equilibrium Method (ISO 1516) (IBR; *see* § 171.7 of this subchapter);

(D) Determination of Flash point—Closed Cup Equilibrium Method (ISO 1523) (IBR; *see* § 171.7 of this subchapter);

(E) Determination of Flash Point—Pensky-Martens Closed Cup Method (ISO 2719) (IBR; *see* § 171.7 of this subchapter);

(F) Determination of Flash Point—Rapid Equilibrium Closed Cup Method (ISO 3679) (IBR; *see* § 171.7 of this subchapter);

(G) Determination of Flash/No Flash—Rapid Equilibrium Closed Cup Method (ISO 3680) (IBR; *see* § 171.7 of this subchapter); or

(H) Determination of Flash Point—Abel Closed-Cup Method (ISO 13736) (IBR; *see* § 171.7 of this subchapter).

* * * * *

■ 33. In § 173.121, paragraph (a) is revised to read as follows:

§ 173.121 Class 3—Assignment of packing group.

(a)(1) The packing group of a Class 3 material is as assigned in column 5 of the § 172.101 Table. When the § 172.101 Table provides more than one packing group for a hazardous material, the packing group must be determined by applying the following criteria:

Packing group	Flash point (closed-cup)	Initial boiling point
I		≤35°C (95 °F)
II	<23°C (73 °F)	>35 °C (95 °F)
III	≥23 °C, ≤60 °C (≥73 °F, ≤140 °F)	>35 °C (95 °F)

(2) The initial boiling point of a Class 3 material may be determined by using one of the following test methods:

(i) Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure (ASTM D 86) (IBR; *see* § 171.7 of this subchapter);

(ii) Standard Test Method for Distillation Range of Volatile Organic Liquids (ASTM D 1078) (IBR; *see* § 171.7 of this subchapter);

(iii) Petroleum Products—Determination of Distillation Characteristics at Atmospheric Pressure (ISO 3405) (IBR; *see* § 171.7 of this subchapter);

(iv) Petroleum Products—Determination of Boiling Range Distribution—Gas Chromatography Method (ISO 3924) (IBR; *see* § 171.7 of this subchapter); or

(v) Volatile Organic Liquids—Determination of Boiling Range of Organic Solvents Used as Raw Materials (ISO 4626) (IBR; *see* § 171.7 of this subchapter).

* * * * *

■ 34. In § 173.124, paragraph (b)(2) is revised to read as follows:

§ 173.124 Class 4, Divisions 4.1, 4.2 and 4.3—Definitions.

* * * * *

(b) * * *

(2) A self-heating material. A self-heating material is a material that through a process where the gradual reaction of that substance with oxygen (in air) generates heat. If the rate of heat production exceeds the rate of heat loss, then the temperature of the substance will rise which, after an induction time, may lead to self-ignition and combustion. A material of this type which exhibits spontaneous ignition or if the temperature of the sample exceeds 200 °C (392 °F) during the 24-hour test period when tested in accordance with UN Manual of Tests and Criteria (IBR; *see* § 171.7 of this subchapter), is classed as a Division 4.2 material.

* * * * *

■ 35. In § 173.136, paragraph (a) is revised to read as follows:

§ 173.136 Class 8—Definitions.

(a) For the purpose of this subchapter, "corrosive material" (Class 8) means a liquid or solid that causes full thickness destruction of human skin at the site of contact within a specified period of time. A liquid, or a solid which may become liquid during transportation, that has a severe corrosion rate on steel or aluminum based on the criteria in § 173.137(c)(2) is also a corrosive material. Whenever practical, *in vitro* test methods authorized in § 173.137 of this part or historical data authorized in paragraph (c) of this section should be used to determine whether a material is corrosive.

* * * * *

■ 36. In § 173.137, in the introductory text, the second sentence is revised and a third, fourth, and fifth sentence are added to read as follows:

§ 173.137 Class 8—Assignment of packing group.

* * * When the § 172.101 Table provides more than one packing group for a Class 8 material, the packing group must be determined using data obtained from tests conducted in accordance with the OECD Guideline for the Testing of Chemicals, Number 435, "*In Vitro* Membrane Barrier Test Method for Skin Corrosion" (IBR, *see* § 171.7 of this subchapter) or Number 404, "Acute Dermal Irritation/Corrosion" (IBR, *see* § 171.7 of this subchapter). A material that is determined not to be corrosive in accordance with OECD Guideline for the Testing of Chemicals, Number 430, "*In Vitro* Skin Corrosion: Transcutaneous Electrical Resistance Test (TER)" (IBR, *see* § 171.7 of this subchapter) or Number 431, "*In Vitro* Skin Corrosion: Human Skin Model Test" (IBR, *see* § 171.7 of this subchapter) may be considered not to be corrosive to human skin for the purposes of this subchapter without further testing. However, a material determined to be corrosive in accordance with Number 430 or Number 431 must be further tested using Number 435 or Number 404. The packing group assignment using data obtained from tests conducted in accordance with OECD Guideline Number 404 or Number 435 must be as follows:

* * * * *

■ 37. Section 173.144 is revised to read as follows:

§ 173.144 Other Regulated Materials (ORM)—Definitions.

Until December 31, 2013 and for the purposes of this subchapter, "ORM–D material" means a material such as a consumer commodity, cartridges, small

arms or cartridges, power devices which, although otherwise subject to the regulations of this subchapter, presents a limited hazard during transportation due to its form, quantity and packaging. It must be a material for which exceptions are provided in Column (8A) of the § 172.101 Hazardous Materials Table.

■ 38. In § 173.150, paragraphs (b) and (c) are revised to read as follows:

§ 173.150 Exceptions for Class 3 (flammable and combustible liquids).

* * * * *

(b) *Limited quantities.* Limited quantities of flammable liquids (Class 3) and combustible liquids are excepted from labeling requirements, unless the material is offered for transportation or transported by aircraft, and are excepted from the specification packaging requirements of this subchapter when packaged in combination packagings according to this paragraph. For transportation by aircraft, the package must also conform to applicable requirements of § 173.27 of this part (*e.g.,* authorized materials, inner packaging quantity limits and closure securement) and only hazardous material authorized aboard passenger-carrying aircraft may be transported as a limited quantity. A limited quantity package that conforms to the provisions of this section is not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, or is offered for transportation and transported by aircraft or vessel, and is eligible for the exceptions provided in § 173.156 of this part. In addition, shipments of limited quantities are not subject to subpart F (Placarding) of part 172 of this subchapter. Each package must conform to the packaging requirements of subpart B of this part and may not exceed 30 kg (66 pounds) gross weight. Except for transportation by aircraft, the following combination packagings are authorized:

(1) For flammable liquids in Packing Group I, inner packagings not over 0.5 L (0.1 gallon) net capacity each, packed in a strong outer packaging;

(2) For flammable liquids in Packing Group II, inner packagings not over 1.0 L (0.3 gallons) net capacity each, packed in a strong outer packaging.

(3) For flammable liquids in Packing Group III and combustible liquids, inner packagings not over 5.0 L (1.3 gallons) net capacity each, packed in a strong outer packaging.

(c) *Consumer commodities.* Until December 31, 2013, a limited quantity package containing a "consumer commodity" as defined in § 171.8 of this subchapter, may be renamed "Consumer commodity" and reclassed as ORM–D or, until December 31, 2012, ORM–D–AIR material and offered for transportation and transported in accordance with the applicable provisions of this subchapter in effect on October 1, 2010.

* * * * *

■ 39. In § 173.151, paragraphs (b), (c), and (d) are revised to read as follows:

§ 173.151 Exceptions for Class 4.

* * * * *

(b) *Limited quantities of Division 4.1.* (1) Limited quantities of flammable solids (Division 4.1) in Packing Groups II and III and, where authorized by this section, charcoal briquettes (Division 4.2) in Packing Group III, are excepted from labeling requirements, unless the material is offered for transportation or transported by aircraft, and are excepted from the specification packaging requirements of this subchapter when packaged in combination packagings according to this paragraph. For transportation by aircraft, the package must also conform to applicable requirements of § 173.27 of this part (*e.g.,* authorized materials, inner packaging quantity limits and closure securement) and only hazardous material authorized aboard passenger-carrying aircraft may be transported as a limited quantity. A limited quantity package that conforms to the provisions of this section is not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, or is offered for transportation and transported by aircraft or vessel, and is eligible for the exceptions provided in § 173.156 of this part. In addition, shipments of limited quantities are not subject to subpart F (Placarding) of part 172 of this subchapter. Each package must conform to the packaging requirements of subpart B of this part and may not exceed 30 kg (66 pounds) gross weight. Except for transportation by aircraft, the following combination packagings are authorized:

(i) For flammable solids in Packing Group II, inner packagings not over 1.0 kg (2.2 pounds) net capacity each, packed in a strong outer packaging.

(ii) For flammable solids in Packing Group III, inner packagings not over 5.0 kg (11 pounds) net capacity each, packed in a strong outer packaging.

(2) For transportation by highway or rail, Charcoal briquettes (NA1361) may be packaged as a limited quantity in accordance with paragraph (b) of this section in packagings not exceeding 30 kg gross weight and are eligible for the exceptions provided in § 173.156.

(c) *Consumer commodities.* Until December 31, 2013, a limited quantity package (including Charcoal briquettes (NA1361)) containing a "consumer commodity" as defined in § 171.8 of this subchapter, may be renamed "Consumer commodity" and reclassed as ORM–D or, until December 31, 2012, ORM–D–AIR material and offered for transportation and transported in accordance with the applicable provisions of this subchapter in effect on October 1, 2010. For transportation by aircraft, the maximum net mass for Charcoal briquettes (NA1361) is 25 kg per package.

(d) *Limited quantities of Division 4.3.* Limited quantities of dangerous when wet solids (Division 4.3) in Packing Groups II and III are excepted from labeling requirements, unless the material is offered for transportation or transported by aircraft, and are excepted from the specification packaging requirements of this subchapter when packaged in combination packagings according to this paragraph. For transportation by aircraft, the package must also conform to applicable requirements of § 173.27 of this part (*e.g.,* authorized materials, inner packaging quantity limits and closure securement) and only hazardous material authorized aboard passenger-carrying aircraft may be transported as a limited quantity. A limited quantity package that conforms to the provisions of this section is not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, or is offered for transportation and transported by aircraft or vessel, and is eligible for the exceptions provided in § 173.156 of this part. In addition, shipments of limited quantities are not subject to subpart F (Placarding) of part 172 of this subchapter. Each package must conform to the packaging requirements of subpart B of this part and may not exceed 30 kg (66 pounds) gross weight. Except for transportation by aircraft, the following combination packagings are authorized:

(1) For dangerous when wet solids in Packing Group II, inner packagings not over 0.5 kg (1.1 pounds) net capacity each, packed in a strong outer packaging.

(2) For dangerous when wet solids in Packing Group III, inner packagings not over 1.0 kg (2.2 pounds) net capacity

each, packed in a strong outer packaging.

■ 40. In § 173.152, paragraphs (b) and (c) are revised to read as follows:

§ 173.152 Exceptions for Division 5.1 (oxidizers) and Division 5.2 (organic peroxides).

* * * * *

(b) *Limited quantities.* Limited quantities of oxidizers (Division 5.1) in Packing Group II and III and organic peroxides (Division 5.2) are excepted from labeling requirements, unless the material is offered for transportation or transported by aircraft, and are excepted from the specification packaging requirements of this subchapter when packaged in combination packagings according to this paragraph. For transportation by aircraft, the package must also conform to applicable requirements of § 173.27 of this part (*e.g.,* authorized materials, inner packaging quantity limits and closure securement) and only hazardous material authorized aboard passenger-carrying aircraft may be transported as a limited quantity. A limited quantity package that conforms to the provisions of this section is not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, or is offered for transportation and transported by aircraft or vessel, and is eligible for the exceptions provided in § 173.156 of this part. In addition, shipments of limited quantities are not subject to subpart F (Placarding) of part 172 of this subchapter. Each package must conform to the packaging requirements of subpart B of this part and may not exceed 30 kg (66 pounds) gross weight. Except for transportation by aircraft, the following combination packagings are authorized:

(1) For oxidizers in Packing Group II, inner packagings not over 1.0 L (0.3 gallon) net capacity each for liquids or not over 1.0 kg (2.2 pounds) net capacity each for solids, packed in a strong outer packaging.

(2) For oxidizers in Packing Group III, inner packagings not over 5 L (1.3 gallons) net capacity each for liquids or not over 5.0 kg (11 lbs) net capacity each for solids, packed in a strong outer packaging.

(3) For organic peroxides that do not require temperature control during transportation—

(i) Except for transportation by aircraft, for Type B or C organic peroxides, inner packagings not over 25 mL (0.845 ounces) net capacity each for liquids or 100 g (3.528 ounces) net capacity for solids, packed in a strong outer packaging.

(ii) For Type D, E, or F organic peroxides, inner packagings not over 125 mL (4.22 ounces) net capacity each for liquids or 500 g (17.64 ounces) net capacity for solids, packed in a strong outer packaging.

(c) *Consumer commodities.* Until December 31, 2013, a limited quantity package containing a "consumer commodity" as defined in § 171.8 of this subchapter, may be renamed "Consumer commodity" and reclassed as ORM–D or, until December 31, 2012, ORM–D–AIR material and offered for transportation and transported in accordance with the applicable provisions of this subchapter in effect on October 1, 2010.

■ 41. In § 173.153, paragraphs (b) and (c) are revised to read as follows:

§ 173.153 Exceptions for Division 6.1 (poisonous material).

* * * * *

(b) *Limited quantities.* The exceptions in this paragraph do not apply to poison-by-inhalation materials. Limited quantities of poisonous material (Division 6.1) in Packing Groups II and III are excepted from the labeling requirements, unless the material is offered for transportation or transported by aircraft, and are excepted from the specification packaging requirements of this subchapter when packaged in combination packagings according to this paragraph. For transportation by aircraft, the package must also conform to applicable requirements of § 173.27 of this part (*e.g.,* authorized materials, inner packaging quantity limits and closure securement) and only hazardous material authorized aboard passenger-carrying aircraft may be transported as a limited quantity. A limited quantity package that conforms to the provisions of this section is not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, or is offered for transportation and transported by aircraft or vessel, and is eligible for the exceptions provided in § 173.156 of this part. In addition, shipments of limited quantities are not subject to subpart F (Placarding) of part 172 of this subchapter. Each package must conform to the packaging requirements of subpart B of this part and may not exceed 30 kg (66 pounds) gross weight. Except for transportation by aircraft, the following combination packagings are authorized:

(1) For poisonous materials in Packing Group II, inner packagings not over 100 mL (3.38 ounces) each for liquids or 0.5 kg (1.1 pounds) each for solids, packed in a strong outer packaging. Inner packagings containing a liquid poisonous material which is also a drug or medicine in Packing Group II may be increased to not over 250 mL (8 ounces) each and packed in a strong outer packaging.

(2) For poisonous materials in Packing Group III, inner packagings not over 5 L (1.3 gallons) each for liquids or 5.0 kg (11 pounds) each for solids, packed in a strong outer packaging.

(c) *Consumer commodities.* Until December 31, 2013, a limited quantity package of poisonous material in Packing Group III or a drug or medicine in Packing Group II and III that is also a "consumer commodity" as defined in § 171.8 of this subchapter, may be renamed "Consumer commodity" and reclassed as ORM–D or, until December 31, 2012, ORM–D–AIR material and offered for transportation and transported in accordance with the applicable provisions of this subchapter in effect on October 1, 2010.

■ 42. In § 173.154, paragraphs (b) and (c) are revised to read as follows:

§ 173.154 Exceptions for Class 8 (corrosive material).

* * * * *

(b) *Limited quantities.* Limited quantities of corrosive material (Class 8) in Packing Groups II and III are excepted from labeling requirements, unless the material is offered for transportation or transported by aircraft, and are excepted from the specification packaging requirements of this subchapter when packaged in combination packagings according to this paragraph. For transportation by aircraft, the package must also conform to the applicable requirements of § 173.27 of this part (*e.g.,* authorized materials, inner packaging quantity limits and closure securement) and only hazardous material authorized aboard passenger-carrying aircraft may be transported as a limited quantity. A limited quantity package that conforms to the provisions of this section is not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, or is offered for transportation and transported by aircraft or vessel, and is eligible for the exceptions provided in § 173.156 of this part. In addition, shipments of limited quantities are not subject to subpart F (Placarding) of part 172 of this subchapter. Each package must conform to the packaging requirements of

subpart B of this part and may not exceed 30 kg (66 pounds) gross weight. Except for transportation by aircraft, the following combination packagings are authorized:

(1) For corrosive materials in Packing Group II, inner packagings not over 1.0 L (0.3 gallon) net capacity each for liquids or not over 1.0 kg (2.2 pounds) net capacity each for solids, packed in a strong outer packaging.

(2) For corrosive materials in Packing Group III, inner packagings not over 5.0 L (1.3 gallons) net capacity each for liquids or not over 5.0 kg (11 lbs) net capacity each for solids, packed in a strong outer packaging.

(c) *Consumer commodities.* Until December 31, 2013, a limited quantity package containing a "consumer commodity" as defined in § 171.8 of this subchapter, may be renamed "Consumer commodity" and reclassed as ORM–D or, until December 31, 2012, ORM–D–AIR material and offered for transportation and transported in accordance with the applicable provisions of this subchapter in effect on October 1, 2010.

* * * * *

■ 43. In § 173.155, paragraphs (b) and (c) are revised to read as follows:

§ 173.155 Exceptions for Class 9 (miscellaneous hazardous materials).

* * * * *

(b) *Limited quantities of Class 9 materials.* Limited quantities of miscellaneous hazardous materials in Packing Groups II and III are excepted from labeling requirements, unless the material is offered for transportation or transported by aircraft, and are excepted from the specification packaging requirements of this subchapter when packaged in combination packagings according to this paragraph. Unless otherwise specified in paragraph (c) of this section, packages of limited quantities intended for transportation by aircraft must conform to the applicable requirements (*e.g.,* authorized materials, inner packaging quantity limits and closure securement) of § 173.27 of this part. A limited quantity package that conforms to the provisions of this section is not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, or is offered for transportation and transported by aircraft or vessel, and is eligible for the exceptions provided in § 173.156 of this part. In addition, packages of limited quantities are not subject to subpart F (Placarding) of part 172 of this subchapter. Each package must conform to the packaging requirements of subpart B of this part and may not exceed 30 kg (66 pounds) gross weight. Except for transportation by aircraft, the following combination packagings are authorized:

(1) For miscellaneous materials in Packing Group II, inner packagings not over 1.0 L (0.3 gallon) net capacity each for liquids or not over 1.0 kg (2.2 pounds) net capacity each for solids, packed in a strong outer packaging.

(2) For miscellaneous materials in Packing Group III, inner packagings not over 5.0 L (1.3 gallons) net capacity each for liquids or not over 5.0 kg (11 lbs) net capacity each for solids, packed in a strong outer packaging.

(c) *Consumer commodities.* Until December 31, 2013, a limited quantity package containing a "consumer commodity" as defined in § 171.8 of this subchapter, may be renamed "Consumer commodity" and reclassed as ORM–D or, until December 31, 2012, ORM–D–AIR material and offered for transportation and transported in accordance with the applicable provisions of this subchapter in effect on October 1, 2010.

■ 44. Section 173.156 is revised to read as follows:

§ 173.156 Exceptions for limited quantity and ORM.

(a) Exceptions for hazardous materials shipments in the following paragraphs are permitted only if this section is referenced for the specific hazardous material in the § 172.101 Table or in a packaging section in this part.

(b) Packagings for limited quantity and ORM–D are specified according to hazard class in §§ 173.150 through 173.155 and in § 173.306. In addition to other exceptions provided for limited quantity and ORM–D materials in this part:

(1) Strong outer packagings as specified in this part, marking requirements specified in subpart D of part 172 of this subchapter, and the 30 kg (66 pounds) gross weight limitation are not required for packages of limited quantity materials marked in accordance with § 172.315 of this subchapter, or, until December 31, 2013, materials classed and marked as ORM–D and described as a Consumer commodity, as defined in § 171.8 of this subchapter, when—

(i) Unitized in cages, carts, boxes or similar overpacks;

(ii) Offered for transportation or transported by:

(A) Rail;

(B) Private or contract motor carrier; or

(C) Common carrier in a vehicle under exclusive use for such service; and

(iii) Transported to or from a manufacturer, a distribution center, or a retail outlet, or transported to a disposal facility from one offeror.

(2) The 30 kg (66 pounds) gross weight limitation does not apply to packages of limited quantity materials marked in accordance with § 172.315 of this subchapter, or, until December 31, 2013, materials classed and marked as ORM–D and described as a Consumer commodity, as defined in § 171.8 of this subchapter, when offered for transportation or transported by highway or rail between a manufacturer, a distribution center, and a retail outlet provided—

(i) Inner packagings conform to the quantity limits for inner packagings specified in §§ 173.150(b), 173.152(b), 173.154(b), 173.155(b) and 173.306 (a) and (b), as appropriate;

(ii) The inner packagings are packed into corrugated fiberboard trays to prevent them from moving freely;

(iii) The trays are placed in a fiberboard box which is banded and secured to a wooden pallet by metal, fabric, or plastic straps, to form a single palletized unit;

(iv) The package conforms to the general packaging requirements of subpart B of this part;

(v) The maximum net quantity of hazardous material permitted on one palletized unit is 250 kg (550 pounds); and

(vi) The package is properly marked in accordance with § 172.315 or, until December 31, 2013, § 172.316 of this subchapter.

■ 45. Section 173.161 is revised to read as follows:

§ 173.161 Chemical kits and first aid kits.

(a) *Applicability.* Chemical kits and first aid kits contain one or more compatible items of hazardous materials in boxes, cases, *etc.* that, for example, are used for medical, analytical, diagnostic, testing, or repair purposes.

(b) *Authorized materials.* (1) The kits may only contain hazardous materials for which packaging exceptions are provided in column 8(A) of the § 172.101 Hazardous Materials Table in this subchapter. For transportation by aircraft, the kits may only contain quantities of hazardous materials authorized as excepted quantities or as limited quantities in §§ 173.4a and 173.27(f) of this part, respectively. Materials forbidden for transportation by passenger aircraft or cargo aircraft may not be included in the kits.

(2) The packing group assigned to the chemical kit and first aid kit as a whole must be the most stringent packing group assigned to any individual

substance in the kit and must be shown on the shipping paper, if applicable, in accordance with subpart C of Part 172 of this subchapter.

(c) *Packaging.* Except for transportation by aircraft or vessel, chemical kits and first aid kits must be packaged in combination packagings conforming to the packaging requirements of subpart B of this part. For transportation by aircraft or vessel, chemical kits and first aid kits must be packaged in specification combination packagings based on the performance level of the most stringent packing group of material contained within the kit. For transportation by aircraft, friction-type closures must be secured by secondary means and inner packagings intended to contain liquids must be capable of meeting the pressure differential requirements prescribed in § 173.27(c) of this subchapter. Inner and outer packaging quantity limits for packages are as follows:

(1) Except for liquids of Division 5.2 (organic peroxide), inner packagings containing not more than 250 mL. Except for transportation by aircraft, for Division 5.2 (organic peroxide) liquids of Type B and C, inner packagings containing not more than 25 mL and for Division 5.2 (organic peroxide) liquids of Type D, E and F, inner packagings containing not more than 125 mL. For transportation by aircraft, for Division 5.2 (organic peroxide) liquids of Type D, E and F (only), inner packagings containing not more than 125 mL;

(2) Except for solids of Division 5.2 (organic peroxide) of Type B and C, inner packagings containing not more than 250 g. Except for transportation by aircraft, for a Division 5.2 (organic peroxide) solid of Type B and C, inner packagings containing not more than 100 g. For transportation by aircraft, for a Division 5.2 (organic peroxide) solid of Type D, E and F (only), inner packagings containing not more than 250 g;

(3) No more than 10 L or 10 kg of hazardous material may be contained in one outer package (excluding dry ice). For transportation by aircraft, no more than 1 L or 1 kg of hazardous material may be contained in one kit (excluding dry ice);

(4) Each package must conform to the packaging requirements of subpart B of this part and may not exceed 30 kg (66 pounds) gross weight;

(5) Except for Carbon dioxide, solid (Dry ice), UN1845, no other hazardous materials may be packed within the same outer packaging as the kits. Dry ice must be packaged in accordance with § 173.217 of this subchapter;

(6) The kits must include sufficient absorbent material to completely absorb the contents of any liquid hazardous materials contained in the kits. The contents must be separated, placed, or packed, and closed with cushioning material to protect them from damage; and

(7) The contents of the kits must be packed so there will be no possibility of the mixture of contents causing dangerous evolution of heat or gas.

(d) *Exceptions.* (1)(i) Chemical kits and first aid kits are eligible for the excepted quantity exceptions provided in §§ 173.4 and 173.4a of this part. For transportation by aircraft, chemical kits and first aid kits are eligible for the limited quantity provisions provided in § 173.27(f) of this part. For inner packaging quantity limits, *see* § 173.27(f), Table 3.

(ii) A package conforming to the provisions of this section is not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, or is offered for transportation and transported by aircraft or vessel. Chemical kits and First aid kits conforming to this section may be marked as a limited quantity as prescribed in § 172.315 of this subchapter and, if applicable, are eligible for the exceptions provided in § 173.156 of this part. Additionally, chemical and first aid kits conforming to this section are not subject to part 174 (carriage by rail) or part 177 (carriage by highway) of this subchapter when marked in accordance with § 172.315 of this subchapter.

(2) Consumer commodities. Until December 31, 2013, a limited quantity package containing a "consumer commodity" as defined in § 171.8 of this subchapter may be renamed "Consumer commodity" and reclassed as ORM–D or, until December 31, 2012, ORM–D–AIR material and offered for transportation and transported in accordance with the applicable provisions of this subchapter in effect on October 1, 2010.

(3) Kits that are carried on board transport vehicles for first aid or operating purposes are not subject to the requirements of this subchapter.

■ 46. Section 173.165 is added to read as follows:

§ 173.165 Polyester resin kits.

(a) Except for transportation by aircraft, polyester resin kits consisting of a base material component (Class 3, Packing Group II or III) and an activator component (Type D, E, or F organic peroxide which does not require temperature control)—

(1) The organic peroxide component must be packed in inner packagings not over 125 mL (4.22 ounces) net capacity each for liquids or 500 g (17.64 ounces) net capacity each for solids;

(2) The flammable liquid component must be packed in inner packagings not over 5 L (1.3 gallons) net capacity each for Packing Group II or III liquid; and

(3) The flammable liquid component and the organic peroxide component may be packed in the same strong outer packaging provided they will not interact dangerously in the event of leakage.

(b) For transportation by aircraft, polyester resin kits consisting of a base material component (Class 3, Packing Group II or III) and an activator component (Type D, E, or F organic peroxide which does not require temperature control)—

(1) The organic peroxide component is limited to a quantity of 125 mL (4.22 ounces) per inner packaging if liquid, and 500 g (1 pound) if solid. The base material is limited to a quantity of 5 L (1.3 gallons) in metal or plastic inner packagings and 1 L (0.3 gallons) in glass inner packagings;

(2) The components may be placed in the same outer packaging provided they will not interact dangerously in the event of leakage;

(3) Packing group will be II or III, according to the criteria for Class 3, applied to the base material. Additionally, unless otherwise excepted in this subchapter, polyester resin kits must be packaged in specification combination packagings based on the performance level required of the base material (II or III) contained within the kit;

(4) Closures must be secured by secondary means;

(5) Inner packagings intended to contain liquids must be capable of meeting the pressure differential requirements prescribed in § 173.27(c) of this part; and

(6) Except as provided in paragraph (b) of this section, exceptions for polyester resin kits intended for transportation by aircraft are provided in §§ 173.4a (excepted quantities) and 173.27(f) (limited quantities) of this part.

(c) Consumer commodities. Until December 31, 2013, a limited quantity package containing a "consumer commodity" as defined in § 171.8 of this subchapter may be renamed "Consumer commodity" and reclassed as ORM–D or, until December 31, 2012, ORM–D–AIR material and offered for transportation and transported in

accordance with the applicable provisions of this subchapter in effect on October 1, 2010.

■ 47. Section § 173.167 is added to read as follows:

§ 173.167 Consumer commodities.

(a) Effective January 1, 2013, a "consumer commodity" (*see* § 171.8 of this subchapter) when intended for transportation by aircraft may only include articles or substances of Class 2 (non-toxic aerosols only), Class 3 (Packing Group II and III only), Division 6.1 (Packing Group III only), UN3077, UN3082, and UN3175, provided such materials do not have a subsidiary risk and are authorized aboard a passenger-carrying aircraft. Friction-type closures must be secured by secondary means. Inner packagings intended to contain liquids must be capable of meeting the pressure differential requirements (75 kPa) prescribed in § 173.27(c) of this part. Consumer commodities are excepted from the specification packaging requirements of this subchapter and each completed package must conform to subpart B of part. Packages of consumer commodities must also be capable of withstanding a 1.2 m drop on solid concrete in the position most likely to cause damage and a 24-hour stack test. Inner and outer packaging quantity limits for consumer commodities are as follows:

(1) Non-toxic aerosols, as defined in § 171.8 of this subchapter and constructed in accordance with § 173.306 of this part, in non-refillable, non-metal containers not exceeding 120 mL (4 fluid ounces) each, or in non-refillable metal containers not exceeding 820 mL (28 ounces) each, except that flammable aerosols may not exceed 500 mL (16.9 ounces) each; or

(2) Liquids, in inner packagings not exceeding 500 mL (16.9 ounces) each; or

(3) Solids, in inner packagings not exceeding 500 g (1.0 pounds) each; or

(4) Any combination thereof.

(b) Inner packagings are to be placed in an outer packaging not to exceed 30 kg (66 pounds) gross weight as prepared for shipment.

■ 48. Section 173.220 is revised to read as follows:

§ 173.220 Internal combustion engines, self-propelled vehicles, mechanical equipment containing internal combustion engines, battery-powered equipment or machinery, fuel cell-powered equipment or machinery.

(a) *Applicability.* An internal combustion engine, self-propelled vehicle, mechanized equipment containing an internal combustion engine, a battery-powered vehicle or equipment, or a fuel cell-powered vehicle or equipment, or any combination thereof, is subject to the requirements of this subchapter when transported as cargo on a transport vehicle, vessel, or aircraft if—

(1) The engine contains a liquid or gaseous fuel. An engine may be considered as not containing fuel when the engine components and any fuel lines have been completed drained, sufficiently cleaned of residue, and purged of vapors to remove any potential hazard and the engine when held in any orientation will not release any liquid fuel;

(2) The fuel tank contains a liquid or gaseous fuel. A fuel tank may be considered as not containing fuel when the fuel tank and the fuel lines have been completed drained, sufficiently cleaned of residue, and purged of vapors to remove any potential hazard;

(3) It is equipped with a wet battery (including a non-spillable battery), a sodium battery or a lithium battery; or

(4) Except as provided in paragraph (f)(1) of this section, it contains other hazardous materials subject to the requirements of this subchapter.

(b) *Requirements.* Unless otherwise excepted in paragraph (b)(4) of this section, vehicles, engines, and equipment are subject to the following requirements:

(1) *Flammable liquid fuel.* A fuel tank containing a flammable liquid fuel must be drained and securely closed, except that up to 500 mL (17 ounces) of residual fuel may remain in the tank, engine components, or fuel lines provided they are securely closed to prevent leakage of fuel during transportation. Self-propelled vehicles containing diesel fuel are excepted from the requirement to drain the fuel tanks, provided that sufficient ullage space has been left inside the tank to allow fuel expansion without leakage, and the tank caps are securely closed.

(2) *Flammable liquefied or compressed gas fuel.* (i) For transportation by motor vehicle, rail car or vessel, fuel tanks and fuel systems containing flammable liquefied or compressed gas fuel must be securely closed. For transportation by vessel, the requirements of §§ 176.78(k) and 176.905 of this subchapter apply.

(ii) For transportation by aircraft:

(A) Flammable gas-powered vehicles, machines, equipment or cylinders containing the flammable gas must be completely emptied of flammable gas. Lines from vessels to gas regulators, and gas regulators themselves, must also be drained of all traces of flammable gas. To ensure that these conditions are met, gas shut-off valves must be left open and connections of lines to gas regulators must be left disconnected upon delivery of the vehicle to the operator. Shut-off valves must be closed and lines reconnected at gas regulators before loading the vehicle aboard the aircraft; or alternatively;

(B) Flammable gas powered vehicles, machines or equipment, which have cylinders (fuel tanks) that are equipped with electrically operated valves, may be transported under the following conditions:

(*1*) The valves must be in the closed position and in the case of electrically operated valves, power to those valves must be disconnected;

(*2*) After closing the valves, the vehicle, equipment or machinery must be operated until it stops from lack of fuel before being loaded aboard the aircraft;

(*3*) In no part of the closed system shall the pressure exceed 5% of the maximum allowable working pressure of the system or 290 psig (2000 kPa), whichever is less; and

(*4*) There must not be any residual liquefied gas in the system, including the fuel tank.

(3) *Truck bodies or trailers on flat cars—flammable liquid or gas powered.* Truck bodies or trailers with automatic heating or refrigerating equipment of the flammable liquid type may be shipped with fuel tanks filled and equipment operating or inoperative, when used for the transportation of other freight and loaded on flat cars as part of a joint rail and highway movement, provided the equipment and fuel supply conform to the requirements of § 177.834(l) of this subchapter.

(4) *Modal exceptions.* Quantities of flammable liquid fuel greater than 500 mL (17 ounces) may remain in the fuel tank in self-propelled vehicles and mechanical equipment only under the following conditions:

(i) For transportation by motor vehicle or rail car, the fuel tanks must be securely closed.

(ii) For transportation by vessel, the shipment must conform to § 176.905 of this subchapter.

(iii) For transportation by aircraft, when carried in aircraft designed or modified for vehicle ferry operations when all the following conditions must be met:

(A) Authorization for this type operation has been given by the appropriate authority in the government of the country in which the aircraft is registered;

(B) Each vehicle is secured in an upright position;

(C) Each fuel tank is filled in a manner and only to a degree that will

preclude spillage of fuel during loading, unloading, and transportation; and

(D) Each area or compartment in which a self-propelled vehicle is being transported is suitably ventilated to prevent the accumulation of fuel vapors.

(c) *Battery-powered or installed.* Batteries must be securely installed, and wet batteries must be fastened in an upright position. Batteries must be protected against a dangerous evolution of heat, short circuits, and damage to terminals in conformance with § 173.159(a) and leakage; or must be removed and packaged separately under § 173.159. Battery-powered vehicles, machinery or equipment including battery-powered wheelchairs and mobility aids are not subject to any other requirements of this subchapter except § 173.21 of this subchapter when transported by rail, highway or vessel.

(d) *Lithium batteries.* Except as provided in § 172.102, Special Provision A101 of this subchapter, vehicles, engines and machinery powered by lithium metal batteries that are transported with these batteries installed are forbidden aboard passenger-carrying aircraft. Lithium batteries contained in vehicles, engines or mechanical equipment must be securely fastened in the battery holder of the vehicle, engine or mechanical equipment and be protected in such a manner as to prevent damage and short circuits (*e.g.,* by the use of non-conductive caps that cover the terminals entirely). Lithium batteries must be of a type that have successfully passed each test in the UN Manual of Tests and Criteria as specified in § 173.185 of this subchapter, unless approved by the Associate Administrator. Equipment (other than vehicles, engines or mechanical equipment) containing lithium batteries, must be described as "Lithium ion batteries contained in equipment" or "Lithium metal batteries contained in equipment," as appropriate, and transported in accordance with § 173.185 and applicable special provisions.

(e) *Fuel cells.* A fuel cell must be secured and protected in a manner to prevent damage to the fuel cell. Equipment (other than vehicles, engines or mechanical equipment) such as consumer electronic devices containing fuel cells (fuel cell cartridges) must be described as "Fuel cell cartridges contained in equipment" and transported in accordance with § 173.230 of this subchapter.

(f) *Other hazardous materials.* (1) Items containing hazardous materials, such as fire extinguishers, compressed gas accumulators, safety devices and other hazardous materials that are integral components of the motor vehicle, engine or mechanical equipment and that are necessary for the operation of the vehicle, engine or mechanical equipment, or for the safety of its operator or passengers, must be securely installed in the motor vehicle, engine or mechanical equipment. Such items are not otherwise subject to the requirements of this subchapter. Equipment (other than vehicles, engines or mechanical equipment) containing lithium batteries must be described as "Lithium batteries contained in equipment" and transported in accordance with § 173.185 of this subchapter and applicable special provisions. Equipment (other than vehicles, engines or mechanical equipment) such as consumer electronic devices containing fuel cells (fuel cell cartridges) must be described as "Fuel cell cartridges contained in equipment" and transported in accordance with § 173.230 of this subchapter.

(2) Other hazardous materials must be packaged and transported in accordance with the requirements of this subchapter.

(g) *Additional requirements for internal combustion engines and vehicles with certain electronic equipment when transported by aircraft or vessel.* When an internal combustion engine that is not installed in a vehicle or equipment is offered for transportation by aircraft or vessel, all fuel, coolant or hydraulic systems remaining in the engine must be drained as far as practicable, and all disconnected fluid pipes that previously contained fluid must be sealed with leak-proof caps that are positively retained. When offered for transportation by aircraft, vehicles equipped with theft-protection devices, installed radio communications equipment or navigational systems must have such devices, equipment or systems disabled.

(h) *Exceptions.* Except as provided in paragraph (f)(2) of this section, shipments made under the provisions of this section—

(1) Are not subject to any other requirements of this subchapter for transportation by motor vehicle or rail car; and

(2) Are not subject to the requirements of subparts D, E and F (marking, labeling and placarding, respectively) of part 172 of this subchapter or § 172.604 of this subchapter (emergency response telephone number) for transportation by vessel or aircraft. For transportation by aircraft, the provisions of § 173.159(b)(2) of this part as applicable, the provisions of § 173.230(f), as applicable, other applicable requirements of this subchapter, including shipping papers, emergency response information, notification of pilot-in-command, general packaging requirements, and the requirements specified in § 173.27 of this subchapter must be met. For transportation by vessel, additional exceptions are specified in § 176.905 of this subchapter.

■ 49. In § 173.225:

■ a. In paragraph (c)(8), the Organic Peroxide Table is amended by removing the entries under the [REMOVE] heading and adding entries under the [ADD] heading in the table below.

■ b. In paragraph (e), the Organic Peroxide IBC Table is amended by revising the entry for "Peroxyacetic acid, stabilized, not more than 17%" under "3109 ORGANIC PEROXIDE, TYPE F, LIQUID".

§ 173.225 Packaging requirements and other provisions for organic peroxides.

* * * * *

(c) * * *

(8) * * *

ORGANIC PEROXIDE TABLE

Technical name	ID No.	Concent. (mass %)	Diluent (mass %) A	Diluent (mass %) B	Diluent (mass %) I	Water (mass %)	Packing method	Temp control	Temp emer-gency	Notes
(1)	(2)	(3)	(4a)	(4b)	(4c)	(5)	(6)	(7a)	(7b)	(8)
[REMOVE]										
*	*	*		*		*		*	*	
Di-(2-tert-butylperoxyisopropyl) benzene(s).	UN3106	> 42–100			≤ 57		OP7			1, 9

ORGANIC PEROXIDE TABLE—Continued

Technical name	ID No.	Concent. (mass %)	Diluent (mass %) A	Diluent (mass %) B	Diluent (mass %) I	Water (mass %)	Packing method	Temp control	Temp emergency	Notes
(1)	(2)	(3)	(4a)	(4b)	(4c)	(5)	(6)	(7a)	(7b)	(8)
Di-(2-tert-butylperoxyisopropyl) benzene(s).	Exempt	≤ 42	.....	.....	≥ 58	.....	Exempt	.....	.....	.....
* *		*		*		*		*	*	
2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexane.	UN3105	> 52–100	.....	.....	.....	.....	OP7	.....	.....	.....
* *		*		*		*		*	*	
[ADD]	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
* *		*		*		*		*	*	
Di-(tert-butylperoxyisopropyl) benzene(s).	UN3106	> 42–100	.....	.....	≤ 57	.....	OP7	.....	.....	1, 9
Di-(tert-butylperoxyisopropyl) benzene(s).	Exempt	≤ 42	.....	.....	≥ 58	.....	Exempt	.....	.....	.....
* *		*		*		*		*	*	
2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexane.	UN3103	> 90–100	.....	.....	.....	.....	OP5	.....	.....	.....
2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexane.	UN3105	> 52—90	≥ 10	.....	.....	.....	OP7	.....	.....	.....
* *		*		*		*		*	*	

* * * * *

(e) * * *

ORGANIC PEROXIDE IBC TABLE

UN No.	Organic peroxide	Type of IBC	Maximum quantity (liters)	Control temperature	Emergency temperature
*	*	*	*	*	*
3109	ORGANIC PEROXIDE, TYPE F, LIQUID	.....	.....	.....	.....
*	*	*	*	*	*
	Peroxyacetic acid, stabilized, not more than 17%	31A	1500	.....	.....
		31H1	1500	.....	.....
		31H2	1500	.....	.....
		31HA1	1500	.....	.....
*	*	*	*	*	*

* * * * *

■ 50. In § 173.230, paragraphs (g) and (h) are revised to read as follows:

§ 173.230 Fuel cell cartridges containing hazardous material.

* * * * *

(g) *Limited quantities.* Limited quantities of hazardous materials contained in fuel cell cartridges are excepted from the labeling requirements, unless the cartridges are offered for transportation or transported by aircraft, and from the placarding and specification packaging requirements of this subchapter when packaged according to this section. Each package must conform to the packaging requirements of subpart B of this part and may not exceed 30 kg (66 pounds) gross weight. Except as authorized in paragraph (h) of this section, a package containing a limited quantity of fuel cell cartridges must be marked as specified in § 172.315 of this subchapter and, for transportation by highway or rail, is not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, or marine pollutant, and are eligible for the exceptions provided in § 173.156 of part. For transportation by highway, rail and vessel, the following combination packagings are authorized:

(1) For flammable liquids, in fuel cell cartridges containing not more than 1.0 L (0.3 gallon) per cartridge, packed in strong outer packaging.

(2) For water-reactive substances (Division 4.3 Dangerous when wet material), in fuel cell cartridges containing not more than 0.5 L (16.9 fluid ounces) for liquids or not over 0.5 kg (1.1 pound) for solids per cartridge, packed in strong outer packaging.

(3) For corrosive materials, in fuel cell cartridges containing not more than 1.0 L (0.3 gallon) for liquids or not more than 1.0 kg (2.2 pounds) for solids per

cartridge, packed in strong outer packaging.

(4) For liquefied (compressed) flammable gas, in fuel cell cartridges not over 120 mL (4 fluid ounces) net capacity per cartridge, packed in strong outer packaging.

(5) For hydrogen in metal hydride, in fuel cell cartridges not over 120 mL (4 fluid ounces) net capacity per cartridge, packed in strong outer packaging.

(6) For transportation by aircraft, the following combination packagings are authorized:

(i) For flammable liquids, in fuel cell cartridges containing not more than 0.5 L (16.9 fluid ounces) per cartridge, packed in strong outer packaging. Additionally, each package may contain no more than 2.5 kg (net mass) of fuel cell cartridges.

(ii) For water-reactive substances (Division 4.3 Dangerous when wet material), in fuel cell cartridges containing not more than 200 g (0.4 pounds) of solid fuel per cartridge, packed in strong outer packaging. Additionally, each package may contain no more than 2.5 kg (net mass) of fuel cell cartridges.

(iii) For corrosive materials, in fuel cell cartridges containing not more than 200 mL (6.7 fluid ounces) for liquids or not more than 200 g (0.4 pounds) for solids per cartridge packed in strong outer packaging. Additionally, each package may contain no more than 2.5 kg (net mass) of fuel cell cartridges.

(iv) For liquefied (compressed) flammable gas, in fuel cell cartridges not over 120 mL (4 fluid ounces) net capacity per cartridge, packed in strong outer packaging. Additionally, each package may contain no more than 0.5 kg (net mass) of fuel cell cartridges.

(v) For hydrogen in metal hydride, in fuel cell cartridges not over 120 mL (4 fluid ounces) net capacity per cartridge, packed in strong outer packaging. Additionally, each package may contain no more than 0.5 kg (net mass) of fuel cell cartridges.

(h) *Consumer commodities.* Until December 31, 2013, except for transportation by aircraft, a limited quantity that conforms to the provisions of paragraph (g) of this section and is also a "consumer commodity" as defined in § 171.8 of this subchapter on October 1, 2010 may be renamed "Consumer commodity" and reclassed as ORM–D. Shipments of ORM–D materials are not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, and are eligible for the exceptions provided in § 173.156 of this part.

■ 51. In § 173.301b, paragraphs (c)(2)(iii) and (e) are revised to read as follows:

§ 173.301b Additional general requirements for shipment of UN pressure receptacles.

* * * * *

(c) * * *

(2) * * *

(iii) By protecting the valves by shrouds or guards conforming to the requirements in ISO 11117 (IBR; *see* § 171.7 of this subchapter). For metal hydride storage systems, by protecting the valves in accordance with the requirements in ISO 16111 (IBR; *see* § 171.7 of this subchapter).

* * * * *

(e) *Pyrophoric gases.* A UN pressure receptacle must have valve outlets equipped with gas-tight plugs or caps when used for pyrophoric or flammable mixtures of gases containing more than 1% pyrophoric compounds. When UN pressure receptacles are manifolded in a bundle, each of the pressure receptacles must be equipped with an individual valve that must be closed while in transportation, and the outlet of the manifold valve must be equipped with a pressure retaining gas-tight plug or cap. Gas-tight plugs or caps must have threads that match those of the valve outlets.

* * * * *

■ 52. In § 173.306, paragraphs (h)(2), (i), and (l) are revised to read as follows:

§ 173.306 Limited quantities of compressed gases.

* * * * *

(h) * * *

(2) *Exceptions.* (i) For other than transportation by aircraft, special exceptions for shipment of lighter refills in the ORM–D class are provided in paragraph (i) of this section.

(ii) For highway transportation, when no more than 1,500 lighter refills covered by this paragraph are transported in one motor vehicle, the requirements of subparts C through H of part 172, and Part 177 of this subchapter do not apply. Lighter refills covered under this paragraph must be packaged in rigid, strong outer packagings meeting the general packaging requirements of subpart B of this part. Outer packagings must be plainly and durably marked on two opposing sides or ends with the words "LIGHTER REFILLS" and the number of devices contained therein in letters measuring at least 20 mm (0.79 in) in height. No person may offer for transportation or transport the lighter refills or prepare the lighter refills for shipment unless that person has been specifically informed of the requirements of this section.

(i) *Limited quantities.* (1) A limited quantity that conforms to the provisions of paragraph (a)(1), (a)(3), (a)(5), (b) or, except for transportation by aircraft, paragraph (h) of this section is excepted from labeling requirements, unless the material is offered for transportation or transported by aircraft, and the specification packaging requirements of this subchapter when packaged in combination packagings according to this paragraph. Packages must be marked in accordance with § 172.315(a) or (b), as appropriate, or as authorized in paragraph (i)(2) of this section. Unless otherwise specified in paragraph (i)(2) of this section, packages of limited quantities intended for transportation by aircraft must conform to the applicable requirements (*e.g.,* authorized materials, inner packaging quantity limits and closure securement) of § 173.27 of this part. A limited quantity package that conforms to the provisions of this section is not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, or is offered for transportation and transported by aircraft or vessel, and is eligible for the exceptions provided in § 173.156 of this part. Outside packagings conforming to this paragraph are not required to be marked "INSIDE CONTAINERS COMPLY WITH PRESCRIBED REGULATIONS." In addition, packages of limited quantities are not subject to subpart F (Placarding) of part 172 of this subchapter. Each package must conform to the packaging requirements of subpart B of this part and may not exceed 30 kg (66 pounds) gross weight.

(2) Until December 31, 2013, a limited quantity package containing a "consumer commodity" as defined in § 171.8 of this subchapter may be renamed "Consumer commodity" and reclassed as ORM–D or ORM–D–AIR material and offered for transportation and transported in accordance with the applicable provisions of this subchapter in effect on October 1, 2010.

* * * * *

(l) For additional exceptions, *see* § 173.307.

■ 53. In § 173.307, paragraph (a)(6) is added to read as follows:

§ 173.307 Exceptions for compressed gases.

(a) * * *

(6) Light bulbs, provided they are packaged so that the projectile effects of

any rupture of the bulb will be contained within the package.

* * * * *

■ 54. Section 173.311 is added to read as follows:

§ 173.311 Metal hydride storage systems.

The following packing instruction is applicable to transportable UN Metal hydride storage systems (UN3468) with pressure receptacles not exceeding 150 liters (40 gallons) in water capacity and having a maximum developed pressure not exceeding 25 MPa. Metal hydride storage systems must be designed, constructed, initially inspected and tested in accordance with ISO 16111 (IBR, *see* § 171.7 of this subchapter) as authorized under § 178.71(f) of this subchapter. Steel pressure receptacles or composite pressure receptacles with steel liners must be marked in accordance with § 173.301b(f) of this part which specifies that a steel UN pressure receptacle bearing an "H" mark must be used for hydrogen bearing gases or other gases that may cause hydrogen embrittlement. Requalification intervals must be no more than every five years as specified in § 180.207 of this subchapter in accordance with the requalification procedures prescribed in ISO 16111.

■ 55. In 173.322, paragraph (e) is added to read as follows:

§ 173.322 Ethyl chloride.

* * * * *

(e) In capsules under the following conditions:

(1) The mass of gas must not exceed 150 g (5.30 ounces) per capsule;

(2) The capsule must be free of faults liable to impair its strength;

(3) The leakproofness integrity of the closure must be maintained by a secondary means (*e.g.,* cap, crown, seal, binding, *etc.*) capable of preventing any leakage of the closure while in transportation; and

(4) The capsules must be placed in a strong outer packaging suitable for the contents and may not exceed a gross mass of 75 kg (165 pounds).

PART 175—CARRIAGE BY AIRCRAFT

■ 56. The authority citation for part 175 continues to read as follows:

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

■ 57. In § 175.8, in paragraph (b)(3), the first sentence is revised to read as follows:

§ 175.8 Exceptions for operator equipment and items of replacement.

* * * * *

(b) * * *

(3) Aerosols of Division 2.2 only (for dispensing of food products), alcoholic beverages, colognes, liquefied gas lighters, and perfumes carried aboard a passenger-carrying aircraft by the operator for use or sale on that specific aircraft. * * *

* * * * *

■ 58. Section 175.9 is revised to read as follows:

§ 175.9 Special aircraft operations.

(a) This subchapter applies to rotorcraft external load operations transporting hazardous material on board, attached to, or suspended from an aircraft. Operators must have all applicable requirements prescribed in 14 CFR Part 133 approved by the FAA Administrator prior to accepting or transporting hazardous material. In addition, rotorcraft external load operations must be approved by the Associate Administrator prior to the initiation of such operations.

(b) *Exceptions.* This subchapter does not apply to the following materials used for special aircraft operations when applicable FAA operator requirements have been met, including training operator personnel on the proper handling and stowage of the hazardous materials carried:

(1) Hazardous materials loaded and carried in hoppers or tanks of aircraft certificated for use in aerial seeding, dusting spraying, fertilizing, crop improvement, or pest control, to be dispensed during such an operation.

(2) Parachute activation devices, lighting equipment, oxygen cylinders, flotation devices, smoke grenades, flares, or similar devices carried during a parachute operation.

(3) Smoke grenades, flares, and pyrotechnic devices affixed to aircraft during any flight conducted as part of a scheduled air show or exhibition of aeronautical skill. The aircraft may not carry any persons other than required flight crewmembers. The affixed installation accommodating the smoke grenades, flares, or pyrotechnic devices on the aircraft must be approved for its intended use by the FAA Flight Standards District Office having responsibility for that aircraft.

(4) Hazardous materials are carried and used during dedicated air ambulance, fire fighting, or search and rescue operations.

(5) A transport incubator unit necessary to protect life or an organ preservation unit necessary to protect human organs, carried in the aircraft cabin, provided:

(i) The compressed gas used to operate the unit is in an authorized DOT specification cylinder and is marked, labeled, filled, and maintained as prescribed by this subchapter;

(ii) Each battery used is of the nonspillable type;

(iii) The unit is constructed so that valves, fittings, and gauges are protected from damage;

(iv) The pilot-in-command is advised when the unit is on board, and when it is intended for use;

(v) The unit is accompanied by a person qualified to operate it;

(vi) The unit is secured in the aircraft in a manner that does not restrict access to or use of any required emergency or regular exit or of the aisle in the passenger compartment; and,

(vii) Smoking within 3 m (10 feet) of the unit is prohibited.

(6) Hazardous materials that are loaded and carried on or in cargo only aircraft, and that are to be dispensed or expended during flight for weather control, environmental restoration or protection, forest preservation and protection, fire fighting and prevention, flood control, or avalanche control purposes, when the following requirements are met:

(i) Operations may not be conducted over densely populated areas, in a congested airway, or near any airport where carrier passenger operations are conducted.

(ii) Each operator must prepare and keep current a manual containing operational guidelines and handling procedures, for the use and guidance of flight, maintenance, and ground personnel concerned in the dispensing or expending of hazardous materials. The manual must be approved by the FAA Principal Operations Inspector assigned to the operator.

(iii) No person other than a required flight crewmember, FAA inspector, or person necessary for handling or dispensing the hazardous material may be carried on the aircraft.

(iv) The operator of the aircraft must have advance permission from the owner of any airport to be used for the dispensing or expending operation.

(v) When Division 1.1, 1.2, and 1.3 materials (except detonators and detonator assemblies) and detonators or detonator assemblies are carried for avalanche control flights, the explosives must be handled by, and at all times be under the control of, a qualified blaster. When required by a State or local authority, the blaster must be licensed and the State or local authority must be identified in writing to the FAA Principal Operations Inspector assigned to the operator.

■ 59. In § 175.10:

■ a. Paragraphs (a)(17) and (18) are redesignated as paragraphs (a)(18) and (19), respectively;
■ b. New paragraph (a)(17) is added; and
■ c. Newly redesignated paragraph (a)(19) is revised.

The addition and revision read as follows:

§ 175.10 Exceptions for passengers, crewmembers, and air operators.

(a) * * *

(17) A lithium ion battery-powered wheelchair or other mobility aid as follows:

(i) A wheelchair or other mobility aid equipped with a lithium ion battery, when carried as checked baggage, provided—

(A) The lithium ion battery must be of a type that successfully passed each test in the UN Manual of Tests and Criteria as specified in § 173.185 of this subchapter, unless approved by the Associate Administrator;

(B) Visual inspection including removal of the battery, where necessary, reveals no obvious defects (removal of the battery from the housing should be performed by qualified airline personnel only);

(C) Battery terminals must be protected from short circuits (*e.g.,* by being enclosed within a battery container that is securely attached to the mobility aid);

(D) The pilot-in-command is advised, either orally or in writing, prior to departure, as to the location of the wheelchair or mobility aid aboard the aircraft; and

(E) The wheelchair or mobility aid is loaded, stowed, secured and unloaded in an upright position and in a manner that prevents unintentional activation and protects it from damage.

(F) A lithium metal battery is forbidden aboard a passenger-carrying aircraft.

(ii) A wheelchair or other mobility aid when carried as checked or carry-on baggage, provided—

(A) The wheelchair or other mobility aid is designed and constructed in a manner to allow for stowage in either a cargo compartment or in the passenger cabin;

(B) The lithium ion battery is removed; and

(C) The lithium ion battery and any spare batteries are carried in the same manner as spare batteries in paragraph (a)(18) of this section.

* * * * *

(19) Portable electronic devices (*e.g.,* cellular phones, laptop computers, and camcorders) powered by fuel cell systems, and not more than two spare fuel cell cartridges per passenger or crew member, when transported in carry-on baggage for personal use under the following conditions:

(i) Fuel cell cartridges may contain only Division 2.1 liquefied flammable gas, or hydrogen in a metal hydride, Class 3 flammable liquids (including methanol), Division 4.3 water reactive substances, or Class 8 corrosive materials;

(ii) The maximum water capacity of a fuel cell cartridge for hydrogen in a metal hydride may not exceed 120 mL (4 fluid ounces). The maximum quantity of fuel in all other fuel cell cartridge types may not exceed:

(A) 200 mL (6.76 ounces) for liquids;

(B) 120 mL (4 fluid ounces) for liquefied gases in non-metallic fuel cell cartridges, or 200 mL (6.76 ounces) for liquefied gases in metal fuel cell cartridges; or

(C) 200 g (7 ounces) for solids.

(iii) No more than two spare fuel cell cartridges may be carried by a passenger;

(iv) Fuel cells containing fuel are permitted in carry-on baggage only;

(v) Fuel cell cartridges containing hydrogen in a metal hydride must meet the requirements in § 173.230(d);

(vi) Fuel cell cartridges may not be refillable by the user. Refueling of fuel cell systems is not permitted except that the installation of a spare cartridge is allowed. Fuel cell cartridges that are used to refill fuel cell systems but that are not designed or intended to remain installed (fuel cell refills) in a portable electronic device are not permitted;

(vii) Fuel cell systems and fuel cell cartridges must conform to IEC/PAS 62282–6–1 (IBR; *see* § 171.7 of this subchapter);

(viii) Interaction between fuel cells and integrated batteries in a device must conform to IEC/PAS 62282–6–1 (IBR, *see* § 171.7 of this subchapter). Fuel cell systems for which the sole function is to charge a battery in the device are not permitted;

(ix) Fuel cell systems must be of a type that will not charge batteries when the consumer electronic device is not in use; and

(x) Each fuel cell cartridge and system that conforms to the requirements in this paragraph (a)(18) must be durably marked by the manufacturer with the wording: "APPROVED FOR CARRIAGE IN AIRCRAFT CABIN ONLY" to certify that the fuel cell cartridge or system meets the specifications in IEC/PAS 62282–6–1 (IBR, *see* § 171.7 of this subchapter) and with the maximum quantity and type of fuel contained in the cartridge or system.

(xi) Spare fuel cell cartridges containing a flammable liquid (Class 3) or corrosive material (Class 8) may be transported in checked baggage.

(xii) Spare fuel cell cartridges containing liquefied flammable gas (Division 2.1), hydrogen in a metal hydride (Division 2.1) or water reactive material (Division 4.3) may only be transported in carry-on baggage.

* * * * *

■ 60. Section 175.25 is revised to read as follows:

§ 175.25 Notification at air passenger facilities of hazardous materials restrictions.

(a) Each person who engages in for-hire air transportation of passengers must display notices of the requirements applicable to the carriage of hazardous materials aboard aircraft, and the penalties for failure to comply with those requirements in accordance with this section. Each notice must be legible, and be prominently displayed so it can be seen by passengers in locations where the aircraft operator issues tickets, checks baggage, and maintains aircraft boarding areas. At a minimum, each notice must communicate the following information:

(1) Federal law forbids the carriage of hazardous materials aboard aircraft in your luggage or on your person. A violation can result in five years' imprisonment and penalties of $250,000 or more (49 U.S.C. 5124). Hazardous materials include explosives, compressed gases, flammable liquids and solids, oxidizers, poisons, corrosives and radioactive materials. Examples: Paints, lighter fluid, fireworks, tear gases, oxygen bottles, and radio-pharmaceuticals.

(2) There are special exceptions for small quantities (up to 70 ounces total) of medicinal and toilet articles carried in your luggage and certain smoking materials carried on your person. For further information contact your airline representative.

(b) *Ticket purchase.* An aircraft operator must ensure that information on the types of hazardous materials specified in paragraph (a) of this section a passenger is permitted and forbidden to transport aboard an aircraft is provided at the point of ticket purchase. During the purchase process, regardless if the process is completed remotely (*e.g.,* via the Internet or phone) or when completed at the airport, with or without assistance from another person (*e.g.,* automated check-in facility), the aircraft operator must ensure that information on the types of hazardous materials a passenger is forbidden to transport aboard an aircraft is provided to passengers. Information may be in text or in pictorial form and, effective

January 1, 2013, must be such that the final ticket purchase cannot be completed until the passenger or a person acting on the passenger's behalf has indicated that it understands the restrictions on hazardous materials in baggage.

(c) *Check-in.* An aircraft operator must ensure that information on the types of hazardous materials specified in paragraph (a) of this section a passenger is permitted and forbidden to transport aboard an aircraft is provided during the flight check-in process.

(1) Effective January 1, 2013, when the flight check-in process is conducted remotely (*e.g.,* via the Internet or phone) or when completed at the airport, without assistance from another person (*e.g.,* automated check-in kiosk), the aircraft operator must ensure that information on the types of hazardous materials a passenger is forbidden to transport aboard an aircraft is provided to passengers. Information may be in text or in pictorial form and should be such that the check in process cannot be completed until the passenger or a person acting on the passenger's behalf has indicated that it understands the restrictions on hazardous materials in baggage.

(2) When the check in process is not conducted remotely (*e.g.,* at the airport with the assistance of an airline representative), passenger notification of permitted and forbidden hazardous materials may be completed through signage (electronic or otherwise), provided it is legible and prominently displayed.

■ 61. In § 175.30, paragraph (e)(3) is revised to read as follows:

§ 175.30 Inspecting shipments.

* * * * *

(e) * * *

(3) The word "OVERPACK" appears on the outside of the overpack when specification packagings are required.

■ 62. Section 175.75 is revised to read as follows:

§ 175.75 Quantity limitations and cargo location.

(a) No person may carry on an aircraft a hazardous material except as permitted by this subchapter.

(b) Except as otherwise provided in this subchapter, no person may carry a hazardous material in the cabin of a passenger-carrying aircraft or on the flight deck of any aircraft, and the hazardous material must be located in a place that is inaccessible to persons other than crew members. Hazardous materials may be carried in a main deck cargo compartment of a passenger aircraft provided that the compartment is inaccessible to passengers and that it meets all certification requirements for a Class B aircraft cargo compartment in 14 CFR 25.857(b) or for a Class C aircraft cargo compartment in 14 CFR 25.857(c). A package bearing a "KEEP AWAY FROM HEAT" handling marking must be protected from direct sunshine and stored in a cool and ventilated place, away from sources of heat.

(c) For each package containing a hazardous material acceptable for carriage aboard passenger-carrying aircraft, no more than 25 kg (55 pounds) net weight of hazardous material may be loaded in an inaccessible manner. In addition to the 25 kg limitation, an additional 75 kg (165 pounds) net weight of Division 2.2 (non-flammable compressed gas) may be loaded in an inaccessible manner. The requirements of this paragraph do not apply to Class 9, ORM–D–AIR and Limited or Excepted Quantity material.

(d) For the purposes of this section—

(1) *Accessible* means, on passenger-carrying or cargo-only aircraft that each package is loaded where a crew member or other authorized person can access, handle and, when size and weight permit, separate such packages from other cargo during flight including a freight container in an accessible cargo compartment when packages are loaded in an accessible manner. Additionally, a package is considered accessible when transported on a cargo-only aircraft if it is:

(i) In a cargo compartment certified by FAA as a Class C aircraft cargo compartment as defined in 14 CFR 25.857(c); or

(ii) In an FAA-certified freight container that has an approved fire or smoke detection system and fire suppression system equivalent to that required by the certification requirements for a Class C aircraft cargo compartment.

(2) *Inaccessible* means all other configurations including a freight container in an accessible compartment when packages are loaded inaccessibly.

(e) For transport aboard cargo-only aircraft, the requirements of paragraphs (c) and (d) of this section do not apply to the following hazardous materials:

(1) Class 3, Packing Group III (that does not meet the definition of another hazard class except CORROSIVE), Division 6.1 ((primary) except those also labeled FLAMMABLE LIQUID), Division 6.2, Class 7, Class 9, and those marked as ORM–D–AIR, Limited Quantity or Excepted Quantity material.

(2) Packages of hazardous materials transported aboard a cargo aircraft, when other means of transportation are impracticable or not available, in accordance with procedures approved in writing by the FAA Regional or Field Security Office in the region where the operator is located.

(3) Packages of hazardous materials carried on small, single pilot, cargo aircraft if:

(i) No person is carried on the aircraft other than the pilot, an FAA inspector, the shipper or consignee of the material, a representative of the shipper or consignee so designated in writing, or a person necessary for handling the material;

(ii) The pilot is provided with written instructions on the characteristics and proper handling of the materials; and

(iii) Whenever a change of pilots occurs while the material is on board, the new pilot is briefed under a hand-to-hand signature service provided by the operator of the aircraft.

(f) At a minimum, quantity limits and loading instructions in the following quantity and loading table must be followed to maintain acceptable quantity and loading between packages containing hazardous materials. The quantity and loading table is as follows:

QUANTITY AND LOADING TABLE

Applicability	Forbidden	Quantity Limitation: 25 kg net weight of hazardous material plus 75 kg net weight of Division 2.2 (non-flammable compressed gas)	No limit
Passenger-carrying aircraft	Cargo Aircraft Only labeled packages.	Inaccessible	Accessible.

QUANTITY AND LOADING TABLE—Continued

Applicability	Forbidden	Quantity Limitation: 25 kg net weight of hazardous material plus 75 kg net weight of Division 2.2 (non-flammable compressed gas)	No limit
Cargo-only aircraft—Packages authorized aboard a passenger-carrying aircraft.	Not applicable	Inaccessible (*See* Note 1)	Accessible (*See* Note 2).
Cargo-only aircraft—Packages not authorized aboard a passenger-carrying aircraft and displaying a Cargo Aircraft Only label.	Inaccessible (*See* Note 1)	Not applicable	Accessible (*See* Note 2).

Note 1: The following materials are not subject to this loading restriction—
a. Class 3, PG III (unless the hazardous material meets the definition of another hazard class, except CORROSIVE).
b. Primary Class 6 (unless also labeled as a flammable liquid).
c. Class 7 (unless the hazardous material meets the definition of another hazard class).
d. Class 9, ORM–D–AIR and Limited Quantity or Excepted Quantity material.
Note 2: Aboard cargo-only aircraft, packages required to be loaded in a position that is considered to be accessible include those loaded in a Class C cargo compartment.

■ 63. In § 175.78, paragraph (c)(4)(iii) is revised to read as follows:

§ 175.78 Stowage compatibility of cargo.

* * * * *

(c) * * *

(4) * * *

(iii) Except for Division 1.4B explosives and as otherwise provided in this Note, explosives of different compatibility groups may be stowed together whether or not they belong to the same division. Division 1.4B explosives must not be stowed together with any other explosive permitted aboard aircraft except Division 1.4S, unless segregated as prescribed in paragraph (c)(4)(iv) of this section ("Note 1").

* * * * *

PART 176—CARRIAGE BY VESSEL

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

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

■ 65. In § 176.2, in the definition for "Cargo transport unit," the first sentence is revised to read as follows:

§ 176.2 Definitions.

* * * * *

Cargo transport unit means a transport vehicle, a freight container, a portable tank or a multiple element gas container (MEGC). * * *

* * * * *

■ 66. In § 176.63, paragraph (f)(2) is revised to read as follows:

§ 176.63 Stowage locations.

* * * * *

(f) * * *

(2) The hatchless container hold is in full compliance with the provisions of SOLAS, Chapter II–2/Regulation 19 (IBR; *see* § 171.7 of this subchapter), applicable to enclosed container cargo spaces, as appropriate for the cargo transported.

■ 67. In § 176.76, paragraph (a)(9) is added to read as follows:

§ 176.76 Transport vehicles, freight containers, and portable tanks containing hazardous materials.

(a) * * *

(9) When security devices, beacons or other tracking or monitoring equipment are used, they must be securely installed and must be of a certified safe type for the hazardous materials that will be carried within the freight container or transport vehicle in which such as device or equipment is installed.

* * * * *

§ 176.84 [Amended]

■ 68. In § 176.84, in paragraph (b) Table of provisions, Code Number "143" and its corresponding provision are removed.

§ 176.142 [Removed and Reserved]

■ 69. Section 176.142 is removed and reserved.

■ 70. Section 176.905 is revised to read as follows:

§ 176.905 Stowage of motor vehicles or mechanical equipment.

(a) A vehicle or any mechanical equipment powered by an internal combustion engine, a fuel cell, batteries or a combination thereof, is subject to the following requirements when carried as cargo on a vessel:

(1) Before being loaded on a vessel, each vehicle or mechanical equipment must be inspected for fuel leaks and identifiable faults in the electrical system that could result in short circuit or other unintended electrical source of ignition. A vehicle or mechanical equipment showing any signs of leakage or electrical fault may not be transported.

(2) The fuel tank of a vehicle or mechanical equipment powered by liquid fuel may not be more than one-fourth full.

(3) Whenever possible, each vehicle or mechanical equipment must be stowed to allow for its inspection during transportation.

(4) Vehicles or mechanical equipment may be refueled when necessary in the hold of a vessel in accordance with § 176.78 of this part.

(b) All equipment used for handling vehicles or mechanical equipment must be designed so that the fuel tank and the fuel system of the vehicle or mechanical equipment are protected from stress that might cause rupture or other damage incident to handling.

(c) Two hand-held, portable, dry chemical fire extinguishers of at least 4.5 kg (10 pounds) capacity each must be separately located in an accessible location in each hold or compartment in which any vehicle or mechanical equipment is stowed.

(d) "NO SMOKING" signs must be conspicuously posted at each access opening to the hold or compartment.

(e) Each portable electrical light, including a flashlight, used in the stowage area must be an approved, explosion-proof type. All electrical connections for any light must be made to outlets outside the space in which any vehicle or mechanical equipment is stowed.

(f) Each hold or compartment must be ventilated and fitted with an overhead water sprinkler system or fixed fire extinguisher system.

(g) Each hold or compartment must be equipped with a smoke or fire detection

system capable of alerting personnel on the bridge.

(h) All electrical equipment in the hold or compartment other than fixed explosion-proof lighting must be disconnected from its power source at a location outside the hold or compartment during the handling and transportation of any vehicle or mechanical equipment. Where the disconnecting means is a switch or circuit breaker, it must be locked in the open position until all vehicles have been removed.

