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CANCELLED

WHEN: Tuesday, April 12, 2011
9 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741–6008

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Presidential Documents

Title 3—

The President

Proclamation 8648 of April 6, 2011

National D.A.R.E. Day, 2011

By the President of the United States of America

A Proclamation

As a Nation, we must work to raise a drug-free and healthy generation of 21st-century leaders. Substance abuse and its consequences have grave impacts on our society—destroying lives, tearing apart families, and introducing drug-related violence to our neighborhoods. Young Americans especially need the help and support of caring adults to resist pressure to use drugs or engage in other harmful activities.

We must address the use of illegal drugs, tobacco, and alcohol, as well as prescription drug abuse, among youth by building knowledge of the warning signs and risks associated with substance abuse. Though parents must take the lead in teaching the value of drug-free living, friends, mentors, teachers, and neighbors also have roles to play in helping adolescents understand the dangers of alcohol and drug addiction. By joining together to tackle this issue and encourage positive behavior, communities can help young people reject the pressure to try illicit substances or engage in other hazardous activity. I encourage students, caregivers, and other concerned individuals to visit www.DrugAbuse.gov for educational materials on the health effects and consequences of drug abuse and addiction.

Law enforcement is often a critical partner in implementing community-based drug abuse prevention strategies. The Drug Abuse Resistance Education (D.A.R.E.) program, in addition to many other prevention efforts across our country, serves as a resource in helping educate young people on how to resist peer pressure and refrain from drug use and violence.

My Administration is committed to reducing drug use and its consequences through a balanced approach that includes prevention, treatment, and law enforcement, and we are supporting national efforts to prevent drug use before it starts. As we work to reduce substance abuse and the great damage it causes in our communities, we will make our country stronger and our people healthier and safer.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim April 7, 2011, as National D.A.R.E. Day. I call upon all Americans to observe this day with appropriate programs and activities.

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

[FR Doc. 2011–8727
Filed 4–8–11; 8:45 am]
Billing code 3195–W1–P

Rules and Regulations

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

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

SECURITIES AND EXCHANGE COMMISSION

5 CFR Part 4401

[Release No. 34–64172]

Supplemental Standards of Ethical Conduct for Members and Employees of the Securities and Exchange Commission

AGENCIES: Securities and Exchange Commission and Office of Government Ethics.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission with the concurrence of the Office of Government Ethics is amending its Supplemental Standards of Conduct for Members and Employees to eliminate a recently established prior approval requirement for outside employment.

DATES: *Effective Date:* May 11, 2011.

FOR FURTHER INFORMATION CONTACT: Shira Pavis Minton, Ethics Counsel, Office of the General Counsel, (202) 551–5170, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1050.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission with the concurrence of the Office of Government Ethics ("OGE") is amending its Supplemental Standards of Conduct for Members and Employees to eliminate a recently established prior approval requirement for outside employment. Staff members of the SEC are already subject to strict limitations regarding the type of employment they are allowed to undertake, and staff regularly seeks advice from the ethics office prior to taking any outside employment. In addition, the requirement appears to be largely cumulative of other measures without providing significant additional benefits. These other measures include the requirement that SEC staff members submit proposed publications or prepared speeches relating to the Commission (or to the statutes or rules it administers) to the General Counsel for review. These measures also include current financial disclosure regulations and current substantive regulations prohibiting conflicting outside employment. The requirement to obtain prior approval for outside employment has not identified any conflicts or otherwise enhanced the ethics program.

I. Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act

The Commission finds, in accordance with section 553(b)(3)(A) of the Administrative Procedure Act,[1] that these rules relate solely to agency organization, procedure, or practice. These rules are therefore not subject to the provisions of the Administrative Procedure Act requiring notice, opportunity for public comment, and publication. The Regulatory Flexibility Act[2] therefore does not apply. Because these rules relate to "agency organization, procedure or practice that does not substantially affect the right or obligations of non-agency parties," they are not subject to the Small Business Regulatory Enforcement Fairness Act.[3] The rules do not contain any new collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.[4]

II. Costs and Benefits of the Amendments

Taken as a whole, the Commission and the public have a substantial interest in the integrity of the Commission's processes. Congress has directed the Commission to oversee the securities markets and securities professionals and to protect investors. To that end, the ethical standards contained in the rules enacted today require the Commission's members and employees to maintain high standards of honesty, integrity, and impartiality, and to avoid actual, or the appearance of, conflicts of interest.

In general, the costs of the procedures in the Commission's rules of practice fall largely on the Commission and its employees. As noted, the amendments set forth in this release relate to internal agency management. These rules re-codify pre-existing obligations on the Commission's members and employees with certain minor modifications. As such, the Commission believes that the costs imposed by compliance with these amended rules have not substantially increased from the obligations of Commission members and employees before these amendments.

III. Consideration of Burden on Competition

Section 23(a)(2) of the Exchange Act, 15 U.S.C. 78w(a)(2), requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition. The purposes of the Exchange Act include protection of interstate commerce and maintenance of fair and honest markets. The degree of trust that investors and the public have in the Commission and its employees is critical to these goals. The Commission and its employees must adhere to the highest standards of integrity and impartiality and avoid the appearance of conflicts of interest. These rules affect a relatively small number of persons. Therefore, the Commission has determined that the burden on competition is small and is necessary and appropriate in furtherance of the purposes of the Exchange Act.

Section 2(b) of the Securities Act, 15 U.S.C. 77b(b); Section 3(f) of the Exchange Act, 15 U.S.C. 78c(f); Section 2(c) of the Investment Company Act of 1940, 15 U.S.C. 80a–2(c); and Section 202(c) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–2(c) require that the Commission consider efficiency, competition, and capital formation, in addition to the protection of investors, whenever it is required to consider or determine whether an action is necessary or appropriate in the public interest. As noted above, these rules apply to a relatively small number of people and do not substantially alter their pre-existing obligations. The Commission believes that the amendments that the Commission is adopting today will have a small impact on competition, the capital markets, or capital formation.

[1] 5 U.S.C. 553(b)(3)(A).
[2] 5 U.S.C. 601 *et seq.*
[3] 5 U.S.C. 804(3)(C).
[4] 44 U.S.C. 3501 *et seq.*

IV. Statutory Basis and Text of the Rule

This amendment to the Commission's ethics rules is being adopted pursuant to statutory authority granted to OGE and to the Commission. These include 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); section 19 of the Securities Act of 1933, 15 U.S.C. 77s; section 23 of the Securities Exchange Act of 1934, 15 U.S.C. 78w; section 319 of the Trust Indenture Act of 1939, 15 U.S.C. 77sss; section 40 of the Investment Company Act of 1940, 15 U.S.C. 80a–39; and section 211 of the Investment Advisers Act of 1940, 15 U.S.C. 80b–11.