(i) Exceptions—A vehicle or mechanical equipment is excepted from the requirements of this subchapter if the following requirements are met:

(1) *Internal combustion engines liquid fuel powered.* (i) The vehicle or mechanical equipment has an internal combustion engine using liquid fuel that has a flashpoint less than 38°C (100°F), the fuel tank is empty, and the engine is run until it stalls for lack of fuel; or

(ii) The vehicle or mechanical equipment has an internal combustion engine using liquid fuel that has a flashpoint of 38°C (100°F) or higher, the fuel tank contains 418 L (110 gallons) of fuel or less, and there are no fuel leaks in any portion of the fuel system.

(2) Vehicle *ferry operations.* The vehicle or mechanical equipment is stowed in a hold or compartment designated by the administration of the country in which the vessel is registered as specially designed and approved for vehicles and mechanical equipment and there are no signs of leakage from the battery, engine, fuel cell, compressed gas cylinder or accumulator, or fuel tank, as appropriate. For vehicles with batteries connected and fuel tanks containing gasoline transported by U.S. vessels, *see* 46 CFR 70.10–1 and 90.10–38.

(3) *Battery-powered.* The vehicle or mechanical equipment is electrically powered solely by wet electric storage batteries (including nonspillable batteries) or sodium batteries;

(4) *Flammable gas powered.* The vehicle or mechanical equipment is equipped with liquefied petroleum gas or other compressed gas fuel tanks, the tanks are completely emptied of liquefied or compressed gas and the positive pressure in the tank does not exceed 2 bar (29 psig), the line from the fuel tank to the regulator and the regulator itself is drained of all traces of liquefied or compressed gas, and the fuel shut-off valve is closed.

(j) Except as provided in § 173.220(d) of this subchapter, the provisions of this subchapter do not apply to items of equipment such as fire extinguishers, compressed gas accumulators, airbag inflators and the like which are installed in the vehicle or mechanical equipment if they are necessary for the operation of the vehicle or equipment, or for the safety of its operator or passengers.

PART 178—SPECIFICATIONS FOR PACKAGINGS

■ 71. The authority citation for part 178 continues to read as follows:

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

■ 72. Section 178.71 is revised to read as follows:

§ 178.71 Specifications for UN pressure receptacles.

(a) *General.* Each UN pressure receptacle must meet the requirements of this section. Requirements for approval, qualification, maintenance, and testing are contained in § 178.70, and subpart C of part 180 of this subchapter.

(b) *Definitions.* The following definitions apply for the purposes of design and construction of UN pressure receptacles under this subpart:

Alternative arrangement means an approval granted by the Associate Administrator for a MEGC that has been designed, constructed or tested to the technical requirements or testing methods other than those specified for UN pressure receptacles in part 178 or part 180 of this subchapter.

Bundle of cylinders. See § 171.8 of this subchapter.

Design type means a pressure receptacle design as specified by a particular pressure receptacle standard.

Design type approval means an overall approval of the manufacturer's quality system and design type of each pressure receptacle to be produced within the manufacturer's facility.

UN tube. See § 171.8 of this subchapter.

(c) *General design and construction.* UN pressure receptacles and their closures must be designed, manufactured, tested and equipped in accordance with the requirements contained in this section. The ISO standard requirements applicable to UN pressure receptacles may be varied only if approved in writing by the Associate Administrator.

(d) *Service equipment.* (1) Except for pressure relief devices, UN pressure receptacle equipment, including valves, piping, fittings, and other equipment subjected to pressure must be designed and constructed to withstand at least 1.5 times the test pressure of the pressure receptacle.

(2) Service equipment must be configured or designed to prevent damage that could result in the release of the pressure receptacle contents during normal conditions of handling and transport. Manifold piping leading to shut-off valves must be sufficiently flexible to protect the valves and the piping from shearing or releasing the pressure receptacle contents. The filling and discharge valves and any protective caps must be secured against unintended opening. The valves must conform to ISO 10297 (IBR, *see* § 171.7 of this subchapter) and be protected as specified in § 173.301b(f) of this subchapter.

(3) UN pressure receptacles that cannot be handled manually or rolled, must be equipped with devices (*e.g.,* skids, rings, straps) ensuring that they can be safely handled by mechanical means and so arranged as not to impair the strength of, nor cause undue stresses, in the pressure receptacle.

(4) Pressure receptacles filled by volume must be equipped with a level indicator.

(e) *Bundles of cylinders.* UN pressure receptacles assembled in bundles must be structurally supported and held together as a unit and secured in a manner that prevents movement in relation to the structural assembly and movement that would result in the concentration of harmful local stresses. The frame design must ensure stability under normal operating conditions.

(1) The frame must securely retain all the components of the bundle and must protect them from damage during conditions normally incident to transportation. The method of cylinder restraint must prevent any vertical or horizontal movement or rotation of the cylinder that could cause undue strain on the manifold. The total assembly must be able to withstand rough handling, including being dropped or overturned.

(2) The frame must include features designed for the handling and transportation of the bundle. The lifting rings must be designed to withstand a design load of 2 times the maximum gross weight. Bundles with more than one lifting ring must be designed such that a minimum sling angle of 45 degrees to the horizontal can be achieved during lifting using the lifting rings. If four lifting rings are used, their design must be strong enough to allow the bundle to be lifted by two rings. Where two or four lifting rings are used, diametrically opposite lifting rings must be aligned with each other to allow for correct lifting using shackle pins. If the bundle is filled with forklift pockets, it must contain two forklift pockets on each side from which it is to be lifted. The forklift pockets must be positioned

symmetrically consistent with the bundle center of gravity.

(3) The frame structural members must be designed for a vertical load of 2 times the maximum gross weight of the bundle. Design stress levels may not exceed 0.9 times the yield strength of the material.

(4) The frame must not contain any protrusions from the exterior frame structure that could cause a hazardous condition.

(5) The frame design must prevent collection of water or other debris that would increase the tare weight of bundles filled by weight.

(6) The floor of the bundle frame must not buckle during normal operating conditions and must allow for the drainage of water and debris from around the base of the cylinders.

(7) If the frame design includes movable doors or covers, they must be capable of being secured with latches or other means that will not become dislodged by operational impact loads. Valves that need to be operated in normal service or in an emergency must be accessible.

(8) For bundles of cylinders, pressure receptacle marking requirements only apply to the individual cylinders of a bundle and not to any assembly structure.

(f) *Design and construction requirements for UN refillable welded cylinders.* In addition to the general requirements of this section, UN refillable welded cylinders must conform to the following ISO standards, as applicable:

(1) ISO 4706: Gas cylinders—Refillable welded steel cylinders—Test pressure 60 bar and below (IBR, *see* § 171.7 of this subchapter).

(2) ISO 18172–1: Gas cylinders—Refillable welded stainless steel cylinders—Part 1: Test pressure 6 MPa and below (IBR, *see* § 171.7 of this subchapter).

(3) ISO 20703: Gas cylinders—Refillable welded aluminum-alloy cylinders—Design, construction and testing (IBR, *see* § 171.7 of this subchapter).

(g) *Design and construction requirements for UN refillable seamless steel cylinders.* In addition to the general requirements of this section, UN refillable seamless steel cylinders must conform to the following ISO standards, as applicable:

(1) ISO 9809–1: Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 1: Quenched and tempered steel cylinders with tensile strength less than 1 100 MPa. (IBR, *see* § 171.7 of this subchapter).

(2) ISO 9809–2: Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 2: Quenched and tempered steel cylinders with tensile strength greater than or equal to 1 100 MPa. (IBR, *see* § 171.7 of this subchapter).

(3) ISO 9809–3: Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 3: Normalized steel cylinders. (IBR, *see* § 171.7 of this subchapter).

(h) *Design and construction requirements for UN refillable seamless aluminum alloy cylinders.* In addition to the general requirements of this section, UN refillable seamless aluminum cylinders must conform to ISO 7866: Gas cylinders—Refillable seamless aluminum alloy gas cylinders—Design, construction and testing. (IBR, *see* § 171.7 of this subchapter). The use of Aluminum alloy 6351–T6 or equivalent is prohibited.

(i) *Design and construction requirements for UN non-refillable metal cylinders.* In addition to the general requirements of this section, UN non-refillable metal cylinders must conform to ISO 11118: Gas cylinders—Non-refillable metallic gas cylinders—Specification and test methods. (IBR, *see* § 171.7 of this subchapter.)

(j) *Design and construction requirements for UN refillable seamless steel tubes.* In addition to the general requirements of this section, UN refillable seamless steel tubes must conform to ISO 11120: Gas cylinders—Refillable seamless steel tubes of water capacity between 150 L and 3000 L—Design, construction and testing. (IBR, *see* § 171.7 of this subchapter).

(k) *Design and construction requirements for UN acetylene cylinders.* In addition to the general requirements of this section, UN acetylene cylinders must conform to the following ISO standards, as applicable:

(1) For the cylinder shell:

(i) ISO 9809–1: Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 1: Quenched and tempered steel cylinders with tensile strength less than 1 100 MPa.

(ii) ISO 9809–3: Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 3: Normalized steel cylinders.

(2) The porous mass in an acetylene cylinder must conform to ISO 3807–2: Cylinders for acetylene—Basic requirements—Part 2: Cylinders with fusible plugs. (IBR, *see* § 171.7 of this subchapter).

(l) *Design and construction requirements for UN composite cylinders.* (1) In addition to the general requirements of this section, UN composite cylinders must be designed for unlimited service life and conform to the following ISO standards, as applicable:

(i) ISO 11119–1: Gas cylinders of composite construction—Specification and test methods—Part 1: Hoop-wrapped composite gas cylinders. (IBR, *see* § 171.7 of this subchapter).

(ii) ISO 11119–2: Gas cylinders of composite construction—Specification and test methods—Part 2: Fully-wrapped fibre reinforced composite gas cylinders with load-sharing metal liners. (IBR, *see* § 171.7 of this subchapter).

(iii) ISO 11119–3: Gas cylinders of composite construction—Specification and test methods—Part 3: Fully wrapped fibre reinforced composite gas cylinders with non-load sharing metallic or non-metallic liners. (IBR, *see* § 171.7 of this subchapter).

(2) ISO 11119–2 and ISO 11119–3 gas cylinders of composite construction manufactured in accordance with the requirements for underwater use must bear the "UW" mark.

(m) *Design and construction requirements for UN metal hydride storage systems.* In addition to the general requirements of this section, metal hydride storage systems must conform to the following ISO standards, as applicable: ISO 16111: Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride (IBR, *see* § 171.7 of this subchapter).

(n) *Material compatibility.* In addition to the material requirements specified in the UN pressure receptacle design and construction ISO standards, and any restrictions specified in part 173 for the gases to be transported, the requirements of the following standards must be applied with respect to material compatibility:

(1) ISO 11114–1: Transportable gas cylinders—Compatibility of cylinder and valve materials with gas contents—Part 1: Metallic materials. (IBR, *see* § 171.7 of this subchapter).

(2) ISO 11114–2: Transportable gas cylinders—Compatibility of cylinder and valve materials with gas contents—Part 2: Non-metallic materials. (IBR, *see* § 171.7 of this subchapter).

(o) *Protection of closures.* Closures and their protection must conform to the requirements in § 173.301(f) of this subchapter.

(p) *Marking of UN refillable pressure receptacles.* UN refillable pressure receptacles must be marked clearly and legibly. The required markings must be permanently affixed by stamping, engraving, or other equivalent method, on the shoulder, top end or neck of the pressure receptacle or on a permanently

affixed component of the pressure receptacle, such as a welded collar. Except for the "UN" mark, the minimum size of the marks must be 5 mm for pressure receptacles with a diameter greater than or equal to 140 mm, and 2.5 mm for pressure receptacles with a diameter less than 140 mm. The minimum size of the "UN" mark must be 5 mm for pressure receptacles with a diameter less than 140 mm, and 10 mm for pressure receptacles with a diameter of greater than or equal to 140 mm. The depth of the markings must not create harmful stress concentrations. A refillable pressure receptacle conforming to the UN standard must be marked as follows:

(1) The UN packaging symbol.

(2) The ISO standard, for example ISO 9809–1, used for design, construction and testing. Acetylene cylinders must be marked to indicate the porous mass and the steel shell, for example: "ISO 3807–2/ISO 9809–1."

(3) The mark of the country where the approval is granted. The letters "USA" must be marked on UN pressure receptacles approved by the United States. The manufacturer must obtain an approval number from the Associate Administrator. The manufacturer approval number must follow the country of approval mark, separated by a slash (for example, USA/MXXXX). Pressure receptacles approved by more than one national authority may contain the mark of each country of approval, separated by a comma.

(4) The identity mark or stamp of the IIA.

(5) The date of the initial inspection, the year (four digits) followed by the month (two digits) separated by a slash, for example "2006/04".

(6) The test pressure in bar, preceded by the letters "PH" and followed by the letters "BAR".

(7) The rated charging pressure of the metal hydride storage system in bar, preceded by the letters "RCP" and followed by the letters "BAR."

(8) The empty or tare weight. Except for acetylene cylinders, empty weight is the mass of the pressure receptacle in kilograms, including all integral parts (*e.g.,* collar, neck ring, foot ring, *etc.*), followed by the letters "KG". The empty weight does not include the mass of the valve, valve cap or valve guard or any coating. The empty weight must be expressed to three significant figures rounded up to the last digit. For cylinders of less than 1 kg, the empty weight must be expressed to two significant figures rounded down to the last digit. For acetylene cylinders, the tare weight must be marked on the cylinders in kilograms. The tare weight is the sum of the empty weight, mass of the valve, any coating and all permanently attached parts (*e.g.,* fittings and accessories) that are not removed during filling. The tare weight must be expressed to two significant figures rounded down to the last digit. The tare weight does not include the cylinder cap or any outlet cap or plug not permanently attached to the cylinder.

(9) The minimum wall thickness of the pressure receptacle in millimeters followed by the letters "MM". This mark is not required for pressure receptacles with a water capacity less than or equal to 1.0 L or for composite cylinders.

(10) For pressure receptacles intended for the transport of compressed gases and UN 1001 acetylene, dissolved, the working pressure in bar, proceeded by the letters "PW".

(11) For liquefied gases, the water capacity in liters expressed to three significant digits rounded down to the last digit, followed by the letter "L". If the value of the minimum or nominal water capacity is an integer, the digits after the decimal point may be omitted.

(12) Identification of the cylinder thread type (*e.g.,* 25E).

(13) The country of manufacture. The letters "USA" must be marked on cylinders manufactured in the United States.

(14) The serial number assigned by the manufacturer.

(15) For steel pressure receptacles, the letter "H" showing compatibility of the steel, as specified in 1SO 11114–1.

(16) Identification of aluminum alloy, if applicable.

(17) Stamp for nondestructive testing, if applicable.

(18) Stamp for underwater use of composite cylinders, if applicable.

(19) For metal hydride storage systems having a limited life, the date of expiration indicated by the word "FINAL," followed by the year (four digits), the month (two digits) and separated by a slash.

(q) *Marking sequence.* The marking required by paragraph (p) of this section must be placed in three groups as shown in the example below:

(1) The top grouping contains manufacturing marks and must appear consecutively in the sequence given in paragraphs (p)(13) through (19) of this section.

(2) The middle grouping contains operational marks described in paragraphs (p)(6) through (11) of this section.

(3) The bottom grouping contains certification marks and must appear consecutively in the sequence given in paragraphs (p)(1) through (5) of this section.

(12) (13) (14) (15) (16) (17) (18) (19)

25E USA 765432 H UW FINAL 2XXX/XX

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(10) (6) (7) (8) (11) (9)

PW200 PH300BAR RCPXXXBAR 62.1 KG 50L 5.8MM

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(1) (2) (3) (4) (5)

ISO 9809-1 USA/MXXXX IB 2005/12

(r) *Other markings.* Other markings are allowed in areas other than the side wall, provided they are made in low stress areas and are not of a size and depth that will create harmful stress concentrations. Such marks must not conflict with required marks.

(s) *Marking of UN non-refillable pressure receptacles.* Unless otherwise specified in this paragraph, each UN non-refillable pressure receptacle must be clearly and legibly marked as prescribed in paragraph (p) of this section. In addition, permanent stenciling is authorized. Except when stenciled, the marks must be on the shoulder, top end or neck of the pressure receptacle or on a permanently affixed component of the pressure receptacle (*e.g.,* a welded collar).

(1) The marking requirements and sequence listed in paragraphs (p)(1) through (19) of this section are required, except the markings in paragraphs (p)(8), (9), (12) and (18) are not applicable. The required serial number marking in paragraph (p)(14) may be replaced by the batch number.

(2) Each receptacle must be marked with the words "DO NOT REFILL" in letters of at least 5 mm in height.

(3) A non-refillable pressure receptacle, because of its size, may substitute the marking required by this paragraph with a label. Reduction in marking size is authorized only as prescribed in ISO 7225, Gas cylinders—Precautionary labels. (IBR, *see* § 171.7 of this subchapter).

(4) Each non-refillable pressure receptacle must also be legibly marked by stenciling the following statement: "Federal law forbids transportation if refilled-penalty up to $500,000 fine and 5 years in imprisonment (49 U.S.C. 5124)."

(5) No person may mark a non-refillable pressure receptacle as meeting the requirements of this section unless it was manufactured in conformance with this section.

■ 73. In § 178.275, paragraph (h) is revised to read as follows:

§ 178.275 Specification for UN Portable Tanks intended for the transportation of liquid and solid hazardous materials.

* * * * *

(h) *Fusible elements.* Fusible elements must operate at a temperature between 110 °C (230 °F) and 149 °C (300.2 °F), provided that the pressure in the shell at the fusing temperature will not exceed the test pressure. They must be placed at the top of the shell with their inlets in the vapor space and in no case may they be shielded from external heat. Fusible elements must not be utilized on portable tanks with a test pressure which exceeds 2.65 bar (265.0 kPa); however, fusible elements are authorized on portable tanks for the transportation of certain organometallic materials in accordance with § 172.102, special provision TP36 of this subchapter. Fusible elements used on portable tanks intended for the transport of elevated temperature hazardous materials must be designed to operate at a temperature higher than the maximum temperature that will be experienced during transport and must be designed to the satisfaction of the approval agency.

* * * * *

■ 74. In § 178.347–1, paragraph (d)(9) is revised to read as follows:

§ 178.347–1 General requirements.

* * * * *

(d) * * *

(9) UW–12 in Section VIII of the ASME Code does not apply to a weld seam in a bulkhead that has not been radiographically examined, under the following conditions:

(i) The strength of the weld seam is assumed to be 0.85 of the strength of the bulkhead.

(ii) The welded seam must be a full penetration butt weld.

(iii) No more than one seam may be used per bulkhead.

(iv) The welded seam must be completed before forming the dish radius and knuckle radius.

(v) Compliance test: Two test specimens of materials representative of those to be used in the manufacture of a cargo tank bulkhead must be tested to failure in tension. The test specimen must be of the same thickness and joined by the same welding procedure. The test specimens may represent all the tanks that are made in the same facility within 6 months after the tests are completed. Before welding, the fit-up of the joints on the test specimens must represent production conditions that would result in the least joint strength. Evidence of joint fit-up and test results must be retained at the manufacturer's facility for at least 5 years.

(vi) Acceptance criteria: The ratio of the actual tensile stress at failure to the actual tensile strength of the adjacent

The test specimens may represent all the tanks that are made in the same facility within 6 months after the tests are completed. Before welding, the fit-up of the joints on the test specimens must represent production conditions that would result in the least joint strength. Evidence of joint fit-up and test results must be retained at the manufacturer's facility for at least 5 years.

(vi) Acceptance criteria: The ratio of the actual tensile stress at failure to the actual tensile strength of the adjacent material of all samples of a test lot must be greater than 0.85.

■ 75. In § 178.603, paragraph (f)(4) is revised to read as follows:

§ 178.603 Drop test.

* * * * *

(f) * * *

(4) The packaging or outer packaging of a composite or combination packaging must not exhibit any damage likely to affect safety during transport. Inner receptacles, inner packagings, or articles must remain completely within the outer packaging and there must be no leakage of the filling substance from the inner receptacles or inner packagings;

* * * * *

■ 76. In § 178.703, paragraph (a)(1)(viii) is revised to read as follows:

§ 178.703 Marking of IBCs.

(a) * * *

(1) * * *

(viii) The maximum permissible gross mass in kg.

* * * * *

■ 77. In § 178.955, paragraphs (c)(6) and (7) are added to read as follows:

§ 178.955 General requirements.

* * * * *

(c) * * *

(6) *Remanufactured Large Packaging* is a metal or rigid Large Packaging that is produced as a UN type from a non-UN type or is converted from one UN design type to another UN design type. Remanufactured Large Packagings are subject to the same requirements of this subchapter that apply to new Large Packagings of the same type.

(7) *Reused Large Packaging* is a Large Packaging intended to be refilled and has been examined and found free of defects affecting its ability to withstand the performance tests. *See* also § 173.36(c) of this subchapter.

* * * * *

PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

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

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

§ 180.207 [Amended]

■ 79. In § 180.207, in paragraph (c), in Table 1, between the right-hand columns entries "Composite pressure receptacles" and "Pressure receptacles used for," a new entry "Metal hydride storage systems" is added in the right-hand column and the number "5" is added for the entry in the left-hand column.

■ 80. In § 180.350, in paragraph (b), the second sentence is revised to read as follows:

§ 180.350 Applicability and definitions.

* * * * *

(b) * * * For the purposes of this subchapter, the replacement of the rigid inner receptacle of a composite IBC with one from the original manufacturer is considered a repair. * * *

* * * * *

Issued in Washington, DC on December 29, 2010 under authority delegated in 49 CFR part 1.

Cynthia L. Quarterman,

Administrator.

[FR Doc. 2010–33324 Filed 1–18–11; 8:45 am]

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Endangered Status for the Sheepnose and Spectaclecase Mussels; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R3–ES–2010–0050; MO 92210–0–0008–B2]

RIN 1018–AV93

Endangered and Threatened Wildlife and Plants; Endangered Status for the Sheepnose and Spectaclecase Mussels

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list two freshwater mussels, the spectaclecase mussel (*Cumberlandia monodonta*) and sheepnose (*Plethobasus cyphyus*) as endangered under the Endangered Species Act of 1973, as amended (Act). If we finalize this rule as proposed, it would extend the Act's protections to these species throughout their ranges, including sheepnose in Alabama, Illinois, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin, and spectaclecase in Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Kansas, Minnesota, Missouri, Nebraska, Ohio, Tennessee, Virginia, West Virginia, and Wisconsin. We determined that critical habitat for these species is prudent, but not determinable at this time. The Service seeks data and comments from the public on this proposed listing rule.

DATES: We will consider comments and information we receive from all interested parties by March 21, 2011. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by March 7, 2011.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on docket number FWS–R3–ES–2010–0050.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R3–2010–0050; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 North Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (*see* Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Richard Nelson, Field Supervisor, at the U.S. Fish and Wildlife Service, Rock Island, Illinois Ecological Services Field Office, 1511 47th Avenue, Moline, IL 61265 (telephone 309–757–5800).

SUPPLEMENTARY INFORMATION:

Public Comments

Our intent is to use the best available commercial and scientific data as the foundation for all endangered and threatened species classification decisions. We request comments or suggestions from other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule to list the spectaclecase and sheepnose mussels as endangered. We particularly seek comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to the species and regulations that may be addressing those threats.

(2) Additional information concerning the ranges, distributions, and population sizes of the species, including the locations of any additional populations of these species.

(3) Any additional information on the biological or ecological requirements of these species.

(4) Current or planned activities in the areas occupied by these species and possible impacts of these activities on the species and their habitats.

(5) Potential effects of climate change on these species and their habitats.

(6) The reasons why areas should or should not be designated as critical habitat as provided by section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether the benefits of designation would outweigh threats to the species that designation could cause (*e.g.,* exacerbation of existing threats, such as overcollection), such that the designation of critical habitat is prudent.

(7) Specific information on:

- What areas contain physical and biological features essential for the conservation of these species;
- What areas are essential to the conservation of these species and
- Special management considerations or protection that proposed critical habitat may require.

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

You may submit your comments and materials concerning this proposed rule by 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. Comments must be submitted to *http://www.regulations.gov* before 11:59 (Eastern Time) on the date specified in the **DATES** 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—including your personal identifying information—on *http://www.regulations.gov.* If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours at the Rock Island, Illinois Ecological Services Field Office (*see* the **FOR FURTHER INFORMATION CONTACT** section).

Public Hearing

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received by March 7, 2011. Such requests must be made in writing and be addressed to the Field Supervisor at the address provided in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Persons needing reasonable accommodations to attend and participate in a public hearing should contact the Rock Island, Illinois Ecological Services Field Office by telephone at 309–757–5800, as soon as possible. To allow sufficient time to process requests, please call no later than one week before the hearing date. Information regarding this proposed rule is available in alternative formats upon request.

Background

Species Descriptions

The spectaclecase (*Cumberlandia monodonta*) is a member of the mussel family Margaritiferidae and was originally described as *Unio monodonta* Say, 1829. The type locality is the Falls of the Ohio (on the Ohio River in the vicinity of Louisville, Kentucky, and adjacent Indiana), and the Wabash River (probably the lower portion in Illinois and Indiana) (Parmalee and Bogan 1998, p. 49). Parmalee and Bogan (1998, p. 49) summarized the synonymy of the spectaclecase. The species has been placed in the genera *Unio, Margaritana, Alasmidonta, Margarita, Margaron,* and *Margaritifera* at various times in history. Ortmann (1912, p. 13) placed it in the monotypic (a taxonomic group with only one biological type) genus *Cumberlandia* in the family Margaritiferidae. Currently recognized synonymy includes *Unio soleniformis* (Lea). Smith (2001, p. 43) reassigned the spectaclecase to the Holarctic genus *Margaritinopsis* based on shell and gill characters. However, the Service will defer to the Committee on Scientific and Vernacular Names of Mollusks of the Council of Systematic Malacologists, American Malacological Union (Turgeon *et al.* 1998), on whether the genus *Margaritinopsis* is accepted as valid for the spectaclecase. Until an official decision is made, the Service will use the commonly accepted *Cumberlandia* for the genus of this species. Spectaclecase is the accepted common name for *Cumberlandia monodonta* (Turgeon *et al.* 1998, p. 32).

The spectaclecase is a large mussel that reaches at least 9.25 inches (23.5 centimeters (cm)) in length (Havlik 1994, p. 19). The shape of the shell is greatly elongated, sometimes arcuate (curved), and moderately inflated, with the valves being solid and moderately thick, especially in older individuals (Parmalee & Bogan 1998, p. 49). Both anterior and posterior ends of the shell are rounded with a shallow depression near the center of shell (Baird 2000, p. 6; Parmalee & Bogan 1998, p. 49). The anterior end is higher than the posterior end (Baird 2000, p. 6). The posterior ridge is low and broadly rounded (Parmalee & Bogan 1998, p. 50). Year-one specimens have heavy ridges running parallel with the growth arrests, which are shell lines that indicate slower periods of growth, thought to be laid down annually (Baird 2000, p. 6). The periostracum (external shell surface) is somewhat smooth, rayless, and light yellow, greenish-tan, or brown in young specimens, becoming rough and dark brown to black in old shells (Parmalee & Bogan 1998, p. 50). The shell commonly will crack posteriorly when dried (Oesch 1984, p. 31).

Internally, the single pseudocardinal tooth (a triangular tooth-like structure along the hinge line of the internal portion of the shell) is simple and peg-like in the right valve, fitting into a depression in the left (Parmalee & Bogan 1998, p. 50). The lateral teeth are straight and single in the right valve, and double in the left valve but become fused with age into an indistinct raised hinge line (Parmalee & Bogan 1998, p. 50). The soft anatomy was described by Williams *et al.* (2008, pp. 497–498). The color of the nacre (interior covering of the shell) is white, occasionally granular and pitted, mostly iridescent in young specimens, but becoming iridescent posteriorly in older shells (Parmalee & Bogan 1998, p. 50). There are no differences between the sexes in the shells of this species (Baird 2000, p. 19). Key characters for distinguishing the spectaclecase from other mussels are its large size, elongate shape, arcuate ventral margin, dark coloration, roughened periostracum, poorly developed teeth, and white nacre (Oesch 1984, pp. 31–32). No other North American mussel species has this suite of characters.

The sheepnose (*Plethobasus cyphyus*) is a member of the mussel family Unionidae and was originally described as *Obliquaria cyphya* Rafinesque, 1820. The type locality is the Falls of the Ohio (Parmalee & Bogan 1998, p. 175) on the Ohio River in the vicinity of Louisville, Kentucky, and adjacent Indiana. Parmalee and Bogan (1998, p. 175) summarized the synonymy of the species. Over the years, the name of this species has been variably spelled *cyphya, scyphius, cyphius, cyphia, cyphyum,* and ultimately *cyphyus.* Over the years the species has been placed in the genera *Obliquaria, Unio, Pleurobema, Margarita,* and *Margaron.* It was ultimately placed in the genus *Plethobasus* by Ortmann (1919, pp. 65–66) where it remains today (Turgeon *et al.* 1998, p. 35). The Service recognizes *Unio aesopus* and *U. compertus* as synonyms of *Plethobasus cyphyus.* Sheepnose is the accepted common name for *Plethobasus cyphyus* as established by the Committee on Scientific and Vernacular Names of Mollusks of the Council of Systematic Malacologists, American Malacological Union (Turgeon *et al.* 1998, p. 35). The Service also recognizes "bullhead" and "clear profit" as older common names for the sheepnose.

Key characters useful for distinguishing the sheepnose from other mussels are its color, the occurrence of central tubercles, and its general shape. Oesch (1984, p. 120) and Parmalee and Bogan (1998, p. 176), describe the sheepnose as a medium-sized mussel that reaches nearly 5 inches (13 cm) in length. The shell is elongate ovate in shape, moderately inflated, and with thick, solid valves. The anterior end of the shell is rounded, but the posterior end is somewhat bluntly pointed to truncate. The dorsal margin of the shell is nearly straight, while the ventral margin is uniformly rounded or slightly convex. The posterior ridge is gently rounded, becoming flattened ventrally and somewhat biangular. There is a row of large, broad tubercular swellings on the center of the shell extending from the beak to the ventral margin. A broad, shallow sulcus (depression on furrow on the outside surface of shell) lies between the posterior ridge and central row. Beaks are elevated, high, and placed near the anterior margin. Juvenile beak sculpture consists of a few concentric ridges at the tip of the beaks. The periostracum is generally smooth, shiny, rayless, and light yellow to a dull yellowish brown. Concentric ridges resulting from growth arrests are usually darker.

Oesch (1984, p. 120) describes the internal anatomy of the sheepnose as the left valve having two heavy, erect, roughened, somewhat triangular, and divergent pseudocardinal teeth. The right valve has a large, triangular, roughened pseudocardinal tooth. The lateral teeth are heavy, long, slightly curved, and serrated. The beak cavity is shallow to moderately deep. The soft anatomy was described by Williams *et al.* (2008, p. 94). The color of the nacre is generally white, but may be pinkish to cream-colored and iridescent posteriorly. There are no differences between the sexes in the shells of this species. The shell of the sheepnose is extremely hard and was given the name "clear profit" by early commercial shellers, being too hard to cut into buttons (Wilson & Clark 1914, p. 57). The species also preserves well in archaeological material (Morrison 1942, p. 357).

Life History

The general biology of the spectaclecase and sheepnose are similar to other bivalve mollusks belonging to the families Margaritiferidae and Unionidae, order Unioniformes or Unionoida. Adult mussels suspension-feed, spending their entire lives partially or completely buried within the substrate (Murray and Leonard 1962, p. 27). Adults feed on algae, bacteria, detritus, microscopic animals, and dissolved organic material (Christian *et*

al. 2004, pp. 108–109; Nichols & Garling 2000, p. 873; Silverman *et al.* 1997, p. 1859; Strayer *et al.* 2004, pp. 430–431). Recent evidence suggests that adult mussels may also deposit feed on particles in the sediment (Raikow & Hamilton 2001, p. 520). For their first several months, juvenile mussels employ foot (pedal) feeding, consuming bacteria, algae, and detritus (Yeager *et al.* 1994, p. 221).

As a group, mussel longevity varies tremendously with some species living only about 4 years (Haag & Rypel 2010, p. 5) but possibly up to 100 to 200 years in other species (Ziuganov *et al.* 2000, p. 102). However, the vast majority of species live a few decades (Haag & Rypel 2010, pp. 4–6). Baird (2000, pp. 54, 59, 67) aged 278 specimens of the spectaclecase in Missouri by sectioning the hinge ligament, as most margaritiferids are aged. The maximum age determined was 56 years, but he surmised that some large individuals may have been older. A very large specimen (9.25 inches (23.5 cm)) from the St. Croix River, Minnesota and Wisconsin, was estimated (based on external growth ring counts) to be approximately 70 years old (Havlik 1994, p. 19). Sheepnose longevity has been reported as being nearly 30 years (Watters *et al.* 2009, p. 221). Thick shelled mussels from large rivers, like sheepnose, are thought to live longer than other species (Stansbery 1961, p. 16).

Mussels tend to grow relatively rapidly for the first few years, and then slow appreciably at sexual maturity, when energy presumably is being diverted from growth to reproductive activities (Baird 2000, pp. 66–67). In spectaclecase, the biggest change in growth rate appears to occur at 10 to15 years of age, which suggests that significant reproductive investment does not occur until they reach 10 years of age (Baird 2000, pp. 66–67).

Margaritiferids and unionids have an unusual mode of reproduction. With very few exceptions, their life cycle includes a brief, obligatory parasitic stage on a host organism, typically fish. Eggs develop into microscopic larvae (glochidia) within special gill chambers of the female. The female expels the mature glochidia, which must attach to an appropriate host species (generally a fish) to complete development. Host specificity varies among margaritiferids and unionids. Some species appear to use a single host, while others can transform on several host species. Following successful infestation, glochidia encyst (enclose in a cyst-like structure), remain attached to the host for several weeks, and then drop off as newly transformed juveniles. For further information on the life history of freshwater mussels, see Williams *et al.* 2008.

Mussel biologists know relatively little about the specific life-history requirements of the spectaclecase and sheepnose. Most mussels, including the spectaclecase and sheepnose, have separate sexes. Age at sexual maturity of the spectaclecase was estimated to be 4 to 5 years for males and 5 to 7 years for females, with sex ratios approximating 50:50 (Baird 2000, p. 24). The spectaclecase life cycle includes a parasitic phase; however, despite extensive investigation, the host species is not yet known. The spectaclecase is thought to release glochidia from early April to late May in the Meramec and Gasconade Rivers, Missouri (Baird 2000, p. 26). Gordon and Smith (1990, p. 409) reported the species as producing two broods, one in spring or early summer and the other in the fall, also based on Meramec River specimens. In the Meramec and Gasconade Rivers, however, Baird (2000, pp. 26–27) found no evidence of two spawns in a given year.

Age at sexual maturity for the sheepnose is unknown, but given its estimated longevity, probably occurs after a few years. The sheepnose is thought to be a short-term brooder, with egg fertilization taking place in early summer (Parmalee & Bogan 1998, p. 177; Williams *et al.* 1998, p. 498), and glochidial release presumably occurring later in the summer. Hermaphroditism occurs in many mussel species (van der Schalie 1966, p. 77), but is not known for the sheepnose. If hermaphroditism does occur in the sheepnose, it may explain the occurrence of small, but persistent populations over long periods of time.

Glochidia of spectaclecase and sheepnose are released in conglutinates (gelatinous structures containing numerous glochidia and analogous to cold capsules). Spectaclecase glochidia lack hooks (teeth-like structures that presumably function to pierce through skin tissue of the host) and are the smallest glochidia known of any North American freshwater mussel; they measure approximately 0.0024 inches (0.06 mm) in both length and height (Baird 2000, p. 22). Tens to hundreds of thousands of glochidia may occur in each conglutinate. Based on eight Missouri spectaclecase specimens, the number of conglutinates released per female varied from 53 to 88, with a mean of 64.5 (Baird 2000, p. 23). Total fecundity (reproductive potential, including glochidia and ova) in Baird's (2000, p. 27) Missouri study varied from 1.93 to 9.57 million per female. In mussels, fecundity is related positively to body size and inversely related to glochidia size (Bauer 1994, pp. 940–941). The reproductive potential of the spectaclecase is therefore phenomenal. However, the fact that extant populations are generally skewed towards larger adults strongly indicates that survival rates to the adult stage must be extraordinarily low.

Researchers in Wisconsin observed female spectaclecase under boulders in the St. Croix River simultaneously releasing their conglutinates (Heath 2008, pers. comm.). The spectaclecase conglutinates are entrained along a transparent, sticky mucous strand up to several feet in length (Lee & Hove 1997, p. 9). Baird (2000, p. 29) observed the release of loose glochidia and small fragments of conglutinates. Based on his observations, he hypothesized that conglutinates sometimes contain mostly immature glochidia, and that conglutinates containing mostly immature glochidia may be aborted when disturbed.

Sheepnose conglutinates are narrow and lanceolate in outline, solid and red or pink in color, and discharged in unbroken form (Oesch 1984, pp. 118–119). Discharge of sheepnose conglutinates have been observed in late July (Ortmann 1911, p. 306) and August (Williams *et al.* 2008, p. 498). Ortmann (1911, p. 306) described them as being pink and "lying behind the posterior end of the shell, which were greedily devoured by a number of minnows." Sheepnose glochidia are semicircular in outline, with the ventral margin obliquely rounded, hinge line long, and medium in size. The length (0.009 inches (0.23 mm)) is slightly greater than the height (0.008 inches (0.20 mm)) (Oesch 1984, p. 119). Several hundred glochidia probably occur in each conglutinate. Judging from the size of the glochidia, total fecundity (including glochidia and ova) per female sheepnose is probably in the tens of thousands.

Like many freshwater mussels, the complex life histories of the spectaclecase and sheepnose have many vulnerable components that may prevent successful reproduction or recruitment of juveniles into existing populations. Glochidia must come into contact with a specific host species for their survival to be ensured. Without the proper host, the glochidia will perish. The host(s) for the spectaclecase is unknown, although over 60 species of fish, amphibians, and crayfish have been tested in the lab during host suitability studies (Baird 2000, pp. 23–24; Henley & Neves 2006, p. 3; Hove *et al.* 2009b, pp. 22–23; Hove *et al.* 1998,

pp. 13–14; Hove *et al.* 2008, p. 4; Knudsen & Hove 1997, p. 2; Lee & Hove 1997, pp. 9–10). Two of 690 wild-collected fish checked by Baird (2000, p. 24) had spectaclecase glochidia attached to their gills; these fish were the bigeye chub (*Hybopsis amblops*) and pealip redhorse (*Moxostoma pisolabrum*). However, these fish are not confirmed as hosts, because the encysted glochidia had not grown measurably and glochidial transformation was not observed (Baird 2000, p. 24). Spectaclecase populations are oftentimes highly aggregated (*see Habitat*) with many apparently even-aged individuals, suggesting that glochidia may excyst simultaneously from a host (Gordon & Layzer 1989, p. 19). Additional host work is underway to test the wild-collected fish species that were found with encysted spectaclecase glochidia (pealip redhorse and bigeye chub), as well as to test additional species of fish and other aquatic organisms for suitability. Host information is needed so that existing populations can be artificially cultured for potential population augmentation and reintroduction efforts.

Little is known regarding host fish of the sheepnose. Until recently the only cited host for this species came from a 1914 report that found glochidia naturally attached to sauger (*Sander canadense*) in the wild. No confirmation of successful transformation was recorded in this early report (Surber 1912, p. 110; Wilson 1914, pp. 338–340). However, recent laboratory studies at the Genoa National Fish Hatchery, the University of Minnesota, and Ohio State University have successfully transformed sheepnose glochidia on fathead minnow (*Pimephales promelas*), creek chub (*Semotilus atrromaculatus*), central stoneroller (*Campostoma anomalum*), and brook stickleback (*Culaea inconstans*) (Watters *et al.* 2005, pp. 11–12; Brady 2008, pers. comm.; Watters 2008, pers. comm.). Although these are identified as suitable hosts in laboratory studies, natural interactions between the aforementioned fishes and the sheepnose seem rare and infrequent due to habitat preferences. Fish that frequent medium to large rivers near mussel beds, like the sauger, may act as hosts in the natural environment.

Habitat

The spectaclecase generally inhabits large rivers, and is found in microhabitats sheltered from the main force of current. It occurs in substrates from mud and sand to gravel, cobble, and boulders in relatively shallow riffles and shoals with a slow to swift current (Baird 2000, pp. 5–6; Buchanan 1980, p. 13; Parmalee & Bogan 1998, p. 50). According to Stansbery (1967, pp. 29–30), this species is usually found in firm mud between large rocks in quiet water very near the interface with swift currents. Specimens have also been reported in tree stumps, in root masses, and in beds of rooted vegetation (Oesch 1984, p. 33). Similar to other margaritiferids, spectaclecase occurrences throughout much of its range tend to be aggregated (Gordon & Layzer 1989, p. 19), particularly under slab boulders or bedrock shelves (Baird 2000, p. 6; Buchanan 1980, p. 13; Parmalee & Bogan 1998, p. 50), where they are protected from the current. Up to 200 specimens have been reported from under a single large slab in the Tennessee River at Muscle Shoals, Alabama (Hinkley 1906, p. 54). Unlike most species that move about to some degree, the spectaclecase may seldom if ever move except to burrow deeper and may die from stranding during droughts (Oesch 1984, p. 17).

The sheepnose is primarily a larger-stream species occurring primarily in shallow shoal habitats with moderate to swift currents over coarse sand and gravel (Oesch 1984, p. 121). Habitats with sheepnose may also have mud, cobble, and boulders. Sheepnose in larger rivers may occur at depths exceeding 6 m (Williams *et al.* 2008, p. 498).

Genetics

A recent genetic study (Monroe *et al.* 2007, pp. 7–13) indicates that much of the remaining genetic variability in the spectaclecase is represented in each of the remaining large populations, and that these populations do not appear to differ significantly from one another. Genetics studies of sheepnose are currently under investigation; however, no conclusions were available at the time of publication (Roe 2010, pers. comm.).

Species Distribution

We use the term "population" here in a geographical and not genetic sense, defining it as all individuals of the spectaclecase or sheepnose living in one stream. Using the term in this way allows the status, trends, and threats to be discussed comparatively across streams where the species occur. In using this term we do not imply that their populations are currently reproducing and recruiting or that they are distinct genetic units. We considered populations of the spectaclecase and sheepnose as extant if live or fresh-dead specimens have been observed or collected since 1990. A "population cluster" refers to where two or more adjacent stream populations of a species occur without a barrier (for example, a dam and impoundment) between them.

Following are generalized sets of criteria that were used to categorize the relative status of populations of spectaclecase and sheepnose. The status of a population is considered "improving" if: (1) There is evidence that habitat degradation appears insignificant, (2) live or fresh dead mussel abundance has improved during post-1990 surveys, or (3) ample evidence of recent recruitment has been documented during post-1990 surveys. The status of a population is considered "stable" if: (1) There is little evidence of significant habitat loss or degradation, (2) live or fresh dead mussel abundance has been fairly consistent during post-1990 surveys, or (3) evidence of relatively recent recruitment has been documented during post-1990 surveys. The status of a population is considered "declining" if: (1) There is ample evidence of significant habitat loss or degradation, (2) live or fresh dead mussel numbers have declined during recent surveys, or (3) no evidence of relatively recent recruitment has been documented during recent surveys. The status of a population is considered "extirpated" if: (1) All known suitable habitat has been destroyed, or (2) no live or fresh dead mussels of any age have been located during recent surveys. The status of a population is considered "unknown" if the available information is inadequate to place the population in one of the above four categories. In a few cases, additional information not listed above may have been used to categorize a population.

Spectaclecase Historical Range and Distribution

The spectaclecase occurred historically in at least 44 streams in the Mississippi, Ohio, and Missouri River basins (Butler 2002a, p. 6, Heath 2008, pers. comm.). Its distribution comprised portions of 15 States (Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, Ohio, Tennessee, Virginia, West Virginia, and Wisconsin). Historical occurrence by stream system (with tributaries) include the: upper Mississippi River system (Mississippi River (St. Croix, Chippewa, Rock, Salt, Illinois (Des Plaines, Kankakee Rivers), Meramec (Bourbeuse, Big Rivers), Kaskaskia Rivers; Joachim Creek)); lower Missouri River system (Missouri River (Platte, River Aux Vases, Osage (Sac, Marais des Cygnes Rivers), Gasconade (Osage Fork, Big Piney River) Rivers)); Ohio River system (Ohio River

(Muskingum, Kanawha, Green, Wabash Rivers)); Cumberland River system (Cumberland River (Big South, Caney Fork; Stones, Red Rivers)); Tennessee River system (Tennessee River (Holston, Nolichucky, Little, Little Tennessee, Clinch (Powell River), Sequatchie, Elk, Duck Rivers)); lower Mississippi River system (Mulberry, Ouachita Rivers).

Spectaclecase Current Range and Distribution

Extant populations of the spectaclecase are known from 19 streams in 11 States (Butler 2002b, p. 7). These include the following stream systems (with tributaries):

- Upper Mississippi River system (Mississippi River (St. Croix, Meramec (Bourbeuse, Big Rivers) Rivers));
- Lower Missouri River system (Sac and Gasconade (Osage Fork, Big Piney River) Rivers);
- Lower Ohio River system (lowermost Ohio River (Kanawha, Green Rivers));
- Cumberland River system (Cumberland River);
- Tennessee River system (Tennessee River (Nolichucky, Clinch, Duck Rivers)); and
- Lower Mississippi River system (Mulberry, Ouachita Rivers).

The 19 extant spectaclecase populations occur in the following 11 States (with streams):

- Alabama (Tennessee River),
- Arkansas (Mulberry, Ouachita Rivers),
- Illinois (Mississippi, Ohio Rivers),
- Iowa (Mississippi River),
- Kentucky (Ohio, Green Rivers),
- Minnesota (Mississippi, St. Croix Rivers),
- Missouri (Mississippi, Meramec, Bourbeuse, Big, Gasconade, Sac, Big Piney Rivers; Osage Fork),
- Tennessee (Tennessee, Clinch, Nolichucky, Duck Rivers; Caney Fork),
- Virginia (Cumberland, Clinch Rivers),
- West Virginia (Kanawha River), and
- Wisconsin (Mississippi, St. Croix Rivers).

Spectaclecase Population Estimates and Status

Based on historical and current data, the spectaclecase has declined significantly rangewide and is now known from only 19 of 44 streams (Table 1), representing a 57 percent decline. The species is presumed extirpated from thousands of river miles and from numerous reaches of habitat in which it occurred historically, including long reaches of upper Mississippi, Ohio, Cumberland, and Tennessee Rivers and many other streams and stream reaches. Of the 19 extant populations, 6 are represented by only one or two recent specimens each and are likely declining and some may be extirpated. Populations in Mississippi and Clinch Rivers have recently experienced significant population declines. Most surviving populations face significant threats and with few exceptions are highly fragmented and restricted to short stream reaches. The spectaclecase is considered extirpated from Indiana, Kansas, Nebraska, and Ohio. The only relatively strong populations remaining are in the Meramec and Gasconade Rivers in Missouri and in the St. Croix River in Minnesota and Wisconsin.

TABLE 1—SPECTACLECASE STATUS IN ALL STREAMS OF HISTORICAL OR CURRENT OCCURRENCE

River Basin	Stream	Current Status	Date of Last Live Observation	Comments
Upper Mississippi River	Mississippi River	declining	2009	
	St. Croix River	stable	2008	
	Chippewa River	extirpated	1989	
	Rock River	extirpated	~1970	
	Salt River	extirpated	1980	
	Illinois River	extirpated	~1914	
	Des Plaines River	extirpated	~1921	
	Kankakee River	extirpated	1906	
	Meramec River	stable	2003	
	Bourbeuse River	stable	1997	
	Big River	stable	2002	
	Kaskaskia River	extirpated	~1970	
	Joachim Creek	extirpated	~1965	
Lower Missouri River	Missouri River	extirpated	~1914	
	Platte River	extirpated	~1917	
	River Aux Vases	extirpated	~1974	
	Osage River	extirpated	1980	
	Sac River	declining	2001	
	Marais des Cygnes River	extirpated	unknown	relic shell observed in 1998.
	Gasconade River	stable	2007	
	Big Piney River	unknown	2004	
	Osage Fork	unknown	1999	
Ohio River	Ohio River	declining	1994	single individual observed.
	Muskingum River	extirpated	unknown	relic shell observed in 1995.
	Kanawha River	unknown	2005	two live individuals observed.
	Green River	unknown	2006	
	Wabash River	extirpated	1970	
Cumberland River	Cumberland River	unknown	2008	single individual observed.
	Big South Fork	extirpated	1911	
	Caney Fork	extirpated	1988	
	Stones River	extirpated	1968	
	Red River	extirpated	1966	
Tennessee River	Tennessee River	unknown	2001	
	Holston River	extirpated	1981	
	Nolichucky River	unknown	1991	

TABLE 1—SPECTACLECASE STATUS IN ALL STREAMS OF HISTORICAL OR CURRENT OCCURRENCE—Continued

River Basin	Stream	Current Status	Date of Last Live Observation	Comments
	Little River	extirpated	~1911	
	Little Tennessee River	extirpated	unknown	relic shell observed in 1980, previous record archaeological.
	Clinch River	declining	2005	
	Powell River	extirpated	~1978	
	Sequatchie River	extirpated	~1925	
	Elk River	extirpated	unknown	relic shell observed in 1998.
	Duck River	declining	1999	single individual observed.
Lower Mississippi River	Mulberry River	unknown	~1995	single individual observed.
	Ouachita River	declining	2000	two individuals observed.

Based on collections made over 100 years ago, the spectaclecase was historically widespread and locally common in many streams rangewide. The spectaclecase is often absent from archaeological shell middens (Morrison 1942, p. 353) and is generally difficult to find due to its habit of occurring under rocks or ledges and burrowing deep into the substrate (Parmalee 1967, p. 25). Therefore, the chance of casually finding the species where population numbers are low is remote.

The spectaclecase was considered a rare species by mussel experts as early as 1970 (Stansbery 1970, p. 13), when the first attempt was made to compile a list of imperiled mussels. The spectaclecase is considered widely distributed but absent from many areas where it formerly occurred (Cummings & Mayer 1992, p. 22). The American Malacological Union and American Fisheries Society consider the spectaclecase to be threatened (Williams *et al.* 1993, p.10). Six of the 19 streams (or big river reaches) considered to harbor extant populations of the spectaclecase are represented by one or two recent specimens (for example, Ohio, Kanawha, Cumberland, Duck, Ouatchita, and Mulberry Rivers), exemplifying the species' imperiled status rangewide.

In some streams, the last reported records for the spectaclecase occurred decades ago (for example, Rock, Des Plaines, Kaskaskia, Platte, Wabash, Stones, Red, and Little Rivers; River Aux Vases; Big South Fork). Parmalee (1967, p. 25) considered the spectaclecase to be "rare and of local occurrence" in Illinois in the 1960s, but that it had "[a]pparently already been extirpated from the Illinois and Kankakee Rivers." The only records known from some streams are relic specimens collected around 1975 (for example, Marais des Cygnes, Muskingum, and Elk Rivers).

Although quantitative historical abundance data for the spectaclecase is rare, generalized relative abundance (the percent abundance of a species, divided by the total abundance of all mussel species combined) was sometimes noted in the historical literature and can be inferred from museum lots. The following is a summary of what is known about the relative abundance and trends of presumably extant spectaclecase populations by stream system.

Upper Mississippi River System

The spectaclecase was historically known from 13 streams in the upper Mississippi River system. Currently, only four streams in the system are thought to have extant spectaclecase populations.

Mississippi River mainstem: In 1907, Bartsch found spectaclecase at approximately nine of the 140 sampled sites from what are now Mississippi River Pools (MRP) 9 to 22 (Havlik 2001b, p. 10). Grier (1922, p. 11) did not find spectaclecase in sampled portions of MRP 4 to 6. Van der Schalie and van der Schalie (1950, p. 456), reporting on studies from the upper Mississippi River to the Missouri River mouth, stated that no live spectaclecase were found in their study of 254 sites during 1930–31. Havlik and Stansbery (1977, p. 12) thought the spectaclecase had disappeared from MRP 8 by the 1920s. Thiel (1981, p. 10) found only shell material in MRP 11 in a survey that spanned MRP 3 to 11 conducted during 1977 to 1980. Whitney *et al.* (1997, p. 12) recorded a single individual during 1994–1995 in MRP 15, for a density of 0.004 per square foot (sq. ft) (0.04 per square meter (sq. m)). Helms (2008, p. 8) found eight live individuals and numerous shells during a recent search of MRP 19, representing the most recent and numerous collection of the species in the Mississippi River.

The spectaclecase is thought to be extant in at least four pools of the Mississippi River mainstem, albeit in very low numbers. Records include MRP 15 (Quad Cities area, Illinois and Iowa; in 1998), MRP 16 (Muscatine area, Iowa and Illinois in 1997), MRP 19 (Burlington area, Illinois and Iowa in 2009), and MRP 22 (Quincy, Illinois and Hannibal, Missouri, area in 1996). Populations may still persist in MRP 9 and 10 where specimens were found in the 1980s (Heath 2010a, pers. comm.). Only a relic spectaclecase shell was found in MRP 3 above the St. Croix River confluence in 2001, and none were found in subsequent surveys (Kelner 2008, pers. comm.). In general, spectaclecase population levels in the upper Mississippi River appear to have always been fairly small and difficult to locate, and are now of questionable long-term persistence.

St. Croix River: The northernmost and one of the three most significant extant populations of the spectaclecase occurs in the St. Croix River, Minnesota and Wisconsin. The population is primarily found in the middle reaches of the river in Chisago and Washington Counties, Minnesota, and Polk and St. Croix Counties, Wisconsin (river miles (RM) 17 to 118). Havlik (1994, p. 19) reported spectaclecase in the St. Croix Wild River State Park portion of the river (approximately RM 62 to 65) and the reproducing population below the St. Croix Falls Dam at St. Croix Falls, Wisconsin (dam located at approximately RM 52). Additional survey work in the lower river at Afton State Park (approximately RM 7 to 9) failed to find the spectaclecase (Havlik 1994, p. 19).

Hornbach (2001, p. 218) reported 68 live specimens from 4 of 16 river reaches. Relative abundance for the spectaclecase varied from 0.67 percent from RM 78 to 92 (20 live spectaclecase among 17 species collected), 0.008 percent from RM 63 to 78 (41 live, 24

species), 0.0006 percent from RM 42 to 52 (6 live, 33 species), and 0.003 percent from RM 40 to 42 (1 live, 21 species). Reaches where the spectaclecase is extant are fragmented by the pool formed from the power dam at St. Croix Falls.

Baird (2000, p. 70) presented a length-frequency histogram for the spectaclecase in the St. Croix River using data from an unpublished 1989 study. The 962 specimens were fairly evenly distributed over the length scale, indicating multiple age classes including healthy numbers of young spectaclecase recruiting into the population. Baird (2000, p. 70) used growth curves determined from his Missouri study of the species to estimate the ages of spectaclecase of known size in the St. Croix River. The percentage of newly recruited individuals (less than or equal to 10 years of age) in the St. Croix was 40 percent— considerably higher than that noted from the Gasconade (10.4 percent) and Meramec (2.8 percent) Rivers in Missouri, two other streams with abundant spectaclecase populations that he studied. The St. Croix spectaclecase population, while among the largest known, may also be the healthiest based on this metric. The spectaclecase is currently distributed from RM 17 to 118 and appears to be recruiting from RM 17 to 54 (downstream of the St. Croix Falls Dam) (Heath 2008, pers. comm.).

The long-term health of mussel populations in the St. Croix may be in jeopardy, however. Hornbach *et al.* (2001, pp. 12–13) determined that juvenile mussel density had suffered a statistically significant decline at three of four lower St. Croix sites sampled in the 1990s and in 2000. Zebra mussels also threaten the spectaclecase and other mussel populations in the lower St. Croix River. A 2000 survey at 20 sites on the lowermost 24 miles of the St. Croix River estimated that nearly one percent of the mussels were infested with zebra mussels (Kelner & Davis 2002, p. 36).

Meramec River: The Meramec River flows into the Mississippi River downstream of St. Louis in east-central Missouri. Its spectaclecase population represents one of the best remaining rangewide. In the late 1970s, Buchanan (1980, p. 13) reported this species from 31 sites, 19 with live individuals. Live or fresh dead individuals occurred from RM 17.5 to 145.7. Buchanan (1980, p. 6) considered it to be common in the lower 108 miles (174 km) of the Meramec River, but locally abundant from RM 17.5 to 84. In 1997, Roberts and Bruenderman (2000, pp. 39, 44), using similar sampling methods as Buchanan (1980, pp. 4–5), resurveyed the Meramec River system and collected spectaclecase from 23 sites, 19 of which had live individuals. They found the largest populations between RM 56.7 and 118.8. Among 17 sites where spectaclecase were found during both surveys, the species was less abundant at nine sites and more abundant at five sites in 1997. At three sites, only relic shells were found during both surveys. In the 1970s, Buchanan (1980, p. 10) reported finding 456 live individuals among the 17 shared sites, whereas Roberts and Bruenderman (2000, p. 44) recorded only 198. A reduction in spectaclecase numbers (260 to 33) at RM 59.5 accounted for most of the overall decrease in abundance between the studies. Confounding the decrease in numbers among shared survey sites, Roberts and Bruenderman (2000, p. 44) surveyed three sites between RM 56.7 and 118.8 that were unsampled by Buchanan (1980, pp. 1–69) and found 500, 538, and 856 live spectaclecase. The most specimens found at a single site in the earlier study was 260 (RM 59.5). Currently, the population in the Meramec River stretches over much of the mainstem, a distance of over 100 miles (161 km) from RM 18.5 to 120.4.

The spectaclecase represented 28 percent of all mussels sampled in the Meramec River in 1997 (Roberts & Bruenderman 2000, p. 39). Baird (2000, pp. 62, 68,77) extensively studied the demographics of the Meramec River spectaclecase population in the late 1990s. The mean estimated age of the population was 32 years. Individuals less than 10 years of age comprised only 2.8 percent of the Meramec population sampled (a total of 2,983 individuals). At the four sites he intentionally selected for their large spectaclecase populations, densities ranged from 0.01 to 0.12 per sq. ft (0.1 to 1.3 per sq. m) while estimated population numbers at these sites ranged from 933 to 22,697. Baird (2000, p. 71) thought that conditions for spectaclecase recruitment in the Meramec had declined in the past 20 to 30 years, but the causes were undetermined. The prevalence of larger adults in the Meramec population may be cause for concern, as it appears to indicate a low level of recruitment in the population.

Bourbeuse River: The Bourbeuse River is a northern tributary of the Meramec River joining it at RM 68. Its spectaclecase population was sampled in 1997 at a single site (RM 10.3), and 7 live individuals were found (Roberts & Bruenderman 2000, p. 91). Sampling near the mouth (RM 0.4), Buchanan (1980, p. 16) found only relic shells. The Bourbeuse population is probably dependent on the much larger Meramec population for long-term sustainability.

Big River: Another Meramec tributary with a population of the spectaclecase, the Big River flows northward into the Meramec River at RM 38. The spectaclecase is only known from the lower end (RM 1.3), where 14 live specimens were found in 1997 (Roberts & Bruenderman 2000, p. 96). At RM 0.4, Buchanan (1980, p. 13) found only relic shells. Similar to the Bourbeuse River population, the population in the Big River is probably dependent on the much larger Meramec population for sustainability. The Meramec River system, including the lower Bourbeuse, lower Big, and Meramec River mainstems, can be considered a single spectaclecase population cluster.

Lower Missouri River System

The spectaclecase was historically known from 10 streams in the Missouri River system. Currently, only four of these streams are thought to have extant populations.

Sac River: The Sac River is a large tributary to the Osage River. The spectaclecase was considered extirpated in the 2002 status review of the species (Butler 2002a). However, three old, live individuals were collected at two sites during a survey of the Sac River in 2004 (Hutson & Barnhart 2004, p. 17). The same survey revealed "numerous" relic shells from six other sites, indicating that the spectaclecase may have been relatively abundant at one time. Prior to the 2004 survey, the spectaclecase had not been collected from this river since 1978 (Bruenderman 2001, pers. comm.). Given the age of the live individuals and the abundance of shell material, Hutson & Barnhart (2004, p. 17) predicted the species would "soon be extirpated" from the river.

Gasconade River: The Gasconade River is a southern tributary of the Missouri River in south-central Missouri and flows into the mainstem east of Jefferson City. When Stansbery (1970, p. 13) included this species in the first compiled list of imperiled mussels, he noted that "the only population of substantial size presently known is found in the Gasconade River." In 1994, Buchanan found over 1,000 individuals between RM 7 and 84 (Buchanan 1994, pp. 5, 8–13). Today, one of the three best spectaclecase populations remaining rangewide occurs in the Gasconade. The spectaclecase population occurs over approximately 200 miles (322 km) of the mainstem from RM 4.9 upstream (Bruenderman *et al.* 2001, p. 54). Baird (2000, pp. 61, 71) studied the demographics of the Gasconade River spectaclecase

population in the late 1990s. Based on his limited number of sampling sites, this species comprised about 20 percent of the entire mussel fauna in this system. The mean estimated age of the population was 25 years. Individuals less than 10 years of age comprised 10.4 percent of the Gasconade population sampled (n = 2,111), indicating a significant level of recent recruitment.

Historically, Stansbery (1967, p. 29) noted that "[t]he size of some aggregation[s] * * * is impressive," and that "the number of individuals may reach a density of well over a dozen per square foot." Both statements are probably in reference to the Gasconade River, Missouri, population, which he had described in the text of his note. Densities at the four sites Baird (2000, pp. 61, 71) intentionally selected for their large spectaclecase populations ranged from 0.03 to 0.06 per sq. ft (0.3 to 0.6 per sq. m); estimated population numbers at these selected sites ranged from 2,156 to 4,766. Baird (2000, p. 71) thought that conditions for spectaclecase recruitment in the Gasconade River had declined in the past 20 to 30 years, but the causes were undetermined.

Big Piney River: The Big Piney River, a southern tributary of the Gasconade River, harbors a small population of the spectaclecase. Although overlooked during a 1999 survey (Bruenderman *et al.* 2001, pp. 14, 28), 15 individuals were collected from the lower mainstem (RM 24) in 2004 (Barnhart *et al.* 2004, p. 5). The status of the population is unknown, but it is probably dependent on the much larger source population in the Gasconade River for sustainability (McMurray 2008, pers. comm.).

Osage Fork: The Osage Fork is a southwestern headwater tributary of the Gasconade River. The spectaclecase is known from the lower portion of this Gasconade River tributary, specifically from RM 13.9. Sampling in the Osage Fork in 1999 yielded 26 live individuals from this site (Bruenderman *et al.* 2001, p. 9). Relative abundance of the spectaclecase in the Osage Fork was 3.9 percent, and catch-per-unit effort was 1.3 per person-hour. This population is thought to be stable, but it may also be dependent on the much larger source population in the Gasconade River for long-term sustainability. The Gasconade River system, including the lower Big Piney, lower Osage Fork, and Gasconade mainstems, can be considered a single population cluster.

Ohio River System

The spectaclecase's continued existence in the Ohio River is extremely uncertain. Once known from five rivers, it has been extirpated from two, and two of the remaining three are recently represented by only one or two individuals each.

Ohio River: The Ohio River is the largest eastern tributary of the Mississippi River, with its confluence marking the divide between the upper and lower portions of the Mississippi River system. Historically, the spectaclecase was documented from the Ohio River from the vicinity of Cincinnati, Ohio, to its mouth. Although no specimens are known from the mainstem upstream of Cincinnati, populations are known from two upstream tributaries, the Muskingum and Kanawha Rivers. Nearly all spectaclecase records from the Ohio River were made around 1900 or before (Schuster 1988, p. 186). The only recent record is for a single live individual found in an abandoned gill net near the Illinois shore in 1994 (Cummings 2008, pers. comm.). If a population of the spectaclecase continues to occur in the Ohio River, its future persistence is extremely doubtful and continued existence seriously threatened by the exotic zebra mussel.

Kanawha River: The Kanawha River is a major southern tributary of the Ohio River that drains much of West Virginia. The spectaclecase was not known from this stream until 2002, when a single, very old, live individual was discovered near Glasgow, Kanawha County (Zimmerman 2002, pers. comm.). Another live individual was found in the same vicinity in 2005, as well as two additional weathered shells in 2006 (Clayton 2008a, pers. comm.). This site is approximately 20 miles (32.2 km) downstream of Kanawha Falls, below which is the only significant mussel bed known from the Kanawha River. It is doubtful that a recruiting spectaclecase population occurs in the Kanawha River due to the small number of individuals found and their advanced age.

Green River: The Green River is a lower Ohio River tributary in west-central Kentucky. The spectaclecase has been collected sparingly in the Green River. That it was not reported in early collections made in the system is indicative of the difficulty in finding specimens (Price 1900, pp. 75–79). Stansbery (1965, p. 13) was the first to find it in the mid-1960s at Munfordville, Hart County, where he reported 47 mussel species collected over a several-year period in the early 1960s. More recently, from 1987 to 1989, Cicerello and Hannan (1990, p. 20) reported single fresh dead specimens at six sites and relic specimens from an additional five sites in Mammoth Cave National Park (MCNP). A single specimen was recorded from MCNP, Edmonson County, in 1995. Sampling conducted from 1996 to 1998 located fresh dead specimens at two sites above MCNP, with a relic shell at a third site farther upstream (Cicerello 1999, pp. 17–18). At least one fresh dead specimen was reported from MCNP in 2001, as well as several live individuals in 2005 and 2006 (Layzer 2008, pers. comm.).

A small spectaclecase population remains in the upper Green River from below Lock and Dam 5 upstream through MCNP, Edmonson County, into western Hart County. Most recent specimens have been reported from the upstream portion of this reach, where it is generally distributed from MCNP upstream to western Hart County. Its distribution is much more sporadic and localized in the lower portion of this reach due to the pooling effect of two locks and dams (5 and 6). In 2001, a concerted effort (approximately 15 person-hours) to locate rare mussels below Lock and Dam 5 and at other sites downstream failed to find spectaclecase (live or shell), although a fresh dead shell had been collected in this area in 1993 (Cicerello 2008, pers. comm.). The occurrence of variable-sized individuals in the 1990s indicates different year classes but not necessarily recent recruitment (Cicerello 2008, pers. comm.). The long-term sustainability of the Green River population, primarily limited to an approximately 15-mile (24-km) reach of the river, is therefore questionable, and its status is unknown.

Cumberland River System

With few exceptions, most records of the spectaclecase in the Cumberland River system were made before the 1920s. It was historically known from the mainstem and four tributaries but appears currently to be restricted to the lowermost Cumberland River a few miles above its confluence with the Ohio River.

Cumberland River mainstem: The Cumberland River is a large southern tributary of the lower Ohio River. The spectaclecase was considered "not rare" in the Cumberland River by Hinkley and Marsh (1885, p. 6), whereas it was found at six sites by Wilson and Clark (1914, pp. 17, 19) during their survey primarily for commercial species in the Cumberland River system. In a 1947–1949 survey of the Kentucky portion of the upper Cumberland River, Neel and Allen (1964, p. 453) reported live specimens only from one of six mainstem sites that they sampled below Cumberland Falls. Neel and Allen (1964, p. 432) considered it to be "uncommon" in the lower Cumberland River (where they did not sample), a

statement possibly based on its sporadic occurrence as reported by Wilson and Clark (1914, pp. 17, 19). One of the last mainstem records is that of a single live specimen found in the cold tailwaters of Wolf Creek Dam, Kentucky, near the Tennessee border in 1982 (Miller *et al.* 1984, p. 108). This was one of only two live mussels found during a survey of the dewatered river reach below the dam, the mussel community having been eliminated from decades of cold water releases. The most recent record is of a single live individual found at RM 10 below Barkley Lock and Dam in 2008 (Fortenbery 2008, p. 9). A thorough search of the area yielded no additional individuals.

Tennessee River System

The spectaclecase was originally known from the Tennessee River and nine of its stream systems. Ortmann (1924, p. 60) reported that the spectaclecase was "frequent… in the upper Tennessee," while acknowledging in an earlier paper (Ortmann 1918, p. 527) that it was locally abundant in parts of the upper Tennessee River system, but noted that it was "generally regarded as a rare species" rangewide.

Hundreds of miles of large river habitat on the Tennessee mainstem have been converted under nine reservoirs, with additional dams constructed in tributaries historically harboring this species (for example, Clinch, Holston, and Elk Rivers). Watters (2000, p. 262) summarizes the tremendous loss of mussel species from various reaches of the Tennessee. The spectaclecase is now known only from the Tennessee mainstem and three of its tributaries. Despite this fact, the Tennessee River system continues to represent one of the last strongholds of the spectaclecase rangewide.

Tennessee River mainstem: The Tennessee River is the largest tributary of the Ohio River, draining portions of seven states. The 53-mile (85-km) stretch of river in northwestern Alabama collectively referred to as the Muscle Shoals historically harbored 69 species of mussels, making it among the most diverse mussel faunas ever known (Garner & McGregor 2001, p. 155). The historical spectaclecase population in this reach was thought to be phenomenal given the amount of historical habitat that was available and literature accounts of the period. Hinkley (1906, p. 54), in 1904, considered the spectaclecase "plentiful," noting 200 individuals under a single slab boulder. Twenty years later, Ortmann (1925, p. 327) stated that "this species must be, or have been, abundant" at Muscle Shoals based on the "considerable number of dead shells" he observed. In these quotes he predicted the demise of the spectaclecase. The construction of three dams (Wilson in 1925, Wheeler in 1930, Pickwick Landing in 1940) inundated most of the historical habitat, leaving only small habitat remnants (Garner & McGregor 2001, p. 155). The largest remnant habitat remaining is the Wilson Dam tailwaters, a reach adjacent to and downstream from Florence, Alabama.