List of Subjects in 5 CFR Part 4401

Administrative practice and procedure, Conduct and ethics.

For the reasons set out in the preamble, Title 5, Chapter XXXIV of the Code of Federal Regulations is amended as follows:

PART 4401—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR MEMBERS AND EMPLOYEES OF THE SECURITIES AND EXCHANGE COMMISSION

■ 1. The authority citation for part 4401 continues to read as follows:

Authority: 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159; 3 CFR 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547; 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.403, 2635.803; 15 U.S.C. 77s, 78w, 77sss, 80a–37, 80b–11.

■ 2. Section 4401.103 is amended by:
■ a. Removing and reserving paragraph (c)(1)(ii);
■ b. Revising paragraph (c)(1)(iii);
■ c. Removing paragraph (d); and
■ d. Redesignating paragraph (e) as paragraph (d).

The revision reads as follows:

§ 4401.103 Outside employment and activities.

* * * * *

(c) * * *

(1) * * *

(iii) No employee shall undertake the following types of employment or activities:

(A) Employment with any entity regulated by the Commission;

(B) Employment or any activity directly or indirectly related to the issuance, purchase, sale, investment or trading of securities or futures on securities or a group of securities, except this prohibition does not apply to securities holdings or transactions permitted by § 4401.102;

(C) Employment otherwise involved with the securities industry; or

(D) Employment otherwise in violation of any applicable law, rule or regulation.

* * * * *

Dated: April 4, 2011.

By the Commission.

Elizabeth M. Murphy,

Secretary.

Robert I. Cusick,

Director, Office of Government Ethics.

[FR Doc. 2011–8485 Filed 4–8–11; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket Number EERE–2008–BT–TP–0020]

RIN 1904–AB89

Energy Conservation Program for Consumer Products: Decision and Order Granting 180-Day Extension of Compliance Date for Residential Furnaces and Boilers Test Procedure Amendments; Correction

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Decision and order; correction

SUMMARY: On March 31, 2011, the U.S. Department of Energy (DOE) published a Decision and Order in the **Federal Register** which granted 27 companies submitting petitions before the required date (*i.e.,* by February 17, 2011), a 180-day extension of the compliance date for recent amendments to the DOE test procedure for residential furnaces and boilers related to the standby mode and off mode energy consumption of these products. Recently, DOE received a petition dated February 17, 2011 from a 28th manufacturer, Viessmann Manufacturing Company, Inc., in which the manufacturer also requested the above-referenced 180-day extension. Although DOE received this petition well after February 17, 2011, the Department believes a number of factors, including international postal handling and Federal mail security screening, contributed to the delay in receipt of this petition. After review, DOE has decided to grant the petition. However, DOE was not able to include its determination regarding this petition in its March 31, 2011 Decision and Order, because publication was already underway. Through this correction notice, DOE is modifying its Decision and Order to add Viessmann Manufacturing Company, Inc., to the list of companies to whom the extension of the compliance date has been granted.

DATES: This correction to the above-referenced Decision and Order is effective April 11, 2011. For representation purposes, petitioners must comply with all applicable provisions of the amended DOE test procedure for residential furnaces and boilers starting on October 15, 2011.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9611. E-mail: *Michael.Raymond@ee.doe.gov.*

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9507. E-mail: *Eric.Stas@hq.doe.gov.*

For information on how to access the docket or to view hard copies of the docket in the Resource Room, contact Ms. Brenda Edwards, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. E-mail: *Brenda.Edwards@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On March 31, 2011, DOE published a notice in the **Federal Register** (76 FR 17755) which announced receipt of petitions requesting a 180-day extension of the April 18, 2011 compliance date for representations associated with amendments to the DOE test procedure for residential furnaces and boilers in the October 20, 2010 final rule (75 FR 64621) from the following 27 companies: (1) Adams Manufacturing Company; (2) Allied Air Enterprises; (3) Bard Manufacturing Co. Inc.; (4) Boyertown Furnace; (5) Carrier Corporation; (6) Crown Boiler; (7) De Dietrich Boilers; (8) ECR International Inc.; (9) Goodman Manufacturing Company; (10) HTP Inc.; (11) Johnson Controls Inc.; (12) Laars Heating Systems Company; (13) Lennox International Inc.; (14) Lochinvar; (15) Newmac Furnace Company; (16) New Yorker Residential Heating Boilers; (17) Nordyne; (18) NY Thermal Inc.; (19) Peerless Boilers Heat LLC; (20) Raypak Inc.; (21) Rheem Manufacturing Company; (22) Slant/Fin; (23) Thermo Products LLC; (24) Trane; (25) Triangle Tube; (26) US Boiler Company; and (27) Weil-McLain.

In the same March 31, 2011 **Federal Register** notice, DOE published a

Decision and Order which granted to the above 27 petitioners the requested 180-day extension of the compliance date for recent amendments to the DOE test procedure for residential furnaces and boilers related to the standby mode and off mode energy consumption of these products.

Recently, DOE received a petition dated February 17, 2011 from a 28th manufacturer, Viessmann Manufacturing Company, Inc., in which the manufacturer also requested the above-referenced 180-day extension. Viessmann Manufacturing Company's petition recited many of the same arguments as the earlier petitioners regarding the undue hardship which the petitioner would face if the requested extension of the compliance date were not granted. DOE has determined that the petitioner has made its case and that the extension should be granted for the reasons stated in the March 31, 2011 Decision and Order.

II. Conclusion

Although DOE received this petition well after February 17, 2011, the Department believes a number of factors, including international postal handling and Federal mail security screening, contributed to this delay in receipt of the petition from this 28th manufacturer. After review, DOE has decided to grant the petition. Through this correction notice, DOE is modifying its Decision and Order to add Viessmann Manufacturing Company, Inc., to the list of companies to whom the extension of the compliance date has been granted.

Issued in Washington, DC, on April 5, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

[FR Doc. 2011–8572 Filed 4–8–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE310; Special Conditions No. 23–250–SC

Special Conditions: Diamond Aircraft Industry Model DA–40NG; Diesel Cycle Engine

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Diamond Aircraft Industry (DAI) GmbH model DA–40NG the Austro Engine GmbH model E4 aircraft diesel engine (ADE) using turbine (jet) fuel. This airplane will have a novel or unusual design feature(s) associated with the installation of a diesel cycle engine utilizing turbine (jet) fuel. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is April 1, 2011.

We must receive your comments by May 11, 2011.

ADDRESSES: Mail two copies of your comments to: Federal Aviation Administration, Regional Counsel, ACE–7, Attn: Rules Docket No. CE310, 901 Locust, Kansas City, MO 64106. You may deliver two copies to the Regional Counsel at the above address. Mark your comments: Docket No. CE310. You may inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Peter L. Rouse, Federal Aviation Administration, Small Airplane Directorate, Aircraft Certification Service, ACE–111, 901 Locust, Kansas City, Missouri, 816–329–4135, fax 816–329–4090.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel about these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive by the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to let you know we received your comments on these special conditions, send us a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On May 11, 2010 Diamond Aircraft Industry GmbH applied for an amendment to Type Certificate No. A47CE to include the new Model DA–40NG with the Austro Engine GmbH Model E4 ADE. The Model DA–40NG, which is a derivative of the model DA–40 currently approved under Type Certificate No. A47CE, is a fully composite, four place, single-engine airplane with a cantilever low wing, T-tail airplane with the Austro Engine GmbH Model E4 diesel engine and an increased maximum takeoff gross weight from 1150 kilograms (kg) to 1280 kg (2535 pounds (lbs) to 2816 lbs).

In anticipation of the reintroduction of diesel engine technology into the small airplane fleet, the FAA issued Policy Statement PS–ACE100–2002–004 on May 15, 2004, which identified areas of technological concern. Refer to this policy for a detailed summary of the FAA's development of diesel engine requirements.

The general areas of concern involve the power characteristics of the diesel engines, the use of turbine fuel in an airplane class that is typically powered by gasoline fueled engines and the vibration characteristics and failure modes of diesel engines. A review of the historical record of diesel engine use in aircraft and part 23 identified these concerns. The review identified specific regulatory areas requiring evaluation for applicability to diesel engine installations. These concerns are not considered universally applicable to all

types of possible diesel engines and diesel engine installations. However, after reviewing the DAI installation, the Austro engine type, the Austro Control GmbH (ACG) requirements, and Policy Statement PS–ACE100–2002–004, the FAA issues these fuel system and engine related special conditions. The Austro engine has a Full Authority Digital Engine Control (FADEC), which also requires special conditions. The FADEC special conditions will be issued in a separate notice.

Type Certification Basis

Under the provisions of § 21.101, DAI must show that the model DA–40NG meets the applicable provisions of the regulations incorporated by reference in Type Certificate No. A47CE or the applicable regulations in effect on the date of application for the change to the model DA–40. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis." In addition, the certification basis includes special conditions and equivalent levels of safety for the following:

Special Conditions:

- Engine torque (Provisions similar to § 23.361, paragraphs (b)(1) and (c)(3)).
- Flutter (Compliance with § 23.629, paragraphs (e)(1) and (2)).
- Powerplant—Installation (Provisions similar to § 23.901(d)(1) for turbine engines).
- Powerplant—Fuel System—Fuel system with water saturated fuel (Compliance with § 23.951 requirements).
- Powerplant—Fuel System—Fuel system hot weather operation (Compliance with § 23.961 requirements).
- Powerplant—Fuel system—Fuel tank filler connection (Compliance with § 23.973(f) requirements).
- Powerplant—Fuel system—Fuel tank outlet (Compliance with § 23.977 requirements).
- Equipment—General—Powerplant Instruments (Compliance with § 23.1305 requirements).
- Operating Limitations and Information—Powerplant limitations—Fuel grade or designation (Compliance with § 23.1521(d) requirements).
- Markings And Placards—Miscellaneous markings and placards—Fuel, oil, and coolant filler openings (Compliance with § 23.1557(c)(1) requirements).
- Powerplant—Fuel system—Fuel-Freezing.
- Powerplant Installation—Vibration levels.
- Powerplant Installation—One cylinder inoperative.
- Powerplant Installation—High Energy Engine Fragments.

Equivalent level of safety for:

- Cockpit controls—23.777(d)
- Motion and effect of cockpit controls—23.779(b)
- Liquid Cooling—Installation—23.1061
- Ignition switches—23.1145

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 23) do not contain adequate or appropriate safety standards for the model DA–40NG because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the model DA–40NG must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in § 11.19, under § 11.38, and become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model.

Novel or Unusual Design Features

The model DA–40NG will incorporate the following novel or unusual design features: Installation of the Austro Engine GmbH Model E4 ADE diesel engine utilizing turbine (jet) fuel.

Discussion

Several major concerns were identified in developing FAA policy. These include installing the diesel engine and noting its vibration levels under both normal operating conditions and when one cylinder is inoperative. The concerns also include accommodating turbine fuels in airplane systems that have generally evolved based on gasoline requirements, anticipated use of a FADEC to control the engine, and appropriate limitations and indications for a diesel engine powered airplane. The general concerns associated with the aircraft diesel engine installation are as follows:

- Installation and Vibration Requirements.
- Fuel and Fuel System Related Requirements.
- Limitations and Indications.

Installation and Vibration Requirements: These special conditions include requirements similar to the requirements of § 23.901(d)(1) for turbine engines. In addition to the requirements of § 23.901 applied to reciprocating engines, the applicant will be required to construct and arrange each diesel engine installation to result in vibration characteristics that do not exceed those established during the type certification of the engine. These vibration levels must not exceed vibration characteristics that a previously certificated airframe structure has been approved for, unless such vibration characteristics are shown to have no effect on safety or continued airworthiness. The engine limit torque design requirements as specified in § 23.361 are also modified.

An additional requirement to consider vibration levels and/or effects of an inoperative cylinder was imposed. Also, a requirement to evaluate the engine design for the possibility of, or effect of, liberating high-energy engine fragments, in the event of a catastrophic engine failure, requirements was added.

Fuel and Fuel System Related Requirements: Due to the use of turbine fuel, this airplane must comply with the requirements in § 23.951(c).

Section 23.961 will be complied with using the turbine fuel requirements. These requirements will be substantiated by flight-testing as described in Advisory Circular AC 23–8B, Flight Test Guide for Certification of Part 23 Airplanes.

This special condition specifically requires testing to show compliance to § 23.961 and adds the possibility of testing non-aviation diesel fuels.

To ensure fuel system compatibility and reduce the possibility of misfueling, and discounting the first clause of § 23.973(f) referring to turbine engines, the applicant will comply with § 23.973(f).