With the exception of 1976–1978 when it was "collected infrequently" from below Wilson Dam (Gooch *et al.* 1979, p. 90), no collections of the spectaclecase were reported at Muscle Shoals from 1931 to 1995 despite surveys conducted in 1956–1957, 1963–1964, and 1991 (Garner & McGregor 2001, p. 156).

Elsewhere along the Tennessee mainstem, a specimen was recently reported from the Guntersville Dam tailwaters in northern Alabama (Butler 2002a, p. 17). From 1997–1999, 10 live, 1 fresh dead, and 4 relic spectaclecase were reported from three sites in this river reach based on Ohio State University Museum (OSUM) records. The species is found only occasionally in the lower Tennessee River below Pickwick Landing Dam in southeastern Tennessee, having been unreported in various surveys (for example, Scruggs 1960, p. 12; van der Schalie 1939, p. 456). Yokley (1972, p. 61) considered it rare, having only found fresh dead specimens in his 3-year study. Hubbs and Jones (2000, p. 28) reported two live specimens found in 1998 at RM 170, Hardin County. The current status of these small populations is unknown (Garner 2008, pers. comm.; Hubbs 2008, pers. comm.).

Clinch River: The Clinch River is a major tributary of the upper Tennessee River in southwestern Virginia and northeastern Tennessee. Böpple and Coker (1912, p. 9) noted numerous spectaclecase shells in muskrat middens in a portion of the Clinch that is now inundated by Norris Reservoir. Ortmann (1918, p. 527) reported the spectaclecase as being locally abundant in the lower Clinch River, again in an area mostly flooded by Norris Reservoir. Oddly, he failed to find this species upstream of Claiborne County, yet, in later years, one of the spectaclecase's largest known populations was identified in this reach. The species was locally common at sites in the upper Clinch River, according to OSUM records from the 1960s. Ahlstedt (1991a, p. 98) considered this species to be relatively rare in the Clinch River based on survey work conducted during 1978 to 1983. He recorded 78 live specimens from 22 sites between RM 151 and 223, for an average of 3.5 per site. The spectaclecase population reported by Ahlstedt (1991a, pp. 89–90) from the lower Clinch River between Melton Hill and Norris Dam (11 specimens from 4 sites between RM 45 and 73) was considered to be small but stable. Once considered abundant in the Clinch River at Speers Ferry, Scott County, Virginia (Bates & Dennis 1978, pp. 18–19), the species is now extremely rare at this site (Neves 1991, p. 264).

Currently, the species is locally common in the Tennessee River system only in the upper Clinch River, and populations are primarily restricted to the Tennessee portion of that stream. Despite low numbers (0.02 per sq. ft (0.2 per sq. m)) detected in quantitative sampling (428; 2.7 sq. ft (0.25 sq. m) quadrats) in 1994 (Ahlstedt & Tuberville 1997, pp. 73, 81), the upper Clinch River in Tennessee may still yield two to three dozen specimens under individual slab boulders. Three individuals were collected at RM 223.6 in Virginia in 2005, and one old individual was collected in 2007 at RM 270.8, representing the farthest upstream record for the species (Eckert 2008, pers. comm.). The upper Clinch River population is considered to be reproducing, with fairly young individuals occasionally found, but overall the population appears to be declining (Ahlstedt 2008, pers. comm.). The recent occurrence of a disjunct population in the lower Clinch River (separated from the upper Clinch River population by Norris Reservoir) was recently verified (Fraley 2008, pers. comm.). The specimens sampled likely recruited since the Norris Dam gates closed in 1936 (Fraley 2008, pers. comm.), despite the cold tailwaters that destroyed the majority of the mussel fauna in this once incredibly diverse river reach.

Nolichucky River: The Nolichucky River is a tributary of the lower French Broad River, in the upper Tennessee River system in North Carolina and Tennessee. The spectaclecase population in this river was once sizable, judging from museum lots (for example, 23 fresh dead, OSUM 1971:0372). Sampling at 41 Nolichucky River sites in 1980, Ahlstedt (1991b, pp. 136–137) reported 8 live spectaclecase from 6 sites between RM 11.4 to 31.9. A small population of the spectaclecase also persists in a relatively short reach of the lower river (Ahlstedt 2008, pers. comm.). The current status of the Nolichucky River population is unknown.

Duck River: The Duck River is wholly in Tennessee and represents the farthest downstream significant tributary of the

Tennessee River, joining it in the headwaters of Kentucky Reservoir. A single spectaclecase, representing a new drainage record, was found live in lower Duck River, Hickman County, in 1999 (Hubbs 1999, p. 1; Powell 2008, pers. comm.). Since then, at least two individuals from the lower part of the river in Humphreys County have been documented, and several relic specimens have been reported farther upstream (Hubbs 2008, pers. comm.; Powell 2008, pers. comm.). These records cover an approximately 20-mile (32-km) reach of river, with the live individual reported from the lower end of this reach. The spectaclecase is considered extremely rare in the Duck River, and its status is unknown.

Lower Mississippi River System

The spectaclecase was apparently never widely distributed in the lower Mississippi River system. Records from only two streams are known, both from Arkansas.

Mulberry River: The Mulberry River is a tributary of the Arkansas River in northwestern Arkansas. Other than the Ouachita River records, the only other record of the spectaclecase in the lower Mississippi River system is a single specimen found in the mid-1990s in the Mulberry River. There is some uncertainty regarding the validity of this record, as the collectors were not experienced malacologists, and no specimen or photograph is available to substantiate the record. This record is, however, accepted as valid (Harris *et al.* 2009, p. 67; Harris 2010, pers. comm.). The status of the spectaclecase in the Mulberry River is unknown.

Ouachita River: The Ouachita River flows into lower Red River, a major western tributary of the lower Mississippi River, draining portions of Arkansas and Louisiana. This species was first reported in this portion of its range from the Ouachita River, southwestern Arkansas, in the early 1900s (Wheeler 1918, p. 121). Spectaclecase records in the Ouachita span a three-county reach of river. Only two live specimens were found in the mid-1990s, both in the lower portion of Ouachita County. A single relic shell (paired valves) was found in Montgomery County, at the upper end of its Ouachita River range in 2000. The population is considered very small and declining (Harris *et al.* 2009, p. 67; Harris 2010).

Summary of Extant Spectaclecase Populations

The spectaclecase appears to be declining rangewide, with the exception of a few significant populations. Its occurrence in the St. Croix, Meramec, Gasconade, and Clinch Rivers represent the only sizable, sustainable, and reproducing populations remaining, although the Clinch River population appears to be in decline. The spectaclecase has been eliminated from three-fifths of the total number of streams from which it was historically known (19 streams currently compared to 44 streams historically). This species has also been eliminated from long reaches of former habitat in thousands of miles of the Illinois, Ohio, Cumberland, and other rivers, and from long reaches of the Mississippi and Tennessee Rivers. In addition, the species is no longer known from the States of Ohio, Indiana, Kansas, and Nebraska. The extirpation of this species from numerous streams and stream reaches within its historical range signifies that substantial population losses have occurred.

Sheepnose Historical Range and Distribution

Historically, the sheepnose occurred in the Mississippi, Ohio, Cumberland, and Tennessee River systems and their tributaries, totaling at least 77 streams (including 1 canal) (Butler 2002b). Its distribution comprised portions of 14 States (Alabama, Illinois, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin). Historical occurrence by stream system (with tributaries) include the following:

- Upper Mississippi River system (Mississippi River (Minnesota, St. Croix, Chippewa (Flambeau River), Wisconsin, Rock, Iowa, Des Moines, Illinois (Des Plaines, Kankakee, Fox, Mackinaw, Spoon, Sangamon (Salt Creek) Rivers; Quiver Creek; Illinois and Michigan Canal), Meramec (Bourbeuse, Big Rivers), Kaskaskia, Saline, Castor, Whitewater Rivers));
- Lower Missouri River system (Little Sioux, Little Blue, Gasconade (Osage Fork) Rivers);
- Ohio River system (Ohio River (Allegheny (Hemlock Creek), Monongahela, Beaver (Duck Creek), Muskingum (Tuscarawas, Walhonding (Mohican River), Otter Fork Licking Rivers), Kanawha, Scioto, Little Miami, Licking, Kentucky, Salt, Green (Barren River), Wabash (Mississinewa, Eel, Tippecanoe, Vermillion, Embarras, White (East, West Forks White River) Rivers) Rivers);
- Cumberland River system (Cumberland River (Obey, Harpeth Rivers; Caney Fork));
- Tennessee River system (Tennessee River (Holston (North Fork Holston River), French Broad (Little Pigeon River), Little Tennessee, Clinch (North Fork Clinch, Powell Rivers), Hiwassee, Duck Rivers)); and
- Lower Mississippi River system (Hatchie, Black, Yazoo (Big Sunflower River), Big Black Rivers).

Sheepnose Current Range and Distribution

Extant populations of the sheepnose are known from 24 rivers in all 14 States of historical occurrence. Current populations occur in the following systems (with tributaries):

- Upper Mississippi River system (Mississippi River (Chippewa (Flambeau River), Wisconsin, Kankakee, Meramec (Bourbeuse River) Rivers));
- Lower Missouri River system (Osage Fork, Gasconade River); Ohio River system (Ohio River (Allegheny, Muskingum (Walhonding River), Kanawha, Licking, Kentucky, Tippecanoe, Eel, Green Rivers));
- Tennessee River system (Tennessee River (Holston, Clinch, Duck (Powell River) Rivers)); and
- Lower Mississippi River system (Big Sunflower River).

The 24 extant sheepnose populations occur in the following 14 States (with streams):

- Alabama (Tennessee River),
- Illinois (Mississippi, Kankakee, Ohio, Wabash Rivers),
- Indiana (Ohio, Tippecanoe, Eel Rivers),
- Iowa (Mississippi River),
- Kentucky (Ohio, Licking, Kentucky, Green Rivers),
- Minnesota (Mississippi River),
- Mississippi (Big Sunflower River),
- Missouri (Mississippi, Meramec, Bourbeuse, Osage Fork Gasconade Rivers),
- Ohio (Ohio, Muskingum Rivers),
- Pennsylvania (Allegheny River),
- Tennessee (Tennessee, Holston, Clinch, Powell, Duck Rivers),
- Virginia (Clinch, Powell Rivers),
- West Virginia (Ohio, Kanawha Rivers), and
- Wisconsin (Mississippi, St. Croix, Chippewa, Flambeau, Wisconsin Rivers).

The sheepnose was last observed from over two dozen streams decades ago (*e.g.,* Minnesota, Rock, Iowa, Illinois, Des Plaines, Fox, Mackinaw, Spoon, Castor, Little Sioux, Little Blue, Monongahela, Beaver, Scioto, Little Miami, Salt, Mississenewa, Vermilion, Embarras, White, Obey, Harpeth, North Fork Holston, French Broad, North Fork Clinch Rivers; Caney Fork). According to Parmalee and Bogan (1998, p. 177) and Neves (1991, pp. 280–281), the sheepnose has been extirpated

throughout much of its former range or reduced to isolated populations. The only records known from some streams are archeological specimens (for example, Little Pigeon, Big Black, Yazoo Rivers; Saline River).

Sheepnose Population Estimates and Status

The sheepnose has been eliminated from two-thirds of the total number of streams from which it was historically known (24 streams currently occupied compared to 77 streams historically) (Table 2). This species has also been eliminated from long reaches of former habitat including thousands of miles of the Mississippi, Wisconsin, Illinois, Ohio, Cumberland, and Tennessee Rivers and dozens of other streams and stream reaches.

Based on the population designation criteria (*see Species Distribution* section, above), of the 24 sheepnose populations that are considered extant, 11 are thought to be stable and 8 are considered declining (Table 2). Five other populations (Walhonding, Gasconade, Muskingum, Osage Fork, and Duck Rivers) are considered extant, but the status of these populations is unknown.

TABLE 2—SHEEPNOSE STATUS AT HISTORICAL LOCATIONS

River basin	Stream	Current status	Date of last observation	Comments
Upper Mississippi River	Mississippi River	Declining	2008	
	Minnesota River	Extirpated	~1944	
	St. Croix River	Extirpated	1988	
	Chippewa/Flambeau River	Stable	~1994	
	Wisconsin River	Declining	2002	
	Rock River	Extirpated	1926	
	Iowa River	Extirpated	1925	Relic shell collected in 1999.
	Des Moines River	Extirpated	~1915	
	Illinois River	Extirpated	1940	Relic shell collected in 1999.
	Des Plaines River	Extirpated	~1970	
	Kankakee River	Stable	2007	
	Fox River	Extirpated	~1913	
	Mackinaw River	Extirpated	~1970	
	Spoon River	Extirpated	1929	
	Sangamon River	Extirpated	~1919	Relic shell collected in 1989.
	Salt Creek	Extirpated	Unknown	Relic shell collected in 1989.
	Quiver Creek	Extirpated	1881	
	Illinois and Michigan (I & M) Canal	Extirpated	?	
	Meramec River	Stable	2002	
	Bourbeuse River	Declining	1997	
	Big River	Extirpated	1978	
	Kaskaskia River	Extirpated	1970	
	Saline River	Extirpated	?	
	Castor River	Extirpated	~1965	
	Whitewater River	Extirpated	1970s	
Lower Missouri River	Little Sioux River	Extirpated	1916	
	Little Blue River	Extirpated	~1915	
	Gasconade River	Unknown	~1965	
	Osage Fork	Unknown	1999	Represented by single specimen, presumably near extirpation.
Ohio River	Ohio River	Stable	2007	
	Allegheny River	Improving	2008	
	Hemlock Creek	Extirpated	Unknown	Relic shell collected in 1991.
	Monongahela River	Extirpated	~1897	
	Beaver River	Extirpated	~1910	
	Duck Creek	Extirpated	1930	
	Muskingum River	Unknown	1993	
	Tuscarawas River	Extirpated	Unknown	Relic shell collected in 1998.
	Walhonding River	Unknown	1993	
	Mohican River	Extirpated	1977	
	Otter Fork Licking River	Extirpated	1973	
	Kanawha River	Stable	2005	
	Scioto River	Extirpated	1963	
	Little Miami River	Extirpated	~1953	
	Licking River	Declining	1998	
	Kentucky River	Declining	1996	
	Salt River	Extirpated	~1900	
	Green River	Improving	2007	
	Barren River	Extirpated	Unknown	Relic shell collected in 1993.
	Wabash River	Extirpated	1988	
	Mississinewa River	Extirpated	1899	
	Eel River	Declining	1997	
	Tippecanoe River	Stable	1995	
	Vermillion River	Extirpated	Unknown	
	Embarras River	Extirpated	1953	
	White River	Extirpated	1913	
	East White River	Extirpated	1969	

TABLE 2—SHEEPNOSE STATUS AT HISTORICAL LOCATIONS—Continued

River basin	Stream	Current status	Date of last observation	Comments
	West Fork White River	Extirpated	1908	Relic shell collected in 2000.
Cumberland River	Cumberland River	Extirpated	1987	
	Obey River	Extirpated	1939	
	Harpeth River	Extirpated	?	
	Caney Fork River	Extirpated	Unknown	Relic shell collected in 1990.
Tennessee River	Tennessee River	Stable	2004	
	Holston River	Declining	2007	
	North Fork Holston River	Extirpated	1913	
	French Broad River	Extirpated	1914	
	Little Pigeon River	Extirpated	Unknown	
	Little Tennessee River	Extirpated	Unknown	Relic shell collected in 1971.
	Clinch River	Stable	2006	
	North Fork Clinch River	Extirpated	~1921	
	Powell River	Stable	2004	
	Hiwassee	Extirpated	Unknown	Relic shell collected in 1975.
	Duck River	Unknown	2003	Record represented by single specimen.
Lower Mississippi River	Hatchie River	Extirpated	1983	
	Black River	Extirpated	Unknown	
	Yazoo River	Extirpated	Unknown	
	Big Sunflower River	Declining	2000	
	Big Black River	Extirpated	Unknown	

Historically, the sheepnose was fairly widespread in many Mississippi River system streams, although rarely common. Archaeological evidence on relative abundance indicates that it has been an uncommon or even rare species in many streams for centuries (Morrison 1942, p. 357; Patch 1976, pp. 44–52; Parmalee *et al.* 1980, p. 101; Parmalee *et al.* 1982, p. 82; Parmalee and Bogan 1986, pp. 28, 30; Parmalee and Hughes 1994, pp. 25–26), and relatively common in only a few (Bogan 1990, p. 135).

Museum collections of this species are almost always few in number (Cummings 2010, pers. comm.), with the exception of the 1960s collections from the Clinch and Powell Rivers, Tennessee and Virginia. Moderate numbers of individuals were also commonly recorded historically from the upper Muskingum River system in Ohio and the lower Wabash River in Indiana and Ohio, based on museum lots. Schuster and Williams (1989, p. 21) reported the species as being not common in the Ohio River, while Cummings and Mayer (1992, p. 50) considered it rare throughout its range. The American Malacological Union considers the sheepnose to be threatened (Williams *et al.* 1993, p. 13).

Some known populations of the sheepnose are represented by the collection of a single specimen. Other populations have seen a dramatic range decline (for example, reduced from several hundred river miles to a single bed of a river system) or we have limited recent information on population status. The following summaries focus primarily on those populations for which we have sufficient information to make status and trend determinations, and less on those populations that are nearly extirpated, have no recruitment, or are of unknown status.

Upper Mississippi River System

Judging from the archeological record, the sheepnose may have been common at some sites on the Mississippi River (Bogan 1990, p. 135) but over the past century it has become a rare species throughout the mainstem (Grier 1922, pp. 13–31; van der Schalie and van der Schalie 1950, pp. 454–457). Robust populations may have been found in some tributary rivers. The sheepnose has been extirpated from eight Mississippi River tributaries (Minnesota, Rock, Iowa, Des Moines, Kaskaskia, Saline, Castor, and Whitewater Rivers) and all but one Illinois River tributary (the Kankakee River). Today, the sheepnose is extant (though in low numbers) in ten mainstem pools, and six tributary rivers of the Upper Mississippi River System.

Mississippi River mainstem: Sheepnose populations in the mainstem of the Upper Mississippi River are declining. Despite the discovery of a juvenile in Mississippi River Pool (MRP) 7 in 2001, recruitment is limited at best. The mainstem population is comprised of a few old individuals spread across a very large geographic range (MRP 3 through MRP 24 a distance of over 550 river miles (880 river km)) (Thiel 1981, p. 10; Havlik and Marking 1981, p. 32; Whitney *et al.* 1996, p. 17; Helms and Associates, Ecological Specialists Inc. 2008, p. 16). The status of this species in the Mississippi River is highly jeopardized (Butler 2002b, p. 7).

Pools with extant populations include MRP 3 (last seen live or fresh dead in 2000–01), MRP 4 (2008), MRP 7 (2001), MRP 11 (2007), MRP 14 (2006–07), MRP 15 (2005–06), MRP 16 (2003), MRP 17 (2004), MRP 20 (1992), and MRP 24 (1999). The 2001 MRP 7 record was for a live juvenile 1.3 inches (3.3 cm) long and estimated to be 3 years old (Davis 2008, pers. comm.).

St. Croix River: The St. Croix River population is isolated and comprised of old individuals with little to no recruitment (Heath 2010b, pers. comm.). Currently, the population is thought to be restricted to the lowermost mainstem below RM 1 in Washington County, Minnesota, and Pierce County, Wisconsin (Heath 2010b, pers. comm.). Three live individuals were collected in 1988, during a mussel relocation project for the U.S. Highway 10 bridge immediately upstream of the confluence with the Mississippi River (Heath 1989, p. 16). Hornbach (2001, p. 218) analyzed mussel collections throughout the St. Croix River and found that the sheepnose was absent in 15 of the 16 river reaches he sampled, only noting the 1988 occurrence. One historical occurrence is known from the vicinity of RM 53 in 1930; however, this is the only known record upstream of RM 1 (Heath 2010b, pers. comm.). Because

there have been no recent collections in the St. Croix River since 1988, this population is most likely extirpated.

Chippewa/Flambeau River: The sheepnose population in the Chippewa River is extant in much of the river system including the lower end of its tributary, the Flambeau River. This population is stable with documented recruitment (Butler 2002b, p. 8). Balding and Balding (1996, p. 5) reported 50 live specimens sampled from 1989–1994, but more recent collections have expanded sites of occurrence to 20 of 67 sites in the middle and upper portions of the Chippewa River, with a relative abundance of 0.8 percent (Balding 2001, pers. comm.). Balding (1992, p. 166) found 12 live specimens and 31 dead shells from 5 of 37 sites in the lower river. Additional survey work extended the number of sites where it was found live to 10 of 45 (Balding 2001, pers. comm.). The Flambeau River supports a small sheepnose population below its lowest dam and near its confluence with the Chippewa River (lower 8 miles (13 km) of river), and is most likely dependent on the source population in the Chippewa River. The Chippewa River sheepnose population is considered one of the best known extant populations. The Flambeau River supports a small sheepnose population below its lowest dam and near its confluence with the Chippewa River (lower 8 miles (13 km) of river), and is most likely dependent on the source population in the Chippewa River.

Wisconsin River: The sheepnose is declining in the Wisconsin River. Historical records for the sheepnose are available throughout the lower 335 miles (539 km) of the 420-mile (676-km) Wisconsin River (Heath 2010c, pers. comm.). In July 2002, 20 live specimens were found in a dense mussel bed near Port Andrew (Seitman 2008, pers. comm.). Currently, the sheepnose is primarily confined to RM 133.7 downstream (a reduction of over 201 river miles (232 km)). The sheepnose population is probably recruiting in the river, primarily in the lower section (below RM 82) (Heath 2010b, pers. comm.). It is unknown if the middle river population, from RM 93 to 133.7, is recruiting because only three living individuals have been found in recent years (Heath 2010c, pers. comm.).

Kankakee River: The sheepnose once occurred along the lower two-thirds of the Kankakee River, an Upper Illinois River tributary, in Indiana and Illinois (Wilson and Clark 1912, p. 47; Lewis and Brice 1980, p. 4). The sheepnose has been extirpated from the channelized portion of the Kankakee in Indiana but persists in the Illinois portion of the river where it appears stable, with evidence of recent recruitment (Butler 2002b, p. 9). Records since 1986 identify the sheepnose in the Kankakee River from the Iroquois River confluence downstream approximately 30 river miles (48 km) (Cummings 2010, pers. comm.; Helms and Associates 2005, p. 3). A mussel relocation effort for a pipeline crossing in the Kankakee River in July 2002 found 11 sheepnose individuals, representing 0.32 percent of the total mussels relocated (Helms 2004, p. D–1). Subsequent monitoring of the site in 2004 and 2007 located four new individuals. One individual collected in 2004 measured 1.6 inches (40 mm) and was estimated to be a juvenile of 3 years of age.

Meramec River: The Meramec River flows into the Mississippi River downstream of St. Louis and drains east-central Missouri. The Meramec sheepnose population is stable and recruiting, and represents one of the best rangewide (Butler 2002b, p. 9). Two studies (Buchanan 1980, p. 4; Roberts & Bruenderman 2000, p. 20) extensively surveyed the mussel fauna of the Meramec River. The most notable difference in the results of these studies was the reduced range in which sheepnose were found. Buchanan (1980, p. 34) found live or fresh dead individuals from RM 4.5 to 145.7 (141.2 river miles (227.2 km)), whereas Roberts and Bruenderman (2000, p. 20) found live or fresh dead individuals from RM 25.6 to 91.3 (65.7 river miles (105.7 km)). The trend data from the late 1970s to 1997 indicate that the sheepnose declined 75.5 river miles (121.5 km) in total range within the Meramec River. The extent of the population in the lower end appears to be shrinking upriver (Butler 2002b, p. 10).

In 2002, a site associated with a railroad crossing in St. Louis County at RM 28 yielded 43 live specimens over 3 days of sampling, including at least one gravid female (Roberts 2008, pers. comm.). Collectively, these data reinforce the level of importance of the Meramec population for the sheepnose rangewide. Although the existing population has been described as stable and recruitment has been documented in the system (Butler 2002b, pp. 11–12), the population has shrunk by half of its former geographic range over the past 30 years.

Bourbeuse River: The Bourbeuse River sheepnose population is distributed in the downstream 90 river miles (145 km) of the river (Buchanan 1980, p. 34), but is considered rare. Although recruitment has been documented in the Bourbeuse River, the sheepnose population is considered declining (Roberts and Bruenderman 2000, p. 130; Roberts 2010, pers. comm.). In the late 1970s, Buchanan (1980, p. 10) found the sheepnose to represent 0.1 percent of the Bourbeuse River mussel fauna, with 10 live specimens sampled from 7 sites. Based on data collected by Buchanan (1980, p. 34) and additional survey work in 1980, live or fresh-dead individuals were found in the Bourbeuse from RM 6.5 to 90.0. Data from a resurvey of the Bourbeuse River collected in 1997 yielded nine live sheepnose from four sites (Roberts and Bruenderman 2000, p. 39) and fresh dead shells were located at an additional site. Sheepnose relative abundance was 0.4 percent. Live or fresh dead sheepnose were found between RM 1.4 to 66.3. This comparison indicates a decrease in the number of extant sites (7 to 4) and a range contraction of 18 river miles (29 km). The sheepnose in the Meramec and Bourbeuse Rivers represents a population cluster.

Lower Missouri River System

Osage Fork Gasconade River: The Lower Missouri River system population is represented by a single sheepnose specimen and is near extirpation. This individual was located in 1999 at RM 21.2 in the Osage Fork, a tributary to the Gasconade River (Bruenderman *et al.* 2001, p. 14). It is the only known record for sheepnose in the Gasconade River drainage for over 25 years.

Ohio River System

Historically, the sheepnose was documented from the entire length of the Ohio River (its type locality), and was first collected there in the early 1800s. Ohio River sampling of 664 river miles (1,068 km) along the northern border of Kentucky yielded 41 sheepnose (Williams 1969, p. 58). Most of these (29) were found in the upper portions of river (from RM 317 to 538), but the population extended downstream to RM 871. Relative abundance was 0.7 percent for the entire reach sampled. Currently, the mainstem Ohio River and 10 tributary streams have extant sheepnose populations.

Ohio River mainstem: The sheepnose is generally distributed, but rare, in most mainstem pools of the Ohio River. The population appears to be more abundant in the lower section of the river with a smaller population in the upper Ohio River pools (McGregor 2008, pers. comm.; Schuster and Williams 1989, p. 24; Zeto *et al.* 1987, p. 184). Long term monitoring data from 1993 to 2007 at RM 176 shows the sheepnose is usually collected each survey,

recruitment is occurring, and the species comprises 1.0 percent of the mussels at the site (relative abundance) (Morrison 2008, pers. comm.). Live sheepnose have also been collected in recent years at RM 725 and RM 300 (Morrison 2008, pers. comm.). The population in the lower Ohio River mainstem is viable with documented recruitment, but the population overall continues to show signs of decline (Butler 2002b, p. 12).

Allegheny River: The Allegheny River drains northwestern Pennsylvania and western New York and joins the Monongahela River at Pittsburgh to form the Ohio River. A recruiting and improving population of sheepnose exists within the middle Allegheny River (Villella 2008, pers. comm.). Sampling efforts from 2006–2008 at 63 sites over 78 miles (125 km) of river produced sheepnose at 18 sites. A total of 244 individuals of 7 different age classes were collected (Villella 2008, pers. comm.) providing ample evidence of recent recruitment.

Kanawha River: The Kanawha River is a major southern tributary of the Ohio River draining much of West Virginia and with headwaters in Virginia and North Carolina. The Kanawha River harbors a small, but recruiting and stable, population of sheepnose in Fayette County, West Virginia (Butler 2002b, p. 14). The Kanawha population appears to be limited to 5 river miles (8 km) immediately below Kanawha Falls (Clayton 2008c, pers. comm.). Sheepnose collections from this reach in 1987 resulted in a density of 0.013 per sq. m (0.140 per sq. ft), and collections from 2005 found a density of 0.016 per sq. m (0.172 per sq. ft) (Clayton 2008c, pers. comm.).

Licking River: The sheepnose is known from the lower half of the Licking River, a southern tributary of the Ohio River in northeastern Kentucky. Currently, the species is known from roughly five sites in the middle Licking River (McGregor 2008, pers. comm.). There is no documented evidence of recent recruitment, and, therefore, the sustainability of the population is unknown. It is possible this population represents a population cluster with the Ohio River.

Green River: The Green River is a lower Ohio River tributary in west-central Kentucky. Currently, a recruiting and improving population remains over an approximately 25 river mile (40 river km) reach in the upper Green River from the vicinity of Mammoth Cave National Park upstream into Hart County (Butler 2002b, p. 15). An investigation of muskrat middens from 2002 and 2003 revealed 42 sheepnose shells, with 39 of the 42 between 1.2 and 2.2 inches (3.0 and 5.6 cm) in length and described as juveniles (Layzer 2008, pers. comm.). Sampling over the past several years (2005–2007) has documented a number of beds experiencing recruitment (McGregor 2008, pers. comm.).

Tippecanoe River: The Tippecanoe River drains the central portion of northern Indiana in the upper Wabash River system. This population of sheepnose is considered stable with relatively recent recruitment (Butler 2002b, p. 17). Survey work between 1987 and 1995 documented sheepnose at 14 sites throughout the river and extended the known range of the species upstream into Marshall County (Butler 2002b, p. 17). The sheepnose is now known from 45 miles (72 km) of the Tippecanoe River (Ecological Specialists, Inc. 1993, pp. 80–81; Cummings and Berlocher 1990, pp. 84, 98; Cummings 2008, pers. comm.; Fisher 2008, pers. comm.).

Kentucky, Wabash, Eel, Muskingum, and Walhonding Rivers: In addition to the aforementioned populations, sheepnose in the Ohio River system are known from the Kentucky, Wabash, and Eel Rivers, which are each represented by two or fewer specimens collected in the past 25 years. Populations of the sheepnose in these three river systems are considered to be declining and may be nearing extirpation (Butler 2002b, p. 15–16). A population cluster in two additional rivers, the Muskingum River and its tributary, the Walhonding River, have unknown populations. Although Watters and Dunn (1995, p. 240) documented recruitment in the lower Muskingum River in the mid-1980s, the sheepnose population in the river is extremely small, and distribution has been reduced to only the lower portion of the river where six individuals were collected in 1992 (Watters and Dunn 1995, pp. 253–254).

Cumberland River System

Historical sheepnose records in the system are known from throughout the mainstem downstream of Cumberland Falls and three of its tributaries (Obey, Harpeth, and Caney Fork Rivers). Wilson and Clark (1914, pp. 15–19, 57) reported the species to be generally uncommon from 14 mainstem sites from what is now Cumberland Reservoir, Kentucky, downstream to Stewart County, Tennessee, a distance of nearly 500 miles (~805 km). Sheepnose was last documented in the Tennessee portion of the river during the early 1980s (Butler 2002b, p. 67).

The only recent record for the Cumberland River is from 1987, at the extreme lower end of the river near its confluence with the Ohio River, below Barkley Dam (Butler 2002b, p. 18). This population may be influenced by the lower Ohio River sheepnose population (Butler 2002b, p. 18) and represents a population cluster. Surveys conducted in 2007–2009 found no sheepnose (Hubbs, 2010, pers. comm.) and so this population may be extirpated.

Tennessee River System

The sheepnose was originally known from the Tennessee River and 10 of its tributary streams. Historically, Ortmann (1925, p. 328) considered the sheepnose to occur "sparingly" in the lower Tennessee River, and to be "rare" in the upper part of the system (Ortmann 1918, p. 545). Hundreds of miles of large river habitat on the Tennessee River mainstem have been converted under nine reservoirs, with additional dams constructed in tributaries historically harboring the sheepnose (for example, Clinch, Holston, Little Tennessee, Hiwassee Rivers) (Tennessee Valley Authority 1971, p. 5). Sheepnose populations currently persist in limited reaches of the Tennessee River mainstem and four tributaries.

Tennessee River mainstem: The 53-mile (85-km) stretch of river in northwestern Alabama referred to as the Muscle Shoals, historically harbored 69 species of mussels, making it the most diverse mussel fauna ever known (Garner and McGregor 2001, pp. 155–157). However, with the construction of three dams (Wilson in 1925, Wheeler in 1930, and Pickwick Landing in 1940) most of the historical habitat was inundated, leaving only small, flowing habitat remnants (Garner and McGregor 2001, p. 158).

The species is found only occasionally in the lower Tennessee River below Pickwick Landing Dam in southwestern Tennessee. Scruggs (1960, p. 11) recorded a relative abundance of 0.2 percent, while Yokley (1972, p. 64) considered it to be "very rare" in this reach (relative abundance of 0.1 percent). Yokley reported only two specimens that were each estimated to be 20 or more years old.

The sheepnose persists in the tailwaters of Guntersville, Wilson, Pickwick Landing, and Kentucky Dams on the mainstem Tennessee River, where it is considered uncommon (Garner & McGregor 2001, p. 165; Gooch *et al.* 1979, p. 9). These populations are considered stable overall but with very limited recruitment (Garner and McGregor 2001, p. 165; McGregor 2008, pers. comm.). The species has been found in low numbers over the past 80 years from relic habitat in the Wilson Dam tailwaters, a several-mile reach

adjacent to and downstream from Florence, Alabama (Butler 2002b, pp. 20–21).

Clinch River: The Clinch River in southwestern Virginia and northeastern Tennessee is one of the largest and most significant tributaries of the upper Tennessee River system. Based on archeological evidence, the sheepnose was "extremely rare" in the lower Clinch River (Parmalee and Bogan 1986, p. 28). As of 2002, the largest lots of museum material available for the sheepnose had been from the Clinch River and its tributary, the Powell River (Watters 2010, pers. comm.). Individual Clinch River museum lots collected during 1963 to 1969 include 36, 39, 70, and 82 fresh dead specimens. The sheepnose population in the Clinch River currently occurs over approximately 60 river miles (96 km) from northern Scott County, Virginia downstream into Hancock County, Tennessee, and is considered stable with recently documented recruitment (Eckert 2008, pers. comm.). Survey work between 1979 and 1994 (Ahlstedt & Tuberville 1997, p. 73) reported low densities of 0.009 to 0.018 individuals per sq. ft. (0.1 to 0.2 per sq. m). Sampling efforts in 2005 and 2006 reported densities from two sites (RM 223.6 and 213.2) in Scott County, Virginia, of 0.021 and 0.006 individuals per sq. m (0.226 and 0.064 per sq. ft), respectively (Eckert 2008, pers. comm.). Relative abundance for sheepnose at these locations was 1.5 percent and 1.0 percent, respectively.

Powell River: The largest sheepnose collection (OSUM) known rangewide was collected in the Powell River, the Clinch River's largest tributary, and included 6 live and 141 fresh dead specimens. Today, the sheepnose population in the Powell River is considered stable, and recruitment has been documented. In 1979, Ahlstedt (1991b, pp. 129–130) reported 45 live specimens from 17 of 78 sites (an average 2.6 individuals per site). Ahlstedt and Tuberville (1997, p. 96) conducted quantitative sampling in the Powell between 1979 and 1994, and found the sheepnose at densities of 0.01 to 0.08 per sq. m (0.107 and 0.861 per sq. ft). Sampling efforts in 2004 reported densities from two sites in Lee County, Virginia (RM 120.3 and 117.3), of 0.012 and 0.017 individuals per sq. m (0.129 and 0.183 per sq. ft), respectively (Eckert 2008, pers. comm.). Relative abundance for sheepnose was 0.82 percent and 0.99 percent, respectively.

Duck River: The Duck River population is recently represented by the collection of single 10+ year old animal in 2003. The sheepnose was likely always rare in the Duck River and, previous to 2003, the species was thought to be extirpated. The current status of the population is unknown.

Holston River: In July 2002, sampling in Holston River produced live sheepnose at 16 of 20 sites sampled below the Cherokee Dam. This reach extended from Nance Ferry to Monday Island (RM 14.6), Jefferson and Knox Counties (Fraley 2008, pers. comm.). A total of 206 specimens were found with an overall relative abundance of 18.2 percent among the 18 species reported live from this reach. The collection was comprised of extremely old individuals with no recently recruited individuals being found. Although the population appeared significant in numbers, the lack of recruitment in this population is indicative of a remnant population on its way to extirpation (Butler 2002b, p. 19). In 2007, Tennessee Valley Authority biologists located sheepnose in the Holston River while conducting fish surveys; however, no additional mussel survey work has been completed in the area since 2002 (Baxter 2010, pers. comm.).

Lower Mississippi River System

The sheepnose was apparently never widely distributed in the lower Mississippi River system. The only verified records are for Hatchie River in Tennessee and the Delta region in Mississippi. The only records for the Yazoo and Big Black Rivers are from archeological sites (Butler 2002b, p. 21). The sheepnose population in the Big Sunflower River, Mississippi, is the only one remaining in the lower Mississippi River system. Once abundant judging from museum and archeological records, there is now only a small declining population in the Big Sunflower River (Jones 2008, pers. comm.). The population is believed to be limited to a 12- to 15-mile (19- to 24-km) reach upstream of Indianola in Sunflower County, Mississippi. Although no juvenile mussels have been found in recent sampling efforts, variably-sized individuals indicate some, possibly very low, level of recruitment in the population (Jones 2008, pers. comm.).

Summary of Extant Sheepnose Populations

The sheepnose has experienced a significant reduction in range, and many of the extant populations are disjunct, isolated, and appear to be declining. The extirpation of this species from over 50 streams (more than 65 percent) within its historical range indicates that substantial population losses have occurred. In the majority of streams with extant populations, the sheepnose appears to be uncommon at best. Only in the Allegheny and Green Rivers is the species considered to be improving in population status. Several other extant populations are thought to exhibit some level of stability and have experienced relatively recent recruitment (Chippewa/Flambeau, Meramec, Ohio, Tippecanoe, Clinch, and Powell Rivers). Given the compilation of current distribution, abundance, and status trend information, the sheepnose appears to exhibit a high level of imperilment.

Previous Federal Actions

We identified the spectaclecase and sheepnose as candidate species in a notice of review published in the **Federal Register** on May 4, 2004 (69 FR 24875). The spectaclecase and sheepnose remained candidate species in subsequent notices, including: May 11, 2005 (70 FR 24869), September 12, 2006 (71 FR 53755), December 6, 2007 (72 FR 69033), December 10, 2008 (73 FR 75176), and November 9, 2009 (74 FR 57804). A candidate species is a species for which we have on file sufficient information on biological vulnerability and threats to support issuing a proposed rule to list the species as endangered or threatened.

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may determine a species to be endangered or threatened due to one or more 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. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

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

The decline of mussels such as the spectaclecase and sheepnose is primarily the result of habitat loss and degradation (Neves 1991, pp. 252, 265). Chief among the causes of decline are impoundments, channelization, chemical contaminants, mining, oil and

gas development, and sedimentation (Neves 1991, pp. 252, 260–261; Neves 1993, pp. 1–7; Neves *et al.* 1997, pp. 63–72; Strayer *et al.* 2004, pp. 435–437; Watters 2000, pp. 261–268; Williams *et al.* 1993, p. 7). These threats to mussels in general (and spectaclecase and sheepnose where specifically known) are individually discussed below.

Dams and Impoundments

Dams eliminate or reduce river flow within impounded areas, trap silts and cause sediment deposition, alter water temperature and dissolved oxygen levels, change downstream water flow and quality, decrease habitat heterogeneity, affect normal flood patterns, and block upstream and downstream movement of species (Layzer *et al.* 1993, pp. 68–69; Neves *et al.* 1997, pp. 63–64; Watters 2000, pp. 261–264). Within impounded waters, decline of freshwater mollusks has been attributed to sedimentation, decreased dissolved oxygen, and alteration in resident fish populations (Neves *et al.* 1997, pp. 63–64; Pringle *et al.* 2009, pp. 810–815; Watters 2000, pp. 261–264). Dams significantly alter downstream water quality and habitats (Allen & Flecker 1993, p. 36), and negatively affect tailwater mussel populations (Layzer *et al.* 1993, p. 69; Neves *et al.* 1997, p. 63; Watters 2000, pp. 265–266). Below dams, mussel declines are associated with changes and fluctuation in flow regime, scouring and erosion, reduced dissolved oxygen levels and water temperatures, and changes in resident fish assemblages (Layzer *et al.* 1993, p. 69; Neves *et al.* 1997, pp. 63–64; Pringle *et al.* 2009, pp. 810–815; Watters 2000, pp. 265–266; Williams *et al.* 1992, p. 7). The decline and imperilment of freshwater mussels in several tributaries within the Tennessee, Cumberland, Mississippi, Missouri, and Ohio River basins have been directly attributed to construction of numerous impoundments in those river systems (Hanlon *et al.* 2009, pp. 11–12; Layzer *et al.* 1993, pp. 68–69; Miller *et al.* 1984, p. 109; Neves *et al.* 1997, pp. 63–64; Sickel *et al.* 2007, pp. 71–78; Suloway 1981, pp. 237–238; Watters 2000, pp. 262–263; Watters & Flaute 2010, pp. 3–7; Williams & Schuster 1989, pp. 7–10).

Population losses due to impoundments have likely contributed more to the decline and imperilment of the spectaclecase and the sheepnose than any other factor. Large river habitat throughout nearly all of the range of both species has been impounded, leaving generally short, isolated patches of vestigial habitat in the area below dams. Navigational locks and dams, (for example, on the upper Mississippi, Ohio, Allegheny, Muskingum, Kentucky, Green, and Barren Rivers), some high-wall dams (for example, on the Wisconsin, Kaskaskia, Walhonding, and Tippecanoe Rivers), and many low-head dams (for example, on the St. Croix, Chippewa, Flambeau, Wisconsin, Kankakee, and Bourbeuse Rivers) have contributed significantly to the loss of sheepnose and spectaclecase habitat (Butler 2002a, pp. 11–20 2002b, pp. 9–25).

The majority of the Tennessee and Cumberland River main stems and many of their largest tributaries are now impounded. There are 36 major dams located in the Tennessee River system and about 90 percent of the Cumberland River downstream of Cumberland Falls (RM 550 (RKM 886)) is either directly impounded by U.S. Army Corps of Engineers (Corps) structures or otherwise impacted by cold tail water released from several dams. Major Corps impoundments on Cumberland River tributaries (for example, Stones River and Caney Fork) have inundated an additional 100 miles (161 km) or more of spectaclecase and sheepnose habitat. Coldwater releases from Wolf Creek, Dale Hollow (Obey River), and Center Hill (Caney Fork) Dams continue to degrade spectaclecase and sheepnose habitat in the Cumberland River system. Layzer *et al.* (1993, p. 68) reported that 37 of the 60 pre-impoundment mussel species of the Caney Fork River have been extirpated. Watters (2000, pp. 262–263) summarizes the tremendous loss of mussel species from various portions of the Tennessee and Cumberland River systems. Approximately one-third of the historical sheepnose and spectaclecase streams are in the Tennessee and Cumberland River systems.

Navigational improvements on the Ohio River began in 1830, and now include 21 lock and dam structures stretching from Pittsburgh, Pennsylvania, to Olmsted, Illinois, near its confluence with the Mississippi River. Historically, habitat now under navigational pools once supported up to 50 species of mussels, including the spectaclecase and sheepnose. Tributaries to the Ohio River, such as the Green and Allegheny rivers, were also altered by impoundments. A series of six locks and dams was constructed on the lower half of the Green River decades ago and extend upstream to the western boundary of Mammoth Cave National Park (MCNP). The upper two locks and dams destroyed spectaclecase habitat, particularly Lock and Dam 6, which flooded the central and western portions of MCNP. Approximately 30 river miles (48 km) of mainstem habitat were also eliminated with the construction of the Green River Dam in 1969. Locks and dams were also constructed on the lower reaches of the Allegheny, Kanawha, Muskingum, and Kentucky Rivers which disrupted historical riverine habitat for the sheepnose.

Similarly, dams impound most of the upper Mississippi River and many of its tributaries. A series of 29 locks and dams constructed since the 1930s in the mainstem resulted in profound changes to the nature of the river, primarily replacing a free-flowing alluvial (flood plain) system with a stepped gradient (higher pool area to riffle area ratio) river. Modifications fragmented the mussel beds where spectaclecase and sheepnose were found in the Mississippi River, reduced stable riverine habitat, and disrupted fish host migration and habitat use.

Dams and impoundments have fragmented and altered stream habitats throughout the Sac River Basin in the lower Missouri River system. Stockton Dam impounds 39 miles (63 km) of the upper Sac River and the Truman Dam inundates about 8 miles (13 km) of the lower Sac River and its tributaries (Hutson & Barnhart 2004, p. 7). The rarity of live spectaclecase in the Sac River, coupled with the large number of dead shells observed in a recent study, suggests that this species has decreased since the river was impounded, and that spectaclecase may soon be extirpated from the Sac River system (Hutson & Barnhart 2004, p. 17).

Dam construction has a secondary effect of fragmenting the ranges of aquatic mollusk species, leaving relict habitats and populations isolated by the structures as well as by extensive areas of deep uninhabitable, impounded waters. These isolated populations are unable to naturally recolonize suitable habitat that is impacted by temporary, but devastating events, such as severe drought, chemical spills, or unauthorized discharges (Cope *et al.* 1997, pp. 235–237; Layzer *et al.* 1993, pp. 68–69; Miller & Payne 2001, pp. 14–15; Neves *et al.* 1997, pp. 63–75; Pringle *et al.* 2009, pp. 810–815; Watters 2000, pp. 264–265, 268; Watters & Flaute 2010, pp. 3–7).

Sedimentation

Nonpoint source pollution from land surface runoff originates from virtually all land use activities and includes sediments; fertilizer, herbicide, and pesticide residues; animal or human wastes; septic tank leakage and gray water discharge; and oils and greases. Nonpoint source pollution can cause excess sedimentation, nutrification, decreased dissolved oxygen

concentration, increased acidity and conductivity, and other changes in water chemistry that can negatively impact freshwater mussels. Land use types around the sheepnose and spectaclecase populations include pastures, row crops, timber, and urban and rural communities.

Excessive sediments are believed to impact riverine mollusks requiring clean, stable streams (Brim Box & Mosa 1999, p. 99; Ellis 1936, pp. 39–40). Impacts resulting from sediments have been noted for many components of aquatic communities. For example, sediments have been shown to affect respiration, growth, reproductive success, and behavior of freshwater mussels, and to affect fish growth, survival, and reproduction (Waters 1995, pp. 173–175). Potential sediment sources within a watershed include virtually all activities that disturb the land surface, and most localities currently occupied by the spectaclecase and sheepnose are affected to varying degrees by sedimentation.

Sedimentation has been implicated in the decline of mussel populations nationwide, and is a threat to spectaclecase and sheepnose (Brim Box & Mosa 1999, p. 99; Dennis 1984, p. 212; Ellis 1936, pp. 39–40; Fraley & Ahlstedt 2000, pp. 193–194; Poole & Downing 2004, pp. 119–122; Vannote & Minshall 1982, pp. 4105–4106). Specific biological impacts include reduced feeding and respiratory efficiency from clogged gills, disrupted metabolic processes, reduced growth rates, limited burrowing activity, physical smothering, and disrupted host fish attractant mechanisms (Ellis 1936, pp. 39–40; Hartfield & Hartfield 1996, p. 373; Marking & Bills 1979, p. 210; Vannote & Minshall 1982, pp. 4105–4106; Waters 1995, pp. 173–175). In addition, mussels may be indirectly affected if high turbidity levels significantly reduce the amount of light available for photosynthesis and thus the production of certain food items (Kanehl & Lyons 1992, p. 7).

Studies indicate that the primary impacts of excess sediment on mussels are sublethal, with detrimental effects not immediately apparent (Brim Box & Mosa 1999, p. 101). The physical effects of sediment on mussels are multifold, and include changes in suspended and bed material load; changes in bed sediment composition associated with increased sediment production and run-off in the watershed; changes in the form, position, and stability of channels; changes in depth or the width-to-depth ratio, which affects light penetration and flow regime; actively aggrading (filling) or degrading (scouring) channels; and changes in channel position that may leave mussels stranded (Brim Box & Mosa 1999, pp. 109–112; Kanehl & Lyons 1992, pp. 4–5; Vannote & Minshall 1982, p. 4106). The Chippewa River in Wisconsin, for example, has a tremendous bedload composed primarily of sand that requires dredging to maintain barge traffic on the mainstem Mississippi below its confluence (Thiel 1981, p. 20). The mussel diversity in the Mississippi River below the confluence with the Chippewa River has predictably declined from historical times. Lake Pepin, a once natural lake formed in the upper Mississippi River upstream from the mouth of the Chippewa River, has become increasingly silted in over the past century, reducing habitat for the spectaclecase and sheepnose (Thiel 1981, p. 20).

Increased sedimentation and siltation may explain in part why spectaclecase and sheepnose mussels appear to be experiencing recruitment failure in some streams. Interstitial spaces in the substrate provide crucial habitat for juvenile mussels. When clogged, interstitial flow rates and spaces are reduced (Brim Box & Mosa 1999, p. 100), thus reducing juvenile habitat. Furthermore, sediment may act as a vector for delivering contaminants such as nutrients and pesticides to streams and juveniles may ingest contaminants adsorbed to silt particles during normal feeding activities. Female spectaclecase and sheepnose produce conglutinates that attract hosts. Such a reproductive strategy depends on clear water during the critical time of the year when mussels are releasing their glochidia.

Agricultural activities are responsible for much of the sediment (Waters 1995, p. 170) and chemical discharge into streams, affecting 60 percent of the impaired river miles in the country (EPA 2007, p. 10). Unrestricted livestock access occurs on many streams and potentially threatens their mussel populations (Fraley & Ahlstedt 2000, pp. 193–194). Grazing may reduce infiltration rates and increase runoff; trampling and vegetation removal increases the probability of erosion (Armour *et al.* 1991, pp. 8–10; Brim Box & Mosa 1999, p. 103). The majority of the remaining spectaclecase and sheepnose populations are threatened by some form of agricultural runoff (nutrients, pesticides, sediment). Copper Creek, a tributary to the Clinch River, for example, has a drainage area that contains approximately 41 percent agricultural land (Hanlon *et al.* 2009, p. 3). Fraley and Ahlstedt (2000, p. 193) and Hanlon *et al.* (2009, pp. 11–12) attributed the decline of the Copper Creek mussel fauna to an increase in cattle grazing and resultant nutrient enrichment and loss of riparian vegetation along the stream, among other factors. This scenario is similar in other parts of the extant range of the spectaclecase and sheepnose.

Sedimentation and urban runoff may also be threats to the sheepnose in the Kankakee River system as the Chicago Metro area continues to expand. Declines in mussel diversity observed in the Ohio River are in part due to pollution from urban centers; in many of these areas the loss of diversity has not recovered from water quality problems that began prior to dam construction (Watters & Flaute 2010, pp. 3–7).

As the spectaclecase primarily inhabits deep water along the outside of bends, it may be particularly vulnerable to siltation. The current often slackens in this habitat, more so than in riffles and runs where other mussel species are typically found, and suspended sediment settles out. Spectaclecase beds covered with a thick layer of silt have been observed in Missouri, often downstream from reaches with eroding banks (Roberts 2008, pers. comm.).

Channelization

Dredging and channelization activities have profoundly altered riverine habitats nationwide. Hartfield (1993, pp. 131–139), Neves *et al.* (1997, pp. 71–72), and Watters (2000, pp. 268–269) reviewed the specific effects of channelization on freshwater mussels. Channelization impacts stream physically (for example accelerated erosion, reduced depth, decreased habitat diversity, geomorphic instability, and loss of riparian vegetation) and biologically (for example decreased fish and mussel diversity, altered species composition and abundance, decreased biomass, and reduced growth rates) (Hartfield 1993, pp. 131–139). Channel construction for navigation increases flood heights (Belt 1975, p. 684), partly as a result of a decrease in stream length and an increase in gradient (Hubbard *et al.* 1993, p. 137 (in Hartfield 1993, p. 131)). Flood events may thus be exacerbated, conveying into streams large quantities of sediment, potentially with adsorbed contaminants. Channel maintenance may result in profound impacts downstream (Stansbery 1970, p. 10), such as increases in turbidity and sedimentation, which may smother bottom-dwelling organisms.

Channel maintenance operations for commercial navigation have impacted habitat for the sheepnose and spectaclecase in many large rivers

rangewide. Periodic channel maintenance may continue to adversely affect this species in the upper Mississippi, Ohio, Muskingum, and Tennessee rivers. Further modifications to the Mississippi River channel are anticipated with the recently authorized Navigation and Environmental Sustainability Program (NESP) (Water Resources Development Act of 2007 (Pub. L. 110–114)), which will consist of construction of larger locks and other navigation improvements downstream of MRP 14. Continual maintenance of the Mississippi River navigation channel requires dredging, wing and closing dam reconstruction and maintenance, and bank armoring. Dredging, maintenance, and construction activities destabilize instream fine sediments are likely to adversely affect the spectaclecase and the sheepnose. Spectaclecase tend to inhabit relatively deep water where they are particularly vulnerable to siltation. The current is slower in this habitat than in riffles and runs, and suspended sediment settles out in greater volume. Dredging to maintain barge traffic on the Mississippi River below the mouth of the Chippewa River in Wisconsin has reduced mussel diversity due to the increase in unstable sand substrates (Thiel 1981, p. 20; U.S. Army Corps of Engineers 1996, p. 1, Tab 14).

Channel maintenance dredging is also a major concern for mussel populations. A large amount of spoil (dredged earth and rock) was dumped directly on a mussel bed in the Muskingum River that included the sheepnose in the late 1990s (Watters 2008, pers. comm.). Thousands of mussels were killed as the result of this single event. Watters and Dunn (1995 p. 231) also noted that the lower ends of two mussel beds coincided with the mouths of Wolf and Bear Creeks. This led them to surmise that pollutants, such as sediment loads or agricultural runoff, in their watersheds may adversely impact mussels in the mainstem Muskingum River below the confluences of Wolf Creek and Bear Creek.

Mussels require a stable substrate to survive and reproduce and are particularly susceptible to channel instability (Neves *et al.* 1997, p. 23; Parmalee & Bogan 1998). Channel and bank degradation have led to the loss of stable substrates in the Meramec River Basin. Roberts and Bruenderman (2000, pp. 7–8, 21–23) pointed to the loss of suitable stable habitat as a major cause of decline in mussel abundance at sites previously surveyed in 1979.

The Tennessee River was once a stronghold for the spectaclecase (Ortmann 1924, p. 60; 1925, p. 327), and the sheepnose was originally known to occur in the Tennessee River and 10 of its tributaries (Ortmann 1925, p. 328). The mainstem of the Tennessee River is maintained as a navigational channel, and a plan to deepen it has been proposed (Hubbs 2008, pers. comm.). Severe bank erosion is ongoing along some reaches of the river below Pickwick Landing Dam, with some sites losing several feet of stream bank per year (Hubbs 2008, pers. comm.).

The sheepnose population within the Big Sunflower River is threatened by a Corps flood control project (Jones 2008, pers. comm.). Dredging for this project is planned to take place downstream of Indianaola, but head-cutting may ultimately destabilize the substrate in which sheepnose now exists. This activity, coupled with other threats potentially affecting sheepnose (*see* below), may lead to extirpation of the population within 10 years (Jones 2008, pers. comm.).

The upper Kankakee River in Indiana was channelized several decades ago. The sheepnose is now considered extirpated from the upper Kankakee, and is restricted to the unchannelized portion of the river in Illinois (Cummings 2008, pers. comm.).

Mining

Instream gravel mining has been implicated in the destruction of mussel populations (Hartfield 1993, pp. 136–138). Negative impacts associated with gravel mining include stream channel modifications (altered habitat, disrupted flow patterns, and sediment transport), water quality modifications (increased turbidity, reduced light penetration, and increased temperature), macroinvertebrate population changes (elimination, habitat disruption, and increased sedimentation), and changes in fish populations (impacts to spawning and nursery habitat and food web disruptions) (Kanehl & Lyons 1992, pp. 4–10).

Heavy metal-rich drainage from coal mining and associated sedimentation has adversely impacted portions of the Tennessee River system in Virginia. Low pH commonly associated with mine runoff can reduce glochidial encystment (attachment) rates (Huebner & Pynnonen 1992, pp. 2350–2353). Acid mine runoff may thus have local impacts on recruitment of the mussel populations close to mines.

Coal-related toxins in the Clinch River may explain the decline and lack of mussel recruitment at some sites in the Virginia portion of that stream (Ahlstedt 2008, pers. comm.). Patterns of mussel distribution and abundances have been found to be negatively correlated with proximity to coal-mining activities (Ahlstedt & Tuberville 1997, pp. 74–75). Known mussel toxicants, such as polycyclic aromatic hydrocarbons, heavy metals (for example, copper, manganese, and zinc), and other chemicals from coal mining and other activities contaminate sediments in the Clinch River (Ahlstedt & Tuberville 1997, p. 75). These chemicals are toxic to juvenile mussels (Ahlstedt & Tuberville 1997, p. 75). Pollutant inputs to the Clinch River from a coal-burning power plant in Carbo, Virginia, were shown to increase mortality and reduce cellulolytic activity (breaking down cellulose) in transplanted mussels (Farris *et al.* 1988, pp. 705–706). Site-specific copper toxicity studies of unionid glochidia in the Clinch River showed that freshwater mussels as a group were generally sensitive to copper, the toxic constituent of the power plant effluent (Cherry *et al.* 2002, p. 596). All of these studies indicate that acid mine runoff may have local impacts on spectaclecase recruitment and survival in this river.

Gravel-mining activities may also be a localized threat in some streams with extant sheepnose and spectaclecase populations. Gravel mining causes stream instability, increasing erosion, turbidity, and subsequent sediment deposition (Meador & Layher 1998, pp. 8–9). Gravel mining is common in the Meramec River system. Between 1997 and 2008, the Missouri Department of Natural Resources issued permits for 102 sand- and gravel-mining sites in the Meramec River (Zeaman 2008, pers. comm.). Although rigid guidelines prohibited instream mining and required streamside buffers, a court ruling deauthorized the Corps from regulating these habitat protective measures. The Corps still retains oversight for gravel mining, but many mining operations do not fall under Corps jurisdiction (Roberts & Bruenderman 2000, p. 23). In the lower Tennessee River, mining is permitted in 18 reaches for a total of 47.9 river miles (77.1 km) between the Duck River confluence and Pickwick Landing Dam, a distance of over 95 miles (153 km) (Hubbs 2008, pers. comm.). This is the reach where mussel recruitment has been noted for many rare species in recent years. These activities have the potential to impact the river's small sheepnose population. The Gasconade River and its tributaries have been subject to gravel mining and other channel modifying practices that accelerate channel destabilization. These physical habitat threats combined with poor water quality and agricultural

nonpoint source pollution are serious threats to all existing mussel fauna in the system.

Oil and Gas Development

Coal, oil, and natural gas resources are present in some of the watersheds that are known to support sheepnose, including the Allegheny River. Exploration and extraction of these energy resources can result in increased siltation, a changed hydrograph, and altered water quality even at a distance from the mine or well field. Sheepnose habitat in larger streams can be threatened by the cumulative effects of multiple mines and well fields (adapted from Service 2008, p. 11).

Coal, oil, and gas resources are present in a number of the basins where sheepnose occur, and extraction of these resources has increased dramatically in recent years, particularly in Pennsylvania and West Virginia. Although oil and gas extraction generally occurs away from the river, extensive road networks are required to construct and maintain wells. These road networks frequently cross or occur near tributaries, contributing sediment to the receiving waterway. In addition, the construction and operation of wells may result in the discharge of brine. Point source discharges are typically regulated; however, nonpoint inputs such as silt and other contaminants may not be sufficiently regulated, particularly those originating some distance from a waterway. In 2006, more than 3,700 permits were issued for oil and gas wells by the Pennsylvania Department of Environmental Protection, which also issued 98 citations for permit violations at 54 wells (Hopey 2007; adapted from Service 2008, p. 12).

Chemical Contaminants

Chemical contaminants are ubiquitous throughout the environment and are considered a major threat in the decline of freshwater mussel species (Cope *et al.* 2008, p. 451; Richter *et al.* 1997, p. 1081; Strayer *et al.* 2004, p. 436; Wang *et al.* 2007a, p. 2029). Chemicals enter the environment through both point and nonpoint discharges including spills, industrial sources, municipal effluents, and agricultural runoff. These sources contribute organic compounds, heavy metals, pesticides, and a wide variety of newly emerging contaminants to the aquatic environment. As a result, water and sediment quality can be degraded to the extent that mussel populations are adversely impacted.

Chemical spills can be especially devastating to mussels because they may result in exposure of a relatively immobile species to extremely elevated concentrations that far exceed toxic levels and any water quality standards that might be in effect. Some notable spills that released large quantities of highly concentrated chemicals resulting in mortality to mussels include:

- Massive mussel kills on the Clinch River at Carbo, Virginia occurred from a power plant alkaline fly ash pond spill in 1967, and a sulfuric acid spill in 1970 (Crossman *et al.* 1973, p. 6);
- Approximately 18,000 mussels of several species, including 750 individuals from three endangered mussel species, were eliminated from the upper Clinch River near Cedar Bluff, Virginia in 1998, when an overturned tanker truck released 1,600 gallons (6,056 liters) of a chemical used in rubber manufacturing (Jones *et al.* 2001, p. 20; Schmerfeld 2006, p. 12); and
- An on-going release of sodium dimethyl dithiocarbamate, a chemical used to reduce and precipitate hexachrome, starting in 1999 impacted approximately 10 river miles (16 km) of the Ohio River and resulted in an estimated loss of one million mussels, including individuals from two federally listed species (DeVault 2009, pers. comm.; Clayton 2008b, pers. comm.).

These are not the only instances where chemical spills have resulted in the loss of high numbers of mussels (Brown *et al.* 2005, p. 1457; Jones *et al.* 2001, p. 20; Neves 1991, p. 252; Schmerfeld 2006, pp. 12–13), but are provided as examples of the serious threat chemical spills pose to mussel species. The sheepnose and spectaclecase are especially threatened by chemical spills because these spills can occur anywhere that highways with tanker trucks, industries, or mines overlap with sheepnose and spectaclecase distribution.

Exposure of mussels to lower concentrations of contaminants more likely to be found in aquatic environments can also adversely affect mussels and result in the decline of freshwater mussel species. Such concentrations may not be immediately lethal, but over time, can result in mortality, reduced filtration efficiency, reduced growth, decreased reproduction, changes in enzyme activity, and behavioral changes to all mussel life stages. Frequently, procedures which evaluate the ''safe'' concentration of an environmental contaminant (for example, national water quality criteria) do not have data for freshwater mussel species or exclude data that are available for freshwater mussels (March *et al.* 2007, pp. 2066–2067, 2073).

Current research is now starting to focus on the contaminant sensitivity of freshwater mussel glochidia and newly-released juvenile mussels (Goudreau *et al.* 1993, pp. 219–222; Jacobson *et al.* 1997, p. 2390; March *et al.* 2007, pp. 2068–2073; Valenti *et al.* 2006, pp. 2514–2517; Valenti *et al.* 2005, pp. 1244–1245; Wang *et al.* 2007c, pp. 2041–2046) and juveniles (Augspurger *et al.* 2003, p. 2569; Bartsch *et al.* 2003, p. 2561; March *et al.* 2007, pp. 2068–2073; Mummert *et al.* 2003, p. 2549; Valenti *et al.* 2006, pp. 2514–2517; Valenti *et al.* 2005, pp. 1244–1245; Wang *et al.* 2007b, pp. 2053–2055; Wang *et al.* 2007c, pp. 2041–2046) to such contaminants as ammonia, metals, chlorine, and pesticides. The toxicity information presented in this section focuses on recent water-only laboratory acute (sudden and severe exposure) and chronic (prolonged or repeated exposure) toxicity tests with early life stages of freshwater mussels using the standard testing methodology published by the American Society for Testing and Materials (ASTM) (American Society for Testing and Materials. 2008. Standard guide for conducting laboratory toxicity tests with freshwater mussels E2455–06. In *Annual Book of ASTM Standards,* Vol 11.06. Philadelphia, PA, pp. 1442–1493.) Use of this standard testing method generates consistent, reliable toxicity data with acceptable precision and accuracy (Wang *et al.* 2007a, p. 2035) and was used for toxicity tests on ammonia, copper, chlorine and select pesticides (Augspurger *et al.* 2007, p. 2025; Bringolf *et al.* 2007b, p. 2101; Bringolf *et al.* 2007c, p. 2087; Wang *et al.* 2007a, p. 2029; Wang *et al.* 2007b, p. 2048; Wang *et al.* 2007c, p. 2036). Use of these tests has documented that, while mussels are sensitive to some contaminants, they are not universally sensitive to all contaminants (Augspurger *et al.* 2007, pp. 2025–2026).

One chemical that is particularly toxic to early life stages of mussels is ammonia. Sources of ammonia include agricultural wastes (animal feedlots and nitrogenous fertilizers), municipal wastewater treatment plants, and industrial waste (Augspurger *et al.* 2007, p. 2026) as well as precipitation and natural processes (decomposition of organic nitrogen) (Augspurger *et al.* 2003, p. 2569; Goudreau *et al.* 1993, p. 212; Hickey & Martin 1999, p. 44; Newton 2003, p. 1243). Therefore, ammonia is considered a limiting factor for survival and recovery of some mussel species due to its ubiquity in aquatic environments and high level of toxicity, and because the highest

concentrations typically occur in mussel microhabitats (Augspurger *et al.* 2003, p. 2574). In addition, studies have shown that ammonia concentrations increase with increasing temperature and low flow conditions (Cherry *et al.* 2005, p. 378; Cooper *et al.* 2005, p. 381), which may be exacerbated by the effects of climate change, and may cause ammonia to become more problematic for juvenile mussels. The EPA-established ammonia water quality criteria (EPA 1985, pp. 94–99) may not be protective of mussels (Augspurger *et al.* 2003, p. 2572; Sharpe 2005, p. 28) under current and future climate conditions.

Mussels are also affected by metals (Keller & Zam 1991, p. 543), such as cadmium, chromium, copper, mercury, and zinc, which can negatively affect biological processes such as growth, filtration efficiency, enzyme activity, valve closure, and behavior (Jacobson *et al.* 1997, p. 2390; Keller & Zam 1991, p. 543; Naimo 1995, pp. 351–355; Valenti *et al.* 2005, p. 1244). Metals occur in industrial and wastewater effluents and are often a result of atmospheric deposition from industrial processes and incinerators. Glochidia and juvenile freshwater mussels have recently been studied to determine the acute and chronic toxicity of copper to these life stages (Wang *et al.* 2007b, pp. 2048–2056; Wang *et al.* 2007c, pp. 2036–2047). The chronic values determined for copper ranged from 8.5 to 9.8 micrograms per liter (ug/L) for survival and from 4.6 to 8.5 ug/L for growth of juveniles. These chronic values are below the EPA 1996 chronic water quality criterion of 15 ug/L (hardness 170 mg/L) for copper (Wang *et al.* 2007b, pp. 2052–2055). March (2007, pp. 2066, 2073) identifies that copper water quality criteria and modified State water quality standards may not be protective of mussels.

Mercury is another heavy metal that has the potential to negatively affect mussel populations, and it is receiving attention due to its widespread distribution and potential to adversely impact the environment. Mercury has been detected throughout aquatic environments as a product of municipal and industrial waste and atmospheric deposition from coal-burning plants. One recent study evaluated the sensitivity of early life stages of mussels to mercury (Valenti *et al.* 2005, p. 1242). This study determined that for the mussel species used (rainbow mussel, *Villosa iris*) glochidia were more sensitive to mercury than were juvenile mussels, with the median lethal concentration value of 14 ug/L compared to 114 ug/L for the juvenile life stage. The chronic toxicity tests conducted determined that juveniles exposed to mercury greater than or equal to 8 ug/L exhibited reduced growth. These observed toxicity values are below EPA's Criteria Continuous Concentration and Criteria Maximum Concentration, which are 0.77 ug/L and 1.4 ug/L, respectively. Based on these data, we believe that EPA's water quality standards for mercury should be protective of juvenile mussels and glochidia, except in cases of illegal dumping, permit violations, or spills. However, impacts to mussels from mercury toxicity may be occurring in some streams. According to the National Summary Data reported by States to the EPA, 3,770 monitored waters do not meet EPA standards for mercury in the United States. (*http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T,* accessed 6/28/2010). Acute mercury toxicity was determined to be the cause of extirpation of a diverse mussel fauna for a 70-mile (112-km) portion of the North Fork Holston River (Brown *et al.* 2005, pp. 1455–1457).

In addition to ammonia, agricultural sources of chemical contaminants include two broad categories that have the potential to adversely impact mussel species: Nutrients and pesticides. Nutrients (such as nitrogen and phosphorus) can impact streams when their concentrations reach levels that cannot be assimilated, a condition known as over-enrichment. Nutrient over-enrichment is primarily a result of runoff from livestock farms, feedlots, and heavily fertilized row crops (Peterjohn & Correll 1984, p. 1471). Over-enriched conditions are exacerbated by low-flow conditions, such as those experienced during typical summer-season flows and that might occur with greater frequency and magnitude as a result of climate change. Bauer (1988, p. 244) found that excessive nitrogen concentrations can be detrimental to the adult freshwater pearl mussel (*Margaritifera margaritifera*), as was evident by the positive linear relationship between mortality and nitrate concentration. Also, a study of mussel life span and size (Bauer 1992, p. 425) showed a negative correlation between growth rate and eutrophication, and longevity was reduced as the concentration of nitrates increased. Nutrient over-enrichment can result in an increase in primary productivity, and the subsequent respiration depletes dissolved oxygen levels. This may be particularly detrimental to juvenile mussels that inhabit the interstitial spaces in the substrate where lower dissolved oxygen concentrations are more likely than on the sediment surface where adults tend to live (Sparks & Strayer 1998, pp. 132–133).

Elevated concentrations of pesticide frequently occur in streams due to pesticide runoff, overspray application to row crops, and lack of adequate riparian buffers. Agricultural pesticide applications often coincide with the reproductive and early life stages of mussel, and thus impacts to mussels due to pesticides may be increased (Bringolf *et al.* 2007a, p. 2094). Little is known regarding the impact of currently used pesticides to freshwater mussels even though some pesticides, such as glyphosate (Roundup), are used globally. Recent studies tested the toxicity of glyphosate, its formulations, and a surfactant (MON 0818) used in several glyphosate formulations, to early life stages of the fatmucket (*Lampsilis siliquoidea*), a native freshwater mussel (Bringolf *et al.* 2007a, p. 2094). Studies conducted with juvenile mussels and glochidia determined that the surfactant (MON 0818) was the most toxic of the compounds tested and that *L. siliquoidea* glochidia were the most sensitive organism tested to date (Bringolf *et al.* 2007a, p. 2094). Roundup, technical grade glyphosate isopropylamine salt, and isopropylamine were also acutely toxic to juveniles and glochidia (Bringolf *et al.* 2007a, p. 2097). The impacts of other pesticides including atrazine, chlorpyrifos, and permethrin on glochidia and juvenile life stages have also recently been studied (Bringolf *et al.* 2007b, p. 2101). This study determined that chlorpyrifos was toxic to both *L. siliquoidea* glochidia and juveniles (Bringolf *et al.* 2007b, p. 2104). The above results indicate the potential toxicity of commonly applied pesticides and the threat to mussel species as a result of the widespread use of these pesticides. All of these pesticides are commonly used throughout the range of the sheepnose and spectaclecase.

A potential, but undocumented, threat to freshwater mussel species, including sheepnose and spectaclecase, are contaminants referred to as "emerging contaminants" that are being detected in aquatic ecosystems at an increasing rate. Pharmaceuticals, hormones, and other organic contaminants have been detected downstream from urban areas and livestock production (Kolpin *et al.* 2002, p. 1202). A large potential source of these emerging contaminants is wastewater being discharged through both permitted (National Pollutant Discharge Elimination System, or NPDES) and non-permitted sites

throughout the country. Permitted discharge sites are ubiquitous in watersheds with sheepnose and spectaclecase populations, providing ample opportunities for contaminants to impact the species (for example, there are more than 250 NPDES sites in the Meramec River, Missouri system, which harbors large, but declining, populations of sheepnose and spectaclecase; Roberts and Bruenderman 2000, p. 78).

The information presented in this section represents some of the threats from chemical contaminants that have been documented both in the laboratory and field and demonstrates that chemical contaminants pose a substantial threat to sheepnose and spectaclecase. This information indicates the potential for contaminants from spills that are immediately lethal to species, to chronic contaminant exposure, which results in death, reduced growth, or reduced reproduction of sheepnose and spectaclecase to contribute to declining sheepnose and spectaclecase populations.

Summary of Factor A

The decline of the freshwater mussels in the eastern United States is primarily the result of the long-lasting effects of habitat alterations such as impoundments, channelization, chemical contaminants, mining, oil and gas development, and sedimentation. Although efforts have been made to restore habitat in some areas, the long-term effects of large-scale and wide-ranging habitat modification, destruction, and curtailment will continue into the foreseeable future.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The spectaclecase and sheepnose are not commercially valuable species but may be increasingly sought by collectors as they become rarer. Although scientific collecting is not thought to represent a significant threat, unregulated collecting could adversely affect localized spectaclecase and sheepnose populations.

Mussel harvest is illegal in some States (for example, Indiana and Ohio), but regulated in others (for example, Alabama, Kentucky, Tennessee, and Wisconsin). These species may be inadvertently harvested by inexperienced commercial harvesters unfamiliar with species identification. Although illegal harvest of protected mussel beds occurs (Watters and Dunn 1995, p. 225, 247–250), commercial harvest is not known to have a significant impact on the spectaclecase and sheepnose.

On the basis of this analysis, we find that overutilization for commercial, recreational, scientific, or educational purposes is not now a threat to the spectaclecase or sheepnose in any portion of its range or likely to become a significant threat in the foreseeable future.

C. Disease or Predation

Little is known about diseases in freshwater mussels (Grizzle & Brunner 2007, p. 6). However, mussel die-offs have been documented in spectaclecase and sheepnose streams (Neves 1986, p. 9), and some researchers believe that disease may be a factor contributing to the die-offs (Buchanan 1986, p. 53; Neves 1986, p. 11). Mussel parasites include water mites, trematodes, oligochaetes, leeches, copepods, bacteria, and protozoa (Grizzle & Brunner 2007, p. 4). Generally, parasites are not suspected of being a major limiting factor (Oesch 1984, p. 6), but a recent study provides contrary evidence. Reproductive output and physiological condition were negatively correlated with mite and trematode abundance, respectively (Gangloff *et al.* 2008, pp. 28–30). Stressors that reduce fitness may make mussels more susceptible to parasites (Butler 2007, p. 90). Furthermore, nonnative mussels may carry diseases and parasites that are potentially devastating to the native mussel fauna, including spectaclecase and sheepnose (Strayer 1999, p. 88).

The muskrat (*Ondatra zibethicus*) is cited as the most prevalent mussel predator (Convey *et al.* 1989, p. 654–655; Hanson *et al.* 1989, pp. 15–16; Kunz 1898, p. 328). Muskrat predation may limit the recovery potential of endangered mussels or contribute to local extirpations of previously stressed populations, according to Neves and Odom (1989, p. 940), but they consider it primarily a seasonal or localized threat. Böpple and Coker (1912, p. 9) noted the occurrence of "large piles of shells made by the muskrats" on an island in the Clinch River, Tennessee, composed of "about one-third" spectaclecase shells. Predation by muskrats may be a seasonal and localized threat to spectaclecase and sheepnose populations but is probably not a significant threat rangewide.

Some species of fish feed on mussels (for example, common carp (*Cyprinus carpio),* freshwater drum (*Aplodinotus grunniens*), redear sunfish (*Lepomis microlophus*)) and potentially on this species when young. Various invertebrates, such as flatworms, hydra, non-biting midge larvae, dragonfly larvae, and crayfish, may feed on juvenile mussels (Neves 2008, pers. comm.). Although predation by naturally occurring predators is a normal aspect of the population dynamics of a healthy mussel population, predation may amplify declines in small populations of this species. In addition, the potential now exists for the black carp (*Mylopharyngodon piceus*), a mollusk-eating Asian fish recently introduced into the waters of the United States (Strayer 1999, p. 89), to eventually disperse throughout the range of the spectaclecase and sheepnose.

The life cycle of freshwater mussels is intimately related to that of the freshwater fish they use as hosts for their parasitic glochidia. For this reason, diseases that impact populations of freshwater fishes also pose a significant threat to mussels. Viral hemorrhagic septicemia (VHS) disease has been confirmed from much of the Great Lakes and St. Lawrence River system. In June 2008, muskellunge (*Esox masquinongy*) from Clearfork Reservoir, near Mansfield, Ohio, tested positive for carrying VHS virus. This is the first known occurrence of VHS virus in the Mississippi River basin.

The VHS virus has been implicated as a mortality factor in fish kills throughout the Great Lakes region. It has been confirmed in 28 fish species, but no identified hosts for sheepnose are on the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) list of fish species susceptible to VHS (APHIS 2008, pp. 1–2). Since the host for spectaclecase is unknown, we do not know how VHS could affect reproduction for spectaclecase. If the VHS virus successfully migrates out of the Clearfork Reservoir and into the Ohio River, it could spread rapidly and cause fish kills throughout the Mississippi River basin. Few spectaclecase and sheepnose populations are currently recruiting at sustainable levels, and fish kills could further reduce encounters with hosts and potentially reduce recruitment.

In summary, disease in freshwater mollusks is poorly known and not currently considered a threat. Although there is no direct evidence at this time that predation is detrimentally affecting the spectaclecase or sheepnose, their small populations and limited ranges leaves them vulnerable to threats of predation from natural or introduced predators. Therefore, we conclude that predation currently represents a threat of low magnitude, but it could potentially become a significant future threat to the spectaclecase and

sheepnose due to their small population sizes.

D. The Inadequacy of Existing Regulatory Mechanisms

States with extant spectaclecase and sheepnose populations prohibit the taking of mussels for scientific purposes without a State collecting permit. However, enforcement of this permit requirement is difficult.

The level of protection that spectaclecase and sheepnose receive from State listing varies from State to State. The sheepnose is State-listed in every State that keeps such a list. Collection of sheepnose in Pennsylvania for use as fish bait is limited to 50 individuals per day. The spectaclecase is State-listed in 8 of the 10 States that harbor extant populations. Only in Missouri and Tennessee is the spectaclecase not assigned conservation status and West Virginia does not have any State-specific legislation similar to the Act.

Nonpoint source pollution is considered a primary threat to sheepnose and spectaclecase habitat; however, current laws do not adequately protect spectaclecase and sheepnose habitat from nonpoint source pollution, as the laws to prevent sediment entering water ways are poorly enforced. Best management practices for sediment and erosion control are often recommended or required by local ordinances for construction projects; however, compliance, monitoring, and enforcement of these recommendations are often poorly implemented. Furthermore, there are currently no requirements within the scope of Federal environmental laws to specifically consider the spectaclecase and sheepnose during Federal activities.

Point source discharges within the range of the spectaclecase and sheepnose have been reduced since the inception of the Clean Water Act (33 U.S.C. 1251 *et seq.*), but this may not provide adequate protection for filter feeding organisms that can be impacted by extremely low levels of contaminants (*see* "Chemical Contaminants" discussion under Factor A). There is no specific information on the sensitivity of the spectaclecase and sheepnose to common industrial and municipal pollutants, and very little information on other freshwater mussels. Therefore, it appears that a lack of adequate research and data prevents existing regulations, such as the Clean Water Act (administered by the EPA and the Corps), from being fully used or effective.

The U.S. Army Corps of Engineers retains oversight authority and requires a permit for gravel-mining activities that deposit fill into streams under section 404 of the Clean Water Act. Additionally, a Corps permit is required under section 10 of the Rivers and Harbors Act (33 U.S.C. 401 *et seq.*) for navigable waterways including the lower 50 miles (80 km) of the Meramec River. However, many gravel-mining operations do not fall under these two categories.

Despite these existing regulatory mechanisms, the spectaclecase and sheepnose continue to decline due to the effects of habitat destruction, poor water quality, contaminants, and other factors. We find that these regulatory measures have been insufficient to significantly reduce or remove the threats to the spectaclecase and sheepnose, and therefore that the inadequacy of existing regulatory mechanisms is a threat to these species throughout all of their ranges.

Based on our analysis of the best available information, we have no reason to believe that the aforementioned regulations will offer adequate protection to the spectaclecase and sheepnose in the foreseeable future.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Temperature

Natural temperature regimes can be altered by impoundments, water releases from dams, industrial and municipal effluents, and changes in riparian habitat. Critical thermal limits for survival and normal functioning of many freshwater mussel species are unknown. High temperatures can reduce dissolved oxygen concentrations in the water, which slows growth, reduces glycogen stores, impairs respiration, and may inhibit reproduction (Fuller 1974, pp. 240–241). Low temperatures can significantly delay or prevent metamorphosis (Watters & O'Dee 1999, pp. 454–455). Water temperature increases have been documented to shorten the period of glochidial encystment, reduce righting speed, increase oxygen consumption, and slow burrowing and movement responses (Bartsch *et al.* 2000, p. 237; Fuller 1974, pp. 240–241; Schwalb & Pusch 2007, pp. 264–265; Watters *et al.* 2001, p. 546). Several studies have documented the influence of temperature on the timing of aspects of mussel reproduction (for example, Allen *et al.* 2007, p. 85; Gray *et al.* 2002, p. 156; Steingraeber *et al.* 2007, pp. 303–309). Peak glochidial releases are associated with water temperature thresholds that can be thermal minimums or thermal maximums, depending on the species (Watters & O'Dee 2000, p. 136). Abnormal temperature changes may cause particular problems to mussels whose reproductive cycles may be linked to fish reproductive cycles (for example,Young & Williams 1984).

Climate Change

It is a widely accepted fact that changes in climate are occurring worldwide (IPCC 2007, p. 30). Understanding the effects of climate change on freshwater mussels is of crucial importance, because the extreme fragmentation of freshwater drainage systems, coupled with the limited ability of mussels to migrate, will make it particularly difficult for mussels to adjust their range in response to changes in climate (Strayer 2008, p. 30). For example, changes in temperature and precipitation can increase the likelihood of flooding or increase drought duration and intensity, resulting in direct impacts to freshwater mussels (Golladay *et al.* 2004, p. 503; Hastie *et al.* 2003, pp. 40–43). Indirect effects of climate change may include declines in host fish stocks, sea level rise, habitat reduction, and changes in human activity in response to climate change (Hastie *et al.* 2003, pp. 43–44).

Population Fragmentation and Isolation

Most of the remaining spectaclecase and sheepnose populations are small and isolated and thus are susceptible to genetic drift, inbreeding depression, and random or chance changes to the environment, such as toxic chemical spills (Avise and Hamrick 1996, pp. 463–466; Smith 1990, pp. 311–321; Watters and Dunn 1995, pp. 257–258 Inbreeding depression can result in death, decreased fertility, smaller body size, loss of vigor, reduced fitness, and various chromosome abnormalities (Smith 1990, pp. 311–321). Despite any evolutionary adaptations for rarity, habitat loss and degradation increase a species' vulnerability to extinction (Noss and Cooperrider 1994, pp. 58–62). Numerous authors (including Noss and Cooperrider 1994, pp. 58–62; Thomas 1994, p. 373) have indicated that the probability of extinction increases with decreasing habitat availability. Although changes in the environment may cause populations to fluctuate naturally, small and low-density populations are more likely to fluctuate below a minimum viable population (the minimum or threshold number of individuals needed in a population to persist in a viable state for a given interval) (Gilpin and Soule 1986, pp. 25–33; Shaffer 1981, p. 131; Shaffer and Samson 1985, pp. 148–150).

These species were widespread throughout much of the upper two-thirds of the Mississippi River system, for example, when few natural barriers existed to prevent migration (via host species) among suitable habitats. Construction of dams, however, destroyed many spectaclecase and sheepnose populations and isolated others. Recruitment reduction or failure is a potential problem for many small sheepnose populations rangewide, a potential condition exacerbated by its reduced range and increasingly isolated populations. If these trends continue, further significant declines in total sheepnose population size and consequent reduction in long-term survivability may soon become apparent.

Spectaclecase are long-lived (up to 70 years; Havlik 1994, p. 19) while sheepnose are relatively long-lived (approximately 30 years; Watters *et al.* 2009, p. 221) Therefore, it may take decades for non-reproducing populations of both species to become extinct following their isolation by, for example, the construction of a dam. The occasional discovery of relatively young spectaclecase in river reaches between impoundments indicates that some post-impoundment recruitment has occurred. The level of recruitment in these cases, however, appears to be insufficient to ensure the long-term sustainability of the spectaclecase. Small isolated populations of spectaclecase and sheepnose that may now be comprised predominantly of adult specimens could be dying out slowly in the absence of recruitment, even without other threats described above. Isolated populations usually face other threats that result in continually decreasing patches of suitable habitat.

Genetic considerations for managing imperiled mussels and for captive propagation were reviewed by Neves (1997a, p. 1422) and Jones *et al.* (2006, pp. 527–535), respectively. The likelihood is high that some populations of the spectaclecase and sheepnose are below the effective population size (EPS) (Soule 1980, pp. 162–164) necessary to adapt to environmental change and persist in the long term. Isolated populations eventually die out when population size drops below the EPS or threshold level of sustainability. Evidence of recruitment in many populations of these two species is scant, making recruitment reduction or outright failure suspect. These populations may be experiencing the bottleneck effect of not attaining the effective population size. Small, isolated, below effective population size-threshold populations of short-lived species (most host fishes) theoretically die out within a decade or so, while below-threshold populations of long-lived species, such as the spectaclecase and sheepnose, might take decades to die out even given years of total recruitment failure. Without historical barriers to genetic interchange, small, isolated populations could be slowly expiring, a phenomenon termed the extinction debt (Tilman *et al.* 1994, pp. 65–66). Even given the totally improbable absence of anthropogenic threats, we may lose disjunct populations to below-threshold effective population size. However, evidence indicates that general degradation continues to decrease habitat patch size and to act insidiously in the decline of spectaclecase and sheepnose populations.

Spectaclecase and sheepnose mussels' scarcity and decreased population size makes maintaining adequate heterogeneity problematic for resource managers. Neves (1997b, p. 6) warned that "[i]f we let conservation genetics become the goal rather than the guidelines for restoring and recovering mussel populations, then we will be doomed to failure with rare species." Habitat alteration, not lack of genetic variability, is the driving force of population extirpation (Caro and Laurenson 1994, pp. 485–486; Neves *et al.* 1997, p. 60). Nevertheless, genetics issues should be considered in maintaining high levels of heterozygosity during spectaclecase recovery efforts. Treating disjunct occurrences of this wide-ranging species as a metapopulation would facilitate conservation management while increasing recovery options (for example, translocating adults or introducing infested hosts and propagated juveniles) to establish and maintain viable populations (Neves 1997b, p. 6). Due to small population size and probable reduction of genetic diversity within populations, efforts should be made to maximize genetic heterogeneity to avoid both inbreeding (Templeton & Read 1984, p. 189) and outbreeding depression (Avise & Hamrick 1996, pp. 463–466) whenever feasible in propagation and translocation efforts (Jones *et al.* 2006, p. 529).

We find that fragmentation and isolation of small remaining populations of the spectaclecase and sheepnose are current and ongoing threats to both species throughout all of their ranges that will continue into the foreseeable future. Further, stochastic events may play a magnified role in population extirpation when small, isolated populations are involved.

Exotic Species

Various exotic or nonnative species of aquatic organisms are firmly established in the range of the spectaclecase and sheepnose. The exotic species that poses the most significant threat to the spectaclecase and sheepnose is the zebra mussel (*Dreissena polymorpha*). Its invasion of freshwater habitats in the United States poses a threat to mussel faunas in many regions, and species' extinctions are expected as a result of its continued spread in the eastern United States (Ricciardi *et al.* 1998, p. 615). Strayer (1999, pp. 75–80) reviewed in detail the mechanisms in which zebra mussels impact native mussels. The primary means of impact is direct fouling of the shells of live native mussels. Zebra mussels attach in large numbers to the shells of live native mussels and are implicated in the loss of entire native mussel beds. Fouling impacts include impeding locomotion (both laterally and vertically), interfering with normal valve movements, deforming valve margins, and locally depleting food resources and increasing waste products. Heavy infestations of zebra mussels on native mussels may overly stress the animals by reducing their energy stores. They may also reduce food concentrations to levels too low to support reproduction, or even survival in extreme cases.

Other ways zebra mussels may impact spectaclecase and sheepnose is through filtering their sperm and possibly glochidia from the water column, thus reducing reproductive potential. Habitat for native mussels may also be degraded by large deposits of zebra mussel pseudofeces (undigested waste material passed out of the incurrent siphon) (Vaughan 1997, p. 11). Because spectaclecase are found in pools and zebra mussel veligers (larvae) attach to hard substrates at the point at which they settle out from the water column, spectaclecase are particularly vulnerable to zebra mussel invasion. The spectaclecase's colonial tendency could allow for very large numbers to be affected by a single favorable year for zebra mussels.

Zebra mussels are established throughout the upper Mississippi, lower St. Croix, Ohio, and Tennessee Rivers, overlapping much of the current range of the spectaclecase and sheepnose. The greatest potential for present zebra mussel impacts to the spectaclecase and sheepnose appears to be in the upper Mississippi River. Kelner and Davis (2002, p. ii) stated that zebra mussels in the Mississippi River from Mississippi River Pool 4 downstream are "extremely abundant and are decimating the native

mussel communities." Huge numbers of dead and live zebra mussels cover the bottom of the river in some localities up to 1 to 2 inches (2.5 to 5.1 centimeters (cm)) deep (Havlik 2001a, p. 16), where they have reduced significantly the quality of the habitat with their pseudofeces (Fraley 2008, pers. comm.). Zebra mussels likely have reduced spectaclecase and sheepnose populations in these heavily infested waters.

As zebra mussels may maintain high densities in big rivers, large tributaries, and below infested reservoirs, spectaclecase and sheepnose populations in affected areas may be significantly impacted. For example, zebra mussel densities in the Tennessee River remained low until 2002, but are now abundant enough below Wilson Dam to be measured quantitatively (Garner 2008, pers. comm.). In addition, there is long-term potential for zebra mussel invasions into other systems that currently harbor spectaclecase and sheepnose populations. Zebra mussels occur in the lower St. Croix River, one of the strongholds for spectaclecase, although it is unclear whether they are likely to spread much further upstream due to the transition from lake-like conditions to almost exclusively riverine conditions above RM 25.

The Asian clam (*Corbicula fluminea*) has spread throughout the range of the spectaclecase and sheepnose since its introduction in the mid-1900s. Asian clams compete with native mussels, especially juveniles, for food, nutrients, and space (Leff *et al.* 1990, p. 415; Neves & Widlak 1987, p. 6) and may ingest unionid sperm, glochidia, and newly metamorphosed juveniles of native mussels (Strayer 1999, p. 82; Yeager *et al.* 2000, p. 255). Dense Asian clam populations actively disturb sediments that may reduce habitat for juveniles of native mussels (Strayer 1999, p. 82).

Asian clam densities vary widely in the absence of native mussels or in patches with sparse mussel concentrations, but Asian clam density is never high in dense mussel beds, indicating that the clam is unable to successfully invade small-scale habitat patches with high unionid biomass (Vaughn & Spooner 2006, pp. 334–335). The invading clam therefore appears to preferentially invade sites where mussels are already in decline (Strayer 1999, pp. 82–83; Vaughn & Spooner 2006, pp. 332–336) and does not appear be a causative factor in the decline of mussels in dense beds. However, an Asian clam population that thrives in previously stressed, sparse mussel populations might exacerbate unionid imperilment through competition and impeding mussel population expansion (Vaughn & Spooner 2006, pp. 335–336).

A molluscivore (mollusk eater), the black carp (*Mylopharyngodon piceus*) is a potential threat to native mussels (Strayer 1999, p. 89); it has been introduced into North America since the 1970s. The species has been proposed for widespread use by aquaculturists to control snails, the intermediate host of a trematode (flatworm) parasite that affects catfish in commercial culture ponds in the southeast and lower Midwest. Black carp are known to eat clams (*Corbicula* spp.) and unionid mussels in China, in addition to snails. They are the largest of the Asian carp species, reaching more than 4 ft. in length and achieving a weight in excess of 150 pounds (Nico & Williams 1996, p. 6). Foraging rates for a 4-year-old fish average 3 or 4 pounds (1.4–1.8 kg) a day, indicating that a single individual could consume 10 tons (9,072 kg) of native mollusks over its lifetime (MICRA 2005, p. 1). In 1994, 30 black carp escaped from an aquaculture facility in Missouri during a flood. Other escapes into the wild by non-sterile black carp are likely to occur.

The round goby (*Neogobius melanostomus*) is another exotic fish species released into the Great Lakes that is well established and likely to spread through the Mississippi River system (Strayer 1999, pp. 87–88). This species is an aggressive competitor of similar sized benthic fishes (sculpins, darters), as well as a voracious carnivore, despite its size (less than 10 in. (25.4 cm) in length), preying on a variety of foods, including small mussels and fishes that could serve as glochidial hosts (Janssen and Jude 2001, p. 325; Strayer 1999, p. 88). Round gobies may therefore have important indirect effects on the spectaclecase and sheepnose through negative effects to their hosts.

Additional exotic species will invariably become established in the foreseeable future (Strayer 1999, pp. 88–89). Added to potential direct threats, exotic species could carry diseases and parasites that may be devastating to the native biota. Because of our ignorance of mollusk diseases and parasites, "it is imprudent to conclude that alien diseases and parasites are unimportant" (Strayer 1999, p. 88).

Exotic species, such as those described above, are an ongoing threat to the spectaclecase and sheepnose—a threat that is likely to increase as these exotic species expand their occupancy within the ranges of the spectaclecase and sheepnose.

Summary of Threats

The decline of the spectaclecase and sheepnose in the eastern United States (described by Butler 2002a, entire; Butler 2002b, entire) is primarily the result of habitat loss and degradation (Neves 1991, p. 252). These losses have been well documented since the mid-19th century (Higgins 1858, p. 550). Chief among the causes of decline are impoundments, channelization, chemical contaminants, mining, and sedimentation (Neves 1991, p. 252; Neves 1993, pp. 4–6; Neves *et al.* 1997, pp. 60, 63–75; Watters 2000, pp. 262–267; Williams *et al.* 1993, pp. 7–9). These stressors have had profound impacts on sheepnose and spectaclecase populations and their habitat.

The majority of the remaining populations of the spectaclecase and sheepnose are generally small and geographically isolated (Butler 2002a, p. 27; 2002b, p. 27). The patchy distributional pattern of populations in short river reaches makes them much more susceptible to extirpation from single catastrophic events, such as toxic chemical spills (Watters and Dunn 1995, p. 257). Furthermore, this level of isolation makes natural repopulation of any extirpated population virtually impossible without human intervention. In addition, the fish host of spectaclecase is unknown; thus, propagation to reestablish the species in restored habitats and to maintain non-reproducing populations and focused conservation of its fish host are currently not possible. Although there are ongoing attempts to alleviate some of these threats at some locations, there appear to be no populations without significant threats, and many threats are without obvious or readily available solutions.

Recruitment reduction or failure is a threat for many small spectaclecase and sheepnose populations rangewide, a condition exacerbated by reduced range and increasingly isolated populations (Butler 2002a, p. 28; 2002b, p. 28). If these trends continue, further significant declines in total spectaclecase and sheepnose population size and consequent reduction in long-term viability may soon become apparent.

Various exotic species of aquatic organisms are firmly established in the range of the spectaclecase and sheepnose. The exotic species that poses the most significant threat to the spectaclecase and sheepnose is the zebra mussel. The invasion of the zebra mussel poses a serious threat to mussel faunas in many regions, and species extinctions are expected as a result of its

continued spread in the eastern United States (Ricciardi *et al.* 1998, p. 618).

Proposed Determination

The Act defines an endangered species as any species that is "in danger of extinction throughout all or a significant portion of its range" and a threatened species as any species "that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future." We find that the spectaclecase and sheepnose are presently in danger of extinction throughout their entire range, based on the immediacy, severity, and scope of the threats described under Factors A, D, and E, above. Although there are ongoing attempts to alleviate some threats, there appear to be no populations without current significant threats, and many threats are without obvious or readily available solutions. These isolated species have a limited ability to recolonize historically occupied stream and river reaches and are vulnerable to natural or human-caused changes in their stream and river habitats. Their range curtailment, small population size, and isolation make the spectaclecase and sheepnose more vulnerable to threats such as sedimentation, disturbance of riparian corridors, changes in channel morphology, point and nonpoint source pollutants, urbanization, and introduced species and to stochastic events (for example, chemical spills). Therefore, on the basis of the best available scientific and commercial information, we propose listing the spectaclecase and sheepnose as endangered in accordance with sections 3(6) and 4(a)(1) of the Act.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Threats to the spectaclecase and sheepnose occur throughout their ranges; therefore, we assessed the status of the species throughout their entire ranges. The threats to the survival of the species occur throughout the species' ranges and are not restricted to any particular significant portion of those ranges. Accordingly, our assessment and proposed determination applies to both species throughout their entire ranges.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in public awareness and conservation by Federal, State, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against take and harm are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species, unless such a plan will not promote the conservation of the species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed, preparation of a draft and final recovery plan, and revisions to the plan as significant new information becomes available. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. The recovery plan identifies site-specific management actions that will achieve recovery of the species, measurable criteria that determine when a species may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprised of species experts, Federal and State agencies, non-government organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Rock Island, Illinois, Ecological Services Field Office (*see* **FOR FURTHER INFORMATION CONTACT** section).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribal, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Listing will also require the Service to review any actions on Federal lands and activities under Federal jurisdiction that may adversely affect the two species; allow State plans to be developed under section 6 of the Act; encourage scientific investigations of efforts to enhance the propagation or survival of the animals under section 10(a)(1)(A) of the Act; and promote habitat conservation plans on non-Federal lands and activities under section 10(a)(1)(B) of the Act.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Federal agencies are required to confer with us informally on any action that is likely to jeopardize the continued existence of a proposed species. Section 7(a)(4) requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may adversely affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal activities that may affect the sheepnose and spectaclecase include, but are not limited to, the funding of, carrying out of, or the issuance of permits for reservoir construction, natural gas extraction, stream alterations, discharges, wastewater facility development, water withdrawal projects, pesticide registration, mining, and road and bridge construction.

Jeopardy Standard

Prior to and following listing and designation of critical habitat, if prudent

and determinable, the Service applies an analytical framework for jeopardy analyses that relies heavily on the importance of core area populations to the survival and recovery of the species. The section 7(a)(2) analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of the species in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of the affected core area population(s), inclusive of associated habitat conditions, a jeopardy finding is considered to be warranted, because of the relationship of each core area population to the survival and recovery of the species as a whole.

Section 9 Take

Section 9(a)(2) of the Act, and its implementing regulations found at 50 CFR 17.21, set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect, or to attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to knowingly possess, sell, deliver, carry, transport, or ship any wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 for endangered species. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, or for incidental take in connection with otherwise lawful activities.

Our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), is to identify, to the maximum extent practicable, those activities that would or would not likely constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness as to the potential effects of this final listing on future and ongoing activities within a species' range. We believe that the following activities are unlikely to result in a violation of section 9:

(1) Existing discharges into waters supporting these species, provided these activities are carried out in accordance with existing regulations and permit requirements (for example, activities subject to sections 402, 404, and 405 of the Clean Water Act and discharges regulated under the National Pollutant Discharge Elimination System).

(2) Actions that may affect the spectaclecase or sheepnose and are authorized, funded, or carried out by a Federal agency when the action is conducted in accordance with any reasonable and prudent measures we have specified in accordance with section 7 of the Act.

(3) Development and construction activities designed and implemented under Federal, State, and local water quality regulations and implemented using approved best management practices.

(4) Existing recreational activities, such as swimming, wading, canoeing, and fishing, that are in accordance with State and local regulations, provided that if a spectaclecase or sheepnose is collected, it is immediately released, unharmed.

Activities that we believe could potentially result in take of spectaclecase or sheepnose include but are not limited to:

(1) Illegal collection or capture of the species;

(2) Unlawful destruction or alteration of the species' occupied habitat (for example, unpermitted instream dredging, channelization, or discharge of fill material);

(3) Violation of any discharge or water withdrawal permit within the species' occupied range; and

(4) Illegal discharge or dumping of toxic chemicals or other pollutants into waters supporting spectaclecase or sheepnose.

We will review other activities not identified above on a case-by-case basis to determine whether they are likely to result in a violation of section 9 of the Act. We do not consider these lists to be exhaustive and provide them as information to the public.

You should direct questions regarding whether specific activities may constitute a future violation of section 9 to the Field Supervisor of the Service's Rock Island, Illinois Ecological Services Field Office (*see* **FOR FURTHER INFORMATION CONTACT** section). You may request copies of the regulations regarding listed wildlife from and address questions about prohibitions and permits to the U.S. Fish and Wildlife Service, Ecological Services Division, Henry Whipple Federal Building, 1 Federal Drive, Fort Snelling, MN 55111 (Phone (612) 713–5350; Fax (612) 713–5292).

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(I) Essential to the conservation of the species, and

(II) That may require special management considerations or protection; and

(ii) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation is defined in section 3 of the Act as the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the applicant is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, we designate critical

habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

There is currently no imminent threat of take attributed to collection or vandalism under Factor B (overutilization for commercial, recreational, scientific, or educational purposes) for sheepnose and spectaclecase and identification of critical habitat is not expected to initiate such a threat. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits include: (1) Triggering consultation under section 7(a)(2) of the Act, in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because the species may not be present; (2) focusing conservation activities on the most essential habitat features and areas; (3) increasing awareness of important habitat areas among State or county governments or private entities; and (4) preventing inadvertent harm to the species.

Critical habitat designation includes the identification of the physical and biological features of the habitat essential to the conservation of each species that may require special management and protection. As such, these designations will provide useful information to individuals, local and State governments, and other entities engaged in activities or long-range planning that may affect areas essential to the conservation of the species. Conservation of the spectaclecase and sheepnose and essential features of their habitats will require habitat management, protection, and restoration, which will be facilitated by disseminating information on the locations and the key physical and biological features of those habitats. In the case of spectaclecase and sheepnose, these aspects of critical habitat designation would potentially benefit the conservation of the species. Therefore, since we have determined that the designation of critical habitat will not likely increase the degree of threat to these species and may provide some measure of benefit, we find that designation of critical habitat is prudent for the spectaclecase and sheepnose.

Primary Constituent Elements

In accordance with sections 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we must consider those physical and biological features—primary constituent elements in the necessary and appropriate quantity and spatial arrangement—essential to the conservation of the species. We must also consider those areas essential to the conservation of the species that are outside the geographical area occupied by the species. Primary constituent elements include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, and rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distribution of a species.

We are currently unable to identify the primary constituent elements for spectaclecase and sheepnose because information on the physical and biological features that are considered essential to the conservation of these species is not known at this time. The apparent poor viability of the species' occurrences observed in recent years indicates that current conditions are not sufficient to meet the basic biological requirements of these species in many rivers. Since spectaclecase and sheepnose have not been observed for decades in many of their historical locations, and much of the habitat in which they still persists has been drastically altered, the optimal conditions that would provide the biological or ecological requisites of these species are not known. Although we can surmise that habitat degradation from a variety of factors has contributed to the decline of these species, we do not know specifically what essential physical or biological features of that habitat are currently lacking for spectaclecase and sheepnose.

Key features of the basic life history, ecology, reproductive biology, and habitat requirements of most mussels, including spectaclecase and sheepnose, are unknown. Species-specific ecological requirements have not been determined (for example, minimum water flow and effects of particular pollutants). Population dynamics, such as species' interactions and community structure, population trends, and population size and age class structure necessary to maintain a long-term viability, have not been determined for these species. Basics of reproductive biology for these species are unknown, such as age and size at earliest maturity, reproductive longevity, and the level of recruitment needed for species survival and long-term viability. Of particular concern to the spectaclecase is the lack of known host(s) species essential for glochidia survival and reproductive success. Similarly, although recent laboratory studies have produced successful transformation of sheepnose glochidia on a few fish species, many questions remain concerning the natural interactions between the sheepnose and its known hosts. Because the host(s) for spectaclecase is unknown and little is known about the sheepnose hosts, there is a degree of uncertainty at this time as to which specific areas might be essential to the conservation of these species (for example, the host(s)'s biological needs and population sizes necessary to support mussel reproduction and population viability) and thus meet a key aspect of the definition of critical habitat. As we are unable to identify many physical and biological features essential to the conservation of spectaclecase and sheepnose, we are unable to identify areas that contain these features. Therefore, although we have determined that the designation of critical habitat is prudent for spectaclecase and sheepnose, because the biological and physical requirements of these species are not sufficiently known, we find that critical habitat for spectaclecase and sheepnose is not determinable at this time.

Peer Review

In accordance with our policy, "Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities," that was published on July 1, 1994 (59 FR 34270), we will seek the expert opinion of at least three appropriate independent specialists regarding this proposed rule. The purpose of such review is to ensure listing decisions are based on scientifically sound data, assumptions, and analysis. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and the data that are the basis for our conclusions regarding the proposal to

list spectaclecase and sheepnose as endangered and our proposal regarding critical habitat for this species.

Required Determinations

Clarity of the 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 as specific as possible. For example, you should tell us the names 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.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The rule would not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We determined that we do not need to prepare an environmental assessment, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), in connection with regulations adopted under section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited in this rule is available on the Internet at *http://www.regulations.gov* or upon request from the Field Supervisor, Rock Island, Illinois Ecological Services Field Office (*see* **FOR FURTHER INFORMATION CONTACT** section).

Authors

The primary authors of this proposed rule are the staff members of the Service's Rock Island and Twin Cities Field Offices (see **FOR FURTHER INFORMATION CONTACT** section).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Feral Regulations, as follows:

PART 17—[AMENDED]

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

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

2. In § 17.11(h) add the entries for "Sheepnose" and "Spectaclecase" in alphabetical order under CLAMS to the List of Endangered and Threatened Wildlife, as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historical range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
CLAMS							
*	*	*	*	*	*	*	
Sheepnose	*Plethobasus cyphyus*	U.S.A. (AL, IL, IN, IA, KY, MN, MS, MO, OH, PA, TN, VA, WV, WI).	NA	E		NA	NA
*	*	*	*	*	*	*	
Spectaclecase	*Cumberlandia monodonta.*	U.S.A. (AL, AR, IL, IN, IA, KS, KY, MN, MO, NE, OH, TN, VA, WV, WI).	NA	E		NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: December 16, 2010.

Rowan W. Gould,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–469 Filed 1–18–11; 8:45 am]

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Part V

Environmental Protection Agency

40 CFR Part 180

Sulfuryl Fluoride; Proposed Order Granting Objections to Tolerances and Denying Request for a Stay; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2005–0174; FRL–8857–9]

Sulfuryl Fluoride; Proposed Order Granting Objections to Tolerances and Denying Request for a Stay

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed Order.

SUMMARY: In this document, EPA is making available its proposed resolution of objections and a stay request with regard to sulfuryl fluoride and fluoride tolerances promulgated in 2004 and 2005 under section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA). The objections and stay request were filed by the Fluoride Action Network, the Environmental Working Group, and Beyond Pesticides. Notwithstanding the fact that this document is a proposed resolution, and regulatory assessment requirements do not apply, EPA is inviting public comment on all aspects of the proposed resolution of objections, including the underlying scientific evaluations.

DATES: Comments must be received on or before April 19, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2005–0174, 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–2005–0174. 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 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 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: Meredith Laws, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 703–308–7038; e-mail address: *laws.meredith@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, pesticide manufacturer, or consumer. Potentially affected entities may include, but are not limited to:

- Food manufacturing (NAICS code 311), *e.g.,* grain and oilseed milling; animal food manufacturing; flour milling; bread and bakery product manufacturing; cookie, cracker, and pasta manufacturing; snack food manufacturing.
- Pesticide manufacturing (NAICS code 32532), *e.g.,* pesticide manufacturers; commercial applicators.
- Community Food Services (NAICS code 624210), *e.g.,* food banks.
- Farm Product Warehousing and Storage (NAICS code 493130), *e.g.,* grain elevators, private and public food warehousing and storage.

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

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

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

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

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

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

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

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

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

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

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

C. What are the acronyms used in this order?

The following is a list of acronyms used in this order:

CAA—Clean Air Act
CAAA—Clean Air Act Amendments of 1990
CSFII—Continuing Survey of Food Intakes by Individuals
CUE—Critical Use Exemption
EPA—Environmental Protection Agency
FACA—Federal Advisory Committee Act
FAN—Fluoride Action Network
FDA—Food and Drug Administration
FIFRA—Federal Insecticide, Fungicide, and Rodenticide Act
FFDCA—Federal Food, Drug, and Cosmetic Act
FQPA—Food Quality Protection Act of 1996
IOM—Institute of Medicine
L—liter
LOAEL—Lowest Observed Adverse Effect Level
MCL—Maximum contaminant level
MCLG—Maximum contaminant level goal
mg—milligram
MOE—Margin of Exposure
MRID—Master Record Identification
NAS—National Academy of Sciences
NOAEL—No Observed Adverse Effect Level
NPDWR—National Public Drinking Water Regulations
NRC—National Research Council
NRDC—Natural Resources Defense Council
OPP—EPA's Office of Pesticide Programs
OW—EPA's Office of Water
PAD—Population Adjusted Dose
ppm—parts per million
RED—Reregistration Eligibility Decision
RfD—Reference Dose
SDWA—Safe Drinking Water Act
SMCL—Secondary maximum contaminant level
SOP—Standard Operating Procedure
USDA—United States Department of Agriculture

II. Introduction

A. What action is the agency taking?

In this document, EPA is making available for comment a proposed order granting objections and denying a stay request with regard to tolerances established for sulfuryl fluoride and fluoride in 2004 (69 FR 3240, January 23, 2004) (FRL–7342–1) and 2005 (70 FR 40899, July 15, 2005) (FRL–7723–7) under FFDCA section 408 (21 U.S.C. 346a). (*See* 40 CFR 180.145(c); 180.575). These objections were first filed by the Fluoride Action Network (FAN) and Beyond Pesticides/National Coalition Against the Misuse of Pesticides. (Ref. 1). FAN and Beyond Pesticides also requested a hearing on their objections. At a later date, FAN and Beyond Pesticides were joined by the Environmental Working Group (hereinafter the three parties are referred to as "the Objectors") (Refs. 2 and 3). The Objectors argue that the sulfuryl fluoride and fluoride tolerances should not have been established by EPA because aggregate exposure to fluoride is unsafe under FFDCA section 408. The stay request as to the tolerances was filed by the Objectors in June, 2006, following release of a report by the National Research Council (NRC) of the National Academy of Sciences (NAS) concerning the risk of fluoride. (71 FR 38125, July 5, 2006) (FRL–8075–6).

After reviewing the objections and the NRC Report, EPA is proposing to grant the objections because it agrees that aggregate exposure to fluoride for certain major identifiable population subgroups does not meet the safety standard in FFDCA section 408. Because EPA is proposing to grant the Objectors' objections a hearing is not warranted. Finally, EPA is proposing to deny the Objectors' request for a stay because the risks from continued sulfuryl fluoride use in the short term is insignificant while the environmental and economic consequences from a sudden withdrawal of sulfuryl fluoride, a methyl bromide replacement, are considerable.

B. What is the agency's authority for taking this action?

The procedure for filing objections to tolerance actions and EPA's authority for acting on such objections is contained in section 408(g) of FFDCA (21 U.S.C. 346a(g)) and regulations at 40 CFR part 178. That same authority governs hearing and stay requests.

III. Statutory and Regulatory Background

In this Unit, EPA provides background on the relevant statutes and regulations governing the Objectors' objections, requests for hearing, and request for a stay as well as on pertinent Agency policies and practices.

Unit III.A. summarizes the requirements and procedures in section 408 of FFDCA and applicable regulations pertaining to pesticide tolerances, including the procedures for objecting to EPA tolerance actions 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, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136 *et seq.*).

Unit III.B. provides an overview of the risk assessment process followed by EPA's Office of Pesticide Programs (OPP). 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 two Agency policies with particular relevance to this action.

Unit III.C. provides a brief overview of the Safe Drinking Water Act (SDWA) and the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) and Title VI of the Clean Air Act (CAA) addressing Stratospheric Ozone Protection. These statutory schemes and international treaty are relevant to this proceeding because EPA regulates fluoride, a sulfuryl fluoride degradate, under SDWA, and because sulfuryl fluoride has played an important role in the United States fulfilling its obligations under the Montreal Protocol and CAA. Specifically, sulfuryl fluoride is a substitute for the ozone-depleting pesticide, methyl bromide.

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 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 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 establishing a detailed safety standard for pesticides, additional protections for infants and children, and the estrogenic substances screening

program. (Pub. L. 104–170, 110 Stat. 1489 (1996)).

EPA also regulates pesticides under FIFRA (7 U.S.C. 136 *et seq.*). While 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 labeling and specifying that use of a pesticide inconsistent with its labeling 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 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—
> * * *
> * * *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.* * *

(21 U.S.C. 346a(b)(2)(D)(v), (vi) and (viii)). 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)(i)(II) requires that EPA assess the risk to pesticides based on "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.* * * " (21 U.S.C. 346a(b)(2)(C)(i)(II)). This provision also creates a presumption that EPA will use an 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 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)). EPA's final order on the objections and requests for hearing is subject to judicial review. (21 U.S.C. 346a(h)(1)). The statute directs that tolerance regulations shall take effect upon publication unless EPA specifies otherwise. (40 U.S.C. 346a(g)(1)). EPA is authorized to stay the effectiveness of the tolerance if objections are filed. (*Id.*).

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:

(1) Identification of the toxicological hazards posed by a pesticide;

(2) Determination of the "level of concern" with respect to human exposure to the pesticide;

(3) Estimation of human exposure to the pesticide; and

(4) 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 data, typically from studies with laboratory animals, to identify any adverse effects on the test subjects. Where available and appropriate, EPA will also take into account studies involving humans, including human epidemiological studies. For most pesticides, the animal toxicity database usually consists of studies investigating a broad range of endpoints 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 cholinesterases), 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 (acute) to long-term (chronic) pesticide exposure and different routes of exposure (oral, dermal, inhalation). Further, EPA evaluates potential adverse effects in

different age groups (adults as well as fetuses and juveniles). (Ref. 4 at 8–10).

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 effects that have no threshold, EPA assumes that any exposure to the substance increases the risk that the adverse effect may occur.

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). EPA follows differing approaches to identifying a level of concern for threshold and non-threshold hazards.

i. *Threshold effects.* 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 no observed adverse effect level (NOAEL), which by definition is the next lower tested dose level below the LOAEL. Generally, EPA will use the lowest NOAEL from the available studies as a starting point (called "the Point of Departure") in estimating the level of concern for humans. (Ref. 4 at 9 (The Point of Departure "is simply the toxic 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 as the Point of Departure when no NOAEL is identified in that study and the LOAEL is close to, or lower than, other relevant NOAELs. The Point of Departure 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 recent years, EPA has increasingly used a more scientifically sophisticated approach to choosing the Point of Departure. This approach, called a benchmark dose, or BMD, estimates a point along a dose-response curve that corresponds to a specific response level. (Ref. 5). For example, a BMD_{10} represents a 10% change from the background or typical value for the response of concern. In contrast to the NOAEL/LOAEL approach, a BMD is calculated using a range of dose response data and thus better accounts for the variability and uncertainty in the experimental results due to characteristics of the study design, such as dose selection, dose spacing, and sample size. In addition to a BMD, EPA generally also calculates a "confidence limit" in the BMD. 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 often uses as the Point of Departure. Use of the BMDL for deriving the Point of Departure rewards better experimental design and procedures that provide more precise estimates of the BMD, resulting in tighter confidence intervals. It also provides a health protective conservative estimate of the safe dose. 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 Points of Departure in human health risk assessment, and as an improvement over the historically applied approach of using NOAELs or LOAELs. (Refs. 6 and 7).

In estimating and describing the level of concern, the Point of Departure is at times used differently depending on whether the risk assessment addresses dietary or non-dietary exposures. For dietary risks, EPA uses the Point of Departure to calculate an acceptable level of exposure or reference dose (RfD). The RfD is calculated by dividing the Point of Departure by all applicable safety or uncertainty factors. Typically, EPA uses a baseline safety/uncertainty factor of 100X in assessing pesticide risk. That value includes a factor of 10 (10X) where EPA is using data from laboratory animals to account for the possibility that humans potentially have greater sensitivity to the pesticide than animals and another factor of 10X to account for potential variations in sensitivity among members of the human population. Additional safety factors may be added to address data deficiencies or concerns raised by the existing data. Under the FQPA, an additional safety factor of 10X is presumptively applied to protect infants and children, unless reliable data support selection of a different factor. This FQPA additional safety factor largely replaces pre-FQPA EPA practice regarding additional safety factors. (Ref. 8 at 4–11).

In implementing FFDCA section 408, EPA's Office of Pesticide Programs, also calculates a variant of the RfD referred to as a Population Adjusted Dose (PAD). APAD is the RfD divided by any portion of the FQPA safety factor that does not correspond to one of the traditional additional safety factors used in general Agency risk assessments. (*Id.* at 13–16). The reason for calculating PADs is so that other parts of the Agency, which are not governed by FFDCA section 408, can, when evaluating the same or similar substances, easily identify which aspects of a pesticide risk assessment are a function of the particular statutory commands in FFDCA section 408. Today, RfDs and PADs are generally calculated for both acute and chronic dietary risks although traditionally RfDs and PADs were only calculated for chronic risks. Throughout this document general references to OPP's calculated safe dose are denoted as an RfD/PAD.

For non-dietary, and combined dietary and non-dietary, risk assessments of threshold effects, the toxicological level of concern is not expressed as an RfD/PAD but rather in terms of an acceptable (or target) margin of exposure (MOE) between human exposure and the Point of Departure. The "margin" of interest is the ratio between human exposure and the Point of Departure which is calculated by dividing human exposure into the Point of Departure. An acceptable MOE is generally considered to be a margin at least as high as the product of all applicable safety factors for a pesticide. For example, if a pesticide needs a 10X factor to account for potential inter-species differences, 10X factor for potential intra-species differences, and 10X factor for the FQPA children's safety provision, the safe or target MOE would be a MOE of at least 1,000. What that means is that for the pesticide in the example to meet the safety standard, human exposure to the pesticide would generally have to be at least 1,000 times smaller than the Point of Departure. Like RfD/PADs, specific target MOEs are selected for exposures of different durations. For non-dietary exposures, EPA typically examines short-term, intermediate-term, and long-term exposures. Additionally, target MOEs may be selected based on both the duration of exposure and the various routes of non-dietary exposure—dermal, inhalation, and oral.

ii. *Non-threshold effects.* For risk assessments for non-threshold effects, EPA does not use the RfD/PAD or MOE approach to choose a level of concern if quantification of the risk is deemed appropriate. Rather, EPA calculates the slope of the dose-response curve for the non-threshold effects from relevant

studies frequently using a linear, low-dose extrapolation model that assumes that any amount of exposure will lead to some degree of risk. This dose-response analysis will be used in the risk characterization stage to estimate the risk to humans of the non-threshold effect.

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)). Additionally, EPA must take into account non-occupational exposure from "other related substances." (*Id.*).

i. *Exposure from food.* There are two critical variables in estimating exposure in food:

- The types and amount of food that is consumed; and
- The residue level in that food.

Consumption is estimated by EPA based on scientific surveys of individuals' food consumption in the United States conducted by the USDA. (Ref. 4 at 12). Information on residue values comes from a range of sources including crop field trials, data on pesticide reduction (or concentration) due to processing, cooking, and other practices, information on the extent of usage of the pesticide, and monitoring of the food supply. (*Id.* at 17).

In assessing exposure from pesticide residues in food, EPA, for efficiency's sake, follows a tiered approach in which it, in the first instance, assesses exposure using the worst case assumptions that 100% of the crop or commodity in question is treated with, or exposed to, the pesticide and 100% of the food from that crop or commodity contains pesticide residues at the tolerance level. (*Id.* at 11). When such an assessment shows no risks of concern, a more complex risk assessment is unnecessary. By avoiding a more complex risk assessment, EPA's resources are conserved and regulated parties are spared the cost of any additional studies that may be needed. If, however, a first tier assessment suggests there could be a risk of concern, EPA then attempts to refine its exposure assumptions to yield a more realistic picture of residue values through use of data on the percent of the crop or commodity actually treated with, or exposed to, the pesticide and data on the level of residues that may be present on the treated crop or commodity. These latter data are used to estimate what has been traditionally referred to by EPA as "anticipated residues."

Use of percent crop/commodity treated data and anticipated residue information is appropriate because EPA's worst-case assumptions of 100% treatment and residues at tolerance value significantly overstate residue values. There are several reasons why this is true. First, all growers of a particular crop would rarely choose to apply the same pesticide to that crop (some may apply no pesticide; some may apply an alternative pesticide); generally, the proportion of the crop treated with a particular pesticide is significantly below 100%. (70 FR 46706, 46731, August 10, 2005) (FRL–7727–4). This is true with food and structural fumigants such as sulfuryl fluoride as well, especially with regard to the structural fumigant use in food processing facilities because such use incurs infrequently and only potentially affects a small portion of the food processed in the facility. Second, the tolerance value represents a high end or worst case value. Tolerance values are chosen only after EPA has evaluated data from experimental trials in which the pesticide has been used in a manner, consistent with the draft FIFRA label, that is likely to produce the highest residue in the crop or food in question (*e.g.,* maximum application rate, maximum number of applications, minimum pre-harvest interval between last pesticide application and harvest). (Refs. 4 and 9). These experimental trials are generally conducted in several locations and involve multiple samples. (*Id.* at 5, 7 and Tables 1 and 5). The results from such experimental trials invariably show that the residue levels for a given pesticide use will vary from as low as non-detectable to measurable values in the parts per million (ppm) range with the majority of the values falling at the lower part of the range. (70 FR 46731) (FRL–7727–4). EPA uses a statistical procedure to analyze the experimental trial results and identify the upper bound of expected residue values. This upper bound value is typically used as the tolerance value. (Ref. 10). There may be some commodities from a treated crop or commodity that approach the tolerance value where the maximum label rates are followed, but most generally fall significantly below the tolerance value. If less than the maximum legal rate is applied, residues will be even lower. Third, residue values measured at the time of treatment do not take into account the lowering of residue values that frequently occurs as a result of degradation over time and through food processing and cooking.

EPA uses several techniques to refine residue value estimates. (Ref. 4 at 17–28). First, where appropriate, EPA will take into account all the residue values reported in the experimental trials, either through use of an average or individually. Second, EPA will consider data showing what portion of the crop or commodity is not treated with, or exposed to, the pesticide. Third, data can be produced showing pesticide degradation and decline over time, and the effect of commercial and consumer food handling and processing practices. Finally, EPA can consult monitoring data gathered by the FDA, the USDA, or pesticide registrants, on pesticide levels in food at points in the food distribution chain distant from the farm, including retail food establishments.

Another critical component of the exposure assessment is how data on consumption patterns are combined with data on pesticide residue levels in food. Traditionally, EPA has calculated exposure by simply multiplying average consumption by average residue values for estimating chronic risks and high-end consumption by maximum residue values for estimating acute risks. Using average residues is a realistic approach for chronic risk assessment due to the fact that variations in residue levels and consumption amounts average out over time especially given the nationwide market for food in the United States. Using average values is inappropriate for acute risk assessments, however, because in assessing acute exposure situations it matters how much of each treated food a given consumer eats in the short-term and what the residue levels are in the particular foods consumed. Yet, using maximum residue values for acute risk assessment tends to greatly overstate exposure because it is unlikely that a person would consume at a single meal multiple food components bearing high-end residues. To take into account the variations in short-term consumption patterns and food residue values for acute risk assessments, EPA uses probabilistic modeling techniques for estimating exposure when more simplistic models appear to show risks of concerns.

All of these refinements to the exposure assessment process, from use of food monitoring data through probabilistic modeling, can have dramatic effects on the level of exposure

predicted, typically reducing worst case estimates by at least 1 or 2 orders of magnitude. (Ref. 11 at 16–17; 70 FR 46706, 46732, August 10, 2005) (FRL–7727–4).

ii. *Exposure from water.* EPA may use either or both field monitoring data and mathematical water exposure models to generate pesticide exposure estimates in drinking water. Monitoring and modeling are both important tools for estimating pesticide concentrations in water and can provide different types of information. Monitoring data can provide estimates of pesticide concentrations in water that are representative of specific agricultural or residential pesticide practices and under environmental conditions associated with a sampling design. Although monitoring data can provide a direct measure of the concentration of a pesticide in water, it does not always provide a reliable estimate of exposure because sampling may not occur in areas with the highest pesticide use, and/or the sampling may not occur when the pesticides are being used.

In estimating pesticide exposure levels in drinking water, EPA most frequently uses mathematical water exposure models. EPA's models are based on extensive monitoring data and detailed information on soil properties, crop characteristics, and weather patterns. (69 FR 30042, 30058–30065, May 26, 2004) (FRL–7355–7). These models calculate estimated environmental concentrations of pesticides using laboratory data that describe how fast the pesticide breaks down to other chemicals and how it moves in the environment. These concentrations can be estimated continuously over long periods of time, and for places that are of most interest for any particular pesticide. Modeling is a useful tool for characterizing vulnerable sites, and can be used to estimate peak concentrations from infrequent, large storms.

Unlike assessments of exposure to pesticides in food, assessments of exposure to pesticides in drinking water conducted under FIFRA and FFDCA section 408 do not assume there is a nationwide market for drinking water. A person's source of drinking water is primarily local and often the pesticide use is quite localized as well. Thus, generally EPA assesses drinking water exposure to pesticides under FIFRA and FFDCA section 408 based on the most vulnerable watersheds and not on a national or even regional average. (*See* 74 FR 59608, 59618–59619, 59658, November 18, 2009) (FRL–8797–6). Further, these assessments commonly use high-end residue estimates from models and assume average consumption levels.

In the case of fluoride, however, the primary source of exposure is not from pesticide use. Additionally, as described in Unit V.A.2., EPA has an extensive monitoring database from across the United States on fluoride levels in drinking water. These factors have been taken into account in how EPA has conducted its FFDCA section 408 risk assessment for fluoride.

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, separate and, where appropriate, aggregate characterizations of risk are conducted for the different routes of exposure (dietary and non-dietary).

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% of the RfD/PAD are generally not of concern. Alternatively, EPA may express risk by comparing the MOE between estimated human exposure and the Point of Departure with the acceptable or target MOE. As described previously, 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 Point of Departure. In contrast to the RfD/PAD approach, higher MOEs denote lower risk. 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.

For non-threshold risks (generally, cancer risks), EPA uses the slope of the dose-response curve for a pesticide in conjunction with an estimation of human exposure to that pesticide to estimate the probability of occurrence of additional adverse effects. Under FFDCA section 408, for non-threshold cancer risks, EPA generally considers cancer risk to be negligible if the probability of increased cancer cases falls within the range of 1 in 1 million. EPA describes this quantitative standard as a "range" because it does not want to impart a false precision to numerical cancer risk estimates. EPA seeks to identify risks differing significantly from a 1 in 1 million risk and that involves both a quantitative as well as qualitative assessment of what a risk estimate represents.

2. *EPA policy on the children's safety factor.* As the previous 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's additional 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 an additional 10X safety factor. (Ref. 8 at 4, 11). Thus, EPA generally refers to the additional 10X factor as a presumptive or default 10X factor. EPA has also made clear, however, that this presumption or default in favor of the additional 10X 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).

C. SDWA and the Montreal Protocol/CAA

1. *SDWA.* SDWA (42 U.S.C. 300f *et seq.*) was enacted to assure that water supply systems serving the public meet minimum national standards for the protection of public health and to protect the underground sources of drinking water upon which the public

relies. (*See* generally A Legislative History of the Safe Drinking Water Act, Committee Print, 97th Cong., 2d Sess. (1982) at 533–541). Under SDWA, EPA is authorized to set "National primary drinking water regulations" (NPDWRs) governing contaminants which the Administrator determines may have an adverse effect on the health of persons. NPDWRs apply to "public water systems" nationwide and include monitoring and reporting requirements. (42 U.S.C. 300g–1).

"Public water systems" are defined as systems that provide water to the public through pipes or other constructed conveyances for human consumption and that have at least 15 service connections or regularly serve at least 25 individuals. (42 U.S.C. 300f(4)(A)). By regulation, EPA has interpreted "regularly serve at least 25 individuals" to mean providing water to an average of at least 25 individuals daily at least 60 days of the year. (40 CFR 141.2). There are over 160,000 public water systems in the United States. The vast majority of these systems (95%) are small (*i.e.* serve populations of 3,300 persons or less) and these systems only serve about 10% of the population. Many of these small systems rely on groundwater as a water source. The largest 2% of the public water systems serve 80% of the population and include the large metropolitan water systems such as in New York City, Washington, DC, Boston and Chicago. Most of these systems rely on surface waters as their primary water source. Public drinking water systems provide water to roughly 85 to 90% of the U.S. population.

In promulgating a NPDWR for a contaminant, EPA must establish both a maximum contaminant level goal (MCLG) for that contaminant as well as either a maximum contaminant level (MCL) or a treatment technology requirement. (42 U.S.C. 300g–1(a)(3) and 300g–1(b)(4)(7)). MCLGs are not regulatory requirements and do not impose any obligations on public water systems. Rather, MCLGs are health goals that are to be set at a level at which, in the Administrator's judgment, "no known or anticipated adverse effects on the health of persons occur and which allows for an adequate margin of safety." (42 U.S.C. 300g–1(b)(4)(A)).

A MCL sets a level of the contaminant not to be exceeded by public water systems and, with some exceptions is to be set as close to the MCLG as is "feasible." (42 U.S.C. 300g–1(b)(4)(B)). The Act defines feasible to mean "feasible with the use of the best technology, treatment techniques or other means which the Administrator finds * * * are available (taking costs into consideration)." (42 U.S.C. 300g–(b)(4)(D)). The legislative history for this provision makes it clear that "feasibility" is to be defined relative to "what may reasonably be afforded by large metropolitan or regional public water systems." (A Legislative History of the Safe Drinking Water Act, Committee Print, 97th Cong., 2d Sess. (1982) at 550. MCLs appear at 40 CFR part 141, subparts B and G).

A treatment technique requirement imposes an obligation on public water systems to use an identified treatment technology and it must "prevent known or anticipated adverse effects on the health of persons to the extent feasible." (42 U.S.C. 300g–1(b)(7)(A). EPA may establish treatment technique requirements in lieu of an MCL only if it is not economically or technologically feasible to ascertain the level of the contaminant. (*Id.*).

SDWA also authorizes EPA to set "secondary" drinking water standards or "SMCLs." Such standards specify levels which are necessary to protect "the public welfare," (42 U.S.C. 300f(2)), but are not Federally enforceable (*see* A Legislative History of the Safe Drinking Water Act, Committee Print, 97th Cong., 2d Sess. (1982) at 557). For example, such a contaminant level might be one which adversely affects the odor or appearance of water so that a large number of people discontinue using that source. SMCLs may vary by geography or other circumstances. EPA has established SMCLs for 15 contaminants, which are intended to be guidelines for the States. (40 CFR part 143).

Every 6 years, EPA is required to review and revise "as appropriate" its existing drinking water standards. (42 U.S.C. 300g–1(b)(9)).

There is a long history of regulation of fluoride under SDWA. In 1975, EPA established a MCL for fluoride at a level varying between 1.4 milligrams (mg)/liter (L) and 2.4 mg/L depending on annual ambient air temperature. (40 FR 59566, December 24, 1975). These levels were set to prevent objectionable dental fluorosis. In 1981, South Carolina petitioned EPA to revoke the fluoride MCL arguing that dental fluorosis is merely a cosmetic effect not an adverse health effect. (*See* 50 FR 20164, May 14, 1985). In response to that petition, EPA took a series of actions. First, in 1985, EPA established a MCLG for fluoride at 4 mg/L. (50 FR 47142, November 14, 1985) (At that time MCLGs were termed "recommended maximum contaminant levels" (RMCLs) under SDWA.). The MCLG was set to protect against crippling skeletal fluorosis, an adverse health effect associated with high levels of fluoride exposure. EPA concluded that dental fluorosis, which had formed the basis for the earlier MCL, was not an adverse health effect under SDWA but only a cosmetic effect. Second, in 1986, EPA established a MCL for fluoride at 4 mg/L, again based on the crippling skeletal fluorosis endpoint. (51 FR 11396, April 2, 1986). Finally, also in 1986, EPA established a SMCL for fluoride at 2 mg/L to protect against objectionable dental fluorosis. (*Id.*). Judicial review of the MCLG was sought by both the Natural Resources Defense Council (NRDC) and by South Carolina. (*NRDC* v. *EPA,* 812 F.2d 721 (DC Cir. 1987)). NRDC argued that the level was too high because, among other reasons, the MCLG should have been set on dental fluorosis. Taking the opposite position, South Carolina claimed that no MCLG at all was appropriate because the evidence did not support that fluoride caused any adverse health effects. The DC Circuit upheld EPA's regulation ruling that EPA had reasonably interpreted SDWA term adverse health effect to be limited to functional impairments and that EPA had reasonably concluded that effects of dental fluorosis were cosmetic in nature and did not result in functional impairment. South Carolina's challenge was dismissed based on the court's conclusion that EPA had made a "permissible administrative judgment" based on the evidence before it. (*Id.* at 725).

Subsequent to these rulemakings, EPA has on two occasions asked NAS to reevaluate the potential risks of fluoride exposure in regard to the MCLG/MCL. The NRC Report on the second request is discussed extensively in Unit IV.D.

2. *The Montreal Protocol/CAA and methyl bromide.* The Montreal Protocol is the international agreement aimed at reducing and eliminating the production and consumption of stratospheric ozone-depleting substances. The stratospheric ozone layer protects humans from overexposure to harmful ultraviolet radiation. The United States was one of the original signatories to the 1987 Montreal Protocol and the United States ratified the Protocol in April, 1988. Congress then enacted the Clean Air Act Amendments (CAAA) of 1990 which included Title VI on Stratospheric Ozone Protection, codified as 42 U.S.C. Chapter 85, Subchapter VI, to ensure that the United States could satisfy its obligations under the Montreal Protocol. EPA issued regulations in 40 CFR part 82 to implement this legislation and has since modified and updated the regulations as needed. In 2009, the Montreal Protocol became the first

universally ratified international environmental treaty.

Methyl bromide was added to the Montreal Protocol as an ozone-depleting substance in 1992 through the Copenhagen Amendment to the Protocol. The Parties to the Montreal Protocol (Parties) agreed that each developed country's level of methyl bromide production and consumption in 1991 should be the baseline for establishing a freeze. Under the Montreal Protocol and Title VI of the CAAA the term "consumption" is a calculated amount equal to production plus imports minus exports. EPA published a final rule in the **Federal Register** on December 10, 1993 (58 FR 65018), listing methyl bromide as a Class I, Group VI controlled substance, freezing U.S. production and consumption at this 1991 baseline level of 25,528,270 kilograms, and setting forth the percentage of baseline allowances for methyl bromide granted to companies in each control period (each calendar year) until 2001, when the complete phase-out would occur. This phase-out date was established in response to a petition filed in 1991 under sections 602(c)(3) and 606(b) of CAAA of 1990, requesting that EPA list methyl bromide as a Class I substance and phase out its production and consumption. This date was consistent with section 602(d) of CAAA of 1990, which, for newly listed Class I ozone-depleting substances, provides that "no extension [of the phase-out schedule in section 604] under this subsection may extend the date for termination of production of any class I substance to a date more than 7 years after January 1 of the year after the year in which the substance is added to the list of class I substances."

At the Seventh Meeting of the Parties (MOP) in 1995, the Parties made adjustments to the methyl bromide control measures and agreed to reduction steps and a 2010 phase-out date for industrialized countries with exemptions permitted for critical uses. At that time, the United States continued to have a 2001 phase-out date in accordance with section 602(d) of CAAA of 1990. At the Ninth MOP in 1997, the Parties agreed to further adjustments to the phase-out schedule for methyl bromide in industrialized countries, with reduction steps leading to a 2005 phase-out.

In October 1998, the U.S. Congress amended CAA to conform the U.S. schedule to the schedule specified under the Protocol for developed countries by requiring EPA to move the date for ending production to January 1, 2005 and authorizing EPA to provide certain exemptions. These amendments were contained in section 764 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Pub. L. 105–277, October 21, 1998) and were codified in section 604 of CAA. (42 U.S.C. 7671c). The amendment that specifically addresses the critical use exemption (CUE) appears at section 604(d)(6), 42 U.S.C. 7671c(d)(6). EPA revised the phase-out schedule for methyl bromide production and consumption in a direct final rulemaking on November 28, 2000 (65 FR 70795) (FRL–6906–4), which allowed for the phased reduction in methyl bromide consumption specified under the Protocol and extended the phase-out to 2005. EPA again amended the regulations to allow for an exemption for quarantine and preshipment purposes with an interim final rule on July 19, 2001 (66 FR 37752)(FRL–7014–5) and with a final rule on January 2, 2003 (68 FR 238)(FRL–7434–1).

On December 23, 2004 (69 FR 76982)(FRL–7850–8), EPA published a final rule that established the framework for the CUE; set forth a list of approved critical uses for 2005; and specified the amount of methyl bromide that could be supplied in 2005 from stocks and new production or import to meet the needs of approved critical uses. EPA subsequently published rules applying the CUE framework to the 2006, 2007, 2008, 2009, and 2010 control periods.

Since its introduction in 2004, sulfuryl fluoride has served as an alternative to methyl bromide with regard to methyl bromide's use as a post-harvest commodity fumigant and fumigant for food processing warehouses and facilities. Introduction of sulfuryl fluoride has played a significant role in the United States' reduction of the postharvest methyl bromide CUEs by almost 80% over the last 6 years.

IV. Regulatory History of Sulfuryl Fluoride

A. In General

Sulfuryl fluoride is a fumigant that is used to kill insect pests, rodents, birds, and snakes. It is used both for the treatment of structures as well as stored food. Sulfuryl fluoride was initially registered under FIFRA as Vikane®, a fumigant to treat drywood termites and other wood boring insects in 1959. More recently, sulfuryl fluoride was identified as a potential alternative for uses of methyl bromide as a food fumigant and as a fumigant of food processing facilities. It was registered under the name of ProFume® by Dow AgroSciences for these uses in 2004 and 2005. Sulfuryl fluoride has achieved significant penetration of several methyl bromide markets. EPA and Dow AgroSciences have concluded that sulfuryl fluoride is used in approximately 40% of mills and food processing facilities and is used on 100% of cocoa beans. More recently, sulfuryl fluoride has been used extensively in fumigating walnuts and dried fruit other than raisins.

Sulfuryl fluoride rapidly breaks down to form sulfate and the fluoride anion.

B. 2004 Registration and Tolerances

In 2004, EPA registered sulfuryl fluoride for use as a direct fumigant of various grains and dried fruits under FIFRA and established corresponding tolerances under FFDCA section 408. (69 FR 3240, January 23, 2004)(FRL–7342–1). Tolerances were established for both the parent chemical, sulfuryl fluoride, and the breakdown product, fluoride. (For convenience, both the sulfuryl fluoride and fluoride tolerances established in association with the use of sulfuryl fluoride are, hereinafter, referred to in this document as sulfuryl fluoride tolerances.) Separate risk assessments were conducted for sulfuryl fluoride and fluoride.