Due to the use of turbine fuel, the applicant will comply with § 23.977(a)(2), and § 23.977(a)(1) will not apply. "Turbine engines" will be interpreted to mean "aircraft diesel engine" for this requirement. An additional requirement to consider the possibility of fuel freezing was imposed.

Due to the use of turbine fuel, the applicant will comply with § 23.1305(c)(8).

Due to the use of turbine fuel, the applicant must comply with § 23.1557(c)(1)(ii). Section 23.1557(c)(1)(ii) will not apply. "Turbine engine" is interpreted to mean "aircraft diesel engine" for this requirement.

Limitations and Indications

Section 23.1305(a) and § 23.1305(b)(2) will apply, except that propeller revolutions per minute (RPM) will be displayed. Sections 23.1305(b)(4), 23.1305(b)(5), and 23.1305(b)(7) are deleted. Additional critical engine parameters for this installation that will be displayed include:

(1) Power setting, in percentage, and

(2) Fuel temperature.

Due to the use of turbine fuel, the requirements for § 23.1521(d), as applicable to fuel designation for turbine engines, will apply.

Applicability

As discussed above, these special conditions are applicable to the model DA–40NG. Should DAI apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability, and it affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.17; and 14 CFR 11.38 and 11.19.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Diamond Aircraft Industry GmbH Model DA–40NG with the installation of the Austro Engine GmbH Model E4 aircraft diesel engine.

1. Engine torque (Provisions similar to § 23.361, paragraphs (b)(1) and (c)(3)):

a. For diesel engine installations, the engine mounts and supporting structure must be designed to withstand the following:

(1) A limit engine torque load imposed by sudden engine stoppage due to malfunction or structural failure.

(a) The effects of sudden engine stoppage may alternatively be mitigated to an acceptable level by utilization of isolators, dampers clutches, and similar provisions, so unacceptable load levels are not imposed on the previously certificated structure.

b. The limit engine torque to be considered under § 23.361(a) must be obtained by multiplying the mean torque by a factor of four for diesel cycle engines.

(1) If a factor of less than four is used, it must be shown that the limit torque imposed on the engine mount is consistent with the provisions of § 23.361(c). In other words, it must be shown that the use of the factors listed in § 23.361(c)(3) will result in limit torques on the mount that are equivalent to or less than those imposed by a conventional gasoline reciprocating engine.

2. Flutter—(Compliance with § 23.629 (e)(1) and (e)(2) requirements):

The flutter evaluation of the airplane done in accordance with 14 CFR 23.629 must include–

(a) Whirl mode degree of freedom which takes into account the stability of the plane of rotation of the propeller and significant elastic, inertial, and aerodynamic forces, and

(b) Propeller, engine, engine mount and airplane structure stiffness and damping variations appropriate to the particular configuration, and

(c) The flutter investigation will include showing the airplane is free from flutter with one cylinder inoperative.

3. Powerplant—Installation (Provisions similar to § 23.901(d)(1) for turbine engines):

Considering the vibration characteristics of diesel engines, the applicant must comply with the following:

a. Each diesel engine installation must be constructed and arranged to result in vibration characteristics that—

(1) Do not exceed those established during the type certification of the engine; and

(2) Do not exceed vibration characteristics that a previously certificated airframe structure has been approved for—

(i) Unless such vibration characteristics are shown to have no effect on safety or continued airworthiness, or

(ii) Unless mitigated to an acceptable level by utilization of isolators, dampers clutches, and similar provisions, so that unacceptable vibration levels are not imposed on the previously certificated structure.

4. Powerplant—Fuel System—Fuel system with water saturated fuel (Compliance with § 23.951 requirements):

Considering the fuel types used by diesel engines, the applicant must comply with the following:

a. Each fuel system for a diesel engine must be capable of sustained operation throughout its flow and pressure range with fuel initially saturated with water at 80° F and having 0.75cc of free water per gallon added and cooled to the most critical condition for icing likely to be encountered in operation.

b. Methods of compliance that are acceptable for turbine engine fuel systems requirements of § 23.951(c) are also considered acceptable for this requirement.

5. Powerplant—Fuel System—Fuel system hot weather operation (Compliance with § 23.961 requirements):

In place of compliance with § 23.961, the applicant must comply with the following:

a. Each fuel system must be free from vapor lock when using fuel at its critical temperature, with respect to vapor formation, when operating the airplane in all critical operating and environmental conditions for which approval is requested. For turbine fuel, or for aircraft equipped with diesel cycle engines that use turbine or diesel type fuels, the initial temperature must be 110 °F, −0°, +5° or the maximum outside air temperature for which approval is requested, whichever is more critical.

b. The fuel system must be in an operational configuration that will yield the most adverse, that is, conservative results.

c. To comply with this requirement, the applicant must use the turbine fuel requirements and must substantiate these by flight-testing, as described in Advisory Circular AC 23–8B, Flight Test Guide for Certification of Part 23 Airplanes.

6. Powerplant—Fuel system—Fuel tank filler connection (Compliance with § 23.973(f) requirements):

In place of compliance with § 23.973(e) and (f), the applicant must comply with the following:

For airplanes that operate on turbine or diesel type fuels, the inside diameter of the fuel filler opening must be no smaller than 2.95 inches.

7. Powerplant—Fuel system—Fuel tank outlet (Compliance with § 23.977 requirements):

In place of compliance with § 23.977(a)(1) and (a)(2), the applicant will comply with the following:

There must be a fuel strainer for the fuel tank outlet or for the booster pump. This strainer must, for diesel engine powered airplanes, prevent the passage of any object that could restrict fuel flow or damage any fuel system component.

8. Equipment—General—Powerplant Instruments (Compliance with § 23.1305 and 91.205 requirements):

In place of compliance with § 23.1305, the applicant will comply with the following:

Below are required powerplant instruments:

(a) A fuel quantity indicator for each fuel tank, installed in accordance with § 23.1337(b).

(b) An oil pressure indicator.

(c) An oil temperature indicator.

(d) A tachometer indicating propeller speed.

(e) A coolant temperature indicator.

(f) An indicating means for the fuel strainer or filter required by § 23.997 to indicate the occurrence of contamination of the strainer or filter before it reaches the capacity established in accordance with § 23.997(d).

Alternately, no indicator is required if the engine can operate normally for a specified period with the fuel strainer exposed to the maximum fuel contamination as specified in MIL–5007D. Additionally, provisions for replacing the fuel filter at this specified period (or a shorter period) are included in the maintenance schedule for the engine installation.

(g) Power setting, in percentage.

(h) Fuel temperature.

(i) Fuel flow (engine fuel consumption).