In assessing the risk of fluoride, EPA relied on the MCLG that had been established under SDWA to establish a RfD-like value for fluoride. Established in 1986, the fluoride MCLG is 4 mg/L and is based on the adverse effect of crippling skeletal fluorosis. (40 CFR 141.41). As was the case with the MCLG, EPA determined that dental fluorosis was not an adverse effect and thus was not an appropriate benchmark for evaluating the safety of fluoride under FFDCA. EPA also determined that, "given the wealth of reliable human data on fluoride," the presumptive additional 10X children's safety factor could be removed. (69 FR 3253) (FRL–7342–1). Using the MCLG in combination with high-end water consumption information and body weights for age subgroups from infants through adults, EPA calculated safe fluoride levels on a milligram of fluoride per kilogram of body weight per day (mg/kg/day) basis. (69 FR 3248) (FRL–7342–1). These RfD-like values were compared to estimated aggregate exposure levels to fluoride from numerous sources: From use of the pesticides sulfuryl fluoride and cryolite on food; from natural and artificial levels of fluoride in drinking water; from background levels of fluoride in beverages, food, and ambient air; and from fluoride in dental products. Because aggregate exposure for each of

the age-based population subgroups fell below the calculated RfD-like values, EPA concluded that the tolerances were safe.

Although FAN did not submit comments on the notice announcing Dow AgroSciences' petition for tolerances, FAN had submitted objections to an earlier sulfuryl fluoride tolerance action. That earlier tolerance action was the establishment of temporary tolerances for sulfuryl fluoride on various grains and dried fruits in conjunction with an experimental use permit for sulfuryl fluoride under FIFRA section 5. (7 U.S.C. 136c). Sulfuryl fluoride was never used under that experimental permit and the temporary tolerances were revoked with the establishment of the 2004 tolerances. However, EPA treated the FAN objections as comments on the petition for tolerances and responded to them in detail in promulgating the 2004 tolerances. (Refs. 13, 14 and 15). Because EPA recognized that the NAS was undertaking a comprehensive evaluation of the latest data on fluoride, EPA noted that its review of the data submitted by FAN was preliminary and subject to reevaluation once the NRC Report was complete. (Ref. 14).

On March 23, 2004, FAN, joined by Beyond Pesticides, filed objections to the 2004 tolerances and requested a hearing on those objections. (*See* Unit IV.D.).

C. 2005 Registration and Tolerances

In 2005, EPA registered sulfuryl fluoride for use as a direct fumigant on additional commodities and also as a structural fumigant for food processing facilities under FIFRA and established corresponding tolerances under FFDCA section 408. (70 FR 40899, July 15, 2005) (FRL–7723–7). Again, EPA relied on the MCLG in assessing the aggregate risk to fluoride, taking into account the additional fluoride exposure from the new uses. (*Id.* at 40905). EPA also assessed fluoride risk using the Point of Departure suggested by NAS' Institute of Medicine for evaluating the risk of crippling skeletal fluorosis. (*Id.* at 40906). Under both approaches, EPA concluded that the tolerances were safe.

FAN submitted comments on the notice announcing Dow AgroSciences' petition for tolerances. EPA prepared a detailed response to these comments. (Ref. 16).

On September 13, 2005, FAN, joined by Beyond Pesticides and the Environmental Working Group, filed objections to the 2005 tolerances and requested a hearing on those objections. (*See* Unit IV.D.).

D. The 2006 NRC Report

In 2003, EPA's Office of Water (OW) asked the NRC to review new research on fluoride to determine whether the MCLG and SMCL for fluoride established under SDWA adequately protect the public health. (Ref. 17 at xii). Specifically, EPA asked NRC "to review toxicologic, epidemiologic, and clinical data on fluoride—particularly data published since NRC's previous (1993) report—and exposure data on orally ingested fluoride from drinking water and other sources * * *," and "to evaluate independently the scientific basis of EPA's MCLG of 4 mg/L and SMCL of 2 mg/L in drinking water and the adequacy of those guidelines to protect children and others from adverse health effects." (*Id.* at 2). NRC was also asked to identify data gaps and to make recommendations for future research relevant to setting the MCLG and SMCL for fluoride." (*Id.*).

NRC completed its report in March 2006. Its overall conclusions were that: (1) "EPA's MCLG of 4 mg/L should be lowered;" (2) further study was needed to assess the protectiveness of the SMCL of 2 mg/L; and (3) "EPA should update the risk assessment of fluoride to include new data on health risks and better estimates of total exposure (relative source contribution) in individuals and to use current approaches to quantifying risk, considering susceptible subpopulations, and characterizing uncertainties and variability." (*Id.* at 352).

NRC's decision as to the MCLG was driven by its concern regarding the fluoride exposure levels that produce the following effects: Severe enamel fluorosis (referred to in this document generally as severe dental fluorosis); clinical stage II skeletal fluorosis; and bone fractures. (*Id.*). Previously, all forms of dental fluorosis had been regarded merely as cosmetic effects and thus not properly considered in setting a MCLG. In the 2006 Report, NRC stated that: "The damage to teeth caused by severe enamel fluorosis is a toxic effect that the majority of the committee judged to be consistent with prevailing risk assessment definitions of adverse health effects." (*Id.* at 127). NRC reasoned as follows:

> Severe enamel fluorosis is characterized by enamel loss and pitting. This damage compromises enamel's protective barrier and can make the teeth more susceptible to environmental stresses and to caries formation because it allows bacteria, plaque, and food particles to become entrapped in the enamel. Caries is dental decay caused by bacterial infection. When the infection goes unchecked, cavities may form that can cause toothache and tooth sensitivity to temperature and sweets. If cavities are untreated, the infection can lead to abscess, destruction of bone, and spread of the infection to other parts of the body. While increased risk of caries has not been firmly established, the majority of the committee found that destruction of the enamel and the clinical practice of treating the condition even in the absence of caries provide additional lines of evidence for concluding that severe enamel fluorosis is an adverse health effect.

(*Id.* at 346) (citation omitted).

Two of the 12 members of the NRC committee "did not agree that severe enamel fluorosis should now be considered an adverse health effect" and would have characterized it as an "adverse dental effect." (*Id.*). Nonetheless, these two committee members concurred in the overall NRC conclusion that the MCLG should protect against this effect. Specifically, the Report stated: "Despite their disagreement on characterization of the condition, these two members concurred with the committee's conclusion that the MCLG should prevent the occurrence of this unwanted condition." (*Id.*). Turning to the level of exposure that can cause severe dental fluorosis, NRC concluded that such fluorosis occurs at an "appreciable frequency" in communities with water supplies containing at or near 4 mg/L but that "the prevalence of severe enamel fluorosis would be reduced to nearly zero by bringing the water fluoride levels in these communities down to below 2 mg/L." (*Id.* at 127–128).

As to skeletal fluorosis, NRC concluded that the MCLG should not be based solely on stage III (crippling) skeletal fluorosis but also take into account stage II skeletal fluorosis (the stage before mobility is significantly affected). Although the data on what level of fluoride exposure was need to cause stage II skeletal fluorosis was inconclusive, NRC ventured that the data "suggest[] that the MCLG might not protect all individuals from the adverse stages of the condition." (*Id.* at 347). NRC advised that "more research is needed to clarify the relationship between fluoride ingestion, fluoride concentrations in bone, and stage of skeletal fluorosis." (*Id.*).

NRC found the evidence on the level of fluoride exposure which could lead to an increased risk of bone fracture to be somewhat more compelling. There was general agreement by NRC with the proposition "that there is scientific evidence that under certain conditions fluoride can weaken bone and increase the risk of fractures." (*Id.* at 348). Further, "the majority of the committee

concluded that lifetime exposure to fluoride at drinking water concentrations of 4 mg/L or higher is likely to increase fracture rates in the population, compared with exposure to 1 mg/L, particularly in some demographic subgroups that are prone to accumulate fluoride into their bones (*e.g.,* people with renal disease)." (*Id.*). Three members of the NRC committee reached a more tempered conclusion suggesting that "the evidence only supported a conclusion that the MCLG *might not* be protective against bone fracture." (*Id.*) (emphasis in original).

Turning to the SMCL, NRC noted that, even if this standard now only addresses, at worst, moderate dental fluorosis, the 2 mg/L "SMCL does not completely prevent the occurrence of moderate enamel fluorosis." (*Id.* at 352). Specifically, NRC found that "[p]ast evidence indicated an incidence range of 4% to 15% (50 FR 20164 [1985])." (Ref. 17 at 130). NRC indicated that "[t]he prevalence of moderate cases that would be classified as being of aesthetic concern (discoloration of the front teeth) is not known but would be lower than 15%." (*Id.*). In the end, NRC recommended further study of U.S. communities with drinking water fluoride levels of greater than 1 mg/L to better characterize the degree and consequences of moderate dental fluorosis and the levels at which these effects occur. (*Id.* at 352–353).

NRC also examined in detail whether fluoride caused reproductive, developmental, neurotoxic, neurobehavioral, or cancer effects or had adverse effects on the endocrine, gastrointestinal, renal, hepatic, and immune systems. Although NRC recommended further study with regard to many of these effects, it did not conclude that any of these potential effects warranted a lowering of the MCLG.

A substantial portion of the NRC Report is devoted to examining fluoride exposure in the United States. NRC considered exposures from drinking water; background levels in food, beverages, soil, and air; residues in food from pesticide usage; and dental products. Drinking water was generally the most significant source but certain age groups' exposures from background levels in food and water and from dental products were not insubstantial. (*Id.* at 60, Fig.2–1). NRC summarized the information on fluoride levels in water from public systems as follows:

> Of the 144 million people with fluoridated public water supplies in 1992, approximately 10 million (7%) received naturally fluoridated water, the rest had artificially fluoridated water. Of the population with artificially fluoridated water in 1992, more than two-thirds had a water fluoride concentration of 1.0 mg/L, with almost one-quarter having lower concentrations and about 5% having concentrations up to 1.2 mg/L.
>
> Of the approximately 10 million people with naturally fluoridated public water supplies in 1992, approximately 67% had fluoride concentrations ≤ 1.2 mg/L. Approximately 14% had fluoride concentrations between 1.3 and 1.9 mg/L and another 14% had between 2.0 and 3.9 mg/L; 2% (just over 200,000 persons) had natural fluoride concentrations equal to or exceeding 4.0 mg/L.

(*Id.* at 25) (citations omitted).

As to persons who rely on private water sources, NRC noted:

> Little information is available on the fluoride content of private water sources, but the variability can reasonably be expected to be high and to depend on the region of the country. Fluoride measured in well water in one study in Iowa ranged from 0.06 to 7.22 mg/L (mean, 0.45 mg/L); home-filtered well water contained 0.02–1.00 mg/L (mean, 0.32 mg/L). Hudak (1999) determined median fluoride concentrations for 237 of 254 Texas counties (values were not determined for counties with fewer than five observations). Of the 237 counties, 84 have median groundwater fluoride concentrations exceeding 1 mg/L; of these, 25 counties exceed 2 mg/L and five exceed 4 mg/L. Residents in these areas (or similar areas in other States) who use groundwater from private wells are likely to exceed current guidelines for fluoride intake.

(*Id.* at 25–26).

E. The Objectors' Objections and Hearing Requests

1. *Procedural history.* The Objectors have filed several sets of objections and hearing requests on the 2004 and 2005 tolerance actions as a result of various preliminary responses by EPA to FAN's requests for hearing. As noted, the Objectors filed objections and hearing requests on March 23, 2004, as to the 2004 tolerance action. On June 4, 2005, EPA responded by letter to the Objectors' hearing request noting numerous potential flaws in the request and giving the Objectors 90 days to respond to the issues raised. On July 15, 2005, EPA issued additional tolerances for sulfuryl fluoride/fluoride and on September 13, 2005, the Objectors submitted objections and hearing requests as to these tolerances. Then, on December 16, 2005, Objectors submitted a revised set of objections and hearing requests in response to EPA's earlier letter. EPA responded to the December 16, 2005 filing on February 13, 2006, seeking further clarification on several issues and giving the Objectors 90 days to respond. On November 6, 2006, the Objectors filed a second set of revised objections and hearing requests that consolidated their objections to both the 2004 and 2005 tolerance actions. (Ref. 3).

The Objectors have made two additional filings with EPA. First, on June 1, 2006, the Objectors filed with EPA a motion for a stay of 2004 and 2005 tolerance actions. (Ref. 2). This stay request was largely in response to the NRC Report on fluoride. Second, in February 2009, the Objectors filed a collection of 18 studies addressing potential effects of fluoride exposure on IQ levels in children. (Ref. 18).

2. *Consolidated objections and hearing requests.* The Objectors' consolidated objections and hearing requests filed in November, 2006, raise six main arguments:

- The fluoride MCLG is not protective of the effects of fluoride on teeth and bones;
- The fluoride MCLG is not protective of other neurotoxic, endocrine, and renal effects of fluoride;
- EPA has not adequately protected children;
- EPA cannot determine the safety of sulfuryl fluoride and fluoride in the absence of a developmental neurotoxicity study;
- EPA has underestimated exposure to fluoride; and
- EPA has committed procedural errors in violation of the Administrative Procedures Act (APA) (5 U.S.C. 551 *et seq.*).

The Objectors argue that the 4 mg/L MCLG for fluoride does not provide adequate protection against severe dental fluorosis, pre-crippling skeletal fluorosis, and increased risk of bone fractures. The Objectors cite to government and literature studies documenting the significant consequences from severe dental fluorosis: "The enamel of the teeth become so porous that the teeth are 'prone to fracture and wear' (ATSDR 2003), 'subject to extensive mechanical breakdown of the surface' (Aoba & Fejerskov 2002), with a 'friable enamel that can result in loss of dental function' (Burt & Eklund 1999)." (Ref. 3 at 16). On pre-crippling skeletal fluorosis, the Objectors assert that pre-crippling skeletal fluorosis can be a painful condition for some people. (*Id.* at 19). Finally, the Objectors cite to many studies on the risk of increased bone fractures from fluoride exposure that allegedly show that these increased risks occur at fluoride exposure levels lower than those in communities with drinking water levels of 4 mg/L. (*Id.* at 22–24).

The Objectors also argue that the 4 mg/L MCLG for fluoride does not

protect against fluoride's effects on the brain, the endocrine system, and the kidneys. The Objectors cited a study in rats allegedly showing brain damage at a fluoride exposure level in water of 1 ppm [1 mg/L] and epidemiological studies showing reductions in IQ levels in children at a fluoride exposure level of 0.9 ppm [0.9 mg/L] in iodine-deficient areas and 1.8 ppm [1.8 mg/L] in areas with sufficient iodine in the diet. (*Id.* at 25–26). As to the endocrine system, the Objectors reference the NRC Report's conclusion that fluoride is an "endocrine disruptor" and argue that fluoride can have adverse effects on insulin secretion and on the thyroid. (*Id.* at 31–35). The Objectors argue that fluoride can affect insulin secretion where drinking water contains 4 mg/L or less of fluoride, (*Id.* at 33), and that NRC has concluded that thyroid effects can occur at exposure levels as low as 0.01–0.03 mg/kg/day for iodine-deficient humans, (*Id.* at 35). As to the kidneys, the Objectors claim that data show that adverse effects can occur when exposure levels in water are at the 1 and 2 mg/L level. (*Id.* at 38–39).

With regard to the safety of children, the Objectors assert that EPA, without basis or explanation, has applied a significantly less protective RfD to infants and children than the RfD applicable to adults. The Objectors note that prior to the promulgation of the 2004 fluoride tolerances EPA had utilized a RfD of 0.114 mg/kg/day for all population age groups. (*Id.* at 59). The Objectors point out, however, that, in both the 2004 and 2005 tolerance actions, EPA increased the RfD for several of the infant and children age groups to levels that are allegedly as much as 10 times higher than the RfD for adults. This higher RfD for infants and children, the Objectors argue, is inconsistent with the statutory requirement for providing an additional margin of safety for infants and children, the basic toxicological principle that bodyweight affects the impact of a chemical, data showing adverse effects at levels below the RfD levels, and data showing that children's bones are more sensitive to fluoride than adult's bones. (*Id.* at 58–67). Further, the Objectors assert that EPA failed to take into account, in its decision on the safety of fluoride to infants and children, the uncertainty in the database concerning fluoride's neurotoxic effects, and fluoride's effects on the endocrine system. (*Id.* at 68–70).

A developmental neurotoxicity study on sulfuryl fluoride, the Objectors claim, is critical to understanding the potential harmful effects of sulfuryl fluoride and fluoride. They argue that EPA's reasons for waiving the study lack merit and that a developmental neurotoxicity study is mandated given NRC's conclusion that fluoride is neurotoxic and that effects on the brain, including rare and severe effects, were seen in animal studies with sulfuryl fluoride. (*Id.* at 72–79).

Turning to human exposure to fluoride, the Objectors argue that EPA has underestimated fluoride exposure and corrected fluoride values show that some people are exposed to unsafe levels of fluoride. The Objectors claim EPA made numerous errors in estimating fluoride exposure: (1) EPA underestimated average fluoride levels in water, (*Id.* at 81–82); (2) EPA considered only average water and food consumption levels instead of taking into account the full range of consumption amounts, (*Id.* at 82–84, 105–106); (3) EPA underestimated fluoride exposures from toothpaste, (*Id.* at 88–91); and (4) EPA had insufficient data to estimate residues of fluoride on food from fumigation with sulfuryl fluoride (*Id.* at 106). The Objectors contend that a risk assessment using corrected exposure values will show that hundreds of thousands of people exceed the 0.114 mg/kg/day RfD and that millions of people would exceed a RfD set based on an endpoint of severe dental fluorosis. (*Id.* at 86, 94–95).

Finally, the Objectors claim that EPA has made several procedural errors that violate the dictates of the APA. First, the Objectors argue that EPA has unreasonably delayed responding to their objections and hearing requests filed in March 2004. Second, the Objectors argue that EPA erred by not making its risk assessment available at the time of issuance of the 2005 tolerance action. Third, EPA's failure to place all requested documents in the record, according to the Objectors, has thwarted full public participation. Fourth, the Objectors assert it was a procedural error for EPA to issue sulfuryl fluoride tolerances without first obtaining the advice of NRC.

The Objectors have also sought an adjudicatory hearing on each of these objections. In support of their hearing request, the Objectors have submitted all the data referenced in their consolidated objections.

F. The Objectors' Stay Request

On June 1, 2006, the Objectors filed a motion with EPA seeking a stay of the effectiveness of the 2004 and 2005 final rules establishing sulfuryl fluoride tolerances. A stay of the effectiveness of these rules would essentially ban use of sulfuryl fluoride because if the tolerances are not effective then any sulfuryl fluoride or fluoride residue remaining in treated foods would render the food adulterated under FFDCA and subject to seizure. This stay request appears to have been triggered by the March 2006 release of the NRC Report on fluoride. (Ref. 2 at 4). The Objectors argued they were entitled to a stay because they had demonstrated (1) that they were likely to prevail on the merits of their objections; (2) the tolerances posed an imminent, substantial and irreparable harm; (3) no other parties would be substantially harmed by a stay; and (4) the public interest supported a stay. (*Id.* at 2). EPA held a 30-day comment period on the stay request. (71 FR 38125, July 5, 2006) (FRL–8075–6).

To support their likelihood of success on the merits argument, the Objectors make similar arguments to those contained in their consolidated objections. As to irreparable harm, the Objectors cite to the NRC Report claiming it linked fluoride not just to adverse effects on bones and teeth but also to interactive and synergistic toxic effects with other chemicals, cancer, and diabetes, as well as adverse effects on the brain, thyroid, pineal gland, kidney, liver, and the endocrine, immune, gastrointestinal, and reproduction systems. (Ref. 2 at 11, 13–15). Further, the Objectors cite to the "high levels of fluoride from pesticides" arguing that "[a]s a result of these broad-reaching, staggeringly high fluoride tolerances, EPA's own data show that sulfuryl fluoride will become the second largest daily source of fluoride in the US." (*Id.* at 3, 35). The Objectors assert that other parties, including Dow AgroSciences, will not be substantially harmed "in view of the overwhelming concern for public health at the heart of the statute." (*Id.* at 36). Finally, the Objectors argue the public interest favors a stay because a stay would protect the public health. (*Id.* at 37).

G. Comments of Dow AgroSciences

Dow AgroSciences has filed two sets of comments on these matters. First, Dow AgroSciences filed comments on the Objectors' request for a stay of the effectiveness of the sulfuryl fluoride tolerances during the public comment period during mid-2006. (Ref. 19). Second, in October 2006, Dow AgroSciences submitted a memorandum to EPA arguing that the Objectors' were not entitled to a hearing on their objections. (Ref. 20).

1. *Comments on stay request.* In its comments, Dow AgroSciences offered a series of reasons as to why a stay was not warranted. First, Dow AgroSciences argues that EPA should follow the

already-established process for how the sulfuryl fluoride/fluoride tolerances would be reviewed in light of the NRC Report. This process, according to Dow AgroSciences, involves an analysis of the NRC Report by EPA's OW followed by a re-evaluation of the tolerances by EPA's OPP. (Ref. 19 at 6–7). Dow AgroSciences asserts that "[a]bandoning now a process established by the Agency and relied upon by SF registrants and the scientific community would be arbitrary, unfair and unwarranted." (*Id.* at 7).

Second, Dow AgroSciences argues that the stay request is delinquent because it was not filed within 60 days of issuance of the final tolerance actions. (*Id.* at 8). Dow AgroSciences bases this claim on the statutory requirement that objections to a tolerance must be filed within 60 days of issuance.

Third, Dow AgroSciences claims that a stay of the tolerance action is inappropriate because the stay request does not address "the underlying ProFume registration under FIFRA * * *." (*Id.* at 10). According to Dow AgroSciences, "[b]ypassing the hearing rights and other procedural requirements provided by FIFRA would deny Dow AgroSciences and other adversely affected parties their due process rights under the U.S. Constitution." (*Id.* at 9).

Fourth, Dow AgroSciences argues that the NRC Report only indicates a concern for "that small, localized segment of the population exposed to high *natural* fluoride levels." (*Id.* at 12). Such "an exceedingly small, isolated number of individuals," Dow AgroSciences contends, would not constitute a "major identifiable" subgroup which is the regulatory focus under FFDCA section 408. (*Id.*).

Fifth, Dow AgroSciences challenged the Objectors' claims that the NRC Report showed that there is a safety concern with fluoride. Dow AgroSciences noted that as to many potential health effects the NAS had either concluded that no risks were present from exposure in drinking water at 4 mg/L or there was insufficient data showing effects and more study was necessary. (*Id.* at 14). With regard to fluoride's effects on the risk of bone fractures, Dow AgroSciences argues that EPA had previously dismissed the value of two studies on which NRC relied and implies that NRC did not give proper weight to a recent study from the University of Michigan. (*Id.* at 15–16). Further, Dow AgroSciences claims that NRC actually had little concern for a potential link between fluoride and stage II skeletal fluorosis. According to Dow AgroSciences, NRC emphasized insufficiency of data on this effect and merely called for more research. (*Id.* at 18). Finally, Dow AgroSciences contends that NRC stepped beyond its competence in offering advice on the legal conclusion of whether severe dental fluorosis is an adverse health effect. (*Id.* at 19). Dow AgroSciences notes that a prior NRC panel had declined to make this ultimate conclusion and that a prior court ruling had indicated this was a question of statutory interpretation under SDWA. (*Id.* at 19–20). Switching tacks, Dow AgroSciences then argues there is a dispute within the scientific community as to whether severe dental fluorosis is an adverse effect. (*Id.* at 20).

Sixth, Dow AgroSciences argues that EPA is not authorized to consider exposure to fluoride from artificial fluoridation of public water supplies in evaluating the safety of the sulfuryl fluoride/fluoride tolerances. (*Id.* at 21). Although acknowledging that FFDCA section 408 directs EPA to consider "aggregate exposure" to both pesticides and other related substances, Dow AgroSciences contends that "[i]t is unnecessarily strained and counterintuitive to set tolerances for pesticides in or on food by looking at the therapeutic use of chemically related substances in humans." (*Id.*). As support for this proposition, Dow AgroSciences asserts that the definition of "pesticide chemical residue" limits EPA to considering pesticide chemicals and their degradates and metabolites. Further, Dow AgroSciences claims that the most plausible reading of the term "other related substances" is that this term covers other related "pesticidal" substances. (*Id.*at 22).

Finally, Dow AgroSciences claims that EPA overestimated exposure to fluoride from use of sulfuryl fluoride. Specifically, Dow AgroSciences states that its records show that sulfuryl fluoride has been utilized less extensively than EPA projected and at lower rates than EPA expected. (*Id.* at 34–35). When more realistic values are used in the exposure assessment, Dow AgroSciences contends that fluoride exposure from use of sulfuryl fluoride declines by over 80%. (*Id.* at 35).

2. *Comments on the hearing requests.* In a memorandum submitted to EPA in October 2006, Dow AgroSciences offered several reasons as to why the Objectors were not entitled to a hearing on their claims. First, Dow AgroSciences argues that many of the issues raised by the Objectors fail to state a material issue of fact because they are contingent in nature or otherwise fail to raise a disputed matter. (Ref. 20 at 9). Second, Dow AgroSciences claims that a number of the Objectors' issues dispute science policy determinations by EPA and thus do not constitute a matter of fact to be resolved at a hearing. (*Id.* at 11). For example, Dow AgroSciences identifies EPA conclusions regarding issues such as what constitutes a "conservative assumption," a "significant subpopulation," or an "adverse health effect" as decisions based on policy, as opposed to factual, reasons. Third, Dow AgroSciences asserts that the Objectors' claim of procedural errors by EPA is a legal issue not appropriate for a hearing. Fourth, Dow AgroSciences argues that many of the Objectors' claims are "no more than mere disagreements with Agency determinations made in earlier stages of the rulemaking process." (*Id.* at 12–13). According to Dow AgroSciences:

> In many instances, Objectors support their issues by citing to studies that have already been reviewed by EPA and have, either expressly or effectively, been found scientifically inadequate, procedurally flawed, or lacking in the requisite amount of empirical support. Objectors cite to these studies in spite of the clear edict that "[m]ere differences in the weight or credence given to particular scientific studies * * * are insufficient" to prompt EPA to hold a hearing. [citation omitted]. Clearly, Objectors disagree with EPA's interpretations of these studies, but such disagreement is irrelevant in the Agency's decision to grant a hearing on the objections submitted.

(*Id.* at 13).

Fifth, Dow AgroSciences contends that the Objectors have not submitted sufficient evidence in support of their claims based on Dow AgroSciences' conclusion that the NRC Report, upon which the Objectors rely, does not in fact substantiate the Objectors' position. (*Id.*) Finally, even where the NRC Report does support the Objectors' claims, Dow AgroSciences asserts that a hearing is not appropriate because the NRC Report was performed under the aegis of SDWA to review the fluoride MCLG and SMCL and not the sulfuryl fluoride/fluoride tolerances and because the NRC Report did not generate new data but simply reviewed studies already examined by EPA. (*Id.* at 17–18). Dow AgroSciences concludes that the "NRC's differences in opinion on the three issues detailed below [bone fracture, skeletal fluorosis, severe dental fluorosis] are just that—mere differences of opinion—and should be evaluated as such." (*Id.* at 18).

V. EPA's Proposed Response to the Objections

EPA is proposing to grant the objections to the establishment of the

sulfuryl fluoride/fluoride tolerances based on EPA's agreement with the Objectors that (1) fluoride risks should be assessed based upon a more sensitive endpoint than crippling skeletal fluorosis; and (2) assessing fluoride risks on a more sensitive endpoint shows that aggregate exposure to fluoride for major identifiable subgroups does not meet the safety standard in FFDCA section 408. In reaching this conclusion, EPA has taken into account, in addition to the arguments and data submitted by the Objectors, the 2006 NRC Report on fluoride, the detailed analysis of that Report and followup peer-reviewed assessment of fluoride by EPA's OW, and a revised risk assessment of fluoride performed by EPA's OPP in light of the NRC Report, and usage information submitted by Dow AgroSciences. (All of these materials have been included in the docket for this action.). The conclusions of the NRC Report are described in Unit IV.D. In Units V.A. and V.B., EPA summarizes OW's reassessment of fluoride risk undertaken on the recommendation of NRC, OPP's revised fluoride risk assessment, and sets forth EPA's proposed findings on the safety of the sulfuryl fluoride tolerances. Unit V.C. addresses comments from Dow AgroSciences pertaining to the safety of fluoride, and in particular, the conclusions of the NRC Report on fluoride safety. EPA is inviting public comment on all aspects of this proposal, including the underlying scientific documents discussed in Units V.A and V.B.

A. OW's Reassessment of Fluoride Risk

One of the principal conclusions of the NRC Report was that EPA "should update the risk assessment of fluoride to include new data on health risks and better estimates of total exposure (relative source contribution) in individuals and to use current approaches to quantifying risk, considering susceptible subpopulations, and characterizing uncertainties and variability." (Ref. 17 at 352). As the NRC Report was prepared in the context of evaluating the fluoride MCLG and SMCL for drinking water, EPA's OW took the lead in preparing this revised fluoride risk assessment. OW's risk assessment was broken into two parts: (1) A dose-response analysis directed at establishing a RfD for fluoride; and (2) an exposure and relative source contribution analysis that catalogued and estimated the various sources of fluoride exposure and characterized the risk of that exposure. EPA's OPP contributed information on exposure to fluoride from use of the pesticides sulfuryl fluoride and cryolite (which also breaks down to fluoride). Both parts of the OW risk assessment were subjected to an external peer review by scientific experts.

1. *Dose-response analysis.* OW's dose-response analysis focused on "examining available dose-response data for the critical noncancer effects of fluoride on teeth and bone identified by NRC (2006) as adverse health effects." (Ref. 21 at 1). For the most part, OW relied on the extensive database of epidemiological studies evaluating the relationship between the level of fluoride in drinking water and severe dental fluorosis, dental caries, and stage II skeletal fluorosis. OW noted a preference for older studies because determination of fluoride exposure levels in more recent studies is made more difficult by "the widespread use of fluoride-containing dentifrices and mouth rinses, the use of fluoride supplements in early childhood, and the potential presence of fluoride in processed foods and beverages (a result of the use of fluoridated water in the preparation of these products)." (*Id.* at 9).

a. *Dental fluorosis.* OW reviewed dozens of epidemiological studies bearing on the relationship of fluoride exposure to severe dental fluorosis. OW concluded that these studies supported the NRC Report conclusion that "the weight of evidence indicates that the threshold for severe dental fluorosis occurs at a water fluoride level of about 2 mg/L." (*Id.* at 35). OW also concluded that one study in particular, Dean (1942), provided the best data set for conducting a dose-response analysis. (*Id.*). In reaching this conclusion, OW undertook a detailed examination of the strengths and weaknesses of the study. OW summarized the strengths as follows:

> [The study was selected] due to its large size and geographic scale (22 U.S. communities in 10 States; 5824 children), range of fluoride concentrations evaluated (from 0.0 to 14.1 mg/L), and selection of an appropriate age class (school children primarily between the ages of 9 and 14; an age class in which a very high percentage of permanent teeth have erupted). In addition, every tooth per subject was examined using the same scoring protocol, and the community water supplies were tested for fluoride content by the same chemist. This dataset is sufficiently large and robust to support statistical analysis, the protocol is sound, and there were few alternate sources of commercially available fluoride (*e.g.,* mouthwash, detrifrice, *etc.*) or fluoridated community water supplies to confound the dental fluorosis data collected by Dean (1942) at the time this study was conducted (late 1930's and early 1940's).

(*Id.* at 92) (citations and internal cross-references omitted). Study weaknesses, identified by OW, included the lack of data on water intake amounts and fluoride exposure from food and the fact that the analytical method used for measuring fluoride was not as sensitive to fluoride and free from sensitivity to interfering substances as current fluoride methods. (*Id.* at 12–13). Additionally, although the time period of the study (late 1930's through early 1940's) makes assessing fluoride exposure levels relatively easier than it is today, the time period also raises uncertainties due to differences between the late 1930's/early 1940's and today with regard to "dental hygiene, dietary intakes, body weights and puberty/hormonal condition (*e.g.,* age of menarche)." (*Id.* at 13). OW concluded that the lack of information relating to exposure from food and water could be overcome, to a large extent, by other data. (*Id.* at 103–105; Appendix C). As to the analytical method, OW found that it was "sensitive to small increments of fluoride over a range of 0.0 ppm to 3.0 ppm, the critical range for assessing the threshold for severe [dental] fluorosis. * * *" (*Id.* at 13). A full discussion of the study can be found in the OW's dose-response report. (*Id.* at 10–13, 87–94, 103–107).

OW also reviewed a smaller set of studies examining the relationship between dental fluorosis and dental caries and the relationship between fluoride levels in drinking water and dental caries. These data were examined to assess whether "[t]he relationship between caries and fluoride exposure displays the U-shaped dose-response that characterizes many nutrients where there are adverse effects with intakes that are below those that confer a benefit and adverse effects with intakes that are greater than those with benefit." (*Id.* at 37). After closely examining all of the data, OW concluded:

> Although the data are supportive of NRC (2006) conclusions regarding enamel pitting they are moderately rather than strongly consistent with the hypothesis that the pitting of the enamel leads to an increased risk for caries. Socioeconomic status, availability of dental care, and personal dental hygiene habits are likely to confound the results from individual studies of the caries relationship. For this reason, OW has selected the pitting of the dental enamel as the critical effect for the dose-response analysis. EPA finding on the caries association is consistent with NRC (2006) that the "available evidence is mixed but generally supportive".

(*Id.* at 64).

b. *Skeletal fluorosis.* After reviewing the limited data available on the

relationship between fluoride exposure and stage II skeletal fluorosis, OW concluded that "the currently available data are not sufficiently robust to support a dose-response analysis of the effects of fluoride in drinking water on the skeletal fluorosis." (*Id.* at 84). Specifically, OW found that the limited data "suggested that a daily fluoride dose in excess of 10 mg may be required to produce signs of stage II skeletal fluorosis (except possibly in the case of individuals with renal disease)." (*Id.* at 83). OW also noted that the NRC Report called attention to the fact that a drinking water fluoride level of 4 mg/L can result in bone fluoride levels similar to those associated with stage II or III skeletal fluorosis; however, OW concluded that "because of inconsistencies in the entire data set, it is unlikely that bone fluoride concentration can be used in a dose-response analysis of skeletal fluorosis." (*Id.* at 65).

c. *Bone fractures.* OW found that more data were available on fluoride's potential effect on bone fractures than skeletal fluorosis. OW concluded that these data (1) "in general, support the conclusions of NRC that relative risk of fracture increases with increasing fluoride concentration * * *." (*Id.* at 84); and (2) "indicate[ ] that exposure to concentrations of fluoride in drinking water of 4 mg/L and above is suggestive of and appears to be positively associated with increased relative risk of bone fractures in susceptible populations when compared to populations exposed to 1 mg F/L." (*Id.* at 86). Nonetheless, OW also determined that "there is no clear evidence that fluoride will cause * * * bone fractures at levels as low as those associated with severe dental fluorosis." (*Id.* at 86). In a parallel to fluoride's effect on the frequency of dental caries, OW noted that there are some data suggesting that there is a U-shaped dose-response curve for fluoride's effect on the risk of bone fracture. Agreeing with the NRC Report, OW stated that fluoride in drinking water at 1 mg/L may result in a reduction of bone fractures compared to either higher or lower fluoride exposures. (*Id.* at 84).

d. *Quantification of dose response.* OW's examination of the data on severe dental fluorosis, stage II skeletal fluorosis, and bone fractures led it to conclude that severe dental fluorosis was the adverse effect due to fluoride exposure likely to occur at the lowest exposure level. (*Id.* at 87). As indicated previously, OW also identified the 1942 Dean study as presenting the most useful data for conducting a dose-response assessment. (*Id.*). To confirm the appropriateness of using the data from the Dean study for a dose-response analysis, OW analyzed the data under a statistical procedure known as categorical analysis. That analysis showed that "fluoride concentration in this dataset is significantly and positively associated with severity of effect ($\chi 2 = 1101.86$, $p < 0.0001$)." (*Id.* at 89). OW then used the Benchmark Dose approach to compute a benchmark dose (BMD) and a benchmark dose confidence limit (BMDL) for severe dental fluorosis at various severe dental fluorosis response rates. The lowest response rate of severe dental fluorosis within the range of probability that the dataset could support was severe dental fluorosis affecting at least 0.5% of the population exposed to fluoride at a particular level in drinking water. (*Id.* at 90–91). At a severe dental fluorosis response rate of 0.5%, the BMD for the concentration of fluoride in drinking water was 2.14 mg/L and the BMDL was 1.87 mg/L. OW ran various sensitivity analyses to confirm these results including comparing them to the NOAEL/LOAEL approach. These analyses supported the use of the BMDL from the Dean study data.

To establish a RfD, it was necessary to convert the 1.87 mg/L fluoride concentration in drinking water into an exposure value in terms of milligram of exposure per kilogram of body weight per day (mg/kg/day) and to take into account any other sources of fluoride exposure (also in terms of mg/kg/day). Because the Dean study did not record drinking water intakes or body weight, OW converted the 1.87 mg/L level using more recent data on drinking water intake and body weight. OW calculated exposure values from consumption of drinking water containing 1.87 mg/L for different age groups of children and at different levels of water intake within those age groups. After examining the range of values produced by this exercise, OW chose the value of 0.07 mg/kg/day as the contribution of drinking water to the fluoride RfD at the time of the Dean (1942) study (values ranged from 0.04 mg/kg/day to 0.19 mg/kg/day). That value was chosen because it was the most protective value assuming average water intake that provided some margin of safety above the IOM's minimum adequate intake level for fluoride of 0.05 mg/kg/day. (*Id.* at 101–102). OW concluded that the only other meaningful fluoride exposure at the time of the Dean study was from fluoride in food and OW estimated that exposure level to be 0.01 mg/kg/day based on data collected in the same time period of the Dean study. (*Id.* at 104). Combining these two values yields 0.08 mg/kg/day. Because the 0.08 mg/kg/day value only marginally exceeds the adequate intake value of fluoride and the value was primarily derived from a human study with a large sample size, OW determined that no safety or uncertainty factors were needed in computing the RfD for fluoride. (*Id.* at 105–106) Thus, 0.08 mg/kg/day was chosen as the fluoride RfD. Although the RfD is based on the endpoint of severe dental fluorosis in children, OW concluded that "the RfD is applicable to the entire population since it is protective for the endpoints of severe fluorosis of primary teeth, skeletal fluorosis and increased risk of bone fractures in adults." (*Id.* at 107).

OW described its confidence in the RfD as "medium." (*Id.*). OW's degree of confidence turned on its analysis of the data in the Dean study. On one hand, OW noted that the Dean study was:

- Internally consistent as evidenced by the BMD stability when end points at the high and low end of the curve were removed,
- Supported by later studies on some of the same water sources showing similar concentrations,
- Used average concentration values from 12 consecutive months for all but the three systems with the highest prevalence of severe dental fluorosis, thereby compensating for potential individual and seasonal variation,
- Based on water quality data from the same time period, and not likely to have been compromised by high levels of interfering substances.

(*Id.* at 106–107) On the other hand, OW found that some uncertainty flowed from its reliance on the Dean study because of the difficulties encountered in converting the concentration-response data to dose estimates for the RfD derivation. (*Id.* at 107).

2. *Exposure assessment.* In evaluating exposure to fluoride, OW focused on the following potentially significant sources:

- Drinking water from public drinking water systems;
- Solid foods and beverages such as milk and juices not from concentrate;
- Residues from the use of sulfuryl fluoride;
- Beverages prepared with commercial water which in some cases may have been fluoridated;
- Infant formula made from powdered concentrate;
- Toothpaste; and
- Incidentally ingested soil.

OW determined fluoride exposure from ambient air, dietary supplements, dental treatments, and pharmaceuticals was

minimal or too episodic to be of consideration for assessing long-term exposure. (Ref. 22).

OW evaluated fluoride levels in drinking water based on the largest and most comprehensive set of drinking water compliance monitoring data ever compiled and analyzed by the Agency. The data include records from approximately 136,000 public drinking water systems, many of which include reports of fluoride concentrations. The data span 8 years (1998–2005), with up to quarterly sample analysis for fluoride, depending on the system and reporting requirements. This amounts to approximately 7,000 to 12,000 quarterly samples depicting fluoride residues. There was an increase in the number of States reporting for the subset of data from 2002–2005; therefore, OW focused on those data when estimating exposure to fluoride from drinking water. For that time period, the average of the quarterly means is 0.87 ppm and the average for the quarterly 90th percentile values is 1.43 ppm. OW has also sub-sampled the monitoring data to focus on systems that had at least one detection equal to or greater than 2 ppm fluoride. Those systems represent 4.6 to 8.3% of the reporting systems, annually, during the 2002–2005 time frame and, over the 4-year reporting period, served approximately 10 million people. For water consumption information, OW relied on data from the CSFII for those consumers reporting consumption of drinking water. OW estimated fluoride exposure amounts for mean and 90th percentile consumers of drinking water from public systems considering both mean and 90th percentile fluoride levels. These values ranged from 0.26 mg/day for infants (mean consumption (all consumers), mean fluoride value) to 1.99 mg/day for adults (90th percentile consumption (consumers-only and mean fluoride level . (Ref. at 68–69, Tables 3–5 and 3–6). For 90th percentile consumers consuming mean fluoride levels, the values ranged from 0.63 mg/day for children 1 to 3 years old to 1.74 mg/day for adults. (*Id.* at 94, Table 6–3).

For exposure to fluoride from food, milk, and non-concentrated juices, OW relied on market basket data, dietary surveys, and national food consumption data, for various age groups. OW estimated that fluoride exposure from these sources ranged from 0.25 mg/day for infants to 0.47 mg/day for teenagers. (*Id.* at 90, Table 6–1).

Fluoride exposure from residues of sulfuryl fluoride in food was estimated by OPP based on usage data and residue data relevant to both sulfuryl fluoride's use as a direct commodity fumigant and as a structural fumigant. Estimated exposure values ranged from 0.03 mg/day for infants to 0.09 mg/day for children 7 to 10 years old. (*Id.* at 96, Table 6–5).

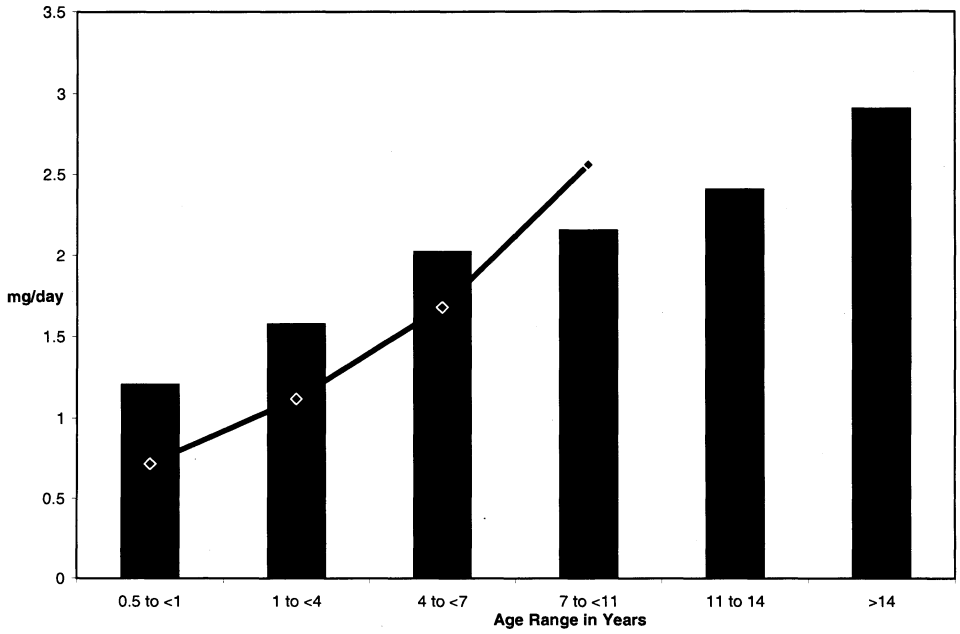
OW estimated fluoride exposure from beverages other than milk and non-concentrated juices from various studies and national consumption data, where appropriate. Fluoride exposure levels from beverages ranged from 0.36 mg/day for 1–<4 year olds to 0.60 mg/day for 7 to 11 year olds. (*Id.* at 92, Table 6–2).

Fluoride exposure from toothpaste was estimated by OW using studies that measure fluoride intake by subtracting the amount of toothpaste left on the toothbrush after brushing and the amount expectorated from the amount initially placed on the toothbrush. OW found a high level of uncertainty with these data because "the confidence bounds around the mean values are indicative of high inter-individual variability," and because the studies were conducted not long after release of FDA recommendations "for children to use only a pea-sized amount of toothpaste when brushing." (*Id.* at 94). OW also relied on data showing that generally young children only brushed their teeth once per day. Toothpaste label directions send different signals on this point, both recommending for children 2 years of age and older that teeth should be brushed "preferably after each meal or at least twice a day" and stating that for younger children a dentist or doctor should be consulted. 21 CFR 355.50(d)(1). Estimated fluoride exposure values ranged from 0.07 mg/day for 0.5 to 1 year olds to 0.34 mg/day for 1 to 4 year olds. (*Id.* at 94, Table 6–4).

OW concluded that other sources of fluoride exposure (*e.g.,* air, dental treatments) were insignificant with the exception of exposure to children through consumption of soil. Fluoride concentrations in the soil in the United States range from less than 10 ppm to 70,000 ppm, with mean or typical levels in the 300–430 ppm range. (*Id.* at 86). Assuming mean levels of fluoride in the soil, OW estimated fluoride exposure for children less than 1 year old to be 0.02 mg/day and for children in the 0–14 age group to be 0.04 mg/day. (*Id.* at 95).

3. *Risk characterization.* In characterizing the risk from fluoride for the purpose of evaluating the fluoride MCLG, OW compared the revised fluoride RfD (0.08 mg/kg/day) to the significant sources of fluoride exposure described previously. OW used average exposure values as to all sources of exposure other than drinking water. For drinking water, OW, examined several different variations of concentration level and consumption level, but principally relied on the approach in long-held OW policy in establishing national drinking water standards that recommends use of average fluoride concentrations in water and 90th percentile consumption levels. (*Id.* at 107–110). OW's characterization of risk using these assumptions is shown in Figure 1.

Figure 1. Total Daily Fluoride Intake Estimates Relative to the Proposed RfD (in mg/day) Using 90th Percentile Drinking Water Intake Data for Consumers Only and the Mean Drinking Water Fluoride Concentration (0.87 mg/L)



(*Id.* at 105, Figure 8–1).

OW explained the meaning of Figure 1 in the following manner:

> When examining Figure [1] it is important to remember that the RfD represents an exposure that is estimated to provide the anticaries benefits from fluoride without causing severe dental fluorosis in 99.5% of the children who drink water with 0.87 mg/L F at a 90th percentile intake level and have average intakes from other media during the period of secondary tooth formation. Based on the dose-response for severe dental fluorosis in EPA (2010a) only 0.5% or fewer of children consistently ingesting fluoride at a level equivalent to the RfD for a several month period would be at risk of experiencing severe dental fluorosis in two or more teeth.

(*Id.* at 104–105).

OW noted that the data show both that fluoride exposure has increased over time and that the incidence of all types of dental fluorosis has also increased. According to OW, "The prevalence of dental fluorosis has increased from 10–12% in the areas with about 1 mg/L in drinking water at the time of Dean to 23% in 1986/87 and to 32% in the 1999–2002 NHANES survey."

(*Id.* at 108) (citations omitted).

OW summarized its overall conclusions as follows:

- Some young children are being exposed to fluoride up to about age 7 at levels that increase the risk for severe dental fluorosis.
- The contribution of residential tap water to total ingested fluoride is lower that it was in the past.
- Use of fluoridated water for commercial beverage production has likely resulted in increased dietary fluoride in purchased beverages, adding to the risk for over-exposure.
- The increase of fluoride in solid foods because of fluoridated commercial process water is more variable than that for beverages.
- Incidental toothpaste ingestion is an important source of fluoride exposure in children up to about 4-years of age. However, use of fluoridated toothpaste is not recommended for children under age 2 according to FDA guidance and package labeling suggesting the need for greater parental awareness of the FDA (2009) recommendations.
- Ambient air, soils, and sulfuryl fluoride residues in foods are minor contributions to total fluoride exposure.

(*Id.* at 108–109).

B. OPP's Revised Fluoride Risk Assessment

In light of the revised fluoride risk assessment by EPA's OW, EPA's OPP has conducted a revised aggregate assessment of fluoride exposure and risk under FFDCA section 408. (Ref. 23). EPA is inviting public comment on all aspects of the revised aggregate assessment.

1. *Hazard/dose-response assessment.* OPP agrees with OW's choice of severe dental fluorosis as the endpoint for assessing chronic risk from fluoride exposure. As noted, both OW and OPP had treated several dental fluorosis as a cosmetic effect and not an adverse health effect. Following the NRC Report and the re-examination of this issue by both OW and OPP, EPA has concluded that severe dental fluorosis is an adverse effect due to the fact that the pitting it causes in the permanent teeth is a structural defect to the teeth. As OW's analysis explains:

> Pitting of the enamel is a structural defect that weakens the barrier between the oral environment and the dentin of the teeth. It is progressive in that the enamel can flake off from the sides of the pits allowing them to become progressively larger. Furthermore, the dentin of teeth with severe dental

fluorosis is hypomineralized and structurally variant increasing the importance of the enamel's protective function.

(Ref. 21 at 64) (citations omitted).

OPP also agrees with OW's choice of 0.08 mg/kg/day as a NOAEL for severe dental fluorosis relying on the Dean study, and the use of that value as a Point of Departure for calculating the RfD. Further, OPP concurs that neither an inter- or intra-species safety factor should be used in the RfD calculation. An inter-species factor is unnecessary because the endpoint is from a human epidemiological study; an intra-species factor is not needed given the extensiveness of the data and the fact that it studied the subpopulations of concern, children of different ages.

Given these findings, OPP concludes that the Objectors were correct in contesting the reliance on the endpoint of crippling skeletal fluorosis to set a RfD for fluoride. OPP agrees that the RfD should be based on a more sensitive endpoint—severe dental fluorosis. It follows that the Objectors were also correct to object to use of children-specific RfD values based on the endpoint of crippling skeletal fluorosis. A RfD based on the Dean study is appropriate for children, however, because such a RfD is derived from data on the effects of fluoride on children.

2. *Exposure assessment.* OPP's revised exposure analysis depends heavily on OW's Relative Source Contribution Analysis. A brief description of how that data and analysis have been incorporated into a FFDCA section 408 risk assessment is provided in the following sections.

a. *Fluoride from sulfuryl fluoride.* In the exposure assessments for the 2004 and 2005 tolerance actions, EPA conducted a somewhat refined exposure assessment of fluoride exposure in food from use of sulfuryl fluoride as both a commodity fumigant and as a structural fumigant for food handling facilities. Taking into account comments OPP has received from Dow AgroSciences, OPP has further refined this aspect of the exposure assessment. (Ref. 24). The three main refinements are:

(1) OPP used a regression analysis to estimate residue values of fluoride in food that occur from actual use rates rather than assuming residue values as measured under maximum application rates;

(2) OPP used a probabilistic analysis to estimate residues resulting from possible sequential treatment of food (*e.g.,* fumigation of raw commodity, incidental treatment during fumigation of structure, fumigation of the processed commodity) rather than conservatively assuming that 100% of food was sequentially treated; and

(3) OPP used more extensive data on the percent of food treated with sulfuryl fluoride. EPA used methyl bromide usage as the basis for estimating the percent usage of sulfuryl fluoride because sulfuryl fluoride was introduced as a replacement for methyl bromide. The refinements to this aspect of the exposure assessment result in a reduction of estimated exposure values to fluoride from sulfuryl fluoride use of roughly an order of magnitude.

Consistent with its well-established practice for chronic exposure assessments, OPP assessed exposure to fluoride residues in food based on average residue values and average food consumption values. Given the national food distribution patterns in the United States, exposure to foods with different residue levels average out over time. Further, because different people eat different foods in different amounts, it would dramatically overstate exposure to assume that a single person consumed all foods at a high end consumption value. The revised exposure values for fluoride from sulfuryl fluoride are presented in Table 1.

TABLE 1—SUMMARY OF SULFURYL FLUORIDE CONTRIBUTIONS TO DIETARY FLUORIDE EXPOSURE

Age range, years	Average estimated exposure (mg/day)			Average estimated exposure mg/kg/day		
	SF structural [a]	SF food [b]	Total	SF structural [a]	SF food [b]	Total
0.5–<1	0.0087	0.021	0.030	0.0008	0.0019	0.0027
1–<4	0.012	0.033	0.045	0.0008	0.0022	0.0030
4–<7	0.015	0.047	0.062	0.0007	0.0022	0.0029
7–<11	0.017	0.054	0.071	0.0005	0.0017	0.0022
11–<14	0.018	0.068	0.086	0.0004	0.0014	0.0018
14+	0.019	0.058	0.076	0.0003	0.0008	0.0011

[a] Reflecting residues resulting from fumigation of structures that may contain human food products.
[b] Reflecting residues resulting from intentional fumigation of human foods.

(Ref. 23 at 10, Table 1).

b. *Fluoride from cryolite.* Previously, OPP estimated fluoride exposure from use of the pesticide cryolite using residue data from cyrolite field trials and data on the percent of food treated with cryolite. Since cryolite has been in use for years, cryolite residues in food are captured by the monitoring data OW collected on fluoride data in food generally. As discussed in the next section, OPP is using this monitoring data in its exposure assessment and thus a separate assessment of fluoride from cryolite would result in double-counting.

c. *Fluoride in food and beverages.* OPP is relying on the comprehensive OW analysis of the extensive fluoride monitoring data in published literature in estimating fluoride exposure from foods and beverages. The food monitoring data predates sulfuryl fluoride use and thus does not capture those residue levels. Consistent with how it conducts chronic exposure assessments for pesticide residues in food, OPP has used central-tendency values in estimating exposure. Exposure estimates for fluoride from background levels in food (including cryolite residues) and in prepared beverages are presented in Table 2.

TABLE 2—SUMMARY OF ESTIMATED FLUORIDE EXPOSURES ATTRIBUTABLE TO BACKGROUND LEVELS IN FOOD AND BEVERAGES

Age range, years	Body weight, kg	Estimated fluoride exposure (mg/day)			Estimated fluoride exposure (mg/kg/day)		
		Solid food *	Beverages	Total	Solid food *	Beverages	Total
0.5–<1	9	0.26	*	0.26	0.029	*	0.029
1–<4	14	0.16	0.36	0.52	0.011	0.026	0.037
4–<7	21	0.35	0.54	0.89	0.017	0.026	0.042
7–<11	32	0.41	0.60	1.01	0.013	0.019	0.032
11–<14	51	0.47	0.38	0.85	0.0092	0.0075	0.017
14+	70	0.38	0.59	0.97	0.0054	0.0084	0.014

* Solid food includes milk as well as fruit and vegetable juices not made from concentrate. These are not categorized as beverages in the FDA Total Diet Study (Egan *et al.,* 2007). For the age range 0.5–<1 year, all fluoride was considered to be from powdered formula and falls into the food category.

(Ref. 23 at 15, Table 6).

d. *Fluoride from public drinking water systems.* People are exposed to fluoride from public drinking water both by direct consumption of the water and from indirect consumption of the water after its use in the preparation of foods and beverages in the home. References in this section to drinking water exposure are intended to capture both of these types of exposure. Exposure to fluoride from water containing fluoride residues that is used in the commercial preparation of food and beverages is accounted for in the estimates of fluoride in food and beverages. (*See* Unit V.B.2.c). To estimate exposure, OPP has coupled average, per-capita consumption from the CSFII with the fluoride concentrations for the water systems described previously. The CSFII consumption estimates include drinking water (direct water) and water used for in-home preparation of foods and beverages (indirect water).

In the earlier exposure assessments, OPP assumed that fluoride in drinking water was present at 2 mg/L. Extensive monitoring data on fluoride levels in drinking water, however, have now been collected and analyzed by OW in conducting its Relative Source Analysis in response to the NRC Report. OPP has relied on these data in estimating exposure. (Ref. 23 at 10–15).

Generally, OPP estimates pesticide exposure from drinking water by focusing on watersheds that are likely to have high end residue levels. This approach is based on several factors. First, pesticide residues in watersheds can have widely different values based on their regional relationship with agricultural areas and environmental factors (*e.g.,* soil type, rainfall amount). Second, consumption of drinking water, unlike food, is mainly a local phenomenon—*i.e.,* tap water is not an amalgam from drinking water systems around the country. Thus, focusing on watersheds with high-end residue levels is critical to fulfilling EPA's statutory obligation to consider aggregate exposure to "major identifiable subgroups of consumers * * *." (21 U.S.C. 346a(b)(2)(D)(vi)). Accordingly, in the first instance, OPP has used OW's drinking water monitoring data to identify drinking water systems with high-end fluoride levels. OPP has focused on water systems that have had at least one measured fluoride value of greater than 2 mg/L, at least one measured value of greater than 3 mg/L, and at least one measured value of greater than 4 mg/L. These groupings of water systems were used because of the significant population groups served by these systems—from well over 1 million to roughly 10 million. OPP believes it is reasonable to use average monitoring values from these groups of water systems because of the relative stability of fluoride levels in water. Importantly, these average values bracket OPP's prior assumption of 2 mg/L with the average values ranging from 1.76 mg/L to 2.58 mg/L.

Given the unusual circumstances of fluoride—not only are there multiple sources in addition to pesticidal sources but several sources are the result of intentional actions designed to result in wide-spread national exposure—OPP believes that OW's approach to assessing fluoride exposure in its Relative Source Analysis under SDWA has relevance to its aggregate exposure analysis under FFDCA section 408. OW's Relative Source Analysis focuses on high-end water consumers who are exposed to average exposures calculated on a national basis. Because the population concerned here is so large, roughly 300 million people, even looking at high-end consumers (OW's traditional approach is to use the 90th percentile) represents consideration of a large population subgroup.

Table 3 provides exposure estimates for fluoride in drinking water from both OPP and OW approaches.

TABLE 3—FLUORIDE EXPOSURE ESTIMATES (MG/KG/DAY) FROM MUNICIPAL WATER [1]

Age range, years	Fluoride concentration in drinking water (mg/L); consumption percentile			
	0.87 90th	1.76 Average	2.28 Average	2.59 Average
0.5–<1	0.093	0.077	0.10	0.11
1–<4	0.045	0.040	0.052	0.059
4–<7	0.039	0.033	0.043	0.049
7–<11	0.027	0.024	0.031	0.035
11–<14	0.024	0.018	0.024	0.027
14+	0.025	0.026	0.033	0.038

[1] Includes drinking water as well as water for in-home preparation of foods and beverages. Estimates are based on 90th percentile consumer only or average *per capita* consumption, as indicated, and do not include fluoride from toothpaste, from soil, or from sulfuryl fluoride.

(Ref. 23 at 11, Table 3; 14, Table 5).

e. *Fluoride from toothpaste.* OW has comprehensively reanalyzed the data on fluoride exposure from toothpaste taking into consideration all available studies. The results of that analysis are presented in Table 4.

TABLE 4—SUMMARY OF ESTIMATED FLUORIDE EXPOSURES FROM INCIDENTAL INGESTION OF FLUORIDATED TOOTHPASTE

Age range, years	Estimated fluoride exposure (mg/day)		Estimated fluoride exposure (mg/kg/day*)	
	1 brushing per day	2 brushings per day	1 brushing per day	2 brushings per day
0.5 – <1	0.07	0.14	0.0078	0.016
1 – <4	0.34	0.68	0.024	0.049
4 – <7	0.22	0.44	0.010	0.021
7 – <11	0.18	0.36	0.0056	0.011
11 – <14	0.2	0.4	0.0039	0.0078
14+*	0.1	0.2	0.0014	0.0029

* No data were available for this age group. The exposure estimate is one half that of the 11 to 14 year group.

(Ref. 23 at 16, Table 7).

OW was also able to identify limited data on the frequency of teeth brushing by children. Those data are presented in Table 5.

TABLE 5—NUMBER OF TOOTHBRUSHINGS PER DAY REPORTED FOR CHILDREN (SIX MONTHS TO FIVE YEARS OLD)

Study	N =	Age (years)	Percentages *		
			1 time/day	2 times/day	3 times/day
Simard *et al.,* 1989	23	2 to 5	4.8	71.4	23.8
Simard *et al.,* 1991	15	1 to 2	60	32	8
Levy *et al.,* 1997	899	0.5	41.2	16.9	6.3
	665	0.75	33.2	17	3.1
	508	1	37	14.7	3.5
Franzman *et al.,* 2006	90	1.3	48	14	4
	100	2	51	23	2
	100	3	51	24	1

* Some studies also reported those brushing their teeth less than once per day and more than three times per day. In these cases the percentages do not add up to 100%.

(Ref. 22 at 81, Table 4–10). Based on the fact that a substantial portion of children brush two or more times per day and that brushing twice per day is consistent with health care recommendations, OPP is assuming two brushings per day in its assessment.

f. *Fluoride from soil.* Young children are exposed to fluoride from inadvertent consumption of soil. OPP estimated fluoride exposure from soil using standard EPA estimates on soil consumption and assuming average fluoride residues in soil. These estimates are presented in Table 6.

TABLE 6—SUMMARY OF ESTIMATED FLUORIDE EXPOSURES FROM INCIDENTAL INGESTION OF SOIL AND OUTDOOR DUST

Age range, years	Estimated fluoride exposure * (mg/day)	Estimated fluoride exposure * (mg/kg/day)
0.5–<1	0.02	0.0022
1–<4	0.04	0.0029
4–<7	0.04	0.0019
7–<11	0.04	0.0013
11–<14	0.04	0.00078
14+	0.02	0.00029

* Assumes soil and dust contains 400 ppm fluoride.

(Ref. 23 at 17, Table 8).

g. *Other sources of fluoride exposure.* Although people are also potentially exposed to fluoride from fluoride in ambient air, fluoride dental treatments, and pharmaceuticals, among other things, OW concluded that these sources of exposure are insignificant compared to other sources of fluoride exposure. Accordingly, OPP is not including such exposures in its aggregate assessment. (Ref. 23 at 16).

3. *Children's safety factor.* In choosing a revised RfD for fluoride, OW did not apply any uncertainty or safety factors to the BMDL for severe dental fluorosis. OW reasoned that uncertainty factors were not warranted due to the extensive human epidemiological data on the effects of fluoride, including extensive data on children, the population of greatest concern. Decisions on pesticide tolerances, however, require OPP to apply special provisions for protection of children. Specifically, section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. In making determinations on this children's safety factor, OPP has focused on the statutory factors of data completeness with regard to toxicity and exposure and evidence bearing on pre- and post-natal toxicity.

As with so many other aspects of the fluoride risk assessment, application of

the children's safety factor provision to fluoride presents unique issues. OPP considered the following factors in determining whether reliable data show that an additional safety factor other than the default 10X value would be safe:

a. *Toxicity data.* As a result of the decades-long water fluoridation program in the United States as well as the substantial areas with high natural levels of fluoride in drinking water, OPP has an epidemiological dataset for fluoride that is far more extensive than for any other pesticide. EPA also has an extensive set of animal data on sulfuryl fluoride and to the extent that sulfuryl fluoride breaks down to the fluoride anion during testing, these studies capture the effects of fluoride (dental fluorosis was observed in a number of studies). On the other hand, OPP has recently requested additional studies on sulfuryl fluoride, a developmental neurotoxicity study and an immunotoxicity study, and the NRC Report identified several areas, notably brain and endocrine effects, where further study would be useful. On the whole, however, OPP concludes that the completeness of the database with regard to fluoride exceeds what is generally available even on the most well-studied pesticides.

b. *Exposure data.* OPP has an extremely extensive database on fluoride levels in drinking water due to the water monitoring data OW has collected. OPP also has reliable data on fluoride exposure from sulfuryl fluoride and on background levels of fluoride in food. To the extent sulfuryl fluoride has not replaced methyl bromide as a fumigant the fluoride estimate from sulfuryl fluoride overstates exposure. There is some uncertainty as to the amount of fluoride exposure from toothpaste. There are several factors here: Data on fluoride exposure from toothpaste are less extensive and are highly variable; the data may not reflect the latest recommendations on the amount of toothpaste children should use; label directions for adults and children 2 years old and above state that teeth should be brushed "thoroughly, preferably after each meal or at least twice a day;" and label directions for children below 2 years of age state that a dentist or doctor should be consulted. However, by assuming two brushings per day and relying on studies that may have used greater amounts of toothpaste than is used today as well as focusing on high-end exposure groups for drinking water, OPP believes it has addressed any uncertainties regarding fluoride exposure from toothpaste.

c. *Pre- and post-natal toxicity.* Not only does OPP have extensive data identifying fluoride's effects in humans and the dose at which those effects occur, but fluoride, unlike most pesticides or their metabolites, is considered a human nutrient. Fluoride's classification as a nutrient—especially its role at certain doses in protecting teeth—cannot be ignored in the safety factor calculation. OPP is averse to choosing a safety factor that would result in the choice of a PAD that indicates that fluoride is harmful at levels below the adequate intake level for beneficial effects. The Objectors have raised concerns about potential other effects of fluoride—for example, brain, endocrine, kidney, and reproductive effects. Nonetheless, data on these effects generally either shows effects only at considerably higher levels than the levels causing severe dental fluorosis or are very equivocal.

On balance, the extensiveness of the data on toxicity of fluoride and human exposure to it, the clear data defining the safe level for the effect of concern on children, and fluoride's status as a human nutrient at levels only slightly below the level that is protective against severe dental fluorosis lead OPP to conclude that reliable data show that an additional safety factor for the protection of children is not necessary. Accordingly, OPP has not used an additional safety factor in its fluoride risk assessment. Hence, the PAD for fluoride is equivalent to the RfD (0.08 mg/kg/day). (Ref. 23 at 9).

4. *Risk characterization.* To characterize the risk of fluoride, OPP has aggregated exposure to fluoride from sulfuryl fluoride, background levels in food (including from cryolite), beverages, drinking water, toothpaste, and soil, and compared that aggregated exposure to the PAD. In evaluating exposure to major identifiable subgroups of consumers, OPP believes that for fluoride it is appropriate to consider the aggregate exposure of at least four different subgroups:

a. Communities served by a water system with at least one sample showing fluoride levels greater than 2 mg/L (2 mg/L communities);

b. Communities served by a water system with at least one sample showing fluoride levels greater than 3 mg/L (3 mg/L communities);

c. Communities served by a water system with at least one sample showing fluoride levels greater than 4 mg/L (4 mg/L communities); and

d. High-end water consumers generally.

The aggregate exposure of these subgroups relative to the RfD/PAD is shown in Table 7:

TABLE 7—AGGREGATE EXPOSURE COMPARED TO RFD BY AGE GROUPS (MG/KG/DAY)

Age groups	RfD/PAD	High-end water consumers	2 mg/L community	3 mg/L community	4 mg/L community
0.5–<1	0.08	0.13	0.13	0.15	0.16
1–<4	0.08	0.11	0.13	0.14	0.15
4–<7	0.08	0.097	0.10	0.11	0.12
7–<11	0.08	0.068	0.070	0.077	0.081
11–<14	0.08	0.047	0.045	0.051	0.054
14+	0.08	0.042	0.044	0.051	0.056

(Ref. 23 at 21, Table 9).

This risk assessment shows that aggregate fluoride exposure to young children exceeds the RfD/PAD under various different methods of identifying major population subgroups. In evaluating this assessment at least two other factors are relevant. First, the assessment of the 2–4 mg/L communities deviates from OPP's traditional approach to assessing exposure in drinking water in that it averages exposures from systems that are surface water-based and systems that are groundwater-based. EPA generally assesses drinking water exposure on the higher value from surface water or groundwater because people get the majority of their drinking water exposure from one location. For fluoride, focusing only on groundwater-based systems would modestly increase the exposure estimate. Second, this assessment does not take into account those people that depend on private drinking water wells and not public drinking water systems. Drinking water

wells in certain portions of the United States can have fluoride levels exceeding those used in the assessments discussed previously.

Based on these assessments, EPA cannot conclude that there is a reasonable certainty of no harm for certain major identifiable groups of consumers from aggregate exposure to fluoride. Therefore, EPA cannot make the required finding that the sulfuryl fluoride and fluoride tolerances are "safe" and is proposing to grant the Objectors' objections to the establishment of the sulfuryl fluoride and fluoride tolerances promulgated on January 23, 2004, and July 15, 2005.

C. Comments From Dow AgroSciences

As noted previously, Dow AgroSciences has filed comments contesting the Objectors' claims regarding the safety of fluoride. First, Dow AgroSciences argues that the Objectors have only potentially shown that small, localized groups of people are exposed to unsafe levels of fluoride and such small groups do not constitute a "major identifiable" subgroup under FFDCA. EPA disagrees with Dow AgroSciences that the groups of people exposed at levels that exceed the RfD are not major identifiable subgroups of consumers. As noted previously, the subgroups OPP relies upon include at least 1 million, and in some cases, many millions of people. Although the individuals within these subgroups facing unacceptable risks from aggregate fluoride exposure are limited to infants and children up to the age of 7, the persons at risk remain substantial.

Second, Dow AgroSciences challenges whether the NRC Report showed that there is a more sensitive endpoint than crippling skeletal fluorosis. Dow AgroSciences' comments on this issue focused on the endpoints of bone fracture, stage II skeletal fluorosis, and severe dental fluorosis.

1. *Bone fracture.* Dow AgroSciences argued that the NRC Report did not place sufficient weight on a 2005 observational study from the University of Michigan (Sowers) and placed too much weight on two other studies (Alarcon and Li) that were judged unreliable by OPP. OW undertook a comprehensive review of all of the available data. Like NRC, it found certain weaknesses in the 2005 Sowers study but overall considered it along with the Li study and several other studies to be one of the key studies for assessing the risk of bone fractures. The Alarcon study was given less weight. Also similar to the NRC Report, OW concluded that "the available data indicate that exposure to concentrations of fluoride in drinking water of 4 mg/L and above is suggestive of and appears to be positively associated with increased relative risk of bone fractures in susceptible populations when compared to populations exposed to 1 mg mg/L." (Ref. 21 at 86). OW also noted, however, that "there are insufficient data to conclude that this increase in relative risk would also apply if comparisons were made to groups exposed to negligible fluoride concentrations or if comparisons were made based on total fluoride intake rather than on the basis of drinking water concentrations." (*Id.*). Ultimately, OW concluded that the fluoride RfD should be based on severe dental fluorosis and that this endpoint was protective of any risk of bone fractures and thus a more definite resolution of this issue is unnecessary.

2. *Stage II skeletal fluorosis.* Dow AgroSciences emphasized that the NRC Report's finding on fluoride's link to stage II skeletal fluorosis were equivocal. OW's conclusions on stage II skeletal fluorosis were similar to those of NRC. OW found that "[t]he results of the limited epidemiological studies and case histories suggest that a daily fluoride dose in excess of 10 mg may be required to produce signs of stage II skeletal fluorosis (except possibly in the case of individuals with renal disease)." (Ref. 21 at 83). But OW concluded that "the currently available data are not sufficiently robust to support a dose-response analysis of the effects of fluoride in drinking water on skeletal fluorosis." (*Id.*). As with risk of bone fractures, because OW determined that the fluoride RfD should be based on severe dental fluorosis and that this endpoint was protective of any risk of stage II skeletal fluorosis, a more definite resolution of this issue is unnecessary.

3. *Severe dental flurosis.* Dow AgroSciences challenged the competency of NRC to make the legal conclusion that severe dental fluorosis is an adverse health effect and also argued that there is dispute within the scientific community regarding the adversity of severe dental fluorosis. Without question, it is EPA that is charged with interpreting SDWA and making legal findings in implementation of that Act. Nonetheless, EPA does not view NRC as stepping beyond its scientific advisory role in its report. OW has previously defined adverse health effects as involving functional impairment and NRC focused on whether the data showed functional impairment in reaching a conclusion on whether severe dental fluorosis is an adverse health effect. For example, the NRC Report states:

> One of the *functions* of tooth enamel is to protect the dentin and, ultimately, the pulp from decay and infection. Severe enamel fluorosis compromises this health-protective *function* by causing structural damage to the tooth. The damage to teeth caused by severe enamel fluorosis is a toxic effect that the majority of the committee judged to be consistent with prevailing risk assessment definitions of adverse health effects.

(Ref. 17 at 127) (emphasis added).

Finally, while there may be a dispute within the scientific community about how to characterize the adversity of severe dental fluorosis, there does not appear to be any significant dispute over the science question of whether severe dental fluorosis results in the pitting of dental enamel. As Dow AgroSciences has pointed out, it is EPA's responsibility to make the legal determination of whether this effect should be categorized as an adverse health effect.

Third, Dow AgroSciences argues that EPA is not authorized to aggregate fluoride added to drinking water for therapeutic purposes with fluoride from sulfuryl fluoride because fluoride from water fluoridation is neither a "pesticide chemical" under FFDCA nor an "other related substance." Dow AgroSciences claims that FFDCA's reference to "other related substances" means other related "pesticidal" substances. EPA disagrees with Dow AgroSciences' interpretation of FFDCA section 408 for several reasons. First, there is no exclusion from the aggregate exposure requirements for substances that have a therapeutic effect at certain levels. Second, there is no serious dispute that at certain levels exposure to fluoride is not therapeutic but harmful, and Dow AgroSciences cannot be contending that exposure to fluoride for water fluoridation does not aggregate within the body with fluoride from other exposures. Third, a significant portion of the U.S. population is exposed to fluoride in water that is naturally-occurring rather than added for therapeutic purposes. Finally, EPA has previously rejected attempts to limit the plain meaning of "other related substances" and does not believe that Dow AgroSciences has offered any compelling legal, policy, or scientific reasoning for adopting an interpretation that would bar EPA from considering the full effects of aggregate exposure to a substance. (*See* 69 FR 30042, 30073, May 26, 2004)(FRL–7355–7).

Dow AgroSciences also claims that EPA overestimated exposure to fluoride from use of sulfuryl fluoride. EPA agrees with this comment and, as described

previously, EPA has incorporated information from Dow AgroSciences on sulfuryl fluoride usage in its sulfuryl fluoride/fluoride exposure assessment.

VI. EPA's Proposed Response to Requests for Hearing

Because EPA is agreeing with the Objectors that the sulfuryl fluoride tolerances do not meet the safety standard and is proposing to grant their objections to the establishment of those tolerances, no further action is needed with regard to the Objectors' hearing requests. At this point, there is no material dispute of fact with regard to the Objectors' claims that warrants a hearing.

VII. EPA's Proposed Response to Request for a Stay and EPA's Proposed Expiration Date for Tolerances

Following release of the NRC Report, the Objectors filed a motion with EPA requesting a stay of the sulfuryl fluoride tolerances. (Ref. 2). In arguing for a stay, the Objectors relied on the four factors contained in *Virginia Petroleum Jobbers Ass'n* v. *FPC,* 259 F.2d 921 (DC Cir. 1958):

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits;

(2) Has the petitioner shown that without such relief it will be irreparably harmed;

(3) Would issuance of the stay substantially harm other parties interested in the proceedings;

(4) Wherein lies the public interest.

In prior tolerance proceedings EPA has indicated it would consider the criteria in FDA's regulations pertaining to stay requests. (*See, e.g.,* 61 FR 39528, 39540, July 29, 1996). Those regulations provide that a stay shall be granted if a petitioner can show all of the following:

(1) The petitioner will otherwise suffer irreparable injury.

(2) The petitioner's case is not frivolous and is being pursued in good faith.

(3) The petitioner has demonstrated sound public policy grounds supporting the stay.

(4) The delay resulting from the stay is not outweighed by public health or other public interests.

(21 CFR 10.35).

The criteria under either approach are quite similar. Thus, in evaluating the stay request EPA will concentrate on an amalgam of the four factors:

- What are the merits of the Objectors' claims;
- Have the Objectors' shown that irreparable harm will occur in the absence of a stay;
- Would a stay substantially harm other parties or cause other effects on the public health; and
- Wherein lies the public interest.

EPA also believes that these factors are relevant in choosing an effective date for its proposed grant of the objections.

A. Merits of the Objectors' Claims

As indicated, EPA agrees with the Objectors that the sulfuryl fluoride tolerances do not meet the safety standard when aggregate fluoride exposure is considered and thus this factor supports granting the stay and making EPA's proposed grant of the objections effective relatively quickly.

B. Irreparable Harm to Objectors

The Objectors argue that the public is irreparably harmed by the sulfuryl fluoride tolerances because aggregate exposure to fluoride poses a long litany of threats to health. According to the Objectors, the NRC Report linked fluoride not just to adverse effects on bones and teeth but also other effects ranging from neurological impacts to cancer. (Ref. 2 at 11, 13–15). The weight of this argument, however, is undermined by two factors.

First, it is beyond dispute that NRC, after a comprehensive evaluation of all of the possible adverse effects of fluoride, recommended that OW lower the fluoride MCLG due to only three very specific health risks: severe dental fluorosis; stage II skeletal fluorosis; and bone fractures. (Ref. 17 at 345–346, 352). Although the NAS recommended further research on some of the other health risks cited by the Objectors, the NAS did not find sufficient evidence on any of them to support a lowering of the MCLG.

Second, and more importantly, the threat that fluoride poses to teeth and bones is due to aggregate exposure to fluoride not the fluoride in food resulting from use of sulfuryl fluoride when viewed in isolation. Use of sulfuryl fluoride is responsible for a tiny fraction of aggregate fluoride exposure. For example, for the most highly-exposed age groups in the populations examined in the revised risk assessment, fluoride from sulfuryl fluoride accounts for about 2 to 3% of aggregate fluoride exposure. Given the aggregate level of fluoride exposure, termination of the use of sulfuryl fluoride would not change the fact that aggregate fluoride levels would still exceed the safe level for highly-exposed subpopulations.

C. Harm to Others/Other Public Health Harms

1. *Overview.* Immediate termination of sulfuryl fluoride tolerances will lead to some combination of the following negative consequences depending how food processors and distributors for the various affected commodities respond: an increase in the use of inventories of the stratospheric ozone-depleting pesticide, methyl bromide; a disruption in the amount and availability of certain commodities; an increase in contamination of commodities with insect parts and waste posing potential health risks; and/or increased short-term and long-term costs for food processors, distributors, and consumers. To the extent that methyl bromide cannot be obtained in sufficient quantities to fill the void left by the absence of sulfuryl fluoride, the other potential negative impacts will be heightened.

In the following discussion, EPA first describes the likely effects that would occur in individual food markets if sulfuryl fluoride use is terminated. Then EPA presents more general information on the availability of methyl bromide, the potential disruption that can occur when food is contaminated with insect parts and waste, and potential health effects from such contamination.

2. *Likely effects in specific markets.* OPP analyzed three uses of sulfuryl fluoride that provide a representative view of how the food industries relying on sulfuryl fluoride may respond to a loss of that pesticide and the impacts of that response:

- Use of sulfuryl fluoride as a structural treatment in flour mills;
- Use of sulfuryl fluoride as a food fumigant for cocoa beans; and
- Use of sulfuryl fluoride as a food fumigant for walnuts.

Each of these uses is discussed in more detail in the next section. (Refs. 25 and 26).

a. *Flour mills.* Generally, flour mills and other food processing facilities are fumigated two to three times per year to control insect populations (the primary pests are the red flour beetle and the confused flour beetle). In the absence of sulfuryl fluoride, there are potentially three possible alternative options whose costs and efficacy differ from sulfuryl fluoride: (1) Use of another chemical pesticide; (2) use of non-chemical controls; or (3) complete removal of all food from the facility during fumigation with sulfuryl fluoride.

i. *Chemical control.* The only chemical alternative for use throughout food processing facilities is methyl bromide. As explained later in this document, mills and food processing

structures that do not have approved critical uses for a given year may not obtain methyl bromide produced under a critical use exemption. To the extent facilities have an approved critical use or can obtain methyl bromide from pre-phase-out inventories, mills will likely switch to methyl bromide if sulfuryl fluoride uses are immediately eliminated. Costs for use of methyl bromide and sulfuryl fluoride appear to be fairly similar at this time. No other chemical pesticides are a viable alternative. Phosphine is a commonly-used food fumigant that could be used in some portions of a flour mill; however, phosphine is highly corrosive to silver and copper metals and their alloys and thus cannot be used in the production areas of mills that contain electronic and electrical equipment which heavily rely on these metals. In terms of total area, the portion of a mill devoted to production is substantial and a failure to effectively dis-infest the production area would quickly result in re-infestation of the entire facility. Thus, phosphine is not an alternative to the use of sulfuryl fluoride. (Ref. 25 at 6–7).

ii. *Non-chemical control.* The leading non-chemical control option for use in flour mills is temperature manipulation. Either heat or cold can be used to destroy insect pests. Use of cooling to control pests in flour mills, however, is unlikely because cold temperatures can damage electronic equipment in production areas. Use of heat is a more likely option. Temperatures of 120–130 degrees Fahrenheit will kill most stored-product insect pests. Heat, however, would not be appropriate for mills principally constructed of wood because heat at these levels will shrink, crack, and warp wood. This can result in structural damage to the facility and may also render the heat treatment ineffective due to leakage of heat from the facility. Approximately 25% of the total number of flour mills in the United States fall in this category. These tend to be the older and smaller mills and thus probably represent less than 25% of mill capacity. Newer mills are generally constructed primarily of concrete or similar materials which would be appropriate for use with heat disinfestation techniques. Initially, use of heat will involve higher costs due to capital investment in heaters and plant modifications. However, in the long run, use of heat may be less costly than chemical pesticides. Switching to heat will also require transition time for the industry. Not only will mills have to purchase (or rent) heaters but modifications may be necessary to the mill to insure that heat is evenly distributed. Individual mills will have to go through a trial and error process to determine how the heating technique can be effective in each unique facility. Because disinfestations are commonly needed only two to three times per year, mills are likely to need an extended transition time to implement the technology effectively. If chemical alternatives are not available during that timeframe, processed food contaminated with insect parts and waste due to failure of initial attempts at heat disinfestation will have to be destroyed. (Ref. 25 at 6).

iii. *Product removal.* A third option that combines chemical and non-chemical control would be complete removal of all food from a facility before fumigation with sulfuryl fluoride. Currently, the sulfuryl fluoride label requires that food in facilities be minimized prior to fumigation. Only food that is not practical to remove may remain during the fumigation. Removal of food is also essential to the efficacy of sulfuryl fluoride. However, if all food is removed such that use of sulfuryl fluoride would not result in fluoride residues in food, no pesticide tolerance would be needed for this use and aggregate exposure to fluoride would not be increased. Currently, Canada has imposed restrictions on the use of sulfuryl fluoride for the fumigation of food processing facilities that are designed to insure that no residues result in food. Two obstacles remain, however, to adoption of this alternative. First, OPP's analysis of this alternative indicates there may be substantial costs. Second, at this time, sulfuryl fluoride's FIFRA label does not contain application instructions sufficient to eliminate residues on food. Thus, if the objections are granted as is proposed, EPA will pursue cancellation of all uses associated with the tolerances which are removed. Unless Dow AgroSciences, the registrant for sulfuryl fluoride, were to seek an amendment of its registration that imposes label restrictions insuring no residues in food, and OPP can determine that the proposed registration changes would achieve that result, this use would not be available to flour mills in the United States. (Ref. 25 at 10).

b. *Fumigation of cocoa and walnuts.* Any food that is stored, processed, or packaged is subject to attack by insects, generally beetles or moths. Phosphine is the dominant fumigant in the commodity market for use against such pests because it is efficacious, cost-effective, and easy to apply. However, phosphine fumigation takes 4 to 7 days to be effective. A fumigant that can work much more quickly, such as sulfuryl fluoride, is used when rapid fumigation is necessary.

Fumigation of harvested walnuts to destroy pests is primarily used for in-shell walnuts. Fumigation can kill pests in in-shell walnuts that are otherwise eliminated from shelled walnuts by shelling and processing of the nutmeat. The available data indicate that a high percentage of in-shell walnuts are fumigated one or more times. Fumigation is primarily not conducted with phosphine because, at peak harvest time, existing fumigation chambers do not have sufficient capacity to allow timely fumigation. Although historically most of this rapid fumigation was done with methyl bromide under a CUE, more recent information suggests that the industry is using sulfuryl fluoride almost entirely. (Ref. 26 at 4).

For cocoa beans, rapid fumigation is necessary due to the circumstances where fumigation is conducted. Cocoa beans are imported to the United States from Africa and South America. Upon arrival, they are taken to a warehouse at the port and fumigated under tarpaulins. To minimize risk to port employees, fumigations typically occur over weekends when the ports and warehouses are closed. One hundred percent of cocoa beans are fumigated with sulfuryl fluoride. (*Id.* at 5). In 2009, approximately $1.2 billion worth of cocoa beans were imported to the United States.

The primary chemical alternative to sulfuryl fluoride for walnuts and cocoa is phosphine. However, as indicated, there are insufficient fumigation chambers for walnuts at peak harvest time. For cocoa, existing facilities do not allow for use of phosphine because they are part of an ongoing port operation and cannot be shut down for more than 2 days at a time and often contain other articles that may be affected by phosphine's corrosive properties. Non-chemical alternatives either take too long (cold, modified atmosphere), may damage the stored commodity (heat), lack market acceptability (irradiation), or are largely untested for the commodities and pests in question (heat). Construction of fumigation chambers for walnuts and cocoa may take several years. (*Id.* at 5).

EPA requests information on whether other commodities treated in the United States or other imported commodities would be affected by elimination of sulfuryl fluoride.

3. *Availability of methyl bromide.* Due to the constraints of CAA and the Montreal Protocol, pesticide users would have very limited ability to use methyl bromide in lieu of sulfuryl fluoride if the sulfuryl fluoride

tolerances were abruptly withdrawn. Methyl bromide is an ozone depleting substance whose production has been banned under the Clean Air Act for domestic use since 2005. Along with other developed countries, the United States is also subject to the methyl bromide production phase-out under the Montreal Protocol. Production of methyl bromide for U.S. use other than for quarantine and preshipment purposes is not allowed under the Montreal Protocol and EPA's Clean Air Act implementing regulations unless the Parties to the Montreal Protocol agree to authorize additional new production for uses that have been demonstrated to be critical under the criteria adopted by the Parties.

The criteria for critical use exemptions (CUEs) are demanding and not easily met. Under Decision IX/6 of the Parties to the Montreal Protocol "a use of methyl bromide should qualify as 'critical' only if the nominating Party determines that: (i) The specific use is critical because the lack of availability of methyl bromide for that use would result in a significant market disruption; and (ii) there are no technically and economically feasible alternatives or substitutes available to the user that are acceptable from the standpoint of environment and public health and are suitable to the crops and circumstances of the nomination." Decision IX/6 para. 1(a). Additionally, Decision IX/6 specifies that:

> [P]roduction and consumption, if any, of methyl bromide for critical uses should be permitted only if:
>
> (i) All technically and economically feasible steps have been taken to minimize the critical use and any associated emission of methyl bromide;
>
> (ii) Methyl bromide is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide, also bearing in mind the developing countries' need for methyl bromide;
>
> (iii) It is demonstrated that an appropriate effort is being made to evaluate, commercialize and secure national regulatory approval of alternatives and substitutes.* * *

Decision IX/6 para. 1(b).

EPA's stratospheric protection regulations contain essentially the same criteria (40 CFR 82.3). Decisions on these criteria are made following a careful review by both the United States and the Parties to the Montreal Protocol.[1] Importantly, because the CUE process is an exception to the phase-out, it has been implemented in a manner that recognizes the importance of the technical substantiation of critical need relative to the criteria agreed upon by the Parties. Between the 2005 and 2011 CUE Nominations, the United States post harvest CUE amount authorized by the Parties has declined by nearly 80% (784,936 kilograms (kg) to 161,394 kg). (Ref. 27). Given the potential availability of alternatives in a few years, taking into consideration the full suite of chemical and non-chemical pest control options for post harvest uses, technical and economic substantiation for methyl bromide would be limited under CUE criteria for uses that had transitioned to sulfuryl fluoride.

Finally, the ability of any given user group to use methyl bromide will also be constrained in any given year by a number of other factors. First, it is impermissible for any person to sell critical use methyl bromide to an end user without receiving a certification that it will be used for an approved critical use. (40 CFR 82.4(p)(1)(i)). Second, although there is no legal restriction on a non-critical user purchasing and using pre-phase-out stocks (the quantity of stored methyl bromide produced prior to the U.S. phase-out in 2005), (75 FR 23167, 23181, May 3, 2010) (FRL–9144–5), whether or not such stocks could be commercially obtained quickly given long-term contracting for stocks is another question. In any event, pre-phase-out inventory has declined substantially and it is unclear at this time how much of it could be purchased for use in the post-harvest market.

Thus, in the short-term, production and import of methyl bromide is restricted with no opportunities for immediate change. In the longer term, given the historical trajectory of the critical use exemption under the Montreal Protocol, there likely will be less, not more, methyl bromide available. Current users of sulfuryl fluoride may attempt to purchase methyl bromide from pre-phase-out inventories if sulfuryl fluoride becomes unavailable; however, the feasibility of obtaining significant quantities from this source is uncertain.

4. *Disruption of the marketplace.* Food containing insect parts and waste may be considered adulterated under FFDCA section 402(a)(4) and subject to seizure by FDA. (21 U.S.C. 342(a)(4); *see* 21 CFR 110.110 (Defect Action Levels)). As the recent recall of the infant formula Similac shows, contamination with insect parts can result in extensive disruption of the market for consumers and significant costs for the food industry. (Ref. 28 ("Worried parents have bombarded the maker of Similac with phone calls and peppered Facebook and Twitter pages over fears about insects in the top-selling baby formula after millions of cans were recalled."); Refs. 29 and 30 (reporting that recall involved "up to 5 million Similac-brand powder formulas" and "Abbot expects to lose $100 million in connection with the recall.")).

5. *Harm to health.* There is a real potential for adverse human health impacts if sulfuryl fluoride is not available for treatment of food commodities, food mills, and other food processing facilities where sulfuryl fluoride is used. Without sulfuryl fluoride, there would be re-infestation of those commodities or facilities if facilities are not able to find suitable alternatives and thus more contamination of food products by the pests controlled by sulfuryl fluoride. Contamination would include whole insects, insect body parts, and insect waste, mainly from various flour beetles, moths, and cockroaches. Some of these contaminants (*e.g.,* from cockroaches) have been identified as allergens. (Ref. 31). Other beetles have been associated with gastrointestinal illness and discomfort. (Ref. 32 and 33). Contamination also could include food-borne pathogens that cause disease, such as *E. coli* or *Salmonella,* introduced by flies that would no longer be controlled by sulfuryl fluoride. (*Id.*)

6. *Conclusion.* In the absence of sulfuryl fluoride tolerances, current sulfuryl fluoride users will, in the first instance, turn to methyl bromide if methyl bromide can be obtained. Users' ability to obtain methyl bromide will depend on a complex mix of factors including: when a final decision is made on the sulfuryl fluoride tolerances; whether the use is an approved critical use for a given year and, if so, the amount of methyl bromide available either from new

[1] Before U.S. production may legally occur, a specific use must receive a CUE through the authorization of the Parties to the Montreal Protocol and then through EPA's regulations. The CUE process takes three years to complete for one control period (one calendar year). Methyl bromide users who wished to obtain a CUE to allow production in 2011 submitted their applications to EPA in 2008. The U.S. Government reviewed those applications and submitted a Critical Use Nomination to the United Nations Environment Programme Ozone Secretariat in early 2009. During 2009, the Methyl Bromide Technical Options Committee (MBTOC) and the Technology and Economic Assessment Panel (TEAP), which are independent advisory bodies to the Parties to the Montreal Protocol, reviewed the Critical Use Nomination and made recommendations to the Parties. In the fall of 2009, the Parties met and approved CUEs for the following post-harvest uses in the U.S.: mills and food processing structures; country ham; dried fruit; and nuts. In 2010, EPA initiated notice-and-comment rulemaking to exempt the approved uses from its regulatory ban on methyl bromide production. The final rule will address what uses qualify for the exemption in 2011 and what amounts may be produced or imported for approved critical uses.

production or from pre-phase-out inventory under the CUE Rule for that year; and whether users have access to pre-phase-out inventory sold for non-critical exemption uses. To the extent that methyl bromide is used as a sulfuryl fluoride replacement, such a reversion to a stratospheric-ozone depleting chemical is a negative public health impact because it will add to damage to the ozone layer and contribute to additional health effects caused by exposure to ultraviolet radiation, including skin cancers and cataracts.

If both sulfuryl fluoride and methyl bromide are unavailable, or supplies are limited, there is likely to be some disruption of the food supply as to the affected commodities and/or there is a greater likelihood of contaminated food being released for public consumption. The extent of disruption and/or contamination varies based on the type of processing facility and the commodities involved. For newer flour mills and other food processing facilities (*i.e.,* ones made principally of concrete), use of heat should eventually be a successful alternative to sulfuryl fluoride. In the interim, food may become contaminated with insect parts and waste as facility owners use trial and error in adapting heat technology to their individual facilities.

Older processing facilities constructed mainly of wood may have no options other than to cease production unless Dow AgroSciences seeks and obtains a registration amendment for sulfuryl fluoride that insures that sulfuryl fluoride is used in a manner not resulting in residues in food. Even so, it is unknown whether use of sulfuryl fluoride under such an approach is economically feasible. EPA expects similar impacts on other food handling facilities that rely on sulfuryl fluoride or methyl bromide fumigation to control pests.

As to cocoa, impacts are likely to be very substantial. Currently, 100% of the imported cocoa in the United States is disinfested using sulfuryl fluoride. The likelihood of switching to methyl bromide is quite low. As of June 29, 2007 for the 2009 CUE control period, cocoa bean users of methyl bromide ceased seeking CUEs. Cocoa is not currently an approved critical use, and thus any methyl bromide produced under a CUE cannot be used on cocoa. Cocoa importers' only avenue for using methyl bromide would be to purchase methyl bromide from the dwindling pre-phase-out inventories. Eventually, fumigation chambers for phosphine could be constructed for cocoa but it may be a matter of years before they are operational and phosphine use is not feasible at existing sulfuryl fluoride fumigation sites. In the absence of an alternative to sulfuryl fluoride for disinfestation of cocoa, cocoa imports (which in 2009 were valued at approximately $1.2 billion) would be lost due to either destruction or refusal of shipments by warehouse operators to comply with FDA regulations. Walnuts may also face significant impacts because of the need for rapid fumigation with either methyl bromide or sulfuryl fluoride. Without sulfuryl fluoride or methyl bromide, a significant portion of the crop may be lost simply due to insufficient fumigation capacity given the relatively long time needed for fumigation with phosphine. Other commodities facing a similar situation to walnuts include dried fruits other than raisins.

D. The Public Interest

Determining where the public interest lies in this matter involves a complex weighing of inter-related environmental and health impacts and cost effects upon commercial interests and consumers. OPP attempts to capture each of these impacts in the following summary, some of which have been described previously. Others are discussed for the first time because they do not neatly fit under factors discussed previously.

1. *Harm from fluoride exposure.* Aggregate exposure to fluoride exceeds the safe level for several major identifiable population subgroups. Of principal concern here are children up to the age of 7.

2. *Sulfuryl fluoride's contribution to fluoride exposure.* Use of sulfuryl fluoride results in a minimal contribution to fluoride exposure. Elimination of sulfuryl fluoride does not solve, or even significantly decrease, the fluoride aggregate exposure problems identified earlier.

3. *Increase in the use of methyl bromide inventories.* There is a worldwide consensus that the use of chemicals that deplete the stratospheric ozone, such as methyl bromide, should be eliminated. Termination of sulfuryl fluoride will increase demand for methyl bromide and may result in an increase of use of methyl bromide inventories.

4. *Impacts on the food supply.* To the extent that neither methyl bromide nor sulfuryl fluoride is available, there are likely to be impacts on the food supply, either through disruption of food availability or contamination of food with insect parts and waste, because other feasible alternatives to sulfuryl fluoride and methyl bromide will not be immediately available.

5. *Other atmospheric effects of sulfuryl fluoride.* EPA acknowledges that recent research has identified the potential for sulfuryl fluoride to contribute to the greenhouse effect; however there does not appear to be consensus yet in the scientific community on its global warming potential.

6. *International consequences.* As explained previously, the United States agreed to end domestic production of methyl bromide in 2005, along with other developed countries that are Parties to the Montreal Protocol. Since 2005, the United States has—along with a handful of other developed countries—been requesting limited continued amounts of methyl bromide to satisfy needs that Parties agree to be 'critical'. Also since 2005, U.S. requests for continued uses have been large, relative to those of other countries. At the beginning of the post-phase-out period, in 2005, 17 developed countries requested and obtained such exemptions; currently, the United States is one of only four developed countries that have not yet eliminated methyl bromide CUEs. (Ref. 27). The United States historically used a majority of the world's methyl bromide; therefore, the challenge faced by U.S. agriculture in this transition has been formidable. Still, enormous progress has been made in adopting alternatives for all major uses, allowing the United States to substantially reduce the size and number of its CUE requests. Sulfuryl fluoride has been an important component to this process. A sudden reversal by the United States in its efforts to reduce the use of methyl bromide may have broad ramifications on the success of the treaty. U.S. authorizations have been reduced further by the Parties to the Montreal Protocol, based on recommendations from the relevant technical committees of the Montreal Protocol. Rapid termination of sulfuryl fluoride tolerances would be at odds with the careful, deliberate, and well-established CUE process. The process is protracted and the relevant criteria demand technical justifications that require time to develop and substantiate. In reality, the multi-step CUE process is not designed with the expectation that it would allow a Party to the Montreal Protocol requesting a CUE for a given year to rapidly adjust either to the introduction of a new alternative or to the withdrawal of an existing alternative. An additional international consequence is that the lack of sulfuryl fluoride to treat imported commodities

such as cocoa could lead to shipments of imported commodities being rejected and trade with some economically vulnerable countries may be negatively affected.

E. Conclusion

Taking all of these factors into account involves weighing EPA's proposed conclusion that Objectors' have meritorious objections and the potential beneficial impacts on the public interest if a stay was granted against the negative impacts on the public interest from a stay approval. The beneficial impacts from granting a stay would be a slight reduction in fluoride exposure and other potential atmospheric effects. On the other hand, granting a stay would potentially cause the following negative impacts:

1. A possible increase in use of methyl bromide inventories, with attendant negative known atmospheric effects;
2. An undermining of the substantial progress made in reducing methyl bromide critical use exemptions in the postharvest market and potential disruption in implementation of an important international treaty, and
3. Significant impacts on several food industries and related effects on the public, including potential health effects on the public.

Despite the health risks posed by overall aggregate fluoride exposure and the Objectors' likelihood of success on the merits, OPP believes that each of the potential negative impacts on the public interest outweigh the beneficial public effects from a stay. Viewed in this light, EPA concludes that the public interest strongly, in fact overwhelmingly, supports denial of the Objectors' stay request.

VIII. Proposed Effective Date of Order

EPA proposes to make this order effective 60 days following publication. However, EPA is also proposing a staggered implementation for withdrawal of the affected tolerances in 40 CFR 180.145(c) and 180.575 taking into account the discussion in Unit VII. concerning the Objectors' stay request. This staggered implementation is proposed to be accomplished by including an expiration/revocation date in 40 CFR 180.145(c) and 180.575 for each of the tolerances not proposed for withdrawal upon the effective date of the order. Given the potential disruption or contamination of some commodities in the food supply, severely limited availability of methyl bromide, and prospect of difficulties in implementing an important international treaty, EPA is proposing to withdraw tolerances under the following implementation or phaseout schedule:

1. *Tolerances for canceled uses: immediately.* For uses that have been removed from the sulfuryl fluoride registration, there is no reason the proposed order should not take effect upon the effective date of the order. These tolerances are: Dried eggs; milk, powdered.

2. *Tolerances for commodities where there is little to no use of sulfuryl fluoride: 90 days.* EPA's analysis and information from Dow AgroSciences indicate that sulfuryl fluoride is not currently used in significant amounts, if at all, on numerous commodities for which direct fumigation is allowed under the sulfuryl fluoride registration. EPA is proposing a termination of tolerances associated with these uses 90 days from the effective date of the order. Ninety days should be sufficient for all affected parties to come into compliance with the revised situation. Tolerances in this category are: barley, bran, postharvest; barley, flour, postharvest; barley, grain, postharvest; barley, pearled barley, postharvest; cattle, meat, dried; cheese; coconut, postharvest; coffee, bean, green, postharvest; corn, field, flour, postharvest; corn, field, grain, postharvest; corn, field, grits, postharvest; corn, field, meal, postharvest; corn, pop, grain, postharvest; cotton, undelinted seed, postharvest; ginger, postharvest; grain, aspirated fractions, postharvest; grape, raisin, postharvest; herbs and spices group 19, postharvest; hog, meat; millet, grain, postharvest; nut, pine, postharvest; nut, tree, Group 14, postharvest (revised to cover only walnuts, postharvest); oat, flour, postharvest; oat, grain, postharvest; oat, groat/rolled oats; peanut, postharvest; pistachio, postharvest; sorghum, grain, postharvest; triticale, grain, postharvest; vegetable, legume, group 6, postharvest; wheat, bran, postharvest; wheat, flour, postharvest; wheat, germ, postharvest; wheat, grain postharvest; wheat, milled byproducts, postharvest; wheat, shorts, postharvest.

3. *Tolerances for commodities directly treated where there is significant sulfuryl fluoride use and no readily-available alternative: 3 years.* For several commodities, sulfuryl fluoride is used on all, or a substantial portion, of the crop and there is no readily-available alternative. These commodities are cocoa, walnuts, and dried fruits other than raisins. Although there is a feasible alternative available for sulfuryl fluoride in the long-term, phosphine, in the short-term that alternative is not available due to the lack of fumigation capacity. The situation for cocoa is perhaps the most dire in that 100% of the crop is treated, the space used for sulfuryl fluoride fumigation is not appropriate for phosphine use, and, given that cocoa is not currently an approved critical use, methyl bromide produced under a CUE may not be used on cocoa. While not facing quite such catastrophic consequences, walnuts are nonetheless in essentially the same situation because the only realistic treatment option in the near term (*i.e.,* methyl bromide) can only be obtained, if at all, from pre-phase-out inventories or from production under the sharply-limited postharvest CUE, and another alternative will not be available until additional fumigation capacity is created. The situation appears similar for dried fruits other than raisins as well; however, EPA requests that information be submitted during the comment period documenting the amount of sulfuryl fluoride use on dried fruits and the availability of alternatives including the availability of capacity for alternative fumigations. EPA is proposing termination of tolerances associated with these uses 3 years from the effective date of the order. Construction of fumigation chambers may take several years.

4. *Tolerances for commodities receiving residues from incidental treatment during structural fumigation—3 years.* The situation for foods requiring tolerances as a result of incidental treatment from structural fumigations is more complicated. Different types of facilities will face different hurdles in transitioning from sulfuryl fluoride to other methods of pest control. For most facilities, use of heat may prove an adequate pest control strategy. However, implementation of heat technology is not expected to be seamless and the availability of sulfuryl fluoride as a backup to avoid potential disruption or contamination is important. OPP expects that, after the first year, use of sulfuryl fluoride in these facilities will be the exception rather than the rule as the technology comes online and facility operators gain experience with it. In other words, sulfuryl fluoride would only be used when difficulties arise in perfecting the use of heat technology in individual facilities. Given the cost of sulfuryl fluoride treatment, facility operators, having invested in heat technology, will have a strong incentive to avoid use of sulfuryl fluoride unless absolutely necessary. A relatively short transition period may be appropriate for these facilities. For wooden structures, however, where heat is not an option,

no chemical or non-chemical alternative is immediately available. These facilities face an uncertain future with perhaps the best alternative being pursuit by Dow AgroSciences of restrictions on the sulfuryl fluoride registration that would eliminate the possibility of residues in food and thus permit continued use of sulfuryl fluoride as a structural fumigant in food handling facilities. Nonetheless, even this approach is in question due to feasibility issues. Thus, to some degree, owners of wooden food handling facilities face the most serious consequences of any producer group and, due to their relatively large share of the market, there could be similarly serious consequences for the public. For that reason, EPA is proposing termination of tolerances associated with these uses 3 years from the effective date of the order. To insure that this extended transition period will not encourage owners of concrete facilities to maintain the status quo, EPA plans to pursue registration modifications for sulfuryl fluoride that differentiate between sulfuryl fluoride use in concrete and wooden structures. EPA's goal would be to allow sulfuryl fluoride use in concrete facilities for a period no longer than necessary to accomplish the transition to heat technology.

EPA specifically requests comment on the potential impacts from the loss of sulfuryl fluoride including any available and additional information on pest control alternatives to sulfuryl fluoride. Such information is important to EPA's decision on the proposed effective dates for this order. Further, EPA recognizes that sulfuryl fluoride is only one of many sources of exposure to fluoride. To the extent that new information indicates that overall fluoride exposure has decreased, including as a result of other government actions, EPA would consider revisiting the determinations in this proposed order.

IX. Request for Public Comment

EPA requests public comment on all aspects of this proposed order: Its hazard, exposure, and risk assessments of fluoride; its evaluation of the factors bearing on whether a stay should be granted; and its proposed effective dates for the order.

X. Regulatory Assessment Requirements

As indicated previously, this action announces the Agency's proposed 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.

XI. 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 to this order because this action is not a rule for purposes of 5 U.S.C. 804(3).

XII. References

As indicated under **ADDRESSES**, a docket has been established for this rulemaking under docket ID number EPA–HQ–OPP–2005–0174. The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical contact listed under **FOR FURTHER INFORMATION CONTACT**.

1. Fluoride Action Network and Beyond Pesticides/National Coalition Against the Misuse of Pesticides, Written Objections and Request for Hearing in the matter of: Sulfuryl Fluoride; Pesticide Tolerance; Final Rule. (March 23, 2004).

2. Motion of Objectors for Stay of Final Rules Establishing Tolerances For Residues of Sulfuryl Fluoride and Fluoride Anion; (Docket Nos. OPP–2005–0174 and OPP–2003–0373) (June 1, 2006).

3. Objectors' Consolidated Objections to Final Rules Establishing Tolerances for Residues of Sulfuryl Fluoride and Fluoride Anion (November 6, 2006).

4. USEPA, *A User's Guide to Available EPA Information on Assessing Exposure to Pesticides in Food* (June 21, 2000).

5. USEPA. Office of Research and Development. 2000. Benchmark Dose Technical Guidance Document. Draft report. Risk Assessment Forum, Office of Research and Development, U.S. Environmental Protection Agency. Washington, DC. EPA/630/R–00/001.

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. 2005b. Final report on Preliminary *N*-Methyl Carbamate Cumulative Risk Assessment. Final Report from the FIFRA Scientific Advisory Panel Meeting of August 23–25, 2005 (Report dated October 13, 2005). Available at: *http://www.epa.gov/scipoly/sap/2005/august/minutes.pdf.*

8. Office of Pesticide Programs, USEPA, 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).

9. USEPA, Residue Chemistry Test Guidelines: OPPTS 860.1500 Crop Field Trials (August 1996).

10. Office of Pesticide Programs, USEPA and Pest Regulatory Management Agency, Health Canada, NAFTA Guidance Document for Guidance for Setting Pesticide Tolerances Based on Field Trial Data (September 28, 2005).

11. Office of Pesticide Programs, USEPA, Choosing a Percentile of Acute Dietary Exposure as a Threshold of Regulatory Concern (March 16, 2000).

12. Office of Pesticide Programs, USEPA, Standard Operating Procedures (SOPs) for Residential Exposure Assessments (Draft December 19, 1997).

13. Office of Prevention, Pesticides, and Toxic Substances, USEPA, "Response To Public Comments Concerning The Use Of Sulfuryl Fluoride As A Post-Harvest Fumigant" (January 16, 2004).

14. Baetcke *et al.,* Office of Pesticide Programs, USEPA, "A Preliminary Evaluation of Articles Related to Fluoride Cited by the Fluoride Action Network (FAN) as Objections to the Sulfuryl Fluoride Pesticide Tolerance Rule" (November 18, 2003).

15. Office of Prevention, Pesticides, and Toxic Substances, USEPA, Memorandum from Vicki L. Dellarco to Dennis McNeilly, Review of Five Recent Papers on Fluoride Submitted by the Fluoride Action Network (January 8, 2004).

16. Office of Prevention, Pesticides, and Toxic Substances, USEPA, "Response to Public Comments Concerning the Use of Sulfuryl Fluoride In Food Handling Facilities" (July 14, 2005).

17. National Research Council of the National Academies, "Fluoride in Drinking Water: A Scientific Review of EPA's Standards" (March 2006).

18. Objectors' Submission to Docket: 18 IQ Studies (posted February 17, 2009).

19. Dow AgroSciences LLC, "Response to Request for Public Comments; Sulfuryl Fluoride; Request for Stay of Tolerances; Public Docket Identification Numbers: EPA–HQ–OPP–2005–0174 and EPA–HQ–OPP–2003–0373 (August 4, 2006).

20. Dow AgroSciences LLC, Memorandum, "Standard for Granting a Hearing under the Federal Food, Drug, and Cosmetic Act Concerning Objections to Tolerances Established by EPA for Profume™ Gas Fumigant" (October 31, 2006).

21. Health and Ecological Criteria Division, Office of Water, USEPA, "Fluoride: Dose-Response Analysis for Non-cancer Effects" (December 2010).

22. Health and Ecological Criteria Division, Office of Water, USEPA, "Fluoride: Exposure and Relative Source Contribution Analysis" (December 2010).

23. Office of Chemical Safety and Pollution Prevention, US EPA, Memorandum from Michael A. Doherty to Meredith Laws, "Sulfuryl Fluoride—Revised Human Health

Risk Assessment for Fluoride to Incorporate New Hazard and Exposure Information" (January 7, 2011).

24. Office of Prevention, Pesticides, and Toxic Substances, US EPA, Memorandum from Colwell A. Cook, Jonathan Becker, and Elisa Rim to Kable Davis/Venus Eagle and Michael Doherty/Christina Swartz, "Revised Assessment of Percent Commodity Treated Values used in the Registrant's Dietary Exposure Assessment for Fluoride (DP# 361041)" (May 1, 2009).

25. Office of Chemical Safety and Pollution Prevention, US EPA, Memorandum from Michelle Ranville and Colwell Cook to Meredith Laws, "Assessment of Impacts on Flour Mills Operators of a Stay in Sulfuryl Fluoride Food Tolerances" (January 7, 2011).

26. Office of Chemical Safety and Pollution Prevention, US EPA, Memorandum from Colwell Cook and Michelle Ranville to Meredith Laws, "Assessment of Impacts of a Stay of Food Tolerances for Sulfuryl Fluoride on Selected Post-Harvest Commodities" (January 7, 2011).

27. Office of Chemical Safety and Pollution Prevention, US EPA, Memorandum from Colwell Cook and Michelle Ranville to Jonathan Fleuchaus, Post Harvest Methyl Bromide Grant to the United States by the Parties to the Montreal Protocol, 2005–2011 (December 16, 2010).

28. Washington Post, "Bugs in Baby Formula? Parents Worried About Recall" (September 24, 2010) (available at *http://www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092402044.html?waporef=obinsite*).

29. U.S. FDA Consumer Update, "Abbott Recalls Some Similac Formulas (September 23, 2010) (available at *http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm226941.htm*).

30. Washington Post, "Bug Contamination Sparks Baby Formula Recall" (September 23, 2010) (available at *http://www.washingtonpost.com/wp-dyn/content/article/2010/09/22/AR2010092206070.html?waporef=obinsite*).

31. Olsen *et al.,* Regulatory Action Criteria for Filth and Other Extraneous Materials, V. Strategy for Evaluating Hazardous and Nonhazardous Filth (Jan. 12, 2001).

32. U.S. FDA Consumer Update, "Abbott Recalls Some Similac Formulas" (September 23, 2010) (available at *http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm226941.htm*).

33. Olsen, Alan, FDA Teamwork Uncovers Insect Infestation, FDA Consumer, Vol. 25, Jul.–Aug. 1991).

List of Subjects in 40 CFR Part 180

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

Dated: January 7, 2011.

Steve Bradbury,

Director, Office of Pesticide Programs.

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Part VI

Department of Labor

Employment and Training Administration

20 CFR Part 655

Wage Methodology for the Temporary Non-agricultural Employment H–2B Program; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AB61

Wage Methodology for the Temporary Non-agricultural Employment H–2B Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule; request for comment on specific issues.

SUMMARY: The Department of Labor (the Department or DOL) is amending its regulations governing the certification for the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment. This Final Rule revises the methodology by which the Department calculates the prevailing wages to be paid to H–2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H–2B status.

DATES: This Final Rule is effective January 1, 2012. Comments should be submitted by March 21, 2011.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Revisions to 20 CFR 655.10

A. The Department's Role in the H–2B Program

As provided by section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1101(a)(15)(H)(ii)(b)), the H–2B visa classification for non-agricultural temporary workers is available to a foreign worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other [than agricultural] temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country." This visa status is granted by U.S. Citizenship and Immigration Services (USCIS), an agency within DHS, under its regulations at 8 CFR 214.2(h)(6) *et seq.* Section 214(c)(1) of the INA requires DHS to consult with appropriate agencies before approving an H–2B visa petition. 8 U.S.C. 1184(c)(1). That consultation occurs according to a USCIS regulatory requirement that an employer first obtain a temporary labor certification from the Secretary of Labor (the Secretary) establishing that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6).

The Secretary's responsibility for the H–2B program is carried out by two agencies within the Department. Applications for labor certification are processed by the Office of Foreign Labor Certification (OFLC) in the Employment and Training Administration (ETA), the agency to which the Secretary has delegated those responsibilities described in the USCIS H–2B regulations. Enforcement of the attestations and assurances made by employers in H–2B applications for labor certification is conducted by the Wage and Hour Division (WHD) under enforcement authority delegated to it by DHS. 8 U.S.C. 1184(c)(14)(B).

B. The Determination of the Prevailing Wage

To comply with its obligations under the program, an employer must pay the H–2B workers hired in connection with the application a wage that will not adversely affect the wages of U.S. workers similarly employed. The Department's H–2B procedures have always provided that adverse effect is prevented by requiring H–2B employers to offer and pay at least the prevailing wage to the H–2B workers and those U.S. workers recruited in connection with the job opportunity. To facilitate compliance with this requirement, the Department has established a process for providing to an employer a prevailing wage for the job opportunity for which certification is being sought. From the outset of the H–2B program, the Department directed that the same prevailing wage procedures be used for the permanent, H–1B, and H–2B programs. Although the Department did not promulgate a separate prevailing wage methodology until 1995, General Administration Letter (GAL) 10–84, "Procedures for Temporary Labor Certifications in Non Agricultural Occupations" (April 23, 1984) provided guidance to the States on the administration of the H–2 nonagricultural program (a predecessor of the H–2B program) requiring the States to determine the prevailing wage in accordance with regulations for the permanent program at 20 CFR 656.40. In 1995, the Department issued separate prevailing wage guidance through GAL 4–95, "Interim Prevailing Wage Policy for Nonagricultural Immigration Programs" (May 18, 1995), Attachment I,[1] and again in 1998, through GAL 2–98 "Prevailing Wage Policy for Nonagricultural Immigration Programs" (November 30, 1998) that continued to extend the provisions of § 656.40 to the H–2B program. Under the two GALs, payment of the rates determined under the Davis-Bacon Act (DBA), 40 U.S.C. 276a *et seq.,* 29 CFR part 1, or the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. 351 *et seq.,* was mandatory for H–2B occupations for which such wage determinations existed. Starting in 1998, in the absence of SCA or DBA wage rates, prevailing wage determinations were based on the Occupational Employment Statistics wage survey (OES), compiled by the Bureau of Labor Statistics (BLS). The OES wage survey produces employment and wage estimates for about 800 occupations and is based upon wage data covering full-time and part-time workers who are given monetary compensation for their labor or services. The OES survey is published annually and features data broken out both by geographic area and industry. The wage estimates in the survey are made available at the national, State and metropolitan and nonmetropolitan area levels. The OES survey directly collects a wage rate for all occupations defined by the Office of Management and Budget's (OMB's) occupational classification system, the Standard Occupational Classification (SOC) system code. Employers, however, have been able since at least 1995 to submit private wage surveys that met Department standards.

Both the 1995 and the 1998 GALs provided that DOL would issue prevailing wage determinations at two levels, entry-level and experienced. At that time, there were not many H–2B program users, and new prevailing wage procedures were designed primarily to address the needs of the permanent and H–1B programs which were dominated by job opportunities in higher skilled occupations. There was considerable desire on the part of H–1B and permanent program users to have the Department create a multi-tiered wage

[1] *See http://wdr.doleta.gov/directives.*

structure to reflect the largely self-evident proposition that workers in occupations that require sophisticated skills and training receive higher wages based on those skills. Since the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported, the two-tier wage structure introduced in 1998 was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a surrogate for the entry-level wage. The Department did not conduct any meaningful economic analysis to test its validity and, most significantly, it did not consider whether assumptions about wages and skill levels for higher skilled occupations might be less valid when applied to lower skilled occupations. In December 2004, the Department revised its regulation governing the permanent program. 69 FR 77326, Dec. 27, 2004. These revisions included changes to 20 CFR 656.40 which governed the procedures for determining the prevailing wage. In particular, these revisions eliminated the requirement that SCA/DBA wage determinations be treated as the prevailing wage where such determinations existed. The regulation provided that use of available SCA/DBA wage rates would be only at the option of the employer.

The preamble to the PERM regulation also discussed Congress's enactment of the H–1B Visa Reform Act in the Consolidated Appropriations Act of 2005, Public Law 108–447, Div. J., Title IV, section 423, which amended section 212(p)(4) of the INA, 8 U.S.C. 1182(p)(4), relating to the H–1B visa program. This legislation mandated that the Department issue prevailing wages at four levels when the prevailing wages were based upon a government survey. The legislation mandated how the four levels were to be calculated by mathematically manipulating the existing two level wages. Section 656.40 of 20 CFR, the regulation implementing the H–1B Visa Reform Act, only specifically referenced prevailing wages established for the PERM and H–1B programs.

Soon after the enactment of the new regulations, the Department issued comprehensive guidance on prevailing wage determinations. Following the practice in place since 1984, this guidance also applied to the H–2B program. ETA Prevailing Wage Determination Policy Guidance, Non-agricultural Immigration Programs, May 2005, revised November 2009.[2] The guidance included the use of the four-tier wage structure and the elimination of the mandatory application of the SCA/DBA wage determinations.

In 2008, the Department issued the regulations that currently govern the H–2B temporary worker program. 73 FR 78020, Dec. 19, 2008 (the 2008 Final Rule). The 2008 Final Rule addressed some aspects of the 2005 prevailing wage guidance. See 20 CFR 655.10(b)(2). However, the Department did not propose or seek comments on the methodology for determining prevailing wages.

In early 2009, a lawsuit was filed challenging various aspects of the Department's H–2B procedures included in the 2008 Final Rule; among the issues raised was the use of the four-tier wage structure in the H–2B program and the optional use of SCA and DBA wages. *Comité de Apoyo a los Trabajadores Agricolas (CATA)* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa.). In its August 30, 2010 decision, the court ruled that the Department had violated the Administrative Procedure Act (APA) in failing to adequately explain its reasoning for using skill levels as part of the H–2B prevailing wage determinations, and failing to consider comments relating to the choice of appropriate data sets in deciding to rely on OES data rather than SCA and DBA in setting the prevailing wage rates. The court ordered the Department to "promulgate new rules concerning the calculation of the prevailing wage rate in the H–2B program that are in compliance with the Administrative Procedure Act no later than 120 days from the date of this order."

This rulemaking represents the Department's efforts to address both substantive and procedural concerns about prevailing wages in the H–2B program. The Department promulgated and published an NPRM in accordance with the court's order, allowing a 30-day comment period. 75 FR 61578, Oct. 5, 2010. Several commenters requested that the Department provide additional time to comment on the proposed rule; the Department requested additional time from the court and was granted until January 18, 2011, to promulgate a Final Rule. The Department, in turn, provided the public an additional 8 days for comment on the NPRM.

The NPRM proposed to eliminate the use of the four-tier wage structure for the H–2B program in favor of the mean OES wage for each occupational category. It also provided that available SCA/DBA wage determination rates for those occupations for which H–2B certification is sought, or collective bargaining agreement (CBA) wages, if such an agreement exists, would be used if they reflected higher wages than the OES wage. The NPRM also proposed to eliminate the use of employer-provided surveys in the H–2B program. After a thorough review of the comments, the Department has decided to finalize these changes.

C. Overview of Comments Received

The Department received almost 300 comments in response to the proposed rule. We have determined that 251 of these comments were completely unique, 8 were duplicates, and 39 were a form letter or based on a form letter. Commenters represented a broad range of constituencies for the H–2B program, including individual employers, worker advocacy groups, labor organizations, small business advocates, business associations, law firms, government agencies, including the Chief Counsel for the Office of Advocacy of the Small Business Association (Chief Counsel for Advocacy, SBA),[3] Members of Congress and Congressional Committees, and various interested members of the public. These comments, both supporting and opposing the proposed regulation, are discussed in greater detail below.

Some of the comments received were outside the scope of the proposed rule. The NPRM proposed a methodology for determining the prevailing wage for use in the H–2B program. Many comments went well beyond that issue, addressing matters such as comprehensive immigration reform, general immigration-related concerns, unemployment-related issues, the incorporation or continuation of special procedures in the H–2B program, enforcement, future regulatory actions, and various regulatory sections under Subpart A that are not part of this rulemaking. Comments submitted before the comment period began or after the comment period closed were not considered.

Among those comments the Department deemed out of scope were several comments received about the use of the wage methodology within the Territory of Guam. A labor certification from the Secretary is not required for H–

[2] *http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.*

[3] The comment submitted by the Chief Counsel for Advocacy, SBA reflected not only that agency's concerns but also those expressed by employers at a roundtable hosted by the SBA on October 20, 2010.

2B employment on Guam.[4] Instead, an employer seeking a foreign labor certification on Guam is required to request and receive a certification from the Governor of Guam. 8 CFR 214.2(h)(6)(iii). The Department did not propose in the NPRM to revise the certification process on Guam; therefore all comments received about Guam have been deemed out of scope.

Additionally, several commenters asserted that the Interim Regulatory Flexibility Analysis (IRFA) in the NPRM failed to consider increased payroll costs associated with the wage increases for other workers who would be paid the prevailing wage. This rule is limited to the determination of methodology for the payment of a prevailing wage to H–2B workers and U.S. workers hired in response to the H–2B required recruitment. Any extension of the requirements to pay the prevailing wage to others is outside the scope of this rule.

II. Discussion of Comments Received

A. The Significance of Setting the Prevailing Wage at the Appropriate Level

The Department's role in the H–2B temporary nonimmigrant program is to certify to DHS that: (1) there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing of the petition for the H–2B classification and at the place where the foreign worker is to perform the work; and (2) the employment of the foreign worker will not adversely impact the wages and working conditions of U.S. workers similarly employed. 20 CFR 655.1(b), 8 CFR 214.2(h)(6)(iii), and 8 CFR 214.2(h)(6)(iv). These two findings address the statutory requirement that H–2B workers be admitted only if no unemployed persons capable of performing such service or labor in this country are available. 8 U.S.C. 1101(a)(15)(h)(ii)(b).

Historically, requiring an H–2B employer to pay the prevailing wage for the locality in which the worker will be employed has been the cornerstone of the required labor market test. The Department has consistently held that payment of the prevailing wage ensures that there is no adverse effect on the wages of similarly employed U.S. workers and provides meaningful access to these job opportunities.

The Department proposed a prevailing wage methodology that will result in wages that more closely reflect the average of wages paid to similarly employed workers in the area of intended employment. In doing so, the Department ensures full compliance with the statutory intent of the H–2B program and that unemployed U.S. workers capable of performing the jobs for which H–2B workers are sought will have meaningful access to job opportunities.

Several commenters claimed that regardless of the changes the Department makes to the wage methodology used in the H–2B program, H–2B employers will not be able to find interested U.S. workers for these job opportunities. The Department's objective in this rulemaking is not to guarantee that U.S. workers will apply for these positions, but to provide a prevailing wage that does not adversely affect the wages of U.S. workers and provides them the opportunity for jobs sought by H–2B employers at competitive wages.

One commenter agreed that setting the appropriate prevailing wage for the position is central to testing the labor market. This commenter argued that U.S. workers cannot be expected to accept employment under conditions below the established minimum levels, citing examples of high unemployment rates in industries in which employers tend to hire H–2B workers, including the construction industry, as well as high unemployment rates among specific groups of vulnerable low-wage workers: Youth, Hispanics, and African Americans. The same commenter indicated that a prevailing wage rate that ensures no adverse effect on wages and working conditions of U.S. workers is needed and that an increase in hourly wages for some H–2B guest workers and U.S. workers recruited and hired as part of the labor certification process is consistent with the INA's statutory intent.

Another commenter indicated that the primary goal of any change in the wage methodology is to ensure that there are no persons in the U.S. capable of performing the advertised unskilled labor. This commenter observed that if the wages are set high enough, U.S. workers will be interested in the work, but if the wages are set too low U.S. labor will not be interested. This commenter also noted that where there are genuine labor shortages, employers would normally attract workers by offering (among other things) higher wages, which would increase wages for U.S. workers.

The Department agrees with the need to ensure there is no adverse effect by offering a wage that would be acceptable to U.S. workers. By proposing a prevailing wage methodology that will pay wages that more closely reflect the average of wages paid in any occupation, the Department creates conditions under which unemployed U.S. workers will have access to job opportunities that they would in fact seek out, rather than those in which the pay is too low. Testifying before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law in April 2008, Ross Eisenbrey, Vice President of the Economic Policy Institute, cited CPS data identified by Jin Dai and Jared Bernstein that examined labor market indicators for seven H–2B occupations that constituted the majority of H–2B employment. Annual wage data for these occupations had increased at a slower rate than has those in other occupations.[5] The testimony points to the fact that economic theory suggests that employers who experience shortages of labor compete for available labor by increasing wages; however, under the H–2B program, if positions are not filled by U.S. workers at the wage offered by the employer, the employer may sidestep this effect by petitioning the Department for permission to bring in foreign workers at that lower wage.

Some commenters questioned the appropriateness of the Department's proposal, asserting that increasing wages of H–2B and U.S. workers recruited in the program is not synonymous with protecting the wages of U.S. workers from adverse effect. The DHS regulations explicitly require that certifications be granted only if they do not result in adverse impact on the wages and working conditions of U.S. workers. Since the inception of the program, the Department has determined that the best way to fulfill its mandate to protect wages is to require employers to pay a prevailing wage. In all labor certification programs, except for the unique requirements of the H–2A program, the Department has used a prevailing wage, however defined or calculated, as a means of protecting U.S. workers against adverse effect—as the INA requires in most programs in which the Department has

[4] The Secretary of Labor is required, for certain military workforce projects, to consult with the Governor of Guam in a certification to the Secretary of Defense regarding the adequacy of recruitment of U.S. workers. Public Law 111–84, Subtitle C, 123 Stat. 2672, section 2834 (October 28, 2009). This is a separate certification from that required to be given to the employer by the Governor of Guam under 8 CFR 214.2(h)(6)(iii).

[5] H–2B Program: Hearing Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. On the Judiciary, 110th Cong. 5 (2008) (statement of Ross Eisenbrey, Vice President, Economic Policy Institute).

a role. The Department proposed no change to this longstanding approach and this Final Rule does not make any such change.

Another commenter questioned why the Department, while asserting that the current wage methodology currently results in an adverse effect on U.S. workers, continues to certify H–2B labor applications as not adversely affecting U.S. workers, when the Department clearly states its belief that it does. The Department's role in all its immigration programs is to ensure that there is no adverse effect on the wages (and working conditions) of similarly employed U.S. workers by requiring the payment of an appropriate prevailing wage. The Department's concern that the current prevailing wage methodology may not be adequate to accomplish this task, together with the court's decision, was the impetus for the development of the NPRM in which the Department provided notice of a proposed change to the methodology, and solicited comments in order to fully examine the issue and determine the most appropriate course for meeting its obligation. The Department must continue to meet its obligations under the existing regulations until such time as a new regulation is promulgated in accordance with APA requirements. Discontinuing the issuance of prevailing wage determinations would abrogate the Department's obligation to administer the H–2B labor certification program.

B. Highest of All Applicable Wages

The Department proposed that the prevailing wage would be the highest of three wage rates: The wage established under an applicable CBA; the rate established under the DBA or SCA for that occupation in the area of intended employment; and the arithmetic mean wage rate established by the OES for that occupation in the area of intended employment. Several commenters approved of this approach, noting that this methodology better protects U.S. workers and is far more likely to ensure that jobs for which employers petition for H–2B workers go unfilled by able U.S. workers because there are no such workers available, not because employers are offering wages far below the rates normally paid and expected by domestic workers in the area of intended employment. Other commenters objected to this approach, asserting that the various sources of prevailing wage rates the Department proposed to consider are not of equal validity.

The Department has concluded that the approach in the NPRM is most consistent with its responsibility under the applicable DHS regulations to grant certifications that avoid adverse effect on wages. The mandate to prevent adverse effect has existed for many years in all of the immigration programs administered by the Department and, except for the unique requirements of the H–2A program, has always been implemented by a requirement that employers offer and pay the prevailing wage. In situations where there is a SCA or DBA wage determination or collectively bargained wage rate in addition to the OES determination, it is compatible with our responsibility to avoid adverse effect to mandate that the employer pay the higher of these determinations. Such determinations are based on real wages being paid to workers in these areas for the same kind of work for which H–2B workers are sought—in other words, the labor pool of those U.S. workers the would-be H–2B employer should be seeking. By requiring the highest wage among these available, validated sources, the Department is guaranteeing that the jobs are offered to available workers at wages that do not create an adverse effect.

1. Collective Bargaining Agreements

The Department proposed retaining from the 2008 Final Rule the inclusion of a collective bargaining wage as the prevailing wage if the job opportunity is covered by an agreement that was negotiated at arms' length between the collective bargaining unit and the employer. Several commenters supported this proposal, but suggested that the Department go further and require that whenever a CBA covers workers in a particular geographic region and a specific occupational classification, the wage rate negotiated in the CBA should apply to all employers in the region who wish to hire H–2B workers in the same occupation classification, even those that are not signatory to the CBA or who have no collective bargaining unit in that occupation.

A CBA is a contractual agreement negotiated at arms' length between more or less equal parties. The provisions of a CBA reflect a negotiation process and a series of concessions between the parties to the agreement that would not apply to other parties not involved in the negotiations. The negotiation of a CBA also involves agreement on a range of issues, wages, working conditions, work rules and many others, all of which combine to lead to a complete agreement, only one of whose elements involves wages. For example, one set of negotiating parties may agree to a lower wage in return for a guarantee of job security while another set may agree to higher wages at a greater risk of job cuts. Thus, the Department is unwilling to use a collectively-bargained wage outside the workplace for which it has been negotiated unless that wage has been determined to be prevailing through the SCA, DBA, or OES wage determination process.

By contrast, another commenter objected to the use of a wage higher than a CBA wage in an employment situation in which a CBA applies, noting that where an employer is subject to a CBA, paying a wage other than the CBA scale rate may violate the terms of the agreement and have ramifications under contract and labor law. However, the Department must consistently use the prevailing wage rate under the H–2B program in order to ensure that U.S. workers have meaningful access to these positions and do not experience wage depression as a result of employers hiring foreign workers at less than prevailing wages. A CBA rate that had fallen below the minimum wage would not be valid. Similarly, a CBA rate below the prevailing wage would not be a valid wage for purposes of the H–2B program.

2. Use of SCA and DBA Wages

The Department also proposed to include consideration of the Davis-Bacon Act (DBA), 40 U.S.C. 3142 *et seq.,* or the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. 351 *et seq.,* wage rate for occupations for which wage rates have been determined under either of the two Acts for the area of intended employment. After considering numerous comments, the Department adopts this proposal in the Final Rule.

An employer association questioned the validity of SCA wage determinations, claiming that the data used for SCA wage determinations is inconsistent and that the use of Federal employee wage data invalidates SCA wage rates. Similarly, two associations representing employers expressed concerns about the methodology and accuracy of DBA surveys. The commenters cited a 1979 report from the General Accounting Office (now the Government Accountability Office, GAO), 1996 Congressional testimony from the GAO, and a 2004 report from the Department's Office of Inspector General (OIG). One commenter suggested that DBA surveys take years to be distributed, collected, calculated and completed. Two of the commenters noted that survey completion is voluntary and the results may therefore be biased. Several commenters (an individual, two employer associations, and an employer) expressed concern

that DBA wage rates are based on union wages, and therefore are not reflective of the market.

After consideration, the Department concludes that the commenters' concerns with the consistency, timeliness, and validity of SCA and DBA wage determinations are unfounded. The highly localized wages in the SCA present the best market information with which to ensure that those workers similarly employed are not being adversely affected. To help ensure reliability, SCA wage determinations are now reviewed on a yearly basis. Where a single rate is paid to a majority (50 percent or more) of the workers in a class of service employees engaged in similar work in a particular locality, that rate is determined to be prevailing. Where a single rate does not prevail, statistical measures of central tendency reflected in BLS surveys are considered when issuing SCA wage determinations. The BLS conducts two surveys that produce locality based wage data: The National Compensation Survey (NCS), which is the primary data source for SCA wage determinations, and the OES survey, which serves as either a supplement to NCS data or as the primary data source for areas or classifications not surveyed by NCS. *See* 29 CFR 4.50–51.

The NCS is conducted by personal visit. Consideration is paid to supplemental sources, such as the General Schedule locality pay schedules, Non-Appropriated Fund (NAF) surveys, surveys conducted by states, and the Federal Wage System Schedules for the comparable geographic area, which indicates what Federal employees would be paid if they worked in the SCA contract work positions. *See* 29 CFR 4.50. While the Department rarely consults these Federal employee pay systems in determining H–2B wage rates, the use of these data, contrary to the commenter's claims, would likely not inflate wage rates: March 2009 NCS data reported by BLS and used by the Federal Office of Personnel Management and the Federal Salary Council showed that Federal employees make an average of 22 percent less than their counterparts in the private sector.[6]

Prevailing wages under the DBA are established for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision (usually a county) of the State in which the work is to be performed. 40 U.S.C. 3142(b). Department regulations establish that the prevailing wage is the wage paid to the majority (greater than 50 percent) of the workers in the classification on similar projects in the area during the relevant period. 29 CFR 1.2(a)(1). If the same wage is not paid to a majority of workers in the classification, then the prevailing wage is the weighted average of the wage rates paid to workers in that classification.

The prevailing wage rates found in the WHD Administrator's determinations are based on survey data derived from the information that responding contractors and other interested parties provide. 29 CFR1.1–1.7. The wage surveys collect information from all interested parties including unions, contractors, and associations. If insufficient wage data is received for a particular county, then the calculation will be expanded to a group of surrounding counties.

The reports relied on by commenters who expressed concern about the accuracy of DBA wages are more than 6 years old and not reflective of the current status of the wage determinations. The Department has successfully implemented significant improvements to the DBA wage determination process in the last 7 years. As noted in the preamble to the proposed rule, WHD's DBA survey program has undergone a significant re-engineering effort, resulting in a greatly improved and timely prevailing wage rate determination process. By working with the Census Bureau at the U.S. Department of Commerce, the Department has successfully expedited the overall survey process. The Census Bureau now mails the data collection forms to employers and other interested parties and, upon their return, scans the completed form and loads the data into the electronic survey database. Additionally, the Department has significantly improved its timeframe for reviewing submitted survey data. As a result of these and other improvements, the Department recently published a statewide survey in less than 18 months. The Department anticipates that this will be the norm for future surveys. To increase survey participation and improve the accuracy of published survey data, the Department has developed newly enhanced post-collection activity, including more follow-up phone calls and on-site clarification and verification reviews.

The surveys used to determine DBA wage rates are sent to all relevant employers within the locality as well as to all other interested parties, including labor organizations, contractors, and employers associations. No one source of wage data is determinative. The Department notes that while the DBA survey, like every other wage survey, is voluntary, and there is no statutory requirement that employers or labor organizations submit their wage data, the Department actively encourages participation; however, there is no statutory requirement that employers or labor organizations must submit their wage data. In order to mitigate any potential bias, the Department has taken and continues to take actions to improve completion rates, get the most representative sample possible, and ensure the accuracy of this data. First, it has expanded community outreach efforts and held additional public conferences. These efforts help responders to better understand the survey process and to appreciate the importance of survey participation. Additionally, an on-line response tool has been introduced, giving recipients the opportunity to submit data electronically. The Department has also engaged an outside contractor to randomly audit responses to improve accuracy and further mitigate any bias. In the rare event of misrepresentation in a survey response, fines and imprisonment can be pursued. Finally, the Department identifies the most fair and appropriate geographical statistical areas by relying on Census jurisdictions and OMB-defined Metropolitan Statistical Areas (MSAs). The Department believes these measures ensure that the DBA wages are reflective of the labor market.

In calculating DBA wage rates, WHD follows several important and well-established policies. First, in order for a classification and rate to prevail, the minimum craft sufficiency standard must be met. Long-standing WHD procedures provide that wage data for a particular classification generally must be received for at least three workers employed by two contractors in order for a wage rate to be published for a classification. Second, in compiling data for building and residential wage determinations, WHD cannot use data from Federal or federally-assisted projects "unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data." 29 CFR 1.3(d). Third, the county is the appropriate geographic unit for data collection, although data may be derived from groups of counties in some situations, as described below. 29 CFR 1.7(a), (b). Finally, data received from metropolitan and rural counties cannot be combined. 29 CFR 1.7(b).

[6] "Annual Report of the President's Pay Agent", December 7, 2009. *http://www.opm.gov/oca/payagent/2009/2009PayAgentReport.pdf.*

In accordance with these principles, WHD first attempts to calculate a prevailing wage based on private project survey data at the county level. *See Mistick Construction,* ARB No. 04–051, slip op. at 3 (Mar. 31, 2006). If there is insufficient private survey data for a particular county, then WHD considers any available survey data from Federal projects. If the combined Federal and non-federal survey data received from a particular county is still insufficient to establish a prevailing wage rate for a classification, then data from surrounding counties may be used, provided that data from metropolitan and rural counties are not combined. See 29 CFR 1.7(b); see also *Mistick Construction,* ARB No. 04–051, slip op. at 3 (Mar. 31, 2006).

In considering survey data from surrounding counties, WHD first expands its calculation from the county alone to a group of counties. For metropolitan counties, WHD expands the county data to all of the other counties located in the same MSA, as determined by OMB. If private survey data from the established county group is still insufficient, then WHD will include Federal project data from all counties in the group. Rural county groups, which are defined by WHD, are made up of contiguous non-metropolitan counties with similar wage patterns.

OMB states that the "general concept of a metropolitan statistical area is that of an area containing a large population nucleus and adjacent communities that have a high degree of integration with that nucleus." 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 FR 37,246, Jun. 28, 2010. The purpose of establishing MSAs is to provide "a nationally consistent set of delineations for collecting, tabulating, and publishing Federal statistics for geographic areas." Id. OMB publishes and maintains official MSA lists, based primarily on decennial Census data.

WHD strictly relies upon OMB's MSA determinations in deciding which surrounding counties constitute a metro county "group" for DBA purposes, and WHD therefore does not reconfigure MSA groups. By using objective and well-established county group designations set by OMB, WHD avoids injecting bias and uncertainty into its wage determination process.

If both private and Federal data for an established county group are still insufficient to determine a prevailing wage rate, then WHD may expand to a "supergroup" of counties (either rural or metropolitan) or even to the statewide level; the expansion stops when sufficiently standard data have been attained for the craft. WHD only expands data to these levels, however, for classifications that have been designated as "key" crafts. A list of "key" crafts can be found in WHD's Prevailing Wage Resource Book. See U.S. Department of Labor, Prevailing Wage Resource Book (July 2009), Davis-Bacon Surveys (Tab 12) at 3, available at *http://www.dol.gov/whd/recovery/pwrb/toc.htm.* For non-key crafts, data are not expanded beyond the county group level.