In place of compliance to § 91.205, comply with the following:

The diesel engine has no manifold pressure gauge as required by § 91.205, in its place, the engine instrumentation as installed is to be approved as equivalent. The Type Certification Data Sheet (TCDS) is to be modified to show power indication will be accepted to be equivalent to the manifold pressure indication.

9. Operating Limitations and Information—Powerplant limitations—Fuel grade or designation (Compliance with § 23.1521(d) requirements):

Instead of compliance with § 23.1521(d), the applicant must comply with the following:

The minimum fuel designation (for diesel engines) must be established so it is not less than required for the operation of the engines within the limitations in paragraphs (b) and (c) of § 23.1521.

10. Markings and Placards—Miscellaneous markings and placards—Fuel, oil, and coolant filler openings (Compliance with § 23.1557(c)(1) requirements):

Instead of compliance with § 23.1557(c)(1), the applicant must comply with the following:

Fuel filler openings must be marked at or near the filler cover with—

For diesel engine-powered airplanes—

(a) The words "Jet Fuel"; and

(b) The permissible fuel designations, or references to the Airplane Flight Manual (AFM) for permissible fuel designations.

(c) A warning placard or note that states the following or similar:

"Warning—this airplane is equipped with an aircraft diesel engine; service with approved fuels only."

The colors of this warning placard should be black and white.

11. Powerplant—Fuel system—Fuel-Freezing:

If the fuel in the tanks cannot be shown to flow suitably under all possible temperature conditions, then fuel temperature limitations are required. These limitations will be considered as part of the essential operating parameters for the aircraft. Limitations will be determined as follows:

(a) The takeoff temperature limitation must be determined by testing or analysis to define the minimum fuel cold-soaked temperature that the airplane can operate on.

(b) The minimum operating temperature limitation must be determined by testing to define the minimum acceptable operating temperature after takeoff (with minimum takeoff temperature established in (1) above).

12. Powerplant Installation—Vibration levels:

Vibration levels throughout the engine operating range must be evaluated and:

(a) Vibration levels imposed on the airframe must be less than or equivalent to those of the gasoline engine; or

(b) Any vibration level higher than that imposed on the airframe by the replaced gasoline engine must be considered in the modification and the effects on the technical areas covered by the following paragraphs must be investigated:

14 CFR part 23, §§ 23.251; 23.613; 23.627; 23.629 (or CAR 3.159, as applicable to various models); 23.572; 23.573; 23.574 and 23.901.

Vibration levels imposed on the airframe can be mitigated to an acceptable level by utilization of isolators, damper clutches and similar provisions so that unacceptable vibration levels are not imposed on the previously certificated structure.

13. Powerplant Installation—One cylinder inoperative:

Tests or analysis, or a combination of methods, must show that the airframe can withstand the shaking or vibratory forces imposed by the engine if a cylinder becomes inoperative. Diesel engines of conventional design typically have extremely high levels of vibration when a cylinder becomes inoperative. Data must be provided to the airframe installer/modifier so either appropriate design considerations or operating procedures, or both, can be developed to prevent airframe and propeller damage.

14. Powerplant Installation—High Energy Engine Fragments:

It may be possible for diesel engine cylinders (or portions thereof) to fail and physically separate from the engine at high velocity (due to the high internal pressures). This failure mode will be considered possible in engine designs with removable cylinders or other non-integral block designs. The following is required:

(a) It must be shown that the engine construction type (massive or integral block with non-removable cylinders) is inherently resistant to liberating high energy fragments in the event of a catastrophic engine failure; or,

(b) It must be shown by the design of the engine, that engine cylinders, other engine components or portions thereof (fragments) cannot be shed or blown off of the engine in the event of a catastrophic engine failure; or

(c) It must be shown that all possible liberated engine parts or components do not have adequate energy to penetrate engine cowlings; or

(d) Assuming infinite fragment energy, and analyzing the trajectory of the probable fragments and components, any hazard due to liberated engine parts or components will be minimized and the possibility of crew injury is eliminated. Minimization must be considered during initial design and not presented as an analysis after design completion.

Issued in Kansas City, Missouri, on April 1, 2011.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–8547 Filed 4–8–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9522]

RIN 1545–BG94

Clarification of Controlled Group Qualification Rules

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains a final regulation that applies to a controlled group of corporations. The regulation clarifies that a corporation that satisfies the controlled group rules for stock ownership and qualification is a member of such group, without regard to its status as a component member.

DATES:

Effective Date: This regulation is effective on April 11, 2011.

Applicability Date: For date of applicability, see § 1.1563–1(e).

FOR FURTHER INFORMATION CONTACT: Grid Glyer (202) 622–7930 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains an amendment to 26 CFR part 1. On September 29, 2009, a notice of proposed rulemaking (NPRM) regarding the controlled group qualification rules under § 1.1563–1 was published in the **Federal Register** (REG–135005–07; 74 FR 49829). The NPRM proposed to amend § 1.1563–1 to clarify that a corporation described in section 1563(b) as an excluded member of a controlled group of corporations is nevertheless a member of the group. The NPRM further proposed to add an example demonstrating that a controlled group of corporations can consist solely of excluded members.

One comment was received and no public hearing was requested or held. The public comment concerned the treatment of gross receipts between members of a controlled group of corporations for purposes of section 41, which provides a tax credit to taxpayers for increasing their research activities. In particular, the comment refers to CCA 200233011, dated May 1, 2002. In that CCA, the IRS Office of Chief Counsel concluded first that a domestic corporation and its majority-owned foreign subsidiaries should be treated as a single taxpayer for purposes of sections 41(f)(1)(A)(i), 41(f)(5) and 1563(a) because they were members of the same controlled group of corporations even though the foreign subsidiaries were treated as excluded members of the group.

Second, the IRS Office of Chief Counsel concluded that, given the particular facts and circumstances of that case, the taxpayer should exclude sales to its majority-owned foreign subsidiaries when computing gross receipts for purposes of determining its base amount under section 41(c). The commenter requested guidance on the facts and circumstances that caused the IRS Office of Chief Counsel to exclude such sales in computing gross receipts. The IRS and the Treasury Department believe that the requested guidance is outside the scope of the NPRM, which only involves the first issue addressed in the CCA, and is consistent with the conclusion of the CCA on that issue.

However, the final regulation makes one clarifying change. Paragraph (a)(1)(ii) of the proposed regulation states that in determining whether a corporation is included in a controlled group of corporations, section 1563(b) shall not be taken into account. Section 1563(b) defines a component member, including an excluded member and an additional member. Paragraph (a)(1)(ii) as now revised will also provide that the underlying regulation, § 1.1563–1(b), which defines a component member, shall not be taken into account in determining the members of a controlled group.