One employer argued that using DBA wage rates would bypass the requirements of the National Labor Relations Act (NLRA). A DBA prevailing wage determination represents an accurate prevailing wage rate available for similar workers in a particular area of employment. Where a collectively-bargained wage rate prevails in a classification on similar projects in the area during the relevant period, then and only then is the resulting DBA prevailing wage the collectively-bargained wage rate. This does not, however, subject an employer to the collective bargaining agreement upon which the underlying wage rate is based. Rather, the rate is interpreted as a reflection of the prevailing wage in the area of employment.

Several commenters suggested that the Department consider SCA and DBA rates in its prevailing wage determinations only when the applicant's H–2B workers would work on projects subject to the SCA or DBA. SCA and DBA wage rates provide a reliable prevailing wage for certain occupations within specific localities. The commenters' concerns that an SCA or DBA wage is a "government wage" are unfounded: the resulting wage closely approximates the prevailing wage for a particular occupation within a particular locality. Since SCA and DBA calculations incorporate workers and projects outside of government contracts, these rates are an appropriate source of prevailing wages.

Some commenters requested that the SCA and DBA wage determinations not be consulted as prevailing wage sources for any occupations not covered by the SCA and DBA surveys. As indicated above, when determining prevailing wages, the Department will not consider either source unless it includes data appropriate for the actual tasks, duties, and activities the worker will perform in the area of intended employment, as described by the employer in the H–2B application.

Similarly, a number of landscaping employers commented that the proposed wage sources (SCA, DBA, and OES) generalize the prevailing wage determination process and do not consider particular job classifications in areas of intended employment. However, the SCA, DBA, and OES wage rates are specific to occupations and areas of intended employment. National Prevailing Wage Center (NPWC) staff will match the job duties listed on the *Application for Prevailing Wage Determination* with the appropriate occupational definition contained in the O*Net Occupational Outlook Handbook, the SCA Dictionary of Occupations, or specific Davis-Bacon wage determinations. Only if an appropriate match can be made will the source be considered in determining the H–2B prevailing wage.

Several submissions from various commenters noted that two different agencies within the Department collect wage data: BLS publishes OES, among other wage surveys, while WHD publishes SCA and DBA prevailing wage rates. Two of these commenters recommended that the Department consolidate wage calculations into fewer surveys, while others recommended that the Department give all of the responsibility for wage determinations to a single agency. The Department believes that OES survey data is distinct enough from SCA wage determinations and DBA surveys that all three should be retained, and that all are appropriate for use in the H–2B program. OES data encompasses occupations outside the scope of the SCA and DBA, while in certain instances the nature of government-contracted service work and construction projects requires SCA and DBA determinations to take into account more detailed information about how the work is performed (*e.g.,* DBA wage rates reflect the work performed by various crafts determined by area practice).

Two employer associations and two employers commented that any increase in H–2B wage rates would be arbitrary. One commenter elaborated, explaining that because the methodologies used to produce the SCA, DBA, and OES wage rates and data are different, none can be truly accurate. As explained above, the SCA, DBA, and OES methodologies use the best information available to establish prevailing wage rates for specialized occupations within specific occupational categories. OES data has been used historically as the basis for prevailing wage determinations in the H–2B and other DOL immigration programs, while SCA and DBA rates were used in the H–2B program before 2005. Furthermore, the three wage rates are not fundamentally different: all are derived from employer survey data.

A few commenters believed incorrectly that the Department's use of SCA and DBA wage rates would require employers to provide fringe benefits or to pay workers the cash equivalent of such benefits. The Acts require contractors performing service or construction work, respectively, on covered Federal contracts to furnish, in addition to the prevailing hourly rate of pay, fringe benefits found prevailing in the locality (or the cash equivalent thereof).[7] SCA and DBA wage determinations reflect two figures—wages and benefits. For purposes of the H–2B program, however, the SCA or DBA prevailing wage is only the wage component of the wage determination. This Final Rule therefore does not require the payment of fringe benefits; such benefits would, however, otherwise be required if the employer's work involves a contract which is covered by one of the Acts.

Numerous commenters urged the Department to include fringe benefits in all H–2B prevailing wage determinations. These commenters assert that not including fringe benefits would "give employers an incentive to hire H–2B workers instead of U.S. workers" in order to avoid additional labor costs, and would thus undermine the requirement that H–2B visas be issued only if no qualified U.S. workers are available. The Department recognizes these commenters' concerns, particularly for H–2B positions that have been certified at an SCA or DBA wage rate. However, the Department historically has not required the payment of fringe benefits to H–2B workers, even before 2005, when SCA and DBA wage rates were mandatory for occupations where such wage determinations existed. See 75 FR 61578, 61579 (Oct. 5, 2010) ("Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program" Proposed Rule). In addition, no data exists to allow adequate computation and monetization of fringe benefits over all the occupations and locations covered by the H–2B program. Therefore, given the Department's historical practice, and given that the Department cannot currently fully estimate the economic impact of requiring fringe benefits for H–2B positions, the Department will not require fringe benefit payments to H–2B workers, regardless of the source of the prevailing wage.[8]

3. The Elimination of the Four-tier Wage Structure

In the NPRM, the Department proposed to eliminate the use of the four-tier wage structure and implement a single prevailing wage rate based on the arithmetic mean of the OES wage data for the job classification in the area of intended employment. The NPRM cited a number of reasons why the four tiers did not establish an adequate prevailing wage. After thorough consideration of the public comments, the Department has decided that the proposed elimination of the use of the four-tier wage structure is appropriate.

The Department continues to believe that the OES wage data is an appropriate wage data available in the absence of a higher CBA, SCA, or DBA wage. The OES wage survey is among the largest continuous statistical survey programs of the Federal Government. BLS produces the survey materials and selects the nonfarm establishments to be surveyed using the list of establishments maintained by State Workforce Agencies (SWAs) for unemployment insurance purposes. The OES collects data from over 1 million establishments. Salary levels based on geographic areas are available at the national and State levels and for certain territories in which statistical validity can be ascertained, including the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Salary information is also made available at the metropolitan and nonmetropolitan area levels within a State. Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Base rate, cost-of-living allowances, guaranteed pay, hazardous duty pay, incentive pay including commissions and production bonuses, tips, and on-call pay are included. The features described above are unique to the OES survey, which is a comprehensive, statistically valid, and useable wage reference, and it is for these reasons that the survey is also used in other foreign labor certification programs administered by the Department, including the H–1B and PERM programs. The frequency and precision of the data collected, as well as the comprehensive nature of the occupations for which such data is collected, make it an appropriate data source for determining applicable wages across the range of occupations found in the H–2B program.

a. The Four-Tier Wage Structure is Not Suitable for Unskilled Jobs

The Department received a number of comments in support of its proposal to eliminate the four-tier wage structure. Three Congressional commenters supported the proposal. One indicated that the four-tier wage structure is inappropriate for the H–2B program because the program involves relatively low-skilled occupations with few differences in skill or experience. Another commenter, a Congressional subcommittee, indicated that the structure is contrary to the Department's obligation to ensure that H–2B employers offer wages that do not adversely affect the wages of the U.S. workforce. The third Congressional commenter argued that a tiered wage structure in the H–2B program undercuts Congressional intent to protect the wages of both U.S. and foreign workers.

Additional commenters supported the Department's decision to eliminate wage tiers, noting that the use of skill level wages in low-skill H–2B jobs causes an adverse effect because all workers in those job categories perform the same job duties and, in the commenters' view, compete with one another for job openings, regardless of their cumulative experience levels. One commenter noted that even if experience in the job normally results in a higher wage level, the current methodology permits employers to pay the H–2B workers entry-level wages, thus placing U.S. workers seeking the same job openings at a disadvantage because their experience is not compensated.

The Department also received a number of comments opposing the elimination of the four-tier wage structure; numerous commenters, including the Chief Counsel for Advocacy, SBA, offered arguments that wage tiers appropriately reflect the level of skill, education, experience and other requirements of the job. Several commenters opposed the elimination of the four-tier wage structure on the grounds that the skill levels allow employers to differentiate between employees based on their skills and level of experience. Some of these commenters expressed concern that the change to the arithmetic mean for all H–2B wages would result in an inappropriate averaging of the wages of entry-level and more experienced workers. Other commenters asserted that the use of a single wage would inflate the prevailing wages of entry-level workers and deflate prevailing wages of highly-experienced workers because it would fail to take into

[7] Section 2(a)(2) of the McNamara O'Hara Service Contract Act, 41 U.S.C. 351(a)(2); 40 U.S.C. 3141(2)(B).

[8] For projects covered by DBA or SCA, employers are responsible for paying fringe benefits as required by those laws regardless of whether the workers are domestic or H–2B workers.

consideration wage differentiation factors such as supervisory duties, responsibilities, and seniority/tenure or experience, particularly for skilled positions in certain industries. One commenter indicated that the wage determination methodology would average in wages for higher skilled workers, and therefore contradicts the intent for establishing the H–2B program as one for the recruitment of unskilled workers.

A few commenters argued against the elimination of skill levels, and presented an alternative in which employers could craft job descriptions in such a way as to couple the higher arithmetic mean-based wage with a requirement for more experience.[9] Several commenters expressed concern that the Department's proposal does not specify that employers will be able to increase their experience requirements as a result of the increased wages and requested that if the Department uses the OES arithmetic mean, H–2B employer-applicants should be allowed to specify the minimum experience requirements that are associated with the new wage.

One commenter argued that the skills in the H–2B program may not be a matter of educational degrees or detailed training, but rather properly and efficiently performing the job. This commenter asserted that employers typically reward H–2B workers with higher wages and benefits based on job performance, and that raising the wages in the program to the mean would eliminate the employer's ability to properly manage and reward those employees.

Other commenters indicated that the elimination of the four-tier wage structure will not maintain fair wage calculations to ensure U.S. workers are not adversely affected by the employment of H–2B workers because the current system ensures unskilled and skilled workers have access to H–2B job positions according to their level of experience, education, and supervision required to perform the job duties. One of these commenters further claimed that because many H–2B workers are in low-skilled or unskilled positions, wage rates from a lower tier should correlate with lower skills and be close to the appropriate wage such that H–2B workers earn wages at similar levels as the wages of domestic workers.

Several commenters representing the ski industry conceded that although not all positions in their industry reflect skill levels, their industry is unique in that certain positions, particularly those for ski and snowboard instructors, require certification and/or accreditation which reflects specific levels of skill and experience consistent with those established for the industry nationally and internationally. These commenters indicated that establishing a prevailing wage rate based on a single overall arithmetic mean fails to account for skill progressions required of the ski instructor positions. In addition, one commenter in the construction industry associated the wage tiers with important skills and knowledge pertaining to safety requirements and programs, noting that Level II and Level III workers are necessary to maintain workers' safety.

As discussed elsewhere in this Final Rule, the Department's obligation to administer the H–2B program requires that the prevailing wage which is offered and paid in the program reflect the minimum requirements of the position. This requirement reflects the Department's obligations to avoid adverse effect on the wages of workers and enable meaningful access to job opportunities for U.S. workers. Because the Department has determined that the majority of H–2B jobs reflect no or few skill differentials, the appropriate prevailing wage an employer must offer and pay, absent a higher CBA, SCA, or DBA wage, is the arithmetic mean of the OES wage data of workers who are similarly employed in the area of intended employment. Where an employer's job opportunity requires skills beyond those minimally required for the position (which may include but are not limited to additional certifications based on experience, or safety accreditations), the employer is at liberty to offer and pay to its workers in excess of the prevailing wage to account for the additional skills or experience which the employer requires.

One commenter noted that the assumption that H–2B workers fill the lower skilled and lower paid positions and that the higher skilled and higher paid positions are taken by U.S. workers leads to a conclusion that no adverse effect exists because the H–2B workforce simply fills a predictable labor shortage permitting U.S workers to consistently fill higher skilled complementary positions.

As discussed in the NPRM, the Department has found that almost all jobs for which employers seek H–2B workers require little, if any, skill—an assertion with which few commenters disagreed. H–2B disclosure data from Fiscal Year (FY) 2007 to 2009 demonstrates that most of the jobs included in the top five industries for which the greatest annual numbers of H–2B workers were certified—construction; amusement, gambling and recreation; landscaping services; janitorial services; and food services and drinking places—require minimal skill to perform, according to every standardized source available to the Department, such as the SOC, O*NET and the Occupational Outlook Handbook. These jobs include, but are not limited to, landscaper laborer, housekeeping cleaner, construction worker, forestry worker, and amusement park worker, which make up the majority of occupations certified in those years, all of which require less than 2 years of experience to perform, if that.[10] This prevalence of job opportunities in low-skilled categories is generally reflected in the H–2B employer applications. These jobs have typically resulted in a Level I wage determination, which is lower than the average wage paid to similarly employed workers in job classifications in non-H–2B jobs.

Under the Department's 2005 Prevailing Wage Guidance, the determination of an appropriate wage level is dependent upon the duties and requirements of the job opportunity as described by the employer on the "Application for Prevailing Wage Determination," ETA Form 9141. The Department applies a standard analysis of the job position (found in the 2005 Prevailing Wage Guidance) to determine the appropriate wage level. In doing so, the Department compares the employer's job requirements with those typical of the job classification. A Level I[11] wage is based on a determination that the job position described by the employer does not deviate, or only minimally deviates, from the typical

[9] The Chief Counsel for Advocacy, SBA's comment reflected the suggestion of several businesses on this alternative.

[10] The Executive Order (E.O.) 12866 analysis below analyzes FY 2007 through 2009 disclosure data that reflects the numbers of jobs certified in these occupations; the top five industries for which the average annual number of H–2B workers were certified are Construction—30,242; Amusement, Gambling, and Recreation—14,041; Landscaping Services—78,027; Janitorial Services—30,902; and Food Services and Drinking Places—22,948.

[11] Level I wage rates under the Prevailing Wage Guidance are typically assigned to job offers for beginning level employees who have a basic understanding of the occupation. These employees perform routine tasks that require limited, if any exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. See *http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.*

minimum requirements of the corresponding SOC-based job classification contained in O*NET, including the specific Job Zone. A Job Zone reference indicates the level of skill, education, experience and/or preparation typically required to perform the job, and ranges from one (for which little or no preparation is needed) to five (in which extensive education, training, and preparation are required to adequately perform the job duties at the entry-level). For example, one of the most requested H–2B job classifications, landscaping and groundskeeping worker, is classified as falling within O*NET Job Zone One.[12] All of the other frequently represented positions in the program: janitors and cleaners, housekeepers, construction laborers, and amusement and recreation attendants, also are categorized within Job Zone One.

The notion that the four wage tiers have a meaningful relationship to skill, as expressed by many commenters including the Chief Counsel for Advocacy, SBA, represents a misunderstanding of the way in which the Department calculates the four tiers. The Department does not collect data associated with skill levels, but instead collects data across the job spectrum. The Department approximates skill levels from that generalized data, not because the data can be disaggregated by skill level, but because it is required to assign a value to four skill levels, in accordance with the formula set forth at section 212(p)(4) of the INA. The formula is artificial, designed to approximate arbitrary skill levels and has a skewing effect when applied to the wage rates applicable to typical H–2B jobs, in which there are fewer skill differentials. The four wage levels currently used by the Department are calculated by applying a statutory mathematical formula to the wage distribution corresponding to a particular occupational classification in the area of intended employment. The Level I wage is established by taking the arithmetic mean of the bottom one-third of the wage distribution; the Level IV wage rate is determined by establishing the arithmetic mean of the top two-thirds of the wage distribution; the Level II and Level III wages are derived from a formula established by section 212(p)(4) of the INA which provides for the reconstitution of two-level Government surveys and creation of two intermediate levels by dividing by the number three the difference between the initial two levels and adding the quotient to the first level to create Level II, and subtracting that quotient from the second level to create Level III.

Thus, there is no correlation in the four-tier wage structure between the skill level required to perform a job and the wage attached to it. An employer can pay a higher wage for many reasons other than skill level. The lack of a meaningful nexus between the skill level and the compensation is significant where applied to the wage rates assigned to typical H–2B jobs in which there are fewer skill differences, because in most cases, a basic skill set is all that is required to adequately perform these jobs. The range of wages reported in these low-skilled occupations represents the range of pay in the occupation, not the range of pay for skills associated with the job opportunity.

These comments did not identify any significant data or analysis that undermines the essential component of the analysis contained in the NPRM: that there are no significant skill-based wage differences in the occupations that predominate in the H–2B program, and to the extent such differences might exist, those differences are not captured by the existing four-tier wage structure. No commenter directly addressed the Department's concerns about these deficiencies in the existing methodology. No commenter challenged the fact that the OES survey does not collect information about the skills or responsibilities of the workers whose wages are included in the survey. No commenter offered any analytical or empirical support for the notion that the mean of the lowest one-third of the workers in the survey somehow reflects the entry-level wage, nor offered an alternative to the OES wage methodology that might better reflect the purported differences in skills within an occupation. While skill-based wage differences may exist in these occupations, there is insufficient evidence to justify any judgment about what that wage rate should be within a particular occupational code, and it is more appropriate for the employer to select a different occupational code that is more suitable for the level of skills and responsibilities required for the position. In the absence of reliable information that would permit the Department to make and quantify such a judgment, our responsibility to avoid adverse effect mandates that the average of the OES wage for that occupation be considered in determining the prevailing wage for the occupation for which workers are sought. Again, as noted above, this does not prevent employers from offering higher wages if necessary to attract appropriate applicants.

Even with the elimination of the four-tier wage structure from the H–2B program, employers would still be able to obtain wage determinations that account for differences in skill. The SOC classification system generally groups job classifications into larger categories encompassing related positions; for example, it recognizes entry-level positions such as the landscaping and groundskeeping workers, as well as positions requiring additional skills or experience such as first-line supervisors/managers of landscaping, lawn service, and groundskeeping workers. The latter are classified as Job Zone Two and contain different and/or additional job duties and requirements, which, if selected by the employer, yield a prevailing wage that is higher than that for the low-skilled worker in the same broader SOC category. The variety of SOC job classifications reflecting different kinds and levels of skills ensures that the employer has the latitude to select a different SOC code for the Department's consideration to reflect a position which requires additional skills and experience, and which permits the employer to adequately compensate for those additional skills and experience.

Therefore, the Department disagrees with some commenters' assertions that raising the OES base wage to the mean necessarily means having to increase job requirements or otherwise justify that increase with additional skills. The jobs themselves are written to incorporate the basic skills at entry. Use of the arithmetic mean in determining the prevailing wage simply recognizes that those who are performing the tasks of the job at Level I are performing the same tasks at Level III, with the distinction between the wages for the two levels not being based on a differential in skills.

If an employer chooses to increase its requirements for the position, it should consider classifying the occupation under an SOC code that more closely approximates the requirements and duties of the job; otherwise, the employer will need to justify the higher requirements as a business necessity. Additionally, nothing in this rule prevents an employer from paying a wage higher than the prevailing wage to a worker who possesses skills, licenses, certifications, etc. above those listed in its H–2B application. Employers who cannot use a different O*NET/OES category remain free to offer a wage higher than the established prevailing wage if they desire to do so. Employers

[12] For a full description of this job classification, see: *http://online.onetcenter.org/link/summary/37–3011.00.*

are also at liberty to specify experience or other requirements consistent with the long-standing program requirement that job qualification must be normal to the occupation, or are otherwise justified by business necessity. This rule does not prevent monetary rewards for those employees who have earned them through experience, skill acquisition, or even employer loyalty. Nothing in this Final Rule suggests nor should be construed to prevent the employer from paying its workers, U.S. and H–2B, more than the required prevailing wage.

Some commenters indicated that particular industries, such as forestry, will fare poorly based on a change to a mean-based OES wage rate. These commenters contended that their job classifications contain numerous occupations that range from low-skilled to professional-skilled work. Their concern is that obtaining a mean-based wage in these classifications will produce a prevailing wage that exceeds the level for a low-skilled job under these classifications.

The Department believes this concern to be misplaced given the way jobs are classified in OES. Each job family in O*NET, and by extension in the OES, contains numerous levels of jobs. That comprehensiveness is one of the reasons the Department has successfully used the OES for over a decade for this purpose. A general forest conservation worker is categorized separately from a forest conservation technician, allowing for two separate levels of compensation, each appropriate to the work being performed. Again, an employer has the opportunity in filing for the prevailing wage determination to select the occupational code it believes most appropriate. That selection is reviewed against the actual job description provided by the employer, and the Department's final determination rests on the actual tasks, duties and activities in which the employer describes the worker as engaging.

The purpose of establishing the prevailing wage is to establish the minimum wage that avoids adverse effect, considering the actual requirements of the position for which H–2B certification is being sought. It is not to ensure that H–2B workers or workers whose experience or skills exceed those of the position receive premium pay for having more in the way of skills, knowledge, or experience than what the position actually requires. The Department, by this Final Rule, is only setting the floor against which compensation for the basic occupation for which an employer seeks H–2B workers is to be measured, in accordance with its obligations under the H–2B program.

b. Section 212(p)(4) of the INA Does Not Impose a Four-tier Wage Structure on the H–2B Program

Several commenters opposed the Department's proposal to eliminate the four-tier wage structure, indicating that the use of a tiered prevailing wage system was supported by the regulatory history of the program. Other commenters, however, noted that the use of skill levels is illogical given the reasoning behind the implementation of the four-tier wage structure in the H–1B program.

The Department disagrees with the comment that suggests that the use of the four-tier wage structure is legally mandated. That contention was discussed and rejected by the district court in *CATA* v. *Solis,* 2010 WL 3431761 at *19. fn. 22 ("[A]ny appeal to § 1182(p)(4) would not constitute a rational explanation for using skill levels in determining H–2B prevailing wage rates"). The Department's analysis in the NPRM and in this Final Rule reaches the same conclusion. While the Department had, for reasons of consistency and administrative efficiency, treated the application of skill levels in the H–2B, H–1B and PERM programs in the same manner, continuing a system that leads to the payment of wages below prevailing is contrary to the Department's regulatory mandate to ensure against adverse effect. The application of tiers to the H–2B program has no rational basis beyond the efficiency served by having one methodology for all foreign labor certification programs. The H–2B program is obviously distinguishable from the H–1B program that was the focus of the Consolidated Appropriations Act of 2005 (Pub. L. 108–447). The H–1B program is specifically designed to address the needs of employers of high-skilled, temporary workers and requires distinguishing among varying levels of skill by the nature of the kinds of jobs that it covers. Those jobs require theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in a specific specialty or its equivalent. As a result, the H–1B program reflects a wide range of experience, skills, and knowledge which appropriately correspond to stratified wage levels. The history of the H–2B program, by contrast, indicates that it grew out of its agricultural predecessor, the Bracero program, as a companion for employers requiring assistance with low-skilled non-agricultural work. Although the Department recognizes that not all positions requested through the H–2B program are for low-skilled labor, the program is still overwhelmingly used for work requiring lesser skilled workers—those occupations that require at most 2 years, and in most cases much less than 2 years, of education, training, or experience to perform the job duties, tasks, and activities. As discussed above, there is no justification for stratifying wage levels to artificially create wage-based skill levels when in fact there is no great difference in skill levels with which to stratify the job.

c. Elimination of the Four-tier Wage Structure in the H–2A Program

In proposing the elimination of the four-tier wage structure in favor of a single arithmetic mean wage, the Department noted that it had previously taken similar action in the H–2A program. One commenter disagreed with the Department's reasoning behind the elimination of the four-tier wage structure arguing that the H–2A and H–2B programs are different and suggested that the Department continue to treat the H–2B program as distinct. Another commenter asserted that the Department's rationale for the elimination of the four-tier wage structure in the H–2A program was based on the concern that the OES data is inaccurate and not concern over adverse effect.

The H–2A and H–2B temporary programs are similar in that they both involve largely low-skilled occupations where skill-based wage differences do not appear to exist to any significant degree and to the extent they do exist, the differences are not reflected in the OES survey data. The Department especially limited its rationale to eliminating OES in the H–2A program to the inappropriateness of the OES in light of a more appropriate wage source (*e.g.,* the Farm Labor Survey). No similar data source exists for the range of jobs in the H–2B program. Thus, the Department has adopted the OES as the best data source available for the H–2B program, absent an applicable CBA, SCA, or DBA wage rate. The lack of skill-based wage differences is a sufficient basis to support the determination that the four-tier wage structure should no longer be used in either program.

d. Other Issues Related to Four-tier Wage Structure

A number of commenters, including the Chief Counsel for Advocacy, SBA, argued that the ruling in *CATA* v. *Solis* did not identify anything inherently

wrong with the four skill levels as used in the current procedure. Several commenters asserted that the Department misconstrued the court's ruling and went well beyond the focus of the order. At least one commenter accused the Department of using the *CATA* v. *Solis* decision to promote an agenda to raise wages and to prevent employers from using the H–2B program.

These comments misconstrue our references to the *CATA* v. *Solis* ruling and demonstrate a misunderstanding of the Department's obligation to administer the H–2B program. The court's ruling in *CATA* v. *Solis* affected only the timing of the NPRM, not its content. The Department announced in the Fall 2009 Semiannual Regulatory Agenda its intention to propose a re-examination of the H–2B program. A review of the H–2B wage system was identified as part of that re-examination. The court's conclusions about the legal necessity for the four-tier system parallel the tentative conclusions that the Department had already reached in its review.

The *CATA* v. *Solis* court's reasoning parallels the Department's approach in some significant areas. The *CATA* v. *Solis* court's principal concern about the four-tier wage structure was the fact that the Department had never published an explanation as to why the two-tier system, and later the four-tier wage structure, that were used in the PERM and H–1B programs were also adopted for use in the H–2B program. The court's critique was largely correct, and this rulemaking is designed to provide the notice and comment process that was previously lacking.

The commenters who observed that the *CATA* v. *Solis* court ordered the Department to simply "show its work" overlook the court's clear disapproval of the use of the four-tier wage structure now used in the H–2B program. The Department based its methodology for the PERM, H–1B, and by extension, the H–2B programs, on the requirements now found in the INA at 8 U.S.C. 1184(p)(4). The Court found that any such reliance on this statutory provision, developed for the use of the H–1B visa program, would be irrational and not an appropriate foundation for the use of skill levels in determining H–2B prevailing wage rates. See *CATA* v. *Solis,* 2010 WL 3431761, at *19 fn. 22. As explained in greater detail above, the Department believes that the use of skill levels in the H–2B program is inappropriate given the job duties, tasks, and experience required to perform them.

C. The Arithmetic Mean Wage Rate Established by the OES Wage Survey Is the Most Appropriate Basis for Calculating the OES Component of the Prevailing Wage Rate

The Department proposed to require that the arithmetic mean of the OES wage rates be the basis for determining the OES component of the prevailing wage rate in the H–2B program as the most effective available method for determining the prevailing wage. To determine the new wage calculation, the Department proposed to use the published arithmetic mean established by the BLS when compiling the OES survey. This mean is the average of all the survey's wages in the occupation. It will produce a wage rate that is at a point between the current Level II and III wages.

Several commenters, including the Chief Counsel for Advocacy, SBA, espousing the importance of the H–2B program to U.S. employers engaged in seasonal business, as well as its importance to both H–2B and U.S. workers, contended that selecting the arithmetic mean as a prevailing wage will result in increased H–2B wages, which will have a negative effect on employers for several reasons. The commenters first noted that some employers will not be able to afford to pay increased H–2B wages, which will be particularly problematic for small companies or those operating at marginal income levels. Commenters argue that this outcome favors larger companies that have greater economic ability to absorb an increase in wages, therefore, driving smaller companies out of business. Commenters, including the comments presented at the SBA-sponsored roundtable (reflected in the Chief Counsel for Advocacy, SBA comment), also asserted that smaller employers may cease to operate if they are unable to pay the increased costs in H–2B wages, especially when such companies are faced with an extreme shortfall of available U.S. workers. Furthermore, some commenters asserted that the costs to employers resulting from the increase in wages will have an overreaching effect on their profitability and were concerned that the disappearance of small and marginal companies may have a resulting negative effect on U.S. workers who may lose their jobs as a result of a shut-down of such companies.

Additionally, several commenters argued the Department did not take into account contracts employers have already put in place for the coming year; contracts that already established a set pricing for services. Employers participating in the H–2B program have always been required to meet the conditions of the labor certification, which include the payment of a valid prevailing wage. The fact that a new wage methodology may result in wages in excess of anticipated labor costs does not minimize the Department's obligation. However, even though the NPRM provided current and future users of the H–2B program with some indication of what the Final Rule would require, we recognize that many employers already may have planned for their labor needs and operations for this year in reliance on the existing prevailing wage methodology. In order to provide employers with sufficient time to plan for their labor needs for the next year and to minimize the disruption to their operations, the Department is delaying implementation of this Final Rule so that the prevailing wage methodology set forth in this Rule applies only to wages paid for work performed on or after January 1, 2012. The Final Rule will be effective in its entirety on January 1, 2012.

This is a final rule, without a phase-in period. We, however, welcome information from the public on the feasibility, and implementation of phasing in the new prevailing wages. The Department recognizes that rapid wage increases may create burdens for employers that choose to participate in the H–2B program, while also providing potentially higher wages for U.S. and H–2B workers hired under the program. Comments should address:

1. Is a phase-in desirable?
2. What would the impact be of a phase-in of the prevailing wage methodology on employers and workers?
3. Over what period and at what levels should any phase-in be implemented that would be consistent with the Department's obligation under this program?

While the Department recognizes the concerns of many commenters, it believes its responsibility to set the prevailing wage is most effectively fulfilled without regard to the size or economic state of the employer. No such qualifier is present in the relevant DHS H–2B regulations or statute. That decision cannot ultimately be influenced by the impact that requiring payment of the prevailing wage will have on any one individual employer. As the Court of Appeals for the First Circuit noted in one of the earliest cases examining the Department's responsibilities under the predecessor H–2 program, "[t]o recognize a legal right to use alien workers upon a showing of business justification would

be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible." *Elton Orchards* v. *Brennan,* 508 F. 2d 493, 500 (1st Cir. 1974). Contrary to one commenter's claim, the Department's decision to require that the arithmetic mean of the OES wage rate as the basis for determining the OES component of the prevailing wage rate is not arbitrary, but a deliberate acknowledgment that the levels currently provided to employers for use in the program are too low when weighed against the data on wages which are currently paid in those occupations for the same jobs. Our responsibility to set wage rates that avoid adverse effect on wages compels us to look to the OES arithmetic mean as an appropriate wage-setting tool, along with the CBA, SCA, and DBA.[13] As discussed earlier, the Department believes the arithmetic mean is far closer to the actual wage being paid in these same occupations and more closely approximates the prevailing wage which must be paid in order to avoid adverse effect.

D. Evidence of Negative Effects on Wages

The Department received a number of comments providing a variety of data and research attempting to refute the concept of wage depression resulting from the prevalence of low wages in the H–2B program. Additionally, several commenters, including the Chief Counsel for Advocacy, SBA, faulted the Department for not providing data and/or studies as empirical support for eliminating the four-tier wage structure. Still others claimed that H–2B workers are already paid wages that are higher than those that predominate in the geographic area where the job opportunity is located. To refute the notion of wage depression caused by the H–2B program, some of the commenters relied on the Department's Initial Regulatory Flexibility Analysis (IRFA) indicating that the relatively small effect of the H–2B program on the overall economy undermines the wage depression rationale for the elimination of the four-tier wage structure.

Many of these commenters relied on a recent study, included in the rulemaking record by one commenter, which contains an economic analysis of the H–2B program by an academic economist, Madeline Zavodny.[14] In concluding that the admission of H–2B workers on the national level does not have a negative correlation to U.S. workers' employment or earnings and has no statistically valid relationship to the wages and employment levels of workers on the state level, the study compares wage changes "in sectors that rely heavily on H–2B visa holders with wages in other industries that hire few or no temporary workers."[15]

Additionally, the appropriate measure of adverse impact on the wages of U.S. workers is not assessed on the national or even the state level but rather must be considered in terms of the workers who are similarly employed. Under the Department's regulations, being similarly employed generally means having substantially comparable jobs in the occupational classification in the area of intended employment. Therefore, any study purporting to measure a net effect of the employment of H–2B workers on the wages, working conditions and access to job opportunities for U.S. workers fails to take into account the lack of uniformity in distribution of H–2B workers, as well as a variety of factors which at any time may also correlate with the presence of H–2B workers in any localized labor market.

The predominance of Level I wages in the program, wages based on the mean of the bottom one-third of all reported wages in the systems, is itself evidence of the adverse impact of those wages on those U.S. workers performing the same tasks and engaged in the same jobs. Specifically, a review of the Department's records for the issuance of prevailing wages in calendar year 2010 indicates that almost 75 percent of jobs are classified at a Level I wage, with the remaining 25 percent scattered in Levels II, III and IV. In a broader examination of wages offered over the past several years, in about 96 percent of cases, the H–2B wage is lower than the mean of the OES wage rates for the same occupation. 75 FR 61580, Oct. 5, 2010. In a low-skilled occupation, the mean for the occupation represents the wage that the average employer is willing to pay for unskilled workers to perform that job. The four-tier structure artificially lowers that wage to a point that it no longer represents a market-based wage for that occupation. The H–2B worker, along with the domestic workers recruited against the application, who are being paid a significantly lower wage than two-thirds of those in that area of employment cannot help but have a depressive effect on the wages of those around him. An employer paying U.S. workers as well as H–2B workers has no incentive to pay the U.S. workers any higher compensation. The local competitors, by extension, have no incentive to pay a higher compensation. Therefore, it follows that if the employer must only offer and pay Level I wages, wages below what the average similarly employed worker is paid, those wages will make the U.S. workers less likely to accept those job opportunities or will require them to accept the job at a wage rate less than the market has determined is prevailing for the job. The net result is an adverse effect on the worker's income. While an arithmetic mean is not an indicator of the single best wage at which U.S. workers are considered to be adversely affected, by its placement at the average wage rate it establishes a more accurate wage for the average U.S. worker.

E. Alternatives for the Calculation of a Prevailing Wage

1. OES Alternatives

The Department received several proposals for alternative prevailing wage-setting methods, including those mentioned at the SBA roundtable later memorialized in the Chief Counsel for Advocacy, SBA comment. We considered alternatives such as using the OES median; using only the DBA wage for construction and using the SCA (or a regional) wage for reforestation; using some set percentile of some of these wages; and including fringe benefits. Our reasons for rejecting those alternatives are set out in the discussion of the RFA in the administrative section of this preamble.

Other options presented as alternatives were not alternatives for the setting a prevailing wage but rather suggestions to change elements in the proposed wage-setting methodology and are dealt with elsewhere in this discussion.

Other commenters noted that although the arithmetic mean represents an improvement to a stratified wage rate system, it will not do enough to protect U.S. workers from adverse effect. At least one such commenter suggested the Department set the OES wage at the 90th percentile wage instead to account for any fringe benefits without which the wages of U.S. workers who are similarly employed would be depressed. The Department declines to do so. As discussed above, the Department historically has not required the payment of fringe benefits to H–2B workers, even when SCA and DBA wage rates were mandatory for occupations where such wage determinations existed. No data exists to allow the full

[13] The Department's justification for its reliance on the OES data has previously been expressed. *See* 69 FR 77368, Dec. 27, 2004.

[14] *See Economic Effect of H–2B Workers,* public comment ETA–2010–0004–0256.1.

[15] *Id.* at 17.

computation and monetization of fringe benefits over all the occupations and locations covered by the H–2B program. Nor is there any basis concluding that the 90th percentile represents any valid surrogate for such data.

One commenter challenged the Department's assertion that SCA rates do not differ substantially from the OES rates used in the H–2B program.[16] To support its claim, this commenter cited a disparity of $2.27 in OES and SCA wage rates for landscaping and grounds keeping workers in Wichita County, Kansas. The Department was not able to replicate this commenter's analysis; however, it appears that much of the difference between the two wage rates resulted from the inappropriate comparison of the SCA wage rate to the baseline, the Foreign Labor Certification Online Wage Library's OES Level I wage. As explained above, the Level I wage rates are not representative of the prevailing wage paid to workers in the locality. If the Level III (mean) wage of $10.26 per hour[17] is used instead (as it would be under the final rule), the $2.27 difference between the OES and SCA rates cited by this commenter shrinks to $0.29, with OES rate falling just short of the $10.55 per hour SCA wage.[18] The Department acknowledges that for some occupations in some areas of intended employment there may appear to be a larger disparity between OES and SCA wage rates. However, many differences result from a comparison of similar-sounding job titles; under this Final Rule the determination of appropriate wage will be based on actual job duties, which the Department believes will minimize false equivalencies and thereby reduce wage disparities.

2. Non-OES Alternatives

One commenter suggested a wage methodology that would have SWAs, rather than employers and/or the Department, conduct surveys to effectively determine the appropriate wage for any occupation in a particular State. Before 1998, when the program was much smaller, SWAs did in fact conduct surveys to produce prevailing wages. The financial resources available today to be devoted to such an activity, in particular given the expansion of the program and the resources available elsewhere (specifically, OES, SCA, and DBA) no longer make this a viable option. In addition, the inconsistencies that resulted from State to State in the treatment of the same job opportunity, reflecting not the local conditions but the quality of the surveyors and the collection instruments used, created difficulties that the benefits of using such surveys do not outweigh.[19] Reliance on SWA surveys in our non-agricultural immigration programs was largely abandoned in 1998 because the OES provides a more reliable and cost-effective means for producing prevailing wage rates on a consistent basis across the country. For these reasons, the Department has determined that the OES survey with its standardized job descriptions, compensation data collection and analysis, and SCA and DBA wage determinations provide a much more accurate portrayal of wage information than State surveys.

Finally, one commenter representing reforestation employers suggested that the Department set as the prevailing wage 115 percent of the higher of the Federal or State minimum wage.[20] The Department believes such a calculation would result in an arbitrary rate not based on labor market conditions. U.S. workers, for instance, may make far more than this rate, in which case the resulting prevailing wage would suppress U.S. worker earnings. On the other hand, U.S. workers could earn less than the 115 percent level, creating a scenario where employers are required to pay H–2B workers more than U.S. workers.

One comment suggested the Department adopt methods of compensating reforestation workers that are more flexible and not based on specific locations, citing inevitable deviations (due to weather, ground conditions, contractor demands) in an itinerant work schedule. An alternative method proposed by a commenter was the establishment of a prevailing wage for a wider region—similar to the H–2A Adverse Effect Wage Rate (AEWR) which typically covers several states with a single wage rate—which would allow employers to deviate from identified worksites as long as they pay workers at least the established rate. The Department recognizes that the uncertainties inherent in reforestation can make it difficult to determine if and where employees will be working as conditions change during the contract period. That is an issue about the amount of work available, not the wages to be paid. The Department notes that in situations where projects stretch across multiple counties or states with different prevailing wages, the employer can avoid this complexity by paying the highest of the prevailing wages of those areas, which is similar to paying to a regional wage, such as the AEWR. Prevailing wage rates for forestry work are generally the same across contiguous counties—and frequently noncontiguous counties—in the same State.

The Department has concluded that it is not feasible or desirable to establish regional wage rates for particular industries in the H–2B program. The prevailing wage rates are locality-based in order to prevent adverse effect on U.S. workers. The Department believes that using a regional wage rate could result in an arbitrary rate not based on labor market conditions. U.S. workers in some localities might make more than this rate, in which case the prevailing wage would suppress U.S. worker earnings, while U.S. workers in other localities might earn less than the H–2B workers earning the regional rate.

3. Other Alternatives

One commenter noted that the NPRM indicated that H–2B workers comprise a small proportion of the U.S. labor force—less than 1 percent of most job categories—and that since most of those positions are low skilled and low paid, it follows that U.S. workers occupy 99 percent of highest paying jobs in any given category. Based on this conclusion, the commenter proposed that to prevent adverse effect on the wages of U.S. workers, the prevailing wage should be based on the BLS 10th percentile wage estimate for the occupation in the area of employment. The commenter further noted that this would keep the H–2B workers in the lowest 10 percent of the wage category and the U.S. workers in the highest 90 percent of the wage category, therefore avoiding any adverse effect on the wages or working conditions of U.S. workers.

While the Department appreciates the suggestion for avoiding the adverse effect on similarly employed U.S. workers, this commenter's proposal reflects a misunderstanding of the purpose behind the change in prevailing wage methodology. The Department's role in the H–2B program is not to determine the wages of H–2B workers, per se, but rather to set an appropriate prevailing wage—a floor—for the job opportunity that will ensure no adverse

[16] This comment addresses a statement made in footnote 7 of the NPRM, in the economic analysis required under Executive Order 12866. 75 FR 61582, Oct. 5, 2010.

[17] 37–3011 for 2000001, at *http://www.flcdatacenter.com/OesQuickResults.aspx?area=2000001&code=37–3011.00&year=11&source=1.*

[18] WD number 2005–2216, revision 13, 11/18/2010.

[19] The Department, in fact, recognized the need for consistency in the approach to establishing prevailing wages when it federalized the prevailing wage determination system in the 2008 Final Rule.

[20] This proposal was also expressed in the comment submitted by the Chief Counsel for Advocacy, SBA.

effect on the wages of U.S. workers who are similarly employed or who could be similarly employed. As discussed earlier, the Department must set a prevailing wage that assures that U.S. workers who might be interested in a job will be paid a wage that approximates the wages available to other U.S. workers in the same occupation. Only if there are insufficient U.S. workers to fill that job at that wage may H–2B workers be hired to make up the labor shortfall.

4. Piece Rates

Several commenters in the seafood processing industry proposed that in light of the prevailing practice in the industry in which workers are paid a piece rate based on production, the Department should permit employers to pay a piece rate based on production for the production-based work and a prevailing wage rate for all non-processing work. The Department notes that it does not prohibit incentive piece rates, provided that the piece rates produce earnings that meet the required prevailing wage.

Having considered the proposed alternatives, the Department has concluded that none would satisfactorily effectuate the Department's objective of ensuring that wages and working conditions of U.S. workers are more adequately protected than under the current prevailing wage determination process, while maintaining an efficient and consistent administrative process. The Department believes the alternatives proposed would at worst reduce and at best not improve the efficiency and consistency of the prevailing wage determination process, or would directly or indirectly adversely effect the wages of U.S. workers who might take H–2B jobs. Finally, the Department must ensure that in the H–2B program the wages offered to H–2B workers and U.S. workers recruited under H–2B job orders are the same wages and terms of employment offered to U.S. workers recruited by employers not participating in the H–2B program, that is, are the prevailing wages. Any method that results in offering H–2B workers lower than average wages adversely affects U.S. workers responding to H–2B-related recruitment. Similarly, any method that results in an employer recruiting for job opportunities using experience requirements that are higher than necessary or not normal to the occupation creates artificial entry barriers for potentially interested U.S. workers. While the Department appreciates the proposed alternatives received, it has concluded that none of the alternatives provided better accomplishes the Department's policy objectives than the prevailing wage determination method contained in the Final Rule.

F. Elimination of Private Wage Surveys

The Department received a wide range of comments about its proposal to eliminate employer-provided surveys from the prevailing wage determination process in the H–2B program. Some commenters supported the Department's proposal, some opposed it, and others sought to retain, but modify, the employer-provided survey review process.

The commenters supporting the Department's proposal to eliminate employer-provided surveys cited reasons including increased clarity and efficiency in the prevailing wage determination process; elimination of a wage source with inconsistent quality and accuracy; less uncertainty related to compliance; elimination of redundancy with the work the Department already performs in collecting vast amounts of representative wage data; and successful experience with OES. One commenter specifically noted that the Department's progress in consolidating prevailing wage determination processing in one national center and the resulting increased consistency supports eliminating employer-provided surveys as inefficient and unnecessary. While several commenters asserted that the only way to determine the wage where there is no adverse impact on U.S. workers is through surveys, either conducted by the employer or the Government, one commenter further opined that the Government was in a better position to gather wage information and undertake wage surveys than a private employer.

In contrast, commenters opposed to the Department's proposal to eliminate employer-provided surveys argued that the value of private surveys in the prevailing wage determination process justifies the administrative cost. Many of the commenters who wished to retain the employer-provided survey review process acknowledged that the current process was not workable in a time-sensitive program like H–2B, contending that more employers would use employer-provided surveys if the survey submission process was more user-friendly and survey review requirements were not so strict. The commenters who wished to retain, but modify, the employer-provided survey review process offered a variety of suggestions to do so. Some commenters suggested shifting review of private surveys to a disinterested third-party, with the cost of such review borne by the industry sponsoring the survey. One commenter suggested the Department require surveys to be conducted by a reliable third party, such as a state agency, or to be "peer reviewed." Some commenters suggested the Department make approved employer-provided surveys available for use by all employers with the same occupation within the same area of intended employment. Other commenters suggested simplifying private survey submission instructions (but did not offer suggestions about how to do this), while others suggested revising the review criteria.

After reviewing all of the comments on the employer-provided survey review process, the Department concludes that the prevailing wage rate is best determined through reliable Government surveys of wage rates, rather than employer-provided surveys that employ varying methods, statistics, and surveys. The Department has concluded that using only CBA, SCA, DBA, and OES to determine the prevailing wage is the most consistent, efficient, and accurate means of determining the prevailing wage rate for the H–2B program. The Department acknowledges, as it did in the preamble to the NPRM, that some private surveys may provide useful information. However, the Department agrees that employer-provided surveys, generally, are not consistently reliable. To illustrate, many H–2B employers in the ski industry and the crab processing industry in FY 2009 attempted to use surveys that did not meet the basic criteria outlined by the 2005 Prevailing Wage Guidance, but which had been previously accepted by the SWAs. Moreover, employers typically provide private surveys when the result is to lower wages below the prevailing wage rate. Such a result is contrary to the Department's role in ensuring no adverse impact. While the Department appreciates commenters' suggestions for alleviating the Department's administrative costs, the Department will not endorse specific private surveys in the H–2B program, in part because of the comprehensive public surveys available to calculate the prevailing wage, and in part to avoid the administrative inefficiency of endorsing surveys that frequently change. The Department believes the values commenters identified, including expedience, consistency, fairness, and accuracy, are best accomplished by using CBA, SCA, DBA, and OES wages, not employer-provided surveys. Moreover, the Department has

concluded that the use of CBA, SCA, DBA, and OES wages will not only protect U.S. worker wages, but also will simplify the H–2B process for both the Department and employers.[21] Given the quality of the three public wage data sources the Department will use and the Department's interest in providing accurate and consistent prevailing wage rates on a fast turn around, the cost of reviewing such private surveys far outweighs their usefulness in the H–2B program.

Several submissions, including two from employers and one from an individual, suggested that the wage surveys used to determine H–2B prevailing wages should only sample temporary workers. However, a wage survey of temporary workers may include workers who provide short-term services to fill in for sick or vacationing employees, while H–2B workers essentially become full-time workers for the entire period of need which may last for most of the year. Moreover, limiting the survey universe in this way would produce results inconsistent with the Department's responsibility to prevent the employment of temporary foreign workers under the H–2B program from adversely impacting U.S. workers, regardless of whether the U.S. workers are temporary or permanent. The sole use of temporary workers' wages would depress prevailing wage calculations, applying substantial downward pressure on wages for similar, permanent work within the region. Therefore, the Department will continue to use wage surveys that include permanent workers.

One commenter expressed concern that eliminating employer-provided surveys made Board of Alien Labor Certification Appeals (BALCA) review an insufficient legal recourse for employers, in that the review would evaluate only whether the Department had made an error in position classification rather than prevailing wage rate accuracy. It is correct that BALCA review will not permit the introduction of private surveys to challenge the determination; this is a necessary corollary to the elimination of private surveys in the program, and is a necessary product of the limitations upon BALCA as an administrative appellate unit charged with judging the Department's compliance with its regulations. The proposed rule does not, moreover, eliminate BALCA's role in the H–2B program. Employers may continue to request BALCA review when an employer disagrees with the Department's application of the prevailing wage determination process at 20 CFR 655.11(e).

Several commenters suggested that some jobs in some industries are so unique that they are not represented by any SOC classification or are so remotely located that OES wage data is too broad to produce a realistic wage rate. These commenters suggested that surveys other than OES are necessary to accurately assess prevailing wages for these unique or remote jobs. The Department believes, however, that almost every job opportunity is effectively captured in the OES or the SCA or DBA wage determination rates and remote locations are effectively incorporated into the areas of intended employment reported in these wage sources.

The crab processing industry's crab picker occupation was cited by many commenters, including the Chief Counsel for Advocacy, SBA, for instance, as an example of the mismatched job in OES. Others cited the ski instructor for a mismatched job classification. Under the OES, crab pickers are classified as Meat, Poultry, and Fish Cutters and Trimmers. The selection of this category when setting up the SOC was not inadvertent as evidenced by the crosswalk from the predecessor categorization, the Dictionary of Occupational Titles (DOT) from the job occupation of "crab meat processor" (DOT title 525.687–126) to the O*NET job classification of Meat Cutters. While specific duties of a crab picker are not included in the OES classification, a crab picker is an appropriate fit within that classification, since removing the meat from cooked crabs and sorting into categories (backfin, claw, etc.) for packaging and sale, as the job is described by many employers in that industry, could be easily encompassed by the duties outlined in the O*NET job classification of the meat cutter.[22] The existence of a job in the DOT, and its mapping to an SOC code as evidenced in the crosswalk from DOT to SOC, is an objective demonstration that the Department deliberately considered and aligned that job to an SOC code, making the SOC code now in use equivalent for these purposes to the former job description in the DOT. The Department further notes that SOC code classification modifications may be requested through a process administered by the BLS that is specifically established for that purpose, in which members of the public, included affected industries, may participate. We encourage employers believing that the SOC code in which their position has been classified is not representative to participate in this established process.[23]

One commenter suggested that some private surveys sometimes produce results below the Federal, State, or local minimum wages and have been used as a mechanism to lower H–2B wages to a level that displaces U.S. workers and adversely affects U.S. workers' wages and working conditions. Two commenters suggested that the Department, by accepting employer-provided surveys, would be authorizing the payment of wage rates lower than the prevailing wage rate as determined by reliable Government sources. One commenter argued that allowing private surveys, with wages below the prevailing wage rate, impedes the upward pressure on wages that would otherwise occur in a labor shortage situation. Similarly, other commenters asserted that acceptance of employer-provided surveys in industries or occupations dominated by temporary workers results in a stagnant and inaccurate prevailing wage rate. Yet another commenter suggested that employer-provided surveys undermine the consistency of prevailing wage rates in the program.

The Department agrees that employer-provided surveys, generally, are not consistently reliable. Wage surveys that find that some employers are paying rates higher than the Department's prevailing wage determination do not require review; employers are always able to pay higher than the required prevailing wage rate. The Department believes that administrative resources are not best spent on reviewing employer-provided surveys, especially when such surveys are provided typically to avoid using a survey that produces a higher wage. The Department, however, acknowledges that there are some very specific situations in which a survey can provide information to which the Department does not currently have access. For example, there are geographic locations that are not included in BLS' data collection area

[21] The Department has so far retained the use of private surveys in both the H–1B and the PERM programs. The H–1B program statutorily requires the use of some level of alternate information. While we may well in future review the use of private surveys in the PERM program, the Department has decided that this rule is not the vehicle in which to perform this activity.

[22] As defined in O*NET, the classification includes the following tasks: Using knives, cleavers, meat saws, bandsaws, or other equipment to perform meat cutting and trimming; cutting and trimming meat to prepare for packing; obtaining and distributing specified meat or carcass; and separating meats and byproducts into specified containers and seal containers.

[23] See *http://www.bls.gov/soc/revisions.htm.*

(such as the Commonwealth of the Northern Mariana Islands (CNMI)). Where there is no data from which to determine an OES wage and where there are no applicable CBA, DBA or SCA wages, employers in those locations will continue to have the opportunity to submit wage surveys.

The Department also acknowledges that there may be other very limited circumstances in which an employer-provided wage survey may be potentially appropriate. This would occur where the employer is able to demonstrate it cannot use a collective bargaining agreement wage because it is not a party to a CBA, and cannot use a DBA wage, an SCA wage, or an OES wage because the job opportunity is not accurately represented within the job classification used in those surveys. In this regard, we are also mindful that the migration to SOC codes was not a perfect match in every case. The Department is particularly aware of the use of the generalized set of occupations as "all other" categories in the SOC, in which a meaningful comparison to the DOT becomes more problematic. Accordingly, to show that a job opportunity is not accurately represented within the SOC job classification system, an employer must demonstrate that the job opportunity was not in the DOT or if the job opportunity was in the DOT, the crosswalk from the DOT to the SOC Codes places the DOT job in an "all other" category in the SOC. Accordingly, the employer must demonstrate that the job entails job duties which require knowledge, skills, abilities, and work tasks that are significantly different than those in any SOC classification other than with the "all other" category.[24]

Employers should submit a request to use a private survey no later than 180 days before the initiation of planned recruitment. This will provide the Department with enough time to analyze the job duties submitted and request additional information. Job titles are not used consistently among employers, and the Department will conduct a careful review of the duties, activities and tasks associated with the job opportunity to determine whether the employer's assessment of how the job opportunity was treated under the DOT is accurate and whether the job is actually significantly different than any job described in the SOC classification other than with the "all other" category. If the Department concludes that it is appropriate to allow the submission of a survey, the employer will then be permitted to submit its survey for evaluation to ensure that it meets the Department's standards for the validity of the statistical methodology and the reliability of data. There will be no appeal from the determination of qualifying for use of a private survey, although there can be an appeal from the acceptability of the prevailing wage determination itself. The Department will issue revised Prevailing Wage Guidance, including changes necessary to conform to this regulation. This includes the requirement that any survey instrument submitted cannot include the wages of H–2B workers or other nonimmigrant workers in calculating the wages. The Department has added this requirement to ensure that wages of H–2B workers do not establish the parameters by which the wages of all workers would be measured, as this could have the net effect of creating a permanent subset of lower wages in that occupation or area of employment.

A number of commenters expressed concern that there is currently no alternative mechanism for labor organizations, worker advocate organizations, or other worker representatives to submit alternative surveys supporting higher wage rates. In none of our immigration programs has the Department ever permitted entities other than the employer to submit prevailing wage surveys. We have found no justification for departing from this practice.

G. Multiple Worksite Wage Methodology

The Department received comments from individual employers, labor unions, worker advocate groups, and a Congressional committee proposing that we revise the current process for determining wage requirements in those occupations that consist of employment in multiple locations under an approved labor certification. These commenters suggested that the Department require an employer to pay the highest prevailing wage rate out of all the areas of employment in which workers will be assigned for all the work performed throughout the itinerary. Many of these commenters stated that such a change is needed to prevent employers from exploiting wage rates in the most economically depressed labor markets. However, historically, the Department has required that employers pay workers the prevailing wage rate for the job opportunity in the area of intended employment, as this is the most effective way to avoid adverse effect in that area. All proposed and existing wage calculations, whether based on the provisions of the SCA, DBA, OES, or applicable Federal, State, or local laws, are determined based on the area of intended employment. Revising the requirement to create a single wage determination regardless of the actual area of intended employment would be contrary to how the Department has determined and applied wage calculations for the H–2B program. The Department does not believe that there is a need at this time to revise this long-standing provision. Additionally, the Department in no way intends to hinder an employer's ability to pay its H–2B and U.S. workers the highest prevailing wage rate for the areas in which they will be assigned for all the work to be performed under the H–2B application, if it so desires.

Along similar lines, a commenter in the forest industry suggested the use of a regional wage methodology linking a number of worksites on an itinerary over a wide geographic area. The commenter takes no position on whether such a methodology would be appropriate for H–2B employers in other industries and occupations besides the forestry-related industry. Though the Department appreciates this suggestion, it has concluded that the SCA and OES provide various forestry occupations enough flexibility to accommodate the job opportunities in each area of intended employment. As discussed above, the Department has a history of determining wages based on the area of intended employment and we are not adopting alternative methodologies that would revise that position.

III. Administrative Information

A. Executive Order 12866

Under Executive Order (E.O.) 12866, the Department must determine whether a regulatory action is economically significant and therefore subject to the requirements of the E.O. and to review by OMB. Section 3(f) of the E.O. defines an economically significant regulatory action as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations

[24] We received a number of comments from the ski industry seeking the opportunity to continue to use the surveys it has submitted in the past. Whether ski instructors qualify under this standard will be assessed when and if a request is submitted under this regulation.

of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

OMB has determined that this Final Rule is an economically significant regulatory action under section 3(f)(1) of E.O. 12866. This regulation would likely result in transfers in excess of $100 million annually and, consequently, is economically significant. Accordingly, OMB has reviewed this Final Rule.

1. Need for Regulation

The Department has determined that a new wage methodology is necessary for the H–2B program. Although many commenters supported the Department's proposal, others questioned the Department's decision to change the methodology for determining the prevailing wage rate. The Department's decision to evaluate the prevailing wage, however, aligns with the Department's mandate under the H–2B program to ensure that U.S. workers are not adversely affected by the employment of H–2B workers. The order in the recent court decision in *CATA* v. *Solis* merely prompted a more expeditious review of this important issue. As noted in the NPRM, the Department has grown increasingly concerned that the current calculation method of the prevailing wage rate does not adequately reflect the appropriate prevailing wage necessary to ensure that U.S. workers are not adversely affected by the employment of H–2B workers. Some commenters stated that the Department lacked the data to support this decision. The Department analyzed the breakdown of wages by OES level of 4,694 submitted requests for prevailing wages (all requests submitted from the inception of the electronic PWD request submission system on January 21, 2010 to November 7, 2010). According to this analysis, 74 percent of H–2B positions were certified at the Level I wage rates during that period. The percentages of H–2B positions certified at Levels II, III, and IV were 10.5, 8.2, and 6.9, respectively. In approximately 96 percent of the cases, the wage rates certified for the H–2B positions were lower than the mean of the OES wage rates for the same occupation. The Department therefore asserts that a reevaluation of the current prevailing wage determination methodology is empirically justified.

The Final Rule defines the prevailing wage to be the highest of: (1) The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between a union and an employer; (2) the wage rate established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which such a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage. The OES wage level under the new methodology would effectively result in the payment of higher wages that would conform more closely to the wages paid by non-H–2B employers according to the results of the OES survey. Thus, it is the Department's position that when the certified prevailing wage is based on the OES survey, using the arithmetic mean will ensure that H–2B workers are paid a wage that will not adversely affect the wages of U.S. workers similarly employed.

2. Economic Analysis

The Department's analysis below compares the expected impacts of this Final Rule to the baseline (*i.e.,* the 2008 Final Rule). According to the principles contained in OMB Circular A–4, the baseline for this rule would be the situation in which the proposed rule is not adopted. Thus, the baseline for this H–2B prevailing wage regulation is the four-tier wage structure derived from the OES wage survey, as outlined in the 2008 Final Rule.

The change in the method of determining prevailing wages under this Final Rule will result in additional compensation for both H–2B workers and U.S. workers hired in response to the required recruitment. In this section, the Department discusses the relevant benefits, costs, and transfers that may apply to this Final Rule.[25]

This Final Rule changes the OES component of the prevailing wage determination to the arithmetic mean of the OES wages for a given area of employment and occupation. This Final Rule requires employers to offer H–2B workers and U.S. workers hired in response to the required H–2B recruitment a wage that is at least equal to the highest of the prevailing wage, or the Federal, State or local minimum wage. Under the Final Rule, the prevailing wage is the highest of the following: (1) The wage rate set in a CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between a union and an employer;[26] (2) the wage rate established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage.

With two exceptions, noted below, the Department calculated the change in hourly wages by matching the OES arithmetic mean wage rates to the H–2B data by the standard occupational classification (SOC) code and the metropolitan statistical area (MSA) of employment. We also matched the SCA and DBA wage rates (exclusive of fringe benefits) to the H–2B data using the occupational title specified in the H–2B program data and the county of employment.[27] For some occupations and counties, SCA and DBA wages had not been determined; in those cases, the SCA and DBA wages did not enter our calculations. In the Department's experience under the H–2B program, the work of landscape laborers generally involves grounds maintenance of the kind contained in SCA and OES job descriptions. Construction related landscaping—the construction of planters, walkways and similar structures as part of building construction projects as used in DBA job descriptions—is rarely applicable to H–2B employment. Accordingly, either SCA or OES rates were used to estimate costs for landscape laborers. Similarly, SCA job descriptions are generally more reflective of H–2B reforestation occupations than are OES job descriptions; therefore, SCA wage rates were used to estimate the effect of the Final Rule on reforestation employers. This analysis is based on job titles rather than actual job duties. After implementation, the Department will closely compare the job duties listed on the Application to the job duties listed in the SOC, SCA Dictionary of Occupation Titles and the DBA wage determinations to identify the most appropriate basis for determining the prevailing wage.

Using certified and partially certified applications in the H–2B program data, we calculated the increase in wages by selecting the highest wage among the OES arithmetic mean, the SCA, and DBA wage. We then subtracted the average H–2B hourly wage certified from the highest of the three wages, and we weighted this differential by the

[25] For the purpose of this analysis, the Department considers H–2B workers as temporary residents of the U.S.

[26] A CBA wage may in fact be the highest of the applicable wages; even under the 2008 Final Rule, if the job opportunity were covered by a CBA, the wage rate in the CBA would be the required wage. Accordingly, including the wage rate set forth in the CBA in the definition of prevailing wage will not result in an increased cost to the employer.

[27] Once this Final Rule is effective, the prevailing wage will be determined not by comparing job titles, but by comparing job duties listed on the employer's application with the occupational definitions in the SOC (for OES), the Dictionary of Occupational Titles (for SCA), or the DBA wage determination.

number of certified workers on each certified or partially certified application.[28] We then summed those products and divided the sum by the total number of certified workers from the certified or partially certified applications.[29] Based on this calculation, we estimate that the change in the method of determining wages will result in a $4.83 increase in the weighted average hourly wage for H–2B workers and similarly employed U.S. workers hired in response to the recruitment required as part of the H–2B application.

This approach for calculating the expected changes in hourly wages relative to the baseline is more accurate than the approach the Department used in the analysis presented in the NPRM in two ways. First, the calculations presented in this analysis use the highest wage among the OES arithmetic mean, the SCA, and DBA wages.[30] In the analysis presented in the NPRM, the SCA and DBA wages were not directly accounted for in these calculations. Second, the calculations presented in this analysis use wage data for each MSA or county where the H–2B work actually took place.[31] In the analysis presented in the NPRM, on the other hand, the Department used the national values rather than location-specific data.

More specifically, because the employer's address frequently does not represent the area where the work actually takes place, the Department conducted a manual extraction of area-of-employment data from the submitted H–2B applications, including the city, state, and zip code corresponding to the area of employment. The Department used a random sample of 500 certified or partially-certified applications from Calendar Year (CY) 2009 H–2B program data.[32] The $4.83 increase in the weighted average hourly wage for H–2B workers (and U.S. workers hired in response to the recruitment required as part of the H–2B application) was calculated using this data sample.

The Department provides an assessment of transfer payments associated with increases in wages resulting from the change in the wage determination method. Transfer payments, as defined by OMB Circular A–4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect but do not result in additional benefits or costs to society. The primary recipients of transfer payments reflected in this analysis are H–2B workers and any U.S. workers hired in response to the required recruitment under the H–2B program. The primary payors of transfer payments reflected in this analysis are H–2B employers. Under the higher wage obligation defined in the Final Rule, those employers who participate in the H–2B program are likely to be those that have the greatest need to access the H–2B program. When summarizing the benefits, costs, or transfers of this rule, we present the 10-year averages to reflect the typical annual effect.[33]

Employment in the H–2B program represents a very small fraction of the total employment in the U.S. economy both overall and in the industries represented in the program. The H–2B program is capped at 66,000 visas issued per year; assuming that half of all entering workers stay at least one additional year, and half of those workers stay a third year, H–2B workers represent approximately 0.09 percent of total U.S. nonfarm employment (130.9 million).[34]

According to H–2B program data for FY 2007–2009, the average annual numbers of H–2B workers certified in the top five industries[35] were as follows: construction—30,242; amusement, gambling, and recreation—14,041; landscaping services—78,027; janitorial services—30,902; and food services and drinking places—22,948. When we scale these figures in accordance with the 66,000 cap, these certifications yield the following percentages of the total employment in each of these industries: Construction—0.2 percent (14,756/7,265,648); amusement, gambling, and recreation—0.5 percent (6,851/1,506,120); landscaping services—6.5 percent (38,073/589,698); janitorial services—1.6 percent (15,079/933,245); and food services and drinking places—0.1 percent (11,197/9,617,597).[36] Thus, as these data illustrate, the H–2B program represents a relatively small fraction of the total employment, even in each of the top five industries in which H–2B workers are found.

In the remaining sections of this analysis, we first present the costs resulting from the Final Rule, including an increase in H–2B employer expenses that could lead to a decrease in production. The Department predicts that most of these costs, which would result from a decrease in current H–2B participation by employers who cannot afford the increased labor costs or who

[28] The Department weighted the wage differentials by the number of certified workers as opposed to the number of workers requested because a decrease in number of workers granted may occur for reasons other than that a U.S. worker was hired in response to the recruitment.

[29] In all wage calculations where we found that the baseline H–2B wage is higher than any alternative wage considered, we assumed that the baseline wage prevails. That is, we assumed that the wage increase is zero for those cases. This situation, however, is rare; the baseline prevailing wage exceeded the OES mean in approximately 4 percent of the cases.

[30] These are hourly wage rates and do not include fringe benefits.

[31] A recent Congressional Research Service (CRS) report used a wage calculation approach that is similar to that used in this Final Rule. The report found that the SCA and DBA wage rates are in some cases higher than the OES arithmetic mean for a given job opportunity. This is consistent with the findings of the analysis conducted for this Final Rule. The CRS report, however, did not rely on wage data for each county where the work actually took place. Also, the CRS report was limited to a selected group of occupations and counties. Source: "Potential Impact of Proposed Regulations on the Wages of H–2B Workers," Congressional Research Service, October 2010.

[32] The Department's program database does not collect city and zip code data for the work locations for the certifications. Therefore, in order to extract that data, the Department hand-selected a random sample from the CY 2009 filed applications to calculate the wage increases. The Department used CY 2009 as a representative year. Although some commenters suggested that FY 2009 was not a representative year for use of the H–2B program, the random sample chosen was consistent with standard statistical methods. Further, the Department selected the data from the calendar year rather than the fiscal year to allay such concerns, but at the same time, represent the most recent data available.

[33] The 10-year analysis period starts on January 1, 2012 and ends on December 31, 2021 since the Final Rule is effective for wages paid to H–2B workers and U.S. workers recruited in connection with an H–2B labor certification for all work performed on or after January 1, 2012.

[34] For this and subsequent calculations, we used an estimated total of 115,500 H–2B workers because the number of visas available under the H–2B program is 66,000 (assuming no statutory increases in the number of visas available for entry in a given year) but employers can hire H–2B workers with existing visas for two additional years. Assuming that half of all such workers (33,000) in any year stay at least one additional year, and half of those workers (16,500) will stay a third year, there will be a total of 115,500 H–2B workers in a given year. That is, in our calculations, we use 66,000 as the annual number of new entrants and 115,500 as the total number of H–2B workers in a given year during the 10-year time horizon. Source: *ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt.*

[35] One industry, forestry services, made the initial top-five list based on the number of H–2B workers certified; however, the employment data was insufficient to include it in this section. Data on employment size and business revenue were available for forestry and, thus, this industry is included in the Regulatory Flexibility Analysis at section B of this Administrative Information section.

[36] The number of visas available under the H–2B program is 66,000, assuming no statutory increases in the number of visas available for entry in a given year. We also assume that half of all such workers (33,000) in any year stay at least one additional year, and half of those workers (16,500) will stay a third year, for a total of 115,500 H–2B workers in a given year. The scale factor (49.8 percent) was derived by dividing 115,500 by the total number of workers certified per year on average during FY 2007–2009 (236,706).

can more easily fill empty positions with U.S. workers, will be borne by an influx of employers who have the need for additional temporary labor but do not currently participate in the H–2B program. We then discuss the transfers from H–2B workers to U.S. workers and from U.S. employers to U.S. and H–2B workers resulting from the change in wage determination methodology. Finally, we analyze a total of four alternatives [37] and explain why the Department chose to eliminate the four-tiered OES wage structure and adopt the OES arithmetic mean absent a higher CBA, DBA, or SCA wage.

i. Costs

In standard economic models of labor supply and demand, an increase in the wage rate represents an increased production cost to employers leading to a reduction in the demand for labor. Because production costs increase with an increase in the wage rate, a resulting decrease in profits is possible for H–2B employers that are unable to increase prices to cover the cost increase. Some H–2B employers, however, can be expected to offset the cost increase by increasing the price of their products or services.[38] In addition, workers who would have been hired at a lower wage rate may not be hired at the higher wage rate, resulting in forgone earnings for workers. In this sense, to the extent that the higher wages imposed by the rule result in lower employment and lower output by firms who had employed those workers, the lost profits on the foregone output and the lost net wages to the foregone workers represent a deadweight loss. In economics, a deadweight loss is a loss of economic efficiency that can occur when equilibrium for a good or service is not optimal. This effect will be magnified during years in which the cap is not reached.[39]

In a practical sense, because the total employment under the H–2B program is capped at 66,000 visas, the macroeconomic effect of reductions in H–2B employment and, therefore, reductions in output are expected to be minimal. There has generally been excess demand for H–2B workers well beyond the 66,000 limit, and the Department believes that the increased wages resulting from the rule will not result in fewer than 66,000 visas for H–2B workers because, even if some employers decide not to participate in the H–2B program, other employers, who previously were unable to secure visas for H–2B workers before the cap was met, and therefore operated without a complete workforce, will participate.

For example, for FY 2007 through 2009, employers applied for an average of 236,706 certified H–2B positions per year. This number reflects the number of positions certified, rather than the number of actual workers who entered the program to fill those positions, which is capped at 66,000 per year. Using this number of certified workers to represent the quantity of labor demanded, and assuming an elasticity of labor demand of -0.3,[40] a $4.83 (56 percent) increase in wages would result in a 16.8 percent decline in the number of H–2B workers requested by employers, for a remaining total of 196,939 H–2B certified positions requested by employers, which still far exceeds the 66,000 maximum visas allowed under the H–2B program. Therefore, any loss of production resulting from some employers dropping out of the program will be offset by production by other employers who would then be able to fill previously vacant positions.