Special Analyses

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

Drafting Information

The principal author of this regulation is Grid Glyer of the Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and the Treasury Department participated in its development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.1563–1 is amended by:

■ 1. Redesignating paragraph (a)(1)(ii) as paragraph (a)(1)(iii) and adding new paragraph (a)(1)(ii).

■ 2. Adding *Example 4* to paragraph (b)(4).

■ 3. Adding a sentence at the end of paragraph (e).

The additions read as follows:

§ 1.1563–1 Definition of controlled group of corporations and component members and related concepts.

(a) * * *

(1) * * *

(ii) *Special rules.* In determining whether a corporation is included in a controlled group of corporations, section 1563(b) and paragraph (b) of this section shall not be taken into account. For rules defining a component member of a controlled group of corporations, including rules defining an excluded member and an additional member, see section 1563(b) and paragraph (b) of this section.

* * * * *

(b) * * *

(4) * * *

Example 4. Individual A owns all of the stock of corporations X, Y and Z. Each of these corporations is an S corporation. X, Y, and Z are each members of a brother-sister controlled group, even though each such corporation is treated as an excluded member of such group. See § 1.1563–1(b)(2)(ii)(C).

* * * * *

(e) *Effective/Applicability date.* * * * Paragraph (a)(1)(ii) of this section

applies to taxable years beginning on or after April 11, 2011.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: April 4, 2011.

Michael Mundaca,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2011–8555 Filed 4–8–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 19 and 30

[Docket No. TTB–2008–0004; T.D. TTB–92a; Re: T.D. TTB–92]

RIN 1513–AA23

Revision of Distilled Spirits Plant Regulations; Corrections

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision; correction.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau published a final rule revising its distilled spirits plant regulations in the **Federal Register** of February 16, 2011 (76 FR 9080). That final rule contained several typographical and textual errors. This document corrects those errors.

DATES: *Effective Date:* April 18, 2011.

FOR FURTHER INFORMATION CONTACT: Christopher M. Thiemann, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200E, Washington, DC 20220; telephone 202–453–2265.

SUPPLEMENTARY INFORMATION: The Alcohol and Tobacco Tax and Trade Bureau (TTB) recently published a final rule completely revising its distilled spirits plant regulations as contained in 27 CFR part 19. TTB published this final rule as T.D. TTB–92 in the **Federal Register** of February 16, 2011 (*see* 76 FR 9080). The final rule also amended cross-references to part 19 found in 27 CFR parts 1, 17, 24, 26, 28, 30 and 31. T.D. TTB–92 is effective on April 18, 2011.

After its publication, TTB found that T.D. TTB–92 contained several typographical and textual errors in the revised regulations in part 19 and a textual error in an amendatory instruction for part 31. This document corrects those errors.

Specifically, typographical errors are corrected in T.D. TTB–92 in the part 19 table of contents listing for § 19.26 (“Alternate” rather than “lternate”), in the “Authority” citation at the beginning of the part (“5121–5124” rather than “5121, 5122–5124”), and in the section heading for § 19.603 (“§ 19.603” rather than “§ 10.603”). In § 19.1, in the definition of “Lot identification number,” the cross-reference to “27 CFR 19.485” is corrected to read “§ 19.485” for consistency with other internal part 19 cross references. Also in § 19.1, the definitions of “Kind” and “Package identification number” are corrected to use the new part 19 section numbers contained in T.D. TTB–92 rather than section numbers from the version of part 19 being replaced.

In § 19.454(a), TTB is correcting “SDA” to read “denatured spirits” in order to clarify that denatured spirits, including specially denatured spirits and completely denatured alcohol, withdrawn free of tax under 27 CFR part 20 may be returned to bonded premises in accordance with § 19.454. In § 19.454(e), TTB is correcting “SDA” to read “specially denatured spirits” in order to clarify that specially denatured spirits, including specially denatured alcohol and specially denatured rum, withdrawn free of tax for export under 27 CFR part 28 may be returned to bonded premises in accordance with § 19.454.

Also, as described in T.D. TTB–92, TTB intends to require serial numbers on certain records to either commence with the number “1” each calendar or fiscal year or otherwise be unique and not repeated. These numbering options are incorporated into the recordkeeping requirements contained in § 19.618, Gauge record, and § 19.620, Transfer record—consignor’s responsibility. However, the option to use a unique, non-repeated number was inadvertently left out of § 19.599, Bottling and packing records. TTB is therefore correcting § 19.599(b) to conform to the similar recordkeeping requirements found in §§ 19.618 and 19.620.

In addition, the amendatory instruction updating a cross-reference to part 19 in 27 CFR part 30 was incorrectly phrased. When referring to the existing text of § 30.31(d), the amendatory instructions in T.D. TTB–92 should have used the phrase “27 CFR 19.383” rather than merely “§ 19.383.”

Corrections

In the final rule document numbered FR Doc. 2011–1956 beginning on page 9080 in the **Federal Register** issue of Wednesday, February 16, 2011, make the following corrections:

1. On page 9090, in the third column, in the part 19 table of contents, the listing “19.26 lternate methods or procedures.” is corrected to read “19.26 Alternate methods or procedures.”.

2. On page 9094, in the second column, in the authority citation for 27 CFR part 19, in the fourth line, the number phrase “5121, 5122–5124” is corrected to read “5121–5124”.

§ 19.1 [Corrected]

■ 3. On page 9095, in the third column, in the definition of “Kind,” the cross-reference to “§ 19.597” is corrected to read “§ 19.487”.

■ 4. On page 9096, in the first column, in the definition of “Lot identification number,” the cross-reference to “27 CFR 19.485” is corrected to read “§ 19.485”.

■ 5. On page 9096, in the first column, in the definition of “Package identification number,” the cross-reference to “27 CFR 19.595” is corrected to read “§ 19.490”.

§ 19.454 [Corrected]

■ 6. On page 9140, in the first column of the table (titled “Type of product”), in paragraph (a), the sentence “SDA withdrawn free of tax under part 20 of this chapter” is corrected to read “Denatured spirits withdrawn free of tax under part 20 of this chapter”.

■ 7. On page 9140, in the first column of the table (titled “Type of product”), in paragraph (e), the sentence “SDA withdrawn free of tax for export under part 28 of this chapter” is corrected to read “Specially denatured spirits withdrawn free of tax for export under part 28 of this chapter”.