Thus, the Department believes that for years in which the number of applications exceeds the number of workers available under the cap, there will be no deadweight loss in the market for H–2B workers even if some employers do not participate in the program as a result of the higher H–2B wages. Indeed, the higher wages expected to result from the Final Rule could in turn result in a more efficient distribution of H–2B visas to employers who can less easily attract available U.S. workers. The Department believes that those employers who can more easily attract U.S. workers will be dissuaded from attempting to participate in the H–2B program after the Final Rule goes into effect, so that those employers participating in the H–2B program after the rule is in place will be those that have a greater need for the program, on average, than those employers participating in the H–2B program before the Final Rule goes into effect. Therefore, there would be no appreciable decline in employment under the program.

In years in which the number of certified H–2B positions is less than the 66,000 visa cap, the higher wages resulting from this Final Rule could be expected to result in a reduction in employment of H–2B workers and, therefore, a reduction in output by employers participating in the H–2B program. This employment reduction would be expected to be partially offset by increased employment of U.S. workers to the extent that employers could attract U.S. workers or could in some cases make other adjustments, such as substituting capital for labor; but, in a sense, the reduction in employment and output would not be completely offset, potentially resulting in some deadweight loss in production among H–2B employers. The history of the H–2B program, however, suggests that this situation is rare. In recent history, the number of H–2B visas has reached the 66,000 cap every year except FY 2009 and FY 2010.

ii. Transfers

The change in the method of determining wages results in transfers from H–2B workers to U.S. workers and from U.S. employers to both U.S. workers and H–2B workers. A transfer from H–2B workers to U.S. workers arises because, as wages increase, jobs that would otherwise be occupied by H–2B workers will be more acceptable to a larger number of U.S. workers. Additionally, faced with higher H–2B wages, some employers may find domestic workers relatively less expensive and may choose to not participate in the H–2B program and, instead, employ U.S. workers. Although some of these U.S. workers may be drawn from other employment, some of them may otherwise be or remain unemployed or out of the labor force entirely, earning no compensation.

The Department is not able to quantify these transfer payments with precision, however. Difficulty in calculating these transfer payments arises primarily from uncertainty about the number of U.S. workers currently collecting unemployment insurance benefits who will become employed as a result of this rule.

To estimate the total transfer to H–2B workers via the increased wages resulting from the new wage determination method, the Department multiplied the total number of H–2B workers in the U.S. in a given year (115,500), which includes both new entrants and an assumed portion of those who entered in each of the two

[37] Although only four alternative arguments have undergone quantitative analysis in this section, there are an additional ten alternative suggestions that contain a qualitative discussion in section II.C of this Final Rule.

[38] Although employers may pass costs onto their customers, data does not exist from which to estimate the amount or extent to which costs would be absorbed by customers. Therefore, the Department was not able to quantify this cost offset.

[39] The output reduction impact of reducing labor demand may be in some cases partially offset by capital substitution and organizational substitution productivity effects. When substitution occurs, the deadweight loss will be reduced.

[40] *See, e.g.,* Hamermesh, Daniel S., Labor Demand, Princeton and Chichester, U.K.: Princeton University Press, 1993.

previous years,[41] by the weighted average hourly wage increase ($4.83), the number of hours worked per day (7), and the total number of days worked (217).[42] On this basis, we estimate the total annual average transfer incurred due to the increase in wages at $847.4 million. As a result, OMB has determined that the rule is an economically significant rule.

The increase in the wage rates induces a transfer from participating employers not only to H–2B workers, but also to U.S. workers hired in response to the required H–2B recruitment. The higher wages are beneficial to U.S. workers because they enhance workers' ability to meet the cost of living and to spend money in their local communities, which has the secondary impact of increasing economic activity and, therefore, generates employment in the community. These are important concerns and a key aspect of the Department's mandate to ensure that wages of similarly employed U.S. workers are not adversely affected.[43]

Several commenters indicated that the increase in the wages of H–2B workers could impact the career ladder established by H–2B employers for non-H–2B employees. The Department recognizes that career ladders of non-H–2B workers could potentially be impacted by the wage increase but is unable to quantify that impact because of the lack of data to ascertain the degree to which H–2B employers will react by increasing wages for their other workers.

Similarly, our calculations do not include the wage increase of U.S. workers hired in response to the required recruitment because of lack of data on these workers.

3. Alternatives

Several commenters proposed alternatives to the wage calculation methodology. In response to these comments, the Department analyzed the following wage calculation alternatives: (1) To continue the current calculation methodology but provide a more complete justification for doing so; (2) to eliminate the four tiers and use the OES arithmetic mean as the OES component of the prevailing wage determination; (3) to eliminate the four tiers and use the OES median as the OES component of the prevailing wage determination; and (4) use the proposed methodology—alternative 2—but require the provision of fringe benefits.

The Department conducted economic analyses of the four alternatives to better understand their impacts. Below is a discussion of each alternative along with an estimation of their associated transfers. Transfers for each alternative use the 2008 Final Rule as the baseline. In addition, for each alternative that was not chosen, we include a discussion on why the alternative was not chosen. Finally, we summarize the total transfers associated with each alternative considered.

i. Continue the Current Calculation Methodology

This alternative was espoused by several commenters, including the Chief Counsel for Advocacy, SBA. For the reasons discussed throughout this Final Rule, continuing the current calculation methodology that relies on the four tiers does not provide adequate protections to U.S. and H–2B workers. The existing procedure for extracting tiered wages from the basic OES wage survey data was adopted without any systematic effort to determine if that system was empirically justified. The OES wage surveys collect no data about the skill levels or duties performed by the workers at any particular wage level. Although lower wages may be associated with lower skill levels and responsibilities in professional occupations, there is no evidence to suggest that such a relationship exists in the lower skilled occupations that predominate in the H–2B program. Even if there were some evidence of the existence of skill-based wage differences with these occupations, the OES survey does not purport to capture such differences. In the absence of such information, our responsibility to set wage rates that avoid adverse effect on wages compels us to use the highest of the SCA or DBA rates, the wage established under an existing CBA, or the OES arithmetic mean wage as the principal wage-setting tool. The cost associated with this alternative is zero because it represents the baseline, that is, the alternative where no action is taken by the Department. The Department, therefore, rejected this alternative.

ii. Eliminate the Four Tiers and Use the Highest of the Wage Rates Set Forth Under the CBA, DBA, SCA, or OES Arithmetic Mean

This alternative is the method required by the Final Rule which defines the prevailing wage to be the highest of: (1) The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between a union and an employer; (2) the wage rate established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which such a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage. This alternative represents the policy that will best achieve the Department's policy objectives of ensuring that wages and working conditions of U.S. workers are more adequately protected and, thus, will not be adversely affected by the admission of H–2B workers to the country.

As discussed above, the elimination of the four tiers and the use of the highest of the wage rates set forth under the CBA, DBA, SCA, or OES where the arithmetic mean would constitute the OES wage rate will result in a total annual average transfer of $847.4 million to H–2B workers.

iii. Eliminate the Four Tiers and Use the Highest of the Wage Rates Set Forth Under the CBA, DBA, SCA, or OES Median

This alternative represents the elimination of the four tiers and the highest of the wage rates set forth under the CBA, DBA, SCA, or OES where the OES median constitutes the OES wage rate. To estimate the total transfer to H–2B workers via the increased wages resulting from the use of the median, we used the same methodology discussed above to calculate the wage differential for the OES mean. The Department multiplied the total number of H–2B workers in a given year (115,500), which includes both new entrants and an assumed portion of those who entered in each of the two previous years, by the weighted average hourly wage increase estimated using the OES median ($4.64), the number of hours worked per day (7),

[41] The Department's data on certified applications cannot be used to determine the actual number of H–2B workers in the country. Certifications are made without regard to the cap on the number of H–2B workers admissible each year and are not intended to indicate whether a worker actually entered the country to fill a position. Additionally, available DHS data is based on total entries of H–2B workers, which may or may not equal the admissions of H–2B workers in a given year. *See http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/table25d.xls.* The Department of State keeps records of visas issued but does not publicly break down these numbers based on subcategories within the H category. *http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html.*

[42] For the number of hours worked per day, we use 7 hours as typical. For the number of days worked, we assume that the employer will retain the H–2B worker for the maximum time allowed (10 months, or 304 days [10 months × 30.42 days]) and will employ the workers for 5 days per week. Thus, total number of days worked equals 217 [10 months × 30.42 days × (5/7)].

[43] An additional transfer noted by a commenter is increased remittances to the worker's home country. The Department, however, does not have data on the remittances made by H–2B workers to their countries of origin.

and the total number of days worked (217). We estimate the total annual average transfer incurred due to the increase in wages represented by the median at $814.1 million.

The Department rejected this methodology. Although the numbers are generally comparable to the arithmetic mean, the median does not represent the best "average" wage across a distribution. The median wage represents only the midpoint of the range of wage values; it does not account for the actual average. The mean is widely considered to be the best measure of central tendency for a normally distributed sample, as it is the measure that includes all the values in the data set for its calculation, and any change in any of the wage rates will affect the value of the mean. This is not the case with the median. The Department has traditionally relied on arithmetic means for wage programs and has determined that these reasons make continuing reliance on the mean, rather than the median, logical.

iv. Use the Proposed Methodology but Require the Provision of Fringe Benefits

To estimate the total transfer to H–2B workers from the increased wages resulting from the elimination of the four tiers and the inclusion of fringe benefits, the Department multiplied the estimated annual number of H–2B workers (115,500), by the weighted average hourly wage increase represented by the DBA wages plus fringe benefits ($7.20), the number of hours worked per day (7), and the total number of days worked (217). For records where DBA wages and fringes were not available, we used the OES mean (as calculated according to option 2) plus the SCA health and welfare (H&W) $3.35 flat fringe.[44] We estimate the total annual average transfer incurred due to the increase in wages represented by the wages plus fringe benefits at $1,263.2 million.[45]

The Department historically has not required the payment of fringe benefits to H–2B workers, even before 2005, when the payment of DBA wage rates was mandatory for occupations where such wage determinations existed. See 75 FR 61578, 61579, Oct. 5, 2010 ("Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program" Proposed Rule). Under this Final Rule, the Department will again certify the DBA wage as the prevailing wage rate that must be paid to H–2B workers if those rates are the highest in those occupations in the area of intended employment among the rates listed in § 655.10. For H–2B positions for which the DBA wage is not applicable, the Department believes that not requiring fringe benefit payments is an appropriate reflection of the Department's historical practices. As previously noted, fringe benefits costs have never been included in H–2B wage determinations. The Department reaffirms its belief that requiring fringe benefit payments to H–2B workers is not necessary in order to prevent an adverse effect on the wages and working conditions of U.S. workers.

v. Summary of Alternatives Analyzed Quantitatively

Exhibit 1 below summarizes the total 10-year transfers incurred for the wage methodology alternatives discussed above relative to the baseline. The 10-year analysis period starts on January 1, 2012[46] and ends on December 31, 2021. The alternative of regional SCA wages applies to forestry workers only. We use discount rates of 7 and 3 percent to estimate the transfers over the 10-year analysis period.

EXHIBIT 1: SUMMARY OF ALTERNATIVES ANALYZED QUANTITATIVELY
($ millions over 10-year analysis period)

		Transfers
7 percent discount rate		
	Take no action	0
	Highest of the CBA, DBA, SCA, and OES mean	5,562
	Highest of the CBA, DBA, SCA, and OES median	5,344
	Inclusion of fringe benefits	8,292
3 percent discount rate		
	Take no action	0
	Highest of the CBA, DBA, SCA, and OES mean	7,018
	Highest of the CBA, DBA, SCA, and OES median	6,742
	Inclusion of fringe benefits	10,462

[44] Health and welfare includes life, accident, and health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans. Minimum employer contributions costing an average of $3.35 per hour are computed on the basis of all hours worked by employees employed on the contract.

[45] See the RFA analysis at section II.C of the Administrative Information section for a more descriptive analysis of the wage differential between DBA and fringe benefits and the prevailing wage under the OES mean for the construction industry.

[46] The Final Rule is effective for wages paid to H–2B workers and U.S. workers recruited in connection with an H–2B labor certification for all work performed on or after January 1, 2012.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Further, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact. For the reasons explained in this section, the Department believes this Final Rule is not likely to impact a substantial number of small entities and, therefore, a final regulatory flexibility analysis is not required by the RFA. However, in the interest of transparency, we have prepared the following Final Regulatory Flexibility Analysis to assess the impact of this regulation on small entities, as defined by the applicable Small Business Administration (SBA) size standards.

Employers seeking to participate in the H–2B program come from virtually all industries and segments of the economy and industries. Participating businesses are a small portion of the national economy overall. A Guide for Government Agencies: How to Comply with the RFA, Small Business Administration, at 20 ("the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall"). Employment in the H–2B program represents a small percentage of the total employment in the U.S. economy, both overall and in the industries represented in the H–2B program. The H–2B program is capped at 66,000 visas issued per year; assuming that half of all entering workers stay at least one additional year, and half of those workers stay a third year, the 115,500 H–2B workers working in the U.S. in a year represent approximately 0.09 percent of total U.S. nonfarm employment (130.9 million).[47]

According to H–2B program data for FY 2007–2009, the average annual numbers of H–2B positions certified by ETA in the top six industries were as follows: construction—30,242; amusement, gambling, and recreation—14,041; landscaping services—78,027; janitorial services—30,902; food services and drinking places—22,948; and forestry services—18,387. As explained below, this Final Rule provides an enhanced analysis of the impact on small businesses, including extending the analysis to forestry services. Thus, we present analysis on the top six industries (rather than the top five industries presented in the NPRM).[48]

When the actual number of entries permitted each year (given the H–2B visa cap of 66,000 workers) is accounted for, H–2B workers represent the following percentages of the total employment in each of these industries: construction—0.2 percent (14,756/7,265,648); amusement, gambling, and recreation—0.5 percent (6,851/1,506,120); landscaping services—6.5 percent (38,073/589,698); janitorial services—1.6 percent (15,079/933,245); and food services and drinking places—0.1 percent (11,197/9,617,597).[49] As these data illustrate, the H–2B program represents a small fraction of the total employment in the top industries in which H–2B workers are found. The Economic Census does not contain industry employment data for forestry support services; therefore, the Department is not able to calculate the percentage of total employment represented by H–2B workers in that industry.

1. Description of the Reasons That Action by the Agency Is Being Considered

The Department has determined that a new wage methodology is necessary for the H–2B program. The Department's decision to reevaluate the prevailing wage aligns with the Department's mandate under the H–2B program to ensure that U.S. workers are not adversely affected by the employment of H–2B workers. The order in the recent court decision in *CATA* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) merely prompted a more expeditious review of this important issue. As noted in the NPRM, the Department has grown increasingly concerned that the current method of calculating the prevailing wage does not produce rates that adequately reflect the appropriate wage necessary to ensure that U.S. workers are not adversely affected by the employment of H–2B workers.

As discussed in the E.O. 12866 analysis, the Department analyzed the breakdown of wages by OES level of 4,694 submitted requests for a prevailing wage submitted this calendar year. This analysis found that 74 percent of H–2B positions were certified at the Level I wage rates; the percentages of H–2B positions certified at Levels II, III, and IV were 10.5, 8.2, and 6.9, respectively.

The existing procedure for extracting tiered wages from the basic OES wage survey data was adopted without any systematic effort to determine if that system was empirically justified. The OES wage surveys collect no data about the skill levels or duties performed by the workers at any particular wage level. Although lower wages may be associated with lower skill levels and responsibilities in professional occupations, there is no evidence to suggest that such a relationship exists in the lower skilled occupations that predominate in the H–2B program. Even if there were some evidence of the existence of skill-based wage differences with these occupations, the OES survey does not purport to capture such differences.

The Final Rule defines the prevailing wage to be the highest of: (1) The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between a union and an employer; (2) the wage rate established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which such a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage. The OES wage level under the new methodology would effectively result in the payment of wages that would conform more closely to the wages paid by non-H–2B employers according to the results of the OES survey. Thus, it is the Department's position that when the certified prevailing wage is based on the OES survey, using the arithmetic mean will not adversely affect the wages of U.S. workers similarly employed.

2. Succinct Statement of the Objectives of, and Legal Basis for, the Rule

The Department is proposing to establish a new wage methodology that adequately protects the wages of U.S. and H–2B workers. The legal basis for

[47] Source: *ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt.*

[48] Although we were not able to obtain industry employment data for the forestry support services industry, we were able to obtain revenue and employment data for this industry from the business data provider ReferenceUSA. ReferenceUSA relies primarily on phone verification and public data sources to obtain employment and revenue figures for businesses of different sizes.

[49] The scale factor was derived by dividing 115,500 by the total number of workers certified per year on average during FY 2007–2009 (236,706). Please see the transfer payments subsection in the E.O.12866 section above for a discussion of how we derived the number of H–2B workers in a given year (115,500).

the rule is the Department's authority, delegated from DHS under its regulations at 8 CFR 214.2(h)(6), to grant temporary labor certifications under the H–2B program. Additionally, as discussed earlier, the Department is subject to the *CATA* v. *Solis* order, which requires the Department to "promulgate new rules concerning the calculation of the prevailing wage rate in the H–2B program that are in compliance with the Administrative Procedure Act no later than 120 days from the date of this order." That date was subsequently modified to give the Department until January 18, 2011 to promulgate the rule.

3. Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Rule Will Apply

Definition of a Small Business

A small entity is one that is independently owned and operated and that is not dominant in its field of operation. The definition of small business varies from industry to industry to properly reflect industry size differences. An agency must either use the SBA definition for a small entity or establish an alternative definition for the industry. The Department has conducted a small entity impact analysis on small businesses in the six industries with the largest number of H–2B workers, as mentioned above: landscaping services; janitorial services (includes housekeeping services); food services and drinking places; amusement, gambling, and recreation; construction; and forestry support services. These top six industries accounted for 82 percent of the total number of H–2B workers certified during FY 2007–2009.[50]

We have adopted the SBA small business size standard for each of the six industries, which is a firm with annual revenues equal to or less than the following: landscaping services, $7 million; janitorial services, $16.5 million; food services and drinking places, $7 million; amusement, gambling, and recreation, $7 million; construction, $20.7 million; and forestry support services, $7 million.[51]

Several commenters expressed a concern that the Department made the assumption in the NPRM analysis that 50 percent of all H–2B employers are small businesses, asserting that this assumption was not based on data. In response to this concern, the Department has obtained third-party data to improve the analysis. Specifically, to identify annual revenue and employment for H–2B employers, the Department used data from the business data provider ReferenceUSA and matched them to H–2B program data. ReferenceUSA relies primarily on phone verification and public data sources to obtain employment and revenue figures for businesses of different sizes.[52]

In order to ensure that the interests of small business were adequately considered, the Department assumed that all H–2B employers with no revenue or employment data available from ReferenceUSA are small.

4. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule

The rule does not impose any reporting or recordkeeping requirements. Other provisions in the current regulations impose those requirements.

For other compliance requirements, this RFA estimates the incremental costs for small businesses from the baseline, that is, from the 2008 Final Rule. The baseline for this rule is the burden of participating in the program under the existing requirements, and is represented by a prevailing wage calculation methodology that uses the four tier wage structure based on the stratification of the OES survey. Using available data, we have estimated the costs of the increased wages and the time required to read and review the Final Rule.

The Department receives an average of 8,717 applications annually (not necessarily the same as the number of applicants, because one employer may file more than one application) for the H–2B program, and the Department estimates that an average of 6,980 of those applications results in petitions for H–2B workers that are approved by DHS. Even if all 6,980 applications were filed by unique small entities, the percentage of small entities authorized to employ temporary non-agricultural workers would be less than 1 percent of the total number of small entities in the six industries with the largest number of H–2B workers.[53] Based on this analysis, the Department estimates that the rule will impact less than 1 percent of the total number of small businesses in the top six industries. Because any small business could apply and receive certification under the program, the universe is all small businesses in the relevant industries that participate in the program. A detailed industry-by-industry analysis is provided below. Several commenters, including the Chief Counsel for Advocacy, SBA, cited two court decisions involving fishing quotas[54] to suggest that the Department incorrectly over-estimated the universe of potentially affected businesses. Those cases are not relevant because they resulted from an agency decision to issue a certification that the rule in question did not significantly impact a substantial number of small businesses. The Department has not made such a certification here. That being said, the Department does not believe it over-estimated the number of potentially affected businesses based on the analysis presented above.

To examine the impact of this rule on small entities, the Department evaluated the impact of the incremental costs on a hypothetical small entity of average size. We used individual employer revenue and employment data from ReferenceUSA to determine which certified or partially certified applicants were considered small by using the industry-specific SBA size standards. Using H–2B program data, the Department estimates the average number of H–2B workers for small

[50] According to H–2B program data, the average annual number of firms (of all sizes) and H–2B workers certified for these industries during FY 2007–2009 were as follows: landscaping services, firms—2,754, workers—78,027; janitorial services, firms—788, workers—30,902; food services and drinking places, firms—851, workers—22,948; amusement, gambling, and recreation, firms—227, workers—14,041; construction, firms—860, workers—30,242; and forestry support services, firms—130, workers—18,387.

[51] The SBA small business size standards for construction range from $7 million (land subdivision) to $33.5 million (general building and heavy construction). However, because employers representing all types of construction businesses may apply for certification to employ H–2B workers, the Department used the average of $20.7 million as the size standard for construction.

[52] As stated in the NPRM, the revenue figure is part of the information collection but is not required for successful completion of the application. It has also been part of the application only since the implementation of the ETA–9142 in 2009. The Department began collecting revenue data at the behest of the SBA to be better able to calculate such figures but the data is at best minimal and sporadically provided and, in the Department's view, the data that we have collected is not adequately representative of revenue figures for employers using the program. Therefore, the Department has concerns about the statistical validity of the data. This is why the Department chose to rely on an outside source (ReferenceUSA) for revenue and employment data that is more comprehensive than the data received in program applications.

[53] The total number of firms classified as small entities in these industries is as follows: landscaping services, 63,210; janitorial services, 45,495; food services and drinking places, 293,373; amusement, gambling, and recreation, 43,726; construction, 689,040; and forestry support services, 1,353. Source: 2002 County Business Patterns and 2002 Economic Census. *http://www.census.gov/econ/susb/data/susb2002.html.*

[54] *Southern Offshore Fishing Association* v. *Daley,* 97–1134–CIV–T–23C, slip op. (Oct. 16, 1998); *North Carolina Fisheries Association* v. *Daley,* 27 F. Supp. 2d 650 (E.D. Va. 1998).

businesses in the top six industries at any given time are as follows: landscaping services, 5.8 workers; janitorial services, 6.9 workers; food services and drinking places, 4.2 workers; amusement, gambling, and recreation, 11.4 workers; construction, 6.6 workers; and forestry support services, 25.4 workers.[55]

Using the data obtained from ReferenceUSA, we then derived the annual revenues for small entities in each of the top six industries. The Department estimates that small businesses in the top six industries have the following average annual revenues: landscaping services, $1.781 million; janitorial services, $4.240 million; food services and drinking places, $1.607 million; amusement, gambling, and recreation, $1.490 million; construction, $4.788 million; and forestry support services, $1.299 million.[56]

i. Change in the Method of Determining Wages for H–2B Workers

This Final Rule requires employers to offer H–2B workers and U.S. workers hired in response to the required H–2B recruitment, a wage that is at least equal to the highest of the prevailing wage, or the Federal, State, or local minimum wage. Under the Final Rule, the prevailing wage is defined as the highest of the following: (1) The wage rate established in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between the union and the employer; (2) the wage rate established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which such a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage.[57] This Final Rule changes the methodology for calculating the prevailing wage to the arithmetic mean of the OES wages for a given area of employment and occupation.

With two exceptions, noted below, the Department calculated the change in hourly wages by matching the OES wage rates to the H–2B data by the SOC and the MSA of employment. We also matched the SCA and DBA wage rates to the H–2B data using the occupational title specified in the H–2B program data and the county of employment.[58] For some occupations and counties, SCA and DBA wages have not been determined; in those cases, the SCA and DBA wages did not enter our calculations. In the Department's experience under the H–2B program, the work of landscape laborers generally involves grounds maintenance of the kind contained in SCA and OES job descriptions. Construction related landscaping—the construction of planters, walkways and similar structures as part of building construction projects as used in DBA job descriptions—is rarely applicable to H–2B employment. Accordingly, SCA and OES rates were used to estimate costs for landscape laborers. Similarly, SCA job descriptions are generally more reflective of H–2B reforestation occupations than are OES job descriptions; therefore, SCA wage rates were used to estimate the effect of the Final Rule on reforestation employers. This analysis is based on job titles rather than actual job duties. After implementation, the Department will closely compare the job duties listed on the Application to the job duties listed in the SOC, SCA Dictionary of Occupation Titles, and the DBA wage determinations to identify the most appropriate basis for determining the prevailing wage.

Using certified and partially certified applications in the H–2B program data, we calculated the increase in wages by selecting the highest wage among the OES arithmetic mean, the SCA wage determination, and DBA wage determination. We then subtracted the average H–2B hourly wage certified from the highest of the three wages, and we weighted this differential by the number of certified workers on each certified or partially certified application. We then summed those products and divided the sum by the total number of certified workers from the certified or partially certified applications.[59] Based on this calculation, the change in the method of determining wages will result in a $4.83 increase in the weighted average hourly wage for H–2B workers (and similarly employed U.S. workers hired in response to the recruitment required as part of the H–2B application).

This approach for calculating the expected changes in hourly wages relative to the baseline is more accurate than the approach the Department used in the analysis presented in the NPRM in two ways. First, the calculations presented in this analysis use the highest wage among the OES arithmetic mean and the SCA and DBA wage determinations. In the analysis presented in the NPRM, the SCA and DBA wages were not directly accounted for in these calculations. Second, the calculations presented in this analysis use wage data for each county where the H–2B work actually took place.[60] In the analysis presented in the NPRM, on the other hand, the Department used the national values rather than location-specific data.

More specifically, because the employer's address frequently does not represent the area where the work actually takes place, the Department conducted a manual extraction of area-of-employment data from the submitted H–2B applications, including the city, state, and zip code corresponding to the area of employment. The Department used a random sample of 500 certified or partially-certified applications from Calendar Year (CY) 2009 H–2B program data.[61] The $4.83 increase in the

[55] The Department estimated that approximately 28 percent of certified H–2B workers are actually hired by dividing the annual H–2B visa cap (66,000) by the total number of positions certified per year on average during FY 2007–2009 (236,706). We then applied this percentage to the number of workers certified in certifications granted in each of the six industries to approximate the distribution of the 66,000 H–2B visas by multiplying 28 percent by the number of workers certified for each certified or partially certified H–2B application.

[56] As indicated above, the SBA small business size standards are highest for construction and janitorial services.

[57] A CBA wage may in fact be the highest of the applicable wages; even under the 2008 Final Rule, if the job opportunity were covered by a CBA, the wage rate in the CBA would be the required wage. Accordingly, including the CBA wage rate in the definition of prevailing wage will not result in an increased cost to the employer covered by the CBA.

[58] Once this Final Rule is effective, the prevailing wage will be determined not by comparing job titles, but by comparing job duties listed on the employer's application with the occupational definitions in the SOC (for OES), the Dictionary of Occupational Titles (for SCA), or the DBA wage determination.

[59] In all wage calculations where we found that the baseline H–2B wage is higher than any alternative wage considered, we assumed that the baseline survey prevails. That is, we assumed that the wage increase is zero for those cases. This situation, however, is rare; the prevailing wage exceeded the OES mean in approximately 4 percent of the cases.

[60] A recent Congressional Research Service (CRS) report used a wage calculation approach that is similar to that used in this Final Rule. The report found that the SCA and DBA wage rates are in some cases higher than the OES arithmetic mean for a given job opportunity. This is consistent with the findings of the analysis conducted for this Final Rule. The CRS report, however, did not rely on wage data for each county where the work actually took place. Also, the CRS report was limited to a selected group of occupations and counties. Source: "Potential Impact of Proposed Regulations on the Wages of H–2B Workers," Congressional Research Service, October 2010.

[61] The Department used the Calendar Year 2009 as a representative year. Although some commenters suggest that FY 2009 was not a representative year for use of the H–2B program, the random sample chosen was consistent with standard statistical methods and was selected from the calendar year, rather than the fiscal year, to reach data outside the FY 2009 data while representing the most recent data available. Calendar Year 2009 applications, for example, reach

Continued

weighted average hourly wage for H–2B workers (and similarly employed U.S. workers hired in response to the recruitment required as part of the H–2B application) was calculated using this data sample.

These calculations yielded the following hourly wage increases by industry associated with this rule: landscaping services, $4.32; janitorial services, $5.81; food services and drinking places, $2.59; amusement, gambling, and recreation, $6.61; construction, $9.72; and forestry support services, $1.23.[62]

ii. Reading and Reviewing the New Processes and Requirements

During the first year that this rule would be in effect, employers would need to learn about the new PWD. We estimate this cost for a hypothetical small entity which is interested in applying for H–2B workers by multiplying the time required to read the new rule and any educational and outreach materials that explain the wage calculation methodology under the rule by the average compensation of a human resources manager.[63] In the first year of the rule, the Department estimates that the average small business participating in the program will spend approximately 1 hour of staff time to read and review the new regulation, which amounts to approximately $61.42 ($61.42 × 1) in labor costs in the first year.[64]

iii. Total Cost Burden for Small Entities

This section presents the total cost burden for small entities, which includes both the wage cost (by far the largest component) and the cost to read and review the rule (applies to the first year only). The Department's calculations indicate that for a hypothetical small entity in each of the top six industries that applies for one worker (representing the smallest of the small entities that hire H–2B workers), the total average annual costs of the rule are: landscaping services, $6,568; janitorial services, $8,832; food services and drinking places, $3,940; amusement, gambling, and recreation, $10,047; construction, $14,771; and forestry support services, $1,875.

The analogous average annual costs for small employers in the top six industries that hire the average number of H–2B workers are as follows: landscaping services, $38,082; janitorial services, $61,286; food services and drinking places, $16,528; amusement, gambling, and recreation, $114,929; construction, $97,657; and forestry support services, $47,433. As a percent of revenue, these costs represent the following: landscaping services, 2.14 percent; janitorial services, 1.45 percent; food services and drinking places, 1.03 percent; amusement, gambling, and recreation, 7.71 percent; construction, 2.04 percent; and forestry support services, 3.65 percent.

The Department considers that a rule has a "significant economic impact" when the total annual cost associated with the rule is equal to or exceeds 1 percent of annual revenue. Thus, the rule is expected to have a significant economic impact on the average participating small entity in each of the top six industries. Although applying to hire H–2B workers is voluntary, and any employer (small or otherwise) may choose not to apply, an employer, whether it continues to participate in the H–2B program or fills its workforce with U.S. workers, could face sizeable costs. However, increased employment opportunities for U.S. workers and higher wages for both U.S. workers and H–2B workers provide a broad societal benefit that, in the Department's view, outweighs these costs.

Several commenters indicated that the increase in the wages of H–2B workers could impact the career ladder established by H–2B employers for non-H–2B employees by adversely impacting the ability to pay those in career ladders a higher wage, thus compressing wages for supervisory positions. The Department recognizes that career ladders could potentially be impacted by the wage increase; however, a lack of data about the prevalence of such career ladders and the ways in which employers might restructure them makes any potential effect impossible to quantify.

Similarly, our calculations do not include the wage increases of U.S. workers hired in response to the required recruitment who must be paid the same wages as H–2B workers because we do not have a basis for estimating how many of these workers are hired as a direct result of the recruitment effort.

The small entities that have historically applied for H–2B workers represent relatively small proportions of all small businesses. The following are the percentages of firms that were certified for H–2B workers among all small U.S. businesses in their respective industries: Landscaping services, 2.3 percent (1,462/63,210); janitorial services, 1.0 percent (436/45,495); food services and drinking places, 0.1 percent (350/293,373); amusement, gambling, and recreation, 0.4 percent (164/43,726); construction, 0.1 percent (358/689,040); and forestry support services, 6.8 percent (92/1,353).[65] Due to the statutory annual cap on available visas, the percentage of small entities receiving H–2B visas, to which the full cost burden would apply, would be even lower.

The Department considers that a rule has an impact on a "substantial number of small entities" when the total number of small entities impacted by the rule is equal to or exceeds 10 percent of the relevant universe of small entities in a given industry. *See, e.g.,* 73 FR 78049, Dec. 19, 2008. The Department has used the 10 percent threshold in previous regulations. Therefore, this rule is not expected to impact a substantial number of small entities.

5. Identification of All Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Rule

The Department is not aware of any relevant Federal rules that duplicate, overlap or conflict with the rule.

6. Summary of Issues Raised in Response to the IRFA

The Department received a number of comments related to its IRFA analysis including, as mentioned above, one submitted by the Chief Counsel for Advocacy, SBA. Several of these comments, including the Chief Counsel for Advocacy, SBA comment, focused on the Department's choice of the universe of potential H–2B participants.

back to applications filed under the regulations in place before the 2008 Final Rule, and were filed using Form ETA 750. In addition, the Department's program database does not collect city and zip code data for the work locations for the certifications. Therefore, to extract that data, the Department hand-selected a random sample from the CY2009 filed applications to calculate the wage increases.

[62] For the number of hours worked per day, we use 7 hours as typical for an average. For the number of days worked, we assumed that the employer would retain the H–2B worker for the maximum time allowed (10 months, or 304 days [10 months x 30.42 days]) and would employ the workers for 5 days per week. Thus, total number of days worked equals 217 [10 months × 30.42 days × (5/7)].

[63] The hourly compensation rate for a human resources manager is calculated by multiplying the hourly wage of $42.95 (as published by the Department's OES survey, O*NET Online) by 1.43 to account for private-sector employee benefits (Source: Bureau of Labor Statistics). Thus, the loaded hourly compensation rate for a human resources manager is $61.42.

[64] The number of small businesses that will read and review the Final Rule is likely to include some that will not apply for the program. There are no available data to quantify this possible effect.

[65] The source of the numerator (*i.e.,* the number of certified H–2B employers) is H–2B program data for FY 2009. The source of the denominator (*i.e.,* the total number of U.S. businesses meeting the SBA small-size criteria) is the 2002 County Business Patterns and 2002 Economic Census. *http://www.census.gov/econ/susb/data/susb2002.html.*

Some of these comments asserted that the Department did not correctly identify the universe of small entities to whom the analysis must be directed, while other comments stated that the Department did in fact correctly identify the universe of small entities affected by the rule.

Other comments, including the Chief Counsel for Advocacy, SBA comment, asserted that the Department did not use its own data with regard to the revenue and size of businesses participating in the program. Comments, including that submitted by the Chief Counsel for Advocacy, SBA, also asserted the Department did not include an analysis of the impacts on the forestry industry with respect to its IRFA analysis. These comments have been discussed previously in this Regulatory Flexibility Act analysis. For example, this Regulatory Flexibility Act analysis now includes an analysis of impacts in the forestry industry in response to these comments.

Other commenters were critical of the fact that the RFA analysis did not consider the broader effects on the economy since companies using the H–2B program may be forced to scale back on employees or on downstream purchases of equipment, inventory or products as a result of increased labor costs. The Department cannot estimate such costs, even assuming their existence.

The Department also received several comments recommending the use of the Department's data on the H–2B program, available on its Web site, to demonstrate the impact on employers, particularly small employers, in various economic sectors. Several commenters, including the Chief Counsel for Advocacy, SBA, sought to derive applicable numbers of H–2B workers from the data available from the certifications employed by DOL. The Department does not believe that its data can be relied upon for the number of H–2B individuals employed in the U.S. at any one time. Employers may file an application as an extension of their normal recruitment efforts, which may or may not result in the hiring of H–2B workers. As discussed above, the Department certifies more workers than can be legally admitted under the H–2B program. The Department has no data that indicate the number of certified workers who are actually hired after a certification has been adjudicated.[66] The Department believes its calculations in this final Regulatory Flexibility Analysis more accurately reflect the usage of the H–2B program by employers.

Many commenters discussed the economic impact of the proposed rule on their own operations. These comments focused on the overall impact of the burden and specifically on the burden imposed on the imposition of a Final Rule, at a time when contracts and financial obligations have been set for the coming season and prices for services have been set and cannot be renegotiated. As discussed in detail above, employers participating in the H–2B program have always been required to meet the conditions of the labor certification, which include the payment of a valid prevailing wage. The fact that a new wage methodology may result in wages in excess of anticipated labor costs does not minimize the Department's obligation to ensure the avoidance of adverse impact on the wages of U.S. workers. Even though the NPRM provided notice to program users of the Department's intent with respect to recognizing that this adverse impact was not being met under the current methodology and so changes would be made, the Department recognizes the commitments that employers have made in reliance on the current methodology. In recognition of these comments and this impact, and in order to provide employers with sufficient time to plan for their labor needs for the next year and to minimize the disruption to their operations, the Department is delaying implementation of this Final Rule so that the prevailing wage methodology set forth in this Rule applies only to wages paid for work performed on or after January 1, 2012. Moreover, the Department has no data that indicate the number of certified workers who are actually hired after a certification has been adjudicated. The Department believes its calculations in this final Regulatory Flexibility Analysis more accurately reflect the usage of the H–2B program by employers.

In addition, several commenters, including the Chief Counsel for Advocacy, SBA, asserted that the Department did not provide viable alternatives in its IRFA. A full discussion of alternatives is contained below. For the reasons stated in the quantitative and qualitative discussion of the alternatives, the Department has decided to retain the proposal of the NPRM of defining the prevailing wage to be the highest of the CBA, DBA or SCA wage determinations, or the arithmetic mean of the OES to best avoid adverse impact.

7. Alternatives Considered as Options for Small Entities

As noted in section 3 of the E.O. 12866 analysis, several commenters proposed alternatives to the wage calculation methodology. In response to these comments, the Department analyzed the following wage calculation alternatives: (1) To continue the current calculation methodology but provide a more complete 000000justification for doing so; (2) to eliminate the four tiers and use the OES arithmetic mean as the OES component of the prevailing wage determination; (3) to eliminate the four tiers and use the OES median as the OES component of the prevailing wage determination; and (4) use the new methodology—alternative 2—but also require the provision of fringe benefits.[67] Below is a discussion of each alternative along with an estimation of their associated impacts on small entities.

i. Continue the Current Calculation Methodology

For the reasons discussed throughout this Final Rule, continuing the current calculation methodology that relies on the four tier wage structure does not provide adequate protections to U.S. and H–2B workers. The existing procedure for extracting tiered wages from the basic OES wage survey data was adopted without any systematic effort to determine if that system was empirically justified. The OES wage surveys collect no data about the skill levels or duties performed by the workers at any particular wage level. Although lower wages may be associated with lower skill levels and responsibilities in professional occupations, there is no evidence to suggest that such a relationship exists in the lower skilled occupations that predominate in the H–2B program. Even if there were some evidence of the existence of skill-based wage differences with these occupations, the OES survey does not purport to capture such differences. In the absence of such information, our responsibility to set wage rates that avoid adverse effect on

[66] One commenter suggested the Department use the Department of State's data regarding H–2B visas issued. The Department thanks the commenter for pointing out the availability of these numbers. However, even the number of H–2B visas issued in any given fiscal year does not necessarily represent actual employment of workers in H–2B status, much less in any given industry sector. That number does not take into account the number of those H–2B workers who do not enter or who are replaced with a U.S. worker prior to employment, or the changes or extensions of status granted for H–2B status.

[67] The Department notes that although only four alternative arguments have undergone quantitative analysis in this section, there are an additional nine alternative suggestions that contain a qualitative discussion in section C of this Administrative Information section.

wages compels us to use the highest of the SCA or DBA rates, the wage established under an existing CBA, or the OES arithmetic mean wage as the principal wage-setting tool. The cost associated with this alternative is zero because it represents the baseline, that is, the alternative where no action is taken by the Department. The Department recognized that action needed to be taken and, therefore, rejected this alternative.

ii. Eliminate the Four Tiers and Use the Highest of the Wage Rates Set Forth Under the CBA, DBA, SCA, or OES Arithmetic Mean

This alternative is the method required by the Final Rule which defines the prevailing wage to be the highest of: (1) The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arm's length between a union and an employer; (2) the wage rate established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which such a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage. This alternative represents the arithmetic mean of the wages of workers in similar occupations in the area of employment, as determined by the OES. This method will best achieve the Department's policy objectives of ensuring that wages of U.S. workers are more adequately protected and, thus, will not be adversely affected by the admission of H–2B workers into the country.

As discussed above, the replacement of the four-tiered wage structure with the highest of the wage rates set forth under the CBA, DBA, SCA, or OES where the arithmetic mean would constitute the OES wage rate will result in the following total average annual cost for a hypothetical small entity that applies for one worker: landscaping services, $6,568; janitorial services, $8,832; food services and drinking places, $3,940; amusement, gambling, and recreation, $10,047; construction, $14,771; and forestry support services, $1,875. The analogous costs for employers that hire the average number of H–2B workers for their respective industries are as follows: landscaping services, $38,082; janitorial services, $61,286; food services and drinking places, $16,528; amusement, gambling, and recreation, $114,929; construction, $97,657; and forestry support services, $47,433.

These increases are more than justified by the need for a wage rate that is based on the prevailing wage that is actually paid to similarly employed U.S. workers as demonstrated by OES mean wage rates, as well as the SCA and DBA wage rates. As noted above, the current methodology requires payment based on the unsupported assumption that skill-based wage differences are common in low-skilled H–2B jobs, and that the OES survey provides a basis for measuring a skill-based wage differential.

iii. Eliminate the Four Tiers and Use the Highest of the Wage Rates Set Forth Under the CBA, DBA, SCA, or OES Median

This alternative would replace the four-tiered wage structure with the highest of the wage rates set forth under the CBA, DBA, SCA, or OES where the OES median constitutes the OES wage rate. The Department used the same methodology discussed above to calculate the wage differential for this alternative. These calculations yielded the following hourly wage increases by industry associated with this rule: landscaping services, $4.18; janitorial services, $5.76; food services and drinking places, $2.47; amusement, gambling, and recreation, $6.38; construction, $9.39; and forestry support services, $1.23.

Using the OES median hourly wages, the Department's calculations indicate that for a hypothetical small entity that applies for one worker (representing the smallest of the small entities that hire H–2B workers), the total average annual costs of the rule are as follows: landscaping services, $6,356; janitorial services, $8,756; food services and drinking places, $3,758; amusement, gambling, and recreation, $9,697; construction, $14,270; and forestry support services, $1,875. The analogous costs for employers that hire the average number of H–2B workers for their respective industries are as follows: landscaping services, $36,848; janitorial services, $60,759; food services and drinking places, $15,762; amusement, gambling, and recreation, $110,930; construction, $94,342; and forestry support services, $47,433.

The Department rejected this methodology. Although the median wage is generally comparable to the arithmetic mean, the median does not represent the most predominant wage across a distribution. The median wage represents only the midpoint of the range of wage values; it does not account for the actual average. The mean is widely considered to be the best measure of central tendency for a normally distributed sample, as it is the measure that includes all the values in the data set for its calculation, and any change in any of the wage rates will affect the value of the mean. This is not the case with the median. The Department has traditionally relied on arithmetic means for wage programs and has determined that these reasons make continuing reliance on the mean, rather than the median, logical.

iv. Use the New Methodology but Require the Provision of Fringe Benefits

This alternative would replace the four-tiered wage structure with the inclusion of fringe benefits. To calculate the change in hourly wages, the Department matched the DBA wages plus fringe benefits to the H–2B data for construction workers by the occupational title and the county of employment. Using certified and partially certified applications in the H–2B program data, we calculated the increase in wages by subtracting the average H–2B hourly wage certified from the DBA wages plus fringe benefits, and we weighted this differential by the number of certified workers on each certified or partially certified applications. For cases for which there was no applicable DBA wage or fringe available, we used the OES mean and the SCA health and welfare (H&W) $3.35 flat fringe.[68] We then summed those products and divided the sum by the total number of certified workers from the certified or partially certified applications. This calculation yielded an hourly wage increase of $7.20.

To estimate the total cost to the average small entity of increased wages for H–2B workers associated with the inclusion of fringe benefits, the Department multiplied the average hourly increase in wages by the average total number of days worked by H–2B workers, the number of hours worked per day, and the average number of H–2B workers employed by all small entities identified in the H–2B data sample.[69] The Department's calculations indicate that for a hypothetical small entity that applies for one worker (representing the smallest of the small entities that hire H–2B workers), the total average annual

[68] Health and welfare includes life, accident, and health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans. Minimum employer contributions costing an average of $3.35 per hour are computed on the basis of all hours worked by employees employed on the contract.

[69] For the number of hours worked per day, we use 7 hours as typical for an average. For the number of days worked, we assume that the employer would retain the H–2B worker for the maximum time allowed (10 months, or 304 days [10 months × 30.42 days]) and would employ the workers for 5 days per week. Thus, total number of days worked equals 217 [10 months × 30.42 days × (5/7)].

costs (to include the wage increase and the cost to read the rule in the first year) of the rule is $10,943. The analogous cost for employers that hired the average number of H–2B workers is $70,002.

The Department historically has not required the payment of fringe benefits to H–2B workers, even before 2005, when the payment of DBA wage rates was mandatory for occupations where such wage determinations existed. *See* 75 FR 61578, 61579, Oct. 5, 2010 ("Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program" Proposed Rule). Under this Final Rule, the Department will again certify the DBA wage as the prevailing wage rate that must be paid to H–2B workers if those rates are the highest in those occupations in the area of intended employment among the rates listed in § 655.10. For H–2B positions for which the DBA wage is not applicable, the Department believes that not requiring fringe benefit payments is an appropriate reflection of the Department's historical practices. As previously noted, fringe benefits costs have never been included in H–2B wage determinations. The Department reaffirms its belief that requiring fringe benefit payments to H–2B workers is not necessary in order to prevent an adverse effect on the wages and working conditions of U.S. workers.

v. Summary of Alternatives Analyzed Quantitatively

According to the analysis, this regulation will not impact a substantial number of small entities. However, we recognize the potential impact on small businesses and have considered alternatives to minimize such impacts. Exhibit 2 below summarizes the average cost per average small entity (that is, a small entity with the average number of employees) for each industry. Exhibit 3 presents the ratio of average cost to average revenue for each industry. The Department's mandate under the H–2B program is to set requirements for employers that wish to hire temporary foreign non-agricultural workers. Those requirements are designed to ensure that foreign workers are used only if qualified domestic workers are not available and that the hiring of H–2B workers will not adversely affect the wages and working conditions of similarly employed domestic workers. These regulations set those minimum standards with regard to wages. The required wage rate is a critical aspect of the H–2B program that determines whether U.S. workers' wages will be adversely affected by the admission of foreign workers. To create different and likely lower standards for one class of employers (*e.g.,* small businesses) would essentially sanction the very adverse effect that the Department is compelled to prevent. Although the Final Rule can have a significant impact on small businesses that use the H–2B program, those costs can be avoided since ultimately an employer's decision to petition to hire H–2B workers is voluntary.

EXHIBIT 2—AVERAGE ANNUAL COST PER SMALL ENTITY OF AVERAGE SIZE

	Landscaping services	Janitorial services	Food services & drinking places	Amusement, gambling, & recreation	Construction	Forestry
Take no action	0	0	0	0	0	0
Highest of the CBA, DBA, SCA, and OES mean	$38,082	$61,286	$16,528	$114,929	$97,657	$47,433
Highest of the CBA, DBA, SCA, and OES median	$36,848	$60,759	$15,762	$110,930	$94,342	$47,433
Inclusion of fringe benefits	$70,002					

EXHIBIT 3—RATIO OF AVERAGE COST TO AVERAGE REVENUE FOR SMALL ENTITY OF AVERAGE SIZE

	Landscaping services	Janitorial services	Food services & drinking places	Amusement, gambling, & recreation	Construction	Forestry
Take no action	0	0	0	0	0	0
Highest of the CBA, DBA, SCA, and OES mean	2.14%	1.45%	1.03%	7.71%	2.04%	3.65%
Highest of the CBA, DBA, SCA, and OES median	2.07%	1.43%	0.98%	7.44%	1.97%	3.65%
Inclusion of fringe benefits	2.89%					

8. Additional Alternatives

As noted elsewhere in the Administrative Information section, the Department received many comments that suggested other alternatives to the prevailing wage methodology proposed in the NPRM. Four of those alternatives have been summarized in sections A and B of this Administrative Information section because the Department conducted quantitative analysis on those alternatives. The additional nine alternatives are summarized here. The Department conducted a qualitative rather than quantitative analysis on these alternatives because a quantitative analysis was either not possible or was unnecessary due to the nature of the alternative suggested.

i. When Other Methods Are Inapplicable, Use a Multiplier of the Federal, State or Local Minimum Wage for a "Living Wage" That Is Higher Than the Federal, State or Local Minimum Wage

Several commenters requested the Department to consider alternatives that could be used when none of the prevailing wage methodologies is available. In particular, one commenter found that the 2010 NPRM mentioned requiring employers to use the Federal, State or local minimum wage rates but did not actually include it as an option for determining the prevailing wage. This commenter further noted that S. 2910, a bill introduced by Senator Bernie Sanders in December 2009, included a provision that would make the minimum wage payable to H–2B or similarly employed U.S. workers 150 percent of the Federal minimum wage under the FLSA. This commenter proposed that the Department adopt and

expand this proposal to require a wage that is not less than 200 percent of the Federal, State, or local minimum wage.

The Department rejects this proposal, along with the similar proposal that the prevailing wage for reforestation workers be set at 115 percent of the Federal or State minimum wage. The purpose of this rulemaking is to establish a methodology for calculating the prevailing wage for a specific occupation within a particular area of employment. Although raising the minimum wage payable under the program might be consistent with the program's mandate to protect U.S. workers from adverse effect, a wage rate that is some multiple of the minimum wage is by definition not a prevailing wage, and therefore is not appropriate for this rulemaking.

ii. Allow for Specific Experience-Based Wage Levels

Many commenters requested that the Department continue to establish wage increases based on the experience of the worker. These commenters argue that employers should be permitted to increase the wages of an H–2B worker based on years of experience, that is, an entry-level worker should not earn the same wage as someone who has been performing the job for several years. Thus, these commenters argue that creating a "one-tiered" system as proposed by the Department would artificially inflate the wages of unskilled workers. Another commenter stated that under the proposed prevailing wage methodology, the Department removes the employer's ability to properly manage and reward employees for a job well done.

As noted in the NPRM, however, the Department does not believe that the level of experience a worker possesses should be a factor in determining minimum wages for low-skilled positions. It is the Department's position that experience differentiation is unnecessary for this program for several reasons.

First, the Department notes that the number of years of experience is irrelevant to the job description itself. In fact, 74.4 percent of the positions in the H–2B program are currently classified as Level I positions. For these positions, H–2B workers are hired if they can perform the task with little or no preparation. As discussed in this Final Rule, almost all jobs for which employers seek H–2B workers require little, if any, skill—an assertion with which few commenters disagreed. H–2B disclosure data from FY 2007 to 2009 demonstrates that most of the jobs for which the greatest annual numbers of H–2B workers were certified in the top five industries—construction; amusement, gambling and recreation; landscaping services; janitorial services; and food services and drinking places—require minimal skill to perform, according to every standardized source available to the Department, such as the SOC, O*NET and the Occupational Outlook Handbook. These jobs, which made up the majority of occupations certified in those years, include, but are not limited to, landscaper laborer, housekeeping cleaner, construction worker, forestry worker, and amusement park worker, all of which require less than 2 years of experience to perform. These jobs have typically been granted a Level I wage determination, which is lower than the average wage paid to similarly employed workers in job classifications in non-H–2B jobs.[70]

Second, the Department noted in the NPRM that it was artificially manipulating the OES data to create the tiered wage system in 1998.[71] The OES survey instrument in itself does not solicit data on skill level; the four-tiered wage structure therefore did not truly represent skills-based play.

Moreover, this rule does not prevent monetary rewards for those employees who have earned them through experience, skill acquisition, or employer loyalty. Nothing in this Final Rule prevents, nor should be construed to prevent, the employer from paying its workers, U.S. or H–2B, more than the required prevailing wage. This Final Rule merely establishes a minimum wage for specific occupations in a locality.

iii. Allow the Use of Regional Wages for the Reforestation Industry

A few reforestation contractors recommended that the Department adopt methods of compensating reforestation workers that are not based on specific locations, citing inevitable deviations (due to weather, ground conditions, contractor demands) in an itinerant work schedule. One commenter proposed the use of a prevailing wage for a wider region, similar to the H–2A program's AEWRs, which typically cover several states with a single wage rate. This would allow employers to deviate from identified worksites as long as they pay workers at least the established rate. The Department recognizes that the uncertainties inherent in reforestation can make it difficult to determine if and where employees will be working as conditions change during the contract period. The Department notes that in situations where projects stretch across multiple localities with different prevailing wages, the employer can avoid the complexity inherent in itinerant work by paying the highest of the prevailing wages of those areas listed on the job order, which would effectively act as a regional wage. Prevailing wage rates for reforestation work are generally the same across contiguous counties—and frequently noncontiguous counties—in the same State.

The Department has concluded that it is not feasible or desirable to establish regional wage rates for particular industries in the H–2B program. The prevailing wage rates are locality-based in order to fulfill the Department's requirement to prevent adverse effect on U.S. workers within the area of intended employment. The Department believes that the establishment of a regional wage rate could result in an arbitrary rate not based on labor market conditions—U.S. workers in some localities might make more than this rate, in which case the prevailing wage would suppress U.S. worker earnings—and therefore would be contrary to the intent of the H–2B program.[72]

iv. Use BLS Wages

One commenter suggested that the Department use BLS wages that are the basis for OES wages. Rather than use the OES for MSAs, this commenter contends that the Department should just use the BLS wage as the prevailing wage for the intended area of employment for the job category that is the latest published 25 percentile rate. The Department notes that the BLS wages are already the basis for the OES prevailing wage rates proposed in the NPRM and adopted in this Final Rule. The OES rates represent a more localized wage rate based on more sophisticated analysis and are a more accurate indicator of the prevailing wages for a SOC classification in any given locality.

Another commenter noted that the NPRM indicated that H–2B workers comprise a small proportion of the U.S. labor force—less than 1 percent of most job categories—and that since most of those positions are low skilled and low paid, it follows that U.S. workers occupy 99 percent of highest paying jobs in any given category. Based on this

[70] The Department, in fact, recognized the need for consistency in the approach to establishing prevailing wages when it federalized the prevailing wage determination system in the 2008 Final Rule.

[71] *Id.*

[72] The Department does not find that the same issues apply to the use of a regional wage in the H–2A program, as there is typically little variation in agricultural wage rates within the USDA regions.

conclusion, the commenter proposed that to prevent adverse effect on the wages of U.S. workers, the prevailing wage should be based on the BLS 10th percentile wage estimate for the occupation in the area of employment. The commenter further noted that this would keep the H–2B workers in the lowest 10 percent of the wage category and the U.S. workers in the highest 90 percent of the wage category, therefore avoiding any adverse effect on the wages or working conditions of U.S. workers.

Although the Department appreciates the suggestion for avoiding the adverse effect on similarly employed U.S. workers, this commenter's proposal reflects a misunderstanding of the purpose behind the change in prevailing wage methodology. The Department's role in the H–2B program is not to determine the wages of H–2B workers, per se, but rather to set an appropriate prevailing wage—a floor—for the job opportunity that will ensure no adverse effect on the wages of U.S. workers who are similarly employed or who could be similarly employed. As discussed earlier, the Department must set a prevailing wage that assures that U.S. workers who might be interested in a job will be paid a wage that approximates the wages available to other U.S. workers in the same occupation. Only if there are insufficient U.S. workers to fill that job at that wage may H–2B workers be hired to make up the labor shortfall.

v. Collective Bargaining Agreements

The Department proposed retaining from the 2008 Final Rule the inclusion of a collective bargaining wage as the prevailing wage if the job opportunity is covered by an agreement that was negotiated at arms' length between the collective bargaining unit and the employer. Several commenters supported this proposal, but suggested that the Department go further and require that whenever a CBA covers workers in a particular geographic region and a specific occupational classification, the wage rate negotiated in the CBA should apply to all employers in the region who wish to hire H–2B workers in the same occupation classification, even those that are not signatory to the CBA or who have no collective bargaining unit in that occupation.

A CBA is a contractual agreement negotiated at arms' length between more or less equal parties. The provisions of a CBA reflect a negotiation process and a series of concessions between the parties to the agreement that would not apply to other parties not involved in the negotiations. The negotiation of a CBA also involves agreement on a range of issues, wages, working conditions, work rules and many others, all of which combine to lead to a complete agreement, only one of whose elements involves wages. For example, one set of negotiating parties may agree to a lower wage in return for a guarantee of job security while another set may agree to higher wages at a greater risk of job cuts. Thus, the Department is unwilling to use a collectively-bargained wage outside the workplace for which it has been negotiated unless that wage has been determined to be prevailing through the SCA, DBA, or OES wage determination process.

By contrast, another commenter objected to the use of a wage higher than a CBA wage in an employment situation in which a CBA applies, noting that where an employer is subject to a CBA, paying a wage other than the CBA scale rate may violate the terms of the agreement and have ramifications under contract and labor law. However, the Department must consistently use the prevailing wage rate under the H–2B program in order to ensure that U.S workers have meaningful access to these positions and do not experience wage depression as a result of employers hiring foreign workers at less than prevailing wages. A CBA rate that has fallen below the minimum wage would not be valid. Similarly, a CBA rate below the prevailing wage would not be a valid wage for purposes of the H–2B program.

vi. Set Wages at 90th Percentile Wage Because the Arithmetic Mean Wage Is Less Than the Average Worker's Compensation

Some commenters noted that although the arithmetic mean represents an improvement to a stratified wage rate system, it will not do enough to protect U.S. workers from adverse effect. At least one such commenter suggested the Department set the prevailing wage at the 90th percentile of the OES wage instead of the arithmetic mean to account for any fringe benefits without which the wages of U.S. workers who are similarly employed would be depressed.

The Department rejects this commenter's proposal. The 90th percentile is not a reflection of the prevailing wage of workers in the U.S. and therefore, is not appropriate for the purposes of this rulemaking. Setting the prevailing wage at the 90th percentile would be comparable to or slightly higher than the current Level IV wage, which applies to only 6.92 percent of the workers in the program, and therefore cannot be considered prevailing. Further, as discussed in another section, employers are not precluded from providing workers with a higher wage. Requiring the arithmetic mean will ensure that employers offer wages comparable to those that U.S. workers expect for a given occupation within a particular locality without unduly disadvantaging employers.

vii. Allow Employers To Compensate Workers Through Production Rate (*i.e.,* "Piece Rate") During Processing and Prevailing Wage for all Non-processing

Several commenters in the seafood processing industry proposed that in light of the prevailing practice in the industry in which workers are paid a piece-rate based on production, the Department should permit employers to pay a piece-rate based on production for the production-based work and a prevailing wage rate for all non-processing work. The Department notes that it does not prohibit incentive piece rates, provided that the piece rates produce earnings that meet the required prevailing wage.

Having considered the proposed alternative, the Department has concluded that it would not satisfactorily effectuate the Department's objective of ensuring that wages and working conditions of U.S. workers are more adequately protected than under the current prevailing wage determination process, while maintaining an efficient and consistent administrative process. The Department believes the alternatives proposed would at worst reduce and at best not improve the efficiency and consistency of the prevailing wage determination process, or would directly or indirectly adversely affect the wages of U.S. workers who might take H–2B jobs. Finally, the Department must ensure that in the H–2B program the wages offered to H–2B workers and U.S. workers recruited under H–2B job orders are the same wages and terms of employment offered to U.S. workers recruited by employers not participating in the H–2B program, that is, are the prevailing wages. Any method that results in offering H–2B workers lower than average wages adversely affects U.S. workers responding to H–2B-related recruitment. Similarly, any method that results in an employer recruiting for job opportunities using experience requirements that are higher than necessary or not normal to the occupation creates artificial entry barriers for potentially interested U.S. workers. While the Department appreciates the proposed alternatives suggested, it has concluded that none of

the alternatives provided better accomplishes the Department's policy objectives than the prevailing wage determination method contained in the Final Rule.

viii. Reinstate the Use of SWA Surveys To Effectively Determine the Appropriate Wage for Any Occupation in That State

One commenter suggested a wage methodology that would have SWAs, rather than employers and/or the Department, conduct surveys to effectively determine the appropriate wage for any occupation in a particular State. Before 1998, when the program was much smaller, SWAs did in fact conduct surveys to produce prevailing wages. The financial resources available today to be devoted to such an activity, in particular given the expansion of the program and the resources available elsewhere (specifically, OES, DBA, and SCA) no longer make this a viable option. In addition, the inconsistencies that resulted from State to State in the treatment of the same job opportunity, reflecting not the local conditions but the quality of the surveyors and the collection instruments used, created difficulties that the benefits of using such surveys do not outweigh. Reliance on SWA surveys in our non-agricultural immigration programs was largely abandoned in 1998 because the OES provides a more reliable and cost-effective means for producing prevailing wage rates on consistent basis across the country. For these reasons, the Department has determined that the OES survey with its standardized job descriptions, compensation data collection and analysis, and DBA and SCA wage determinations provide a much more accurate portrayal of wage information than State surveys.

ix. Include Only the Wages of Temporary Workers in Determining the Prevailing Wage for the H–2B Program

Several submissions, including two from employers and one from an individual, suggested that the wage surveys used to determine H–2B prevailing wages should only sample temporary workers. However, a wage survey of temporary workers may include workers who provide short-term services to fill in for sick or vacationing employees, whereas H–2B workers essentially become full-time workers for the entire period of need. Moreover, limiting the survey universe in this way would produce results inconsistent with the Department's responsibility to prevent the employment of temporary foreign workers under the H–2B program from adversely impacting U.S. workers, regardless of whether they are temporary or permanent. The sole use of temporary workers' wages would depress prevailing wage calculations, applying substantial downward pressure on wages for similar, permanent work within the region. Therefore, the Department will continue to use wage surveys that include permanent workers to make H–2B prevailing wage determinations.

x. Summary of Other Alternatives

Having considered the proposed alternatives, the Department has concluded that none would satisfactorily effectuate the Department's objective of ensuring that wages and working conditions of U.S. workers are more adequately protected than under the current prevailing wage determination process, while maintaining an efficient and consistent administrative process. The Department believes the alternatives proposed would at worst reduce and at best not improve the efficiency and consistency of the prevailing wage determination process, or would directly or indirectly adversely affect the wages of U.S. workers who might take H–2B jobs. Finally, the Department must ensure that in the H–2B program the wages paid to H–2B workers do not adversely affect the wages paid to U.S. workers and U.S. workers recruited under H–2B job orders by employers not participating in the H–2B program. Any method that results in offering H–2B workers lower than average wages adversely affects U.S. workers similarly employed. While the Department appreciates the proposed alternatives received, it has concluded that none of the alternatives provided better accomplishes the Department's policy objectives than the prevailing wage determination method contained in the Final Rule.

9. Steps To Minimize Economic Impact on Small Entities

As the Department explained in its IRFA analysis, it recognizes the potential impact on small businesses that this Final Rule will have and has reviewed alternatives to minimize such impacts. The Department's mandate under the H–2B program as extended to it by the Department of Homeland Security under the INA is to set requirements for employers that wish to hire temporary foreign non-agricultural workers. Those requirements are designed to ensure that foreign workers are used only if qualified domestic workers are not available and that the hiring of H–2B workers will not adversely affect the wages and working conditions of similarly employed domestic workers. This Final Rule sets those minimum standards with regard to wages. As discussed throughout this Final Rule, the required wage rate, as established by the methodology set in this rule, determines whether U.S. workers' wages will be adversely affected by the hiring of an H–2B worker. A different and presumably lower standard applied to small business would potentially result in the very adverse effect that the Department is compelled to prevent. As a result, a different standard for this class of employers cannot be implemented by the Department.

However, the Department recognizes the impact that wage increases are likely to have on businesses, including small businesses, that have in recent years relied on H–2B visas. In particular, the Department recognizes the commitments that employers have made in reliance on the current methodology, which has been expressed by many employers. In recognition of this impact, and in order to provide employers with sufficient time to plan for their labor needs for the next year and to minimize the disruption to their operations, the Department is delaying implementation of this Final Rule so that the prevailing wage methodology set forth in this Rule applies only to wages paid for work performed on or after January 1, 2012.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. This Final Rule has no Federal mandate, which is defined in 2 U.S.C. 658(6) to include either a "Federal intergovernmental mandate" or a "Federal private sector mandate." A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H–2B worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

D. Small Business Regulatory Enforcement Fairness Act of 1996

The Department has determined that this rulemaking does not impose a significant impact on a substantial number of small entities under the RFA; therefore, the Department is not required to produce any compliance guides for small entities as mandated by

the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The Department has, however, concluded that this rule is a major rule requiring review by the Congress under the SBREFA because it will likely result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

E. Executive Order 13132—Federalism

The Department has reviewed this Final Rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have federalism implications. The rule does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of Government as described by E.O. 13132. Therefore, the Department has determined that this rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

F. Executive Order 13175—Indian Tribal Governments

This Final Rule was reviewed under the terms of E.O. 13175 and determined not to have tribal implications. The rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. As a result, no tribal summary impact statement has been prepared.

G. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681) requires the Department to assess the impact of this Final Rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this Final Rule and determined that it will not have a negative effect on families.

H. Executive Order 12630—Government Actions and Interference With Constitutionally Protected Property Rights

The Final Rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

I. Executive Order 12988—Civil Justice

The Final Rule has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The Department has developed the proposed rule to minimize litigation and provide a clear legal standard for affected conduct, and has reviewed the proposed rule carefully to eliminate drafting errors and ambiguities.

J. Plain Language

The Department drafted this Final Rule in plain language.

K. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l). The information collection (IC) requirements for the current H–2B program are approved under OMB control number 1205–0466 (which includes ETA Form 9141 and ETA Form 9142). This rule imposes no new information collection requirements and there are no burden adjustments that need to be made to the analysis. For an additional explanation of how the Department calculated the burden hours and related costs, the PRA packages for these information collections may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting the Department at: Office of Policy Development and Research, Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210 or by phone request to 202–693–3700 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

■ Accordingly, ETA amends 20 CFR part 655 as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts A and C issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), Pub. L. 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K authority repealed.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. Amend § 655.10 by:

■ a. Revising paragraphs (b) introductory text, (b)(1), and (2);

■ b. Removing paragraphs (b)(4) and (b)(5) and redesignating paragraph (b)(3) as (b)(4) and (b)(6) as (b)(5);

■ c. Adding new paragraphs (b)(3), (b)(6), and (b)(7); and

■ d. Removing paragraphs (f) and (g) and redesignating paragraphs (h) as (f), and (i) as (g).

§ 655.10 Determination of prevailing wage for temporary labor certification purposes.

* * * * *

(b) *Basis for prevailing wage determinations.* The prevailing wage is the highest of the following:

(1) The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between the union and the employer;

(2) The wage rate established under the DBA or SCA for the occupation in the area of intended employment if the job opportunity is in an occupation for which such a wage rate has been determined; or

(3) The arithmetic mean of the wages of workers similarly employed in the occupation in the area of intended employment as determined by the OES. This computation will be based on the arithmetic mean wage of all workers in the occupation.

* * * * *

(6) In geographic areas where the OES does not gather wage data, including but not limited to the jurisdiction of the Commonwealth of the Northern Mariana Islands, and there is no CBA, DBA, or SCA wage available for the job opportunity, the NPC will consider wage information in the form of a wage survey provided by an employer in making a prevailing wage determination. Such a survey may only be submitted with a request for a prevailing wage determination. A request filed under this paragraph does not need to be preceded by a request and approval to submit wage information as described in paragraph (b)(7) of this section.

(7)(i) An employer may submit a written request to the Administrator, OFLC to provide a private wage survey for OFLC to consider in making a prevailing wage determination which must demonstrate that the following factors are present:

(A) There is no CBA, DBA, or SCA wage available for the job opportunity;

(B) The job opportunity was not listed in the Dictionary of Occupational Titles (DOT) and is not listed in the Standard Occupational Classification (SOC) system, or if the job opportunity was listed in the DOT or is listed in the SOC system, the DOT crosswalk to the SOC system links to an occupational classification signifying a generalized set of occupations as "all other"; and

(C) The job description entails job duties which require knowledge, skills, abilities, and work tasks that are significantly different, as defined in guidance to be issued by the OFLC, than those in any other SOC occupation.

(ii) The Administrator, OFLC may approve or deny an employer's written request to provide a wage survey. If the Administrator, OFLC approves the employer's written request, the Administrator, OFLC will send an approval letter to the employer. Approvals shall be valid for 1 year from the date of approval and only for the job opportunity and area of intended employment specified in the original written request. This approval does not constitute an acceptance of any particular wage survey.

(iii) If approval is granted, the employer may submit a request for a prevailing wage determination to the NPC along with a copy of the Administrator, OFLC's approval letter and a complete copy of the private survey. The NPC will evaluate the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC National Office.

(iv) In each case where the employer submits a wage survey for which it seeks acceptance, the employer must provide specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC National Office.

(v) The survey must be based upon recently collected data:

(A) Any published survey must have been published within 24 months of the date of submission, must be the most current edition of the survey, and must be based on data collected not more than 24 months before the publication date.

(B) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted for consideration.

(vi) The survey cannot as any part of its data wage information reflect the wages of H–2B workers or other nonimmigrant workers.

(vii) If the NPC does not approve the survey for use in the H–2B program, the NPC shall inform the employer in writing of the reasons the survey was not accepted. An employer may appeal the NPC's decision in accordance with § 655.11.

* * * * *

Signed in Washington this 14th day of January 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2011–1117 Filed 1–18–11; 8:45 am]

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To amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution. (Jan. 4, 2011; 124 Stat. 4128)

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S. 4036/P.L. 111–382
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