§ 19.599 [Corrected]

■ 8. On page 9152, in the second column, in § 19.599, in paragraph (b), the text “Serial number of the record (beginning with “1” at the start of each calendar or fiscal year)” is corrected to read “Serial number of the record (which must commence with “1” at the start of each calendar or fiscal year, or be a unique identifying number that is not repeated)”.

§ 19.603 [Corrected]

■ 9. On page 9153, in the first column, the section heading “§ 10.603, Liquor bottle records” is corrected to read “§ 19.603, Liquor bottle records”.

§ 30.31 [Corrected]

■ 10. On page 9171, in the third column, in paragraph 16, in the amendatory instructions for § 30.31, the phrase “the reference to ‘§ 19.383’ ” is corrected to read “the reference to ‘27 CFR 19.383’ of this chapter”.

Dated: April 5, 2011.

John J. Manfreda,

Administrator.

[FR Doc. 2011–8528 Filed 4–8–11; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

28 CFR Part 94

[Docket No.: OJP (OVC) 1539]

RIN 1121–AA78

International Terrorism Victim Expense Reimbursement Program

AGENCY: Office of Justice Programs, Justice.

ACTION: Interim-final rule.

SUMMARY: The Office for Victims of Crime (OVC) is promulgating this interim-final rule for its International Terrorism Victim Expense Reimbursement Program (ITVERP) in order to remove a regulatory limitation on the discretion of the Director of OVC to accept claims filed more than three years after the date that an incident is designated as an incident of international terrorism.

DATES:

Effective date: This interim-final rule is effective April 11, 2011.

Comment date: Written comments must be submitted on or before June 10, 2011.

FOR FURTHER INFORMATION CONTACT: Chandria Slaughter, Grant Program Specialist, International Terrorism Victim Expense Reimbursement Program, at 202–307–5983.

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov.* Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you wish to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not wish it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to only partially post that comment) on *http://www.regulations.gov.* Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

II. Background

ITVERP is a Federal program that provides reimbursement to nationals of the United States and Federal government employees (and certain family members of such individuals, under some circumstances), who are victims of international terrorism and who incur expenses as a result of such incidents. For further information, see the ITVERP Web site at *http://www.ojp.usdoj.gov/ovc/intdir/itverp.*

OVC is promulgating (pursuant to 42 U.S.C. 10603c and 42 U.S.C. 10604(a)) this interim-final rule to provide the Director of OVC with express discretionary authority to accept claims filed more than three years after the date that an incident is designated as one of international terrorism. Largely owing to considerations of administrative convenience, the present ITVERP rule regarding application deadlines limits the period within which OVC would entertain waivers of claim filing deadlines. Based on experience administering the program since it went into effect in 2006, OVC has determined that this limit on waivers of late claims may lead to denials of reimbursement for victims with otherwise meritorious claims, even under circumstances where tolling of the deadline would be appropriate.

The rule will allow the Director of OVC to toll or extend the deadline for a late-filed claim where the Director finds good cause to do so. In the ordinary course, a showing of good cause generally would require that the claimant submit a written explanation—satisfactory to the Director—for missing the deadline. Examples of good cause include situations where a victim's treatment for injuries sustained in an incident were covered initially by collateral sources, but these sources later become unavailable after the filing deadline has expired; where outreach to overseas claimants has not been effective; and where a claimant's extended illness, living abroad in remote areas for extended periods of time, or barriers to accessing information about the program led to the late filing. Absent circumstances consonant with the foregoing, good cause would not exist; thus, for example, claimant's missing the deadline due to mere inattentiveness to the program's deadlines would not be sufficient to establish good cause.

The amended rule will not alter any existing regulatory deadlines, nor will it impose any new deadlines (or any burden whatsoever) on claimants, but instead merely will operate to relieve an administrative restriction, in the existing rule, on claim filing (such rule having been promulgated largely for the administrative convenience of OVC, which has found it, over the course of four years of program administration, to be unnecessary). This rule is being published in interim-final form, effective immediately, as there are presently ITVERP claims before OVC that might otherwise be unnecessarily denied or delayed.

III. Regulatory Requirements

Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted in accordance with Exec. Order No. 12866, section 1(b), 58 FR 51, 735 (Sept. 30, 1993), Principles of Regulation. OJP has determined that this regulation is not a "significant regulatory action" under Executive Order No. 12866. Nevertheless, this regulation has been reviewed, in accordance with the general principles of Executive Order No. 12866, by the Office of Management and Budget.

Administrative Procedure Act

OVC's implementation of this rule as an interim-final rule, with provision for post-promulgation public comment, is based on findings of good cause pursuant to the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B) and (d)). This minor rule amendment merely alleviates a procedural restriction on

ITVERP claimants that might otherwise lead to the denial of meritorious claims from victims, even where such victims show good cause for delayed filing.

The rule would not adversely affect any segment of the public whatsoever, as it would not result in the denial of any additional claims, and therefore advance notice and public comment are unnecessary. The present rule clearly is one that "grants or recognizes an exemption or relieves a restriction," and, therefore, waiver of the 30-day period prior to the rule's taking effect is likewise appropriate here. *See* 5 U.S.C. 553(d)(1). The changes made by this interim-final rule remove an unnecessary administrative restriction on claim filing, and operate for the benefit of victims of international terrorism who may apply for the program.

As there are presently ITVERP claims before OVC that might otherwise be unnecessarily denied or delayed absent this amendment, it is impractical and contrary to the public interest to delay implementation of this rule. Moreover, the portion of the ITVERP rule amended by this interim-final rule directly affects only the Director of OVC, and the Director has "actual notice" of this rule, per 5 U.S.C. 553(b). OVC believes that the rule is noncontroversial and adverse comments will not be received, although comments on this rule are invited. Accordingly, OVC finds that "good cause" exists under 5 U.S.C. 553(b)(B) and 553(d) to make this rule effective upon publication in the **Federal Register**. Public comment after this rule is published is welcomed, and will be carefully reviewed to ensure that any substantive concerns or issues are addressed.

Executive Order 13132—Federalism

This regulation will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Exec. Order No. 13132, 64 FR 43, 255 (Aug. 4, 1999), it is determined that this regulation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Cost/Benefit Assessment

This regulation has no cost to state, local, or tribal governments, or to the private sector. It merely alleviates an administrative restriction on victim claim filing by permitting the OVC Director to allow late filing where the Director determines that this is appropriate. The ITVERP is funded by fines, fees, penalty assessments, and forfeitures paid by federal offenders, as well as gifts from private individuals, deposited into the Crime Victims Fund in the U.S. Treasury, and set aside in the Antiterrorism Emergency Reserve Fund, which is capped at $50 million in any given year. The cost to the Federal Government consists both of administrative expenses and amounts reimbursed to victims. Both types of costs depend on the number of claimants, prospective as well as retroactive. This rule is not expected to significantly increase the number of eligible claimants, and therefore the negligible cost potentially associated with allowing certain late-filed claims to be processed is clearly outweighed by considerations of fairness in the program's administration (given that the program is relatively new) and the benefit of ensuring that victims eligible for, and in need of, reimbursement for injuries and losses from overseas terrorism are provided such reimbursement. This regulation is not expected to substantially increase the overall budgetary impact of the ITVERP.

Regulatory Flexibility Act

This regulation will not have a significant economic impact on a substantial number of small entities. This regulation has no cost to State, local, or tribal governments, or to the private sector. The ITVERP is funded by fines, fees, penalty assessments, and bond forfeitures paid by Federal offenders, as well as gifts from private individuals, deposited into the Crime Victims Fund in the U.S. Treasury. Therefore, an analysis of the impact of this regulation on such entities is not required under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Paperwork Reduction Act of 1995

This rule contains no new information collection or record-keeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

Unfunded Mandates Reform Act of 1995

This regulation will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

List of Subjects in 28 CFR Part 94

Administrative practice and procedures, International terrorism, Victim compensation.

Accordingly, for the reasons set forth in the preamble, title 28, part 94, subpart A of the Code of Federal Regulations is amended as follows:

PART 94—CRIME VICTIM SERVICES

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

Authority: Victims of Crime Act (VOCA), Title II, Secs. 1404C and 1407 (42 U.S.C. 10603c, 10604).

Subpart A—International Terrorism Victim Expense Reimbursement Program

■ 2. Revise § 94.32 to read as follows:

§ 94.32 Application deadline.

For claims related to acts of international terrorism that occurred after October 6, 2006, the deadline to file an application is three years from the date of the act of international terrorism. For claims related to acts of international terrorism that occurred between December 21, 1988, and October 6, 2006, the deadline to file an application is October 6, 2009. At the discretion of the Director, the deadline for filing a claim may be tolled or extended upon a showing of good cause.

Dated: March 31, 2011.

Laurie O. Robinson,

Assistant Attorney General.

[FR Doc. 2011–8479 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0202]

Drawbridge Operation Regulations; Harlem River, New York, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the 103rd Street (Wards Island) Pedestrian Bridge, mile 0.0, across the Harlem River at New York City, New York. The deviation is necessary to facilitate bridge rehabilitation. This deviation allows the

bridge to remain in the closed position for 70 days.

DATES: This deviation is effective from April 30, 2011 through July 8, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0202 and are available online at *http://www.regulations.gov*, inserting USCG–2011–0202 in the "Keyword" and then clicking "Search". They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Mr. Joe Arca, Project Officer, First Coast Guard District, *joe.m.arca@uscg.mil*, or telephone (212) 668–7165. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The 103rd Street (Wards Island) Pedestrian Bridge, across the Harlem River, mile 0.0, at New York City, New York, has a vertical clearance in the closed position of 55 feet at mean high water and 60 feet at mean low water. The drawbridge operation regulations are listed at 33 CFR 117.789.

The owner of the bridge, New York City Department of Transportation, has requested a temporary deviation from the regulations to complete rehabilitation of the bridge which was begun in January 2011.

The Coast Guard published a temporary deviation for the 103rd Street (Wards Island) Pedestrian Bridge on January 20, 2011, (76 FR 3516), authorizing the bridge to remain in the closed position effective from January 10, 2011 through April 29, 2011.

The bridge owner has requested a second temporary deviation through July 8, 2011 in order to continue rehabilitation past April 29, 2011, due to unanticipated additional repair work which was discovered.

In addition, containment scaffolding located under the lift span will reduce the vertical clearance by approximately four feet while the scaffolding is in place. Most vessel traffic that uses this waterway can fit under the draw without requiring bridge openings.

Under this temporary deviation the 103rd Street (Wards Island) Pedestrian Bridge may remain in the closed position from April 30, 2011 through July 8, 2011. Vessels that can pass under the bridge in the closed position may do so at any time.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: March 31, 2011.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2011–8515 Filed 4–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0203]

Drawbridge Operation Regulations; Apponagansett River, Dartmouth, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Padanaram Bridge at mile 1.0 across the Apponagansett River, at Dartmouth, Massachusetts. The deviation is necessary to facilitate electrical maintenance. This deviation allows the bridge to remain in the closed position for five days.

DATES: This deviation is effective from April 18, 2011 through April 22, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0203 and are available online at *http://www.regulations.gov,* inserting USCG–2011–0203 in the "Keyword" and then clicking "Search". They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Mr. John McDonald, Project Officer, First Coast Guard District, *john.w.mcdonald@uscg.mil,* or telephone (617) 223–8364. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Padanaram Bridge, across the Apponagansett River, mile 1.0, at Dartmouth, Massachusetts, has a vertical clearance in the closed position of 9 feet at mean high water and 12 feet at mean low water. The drawbridge operation regulations are listed at 33 CFR 117.587.

The owner of the bridge, the Town of Dartmouth, requested a temporary deviation from the regulations to facilitate electrical repairs, motor replacement, at the bridge.

Under this temporary deviation the Padanaram Bridge may remain in the closed position from April 18, 2011 through April 22, 2011. Vessels that can pass under the bridge in the closed position may do so at any time.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: March 29, 2011.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2011–8517 Filed 4–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0095]

Drawbridge Operation Regulation; Calcasieu River, Westlake, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Union Pacific Railroad swing bridge across the Calcasieu River, mile 36.4, at Westlake, Calcasieu Parish, Louisiana. The deviation is necessary to perform maintenance and updates to the bridge's operating system. This deviation allows the bridge to remain closed to navigation during night operations on two separate occasions.

DATES: This deviation is effective from 11 p.m. on Sunday, April 17, 2011, through 5 a.m. on Monday, April 25, 2011, and from 11 p.m. on Sunday, May 8, 2011, through 5 a.m. on Tuesday, May 31, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0095 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0095 in the "Keyword" box and then clicking "Search". They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Kay Wade, Bridge Administration Branch, Coast Guard; telephone 504–671–2128, e-mail *Kay.B.Wade@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Union Pacific Railroad has requested a temporary deviation from the operating schedule for the swing span bridge across the Calcasieu River, mile 36.4, at Westlake, Calcasieu Parish, Louisiana. The swing span bridge has a vertical clearance of 1.07 feet above mean high water, elevation 3.56 feet Mean Gulf Level in the closed-to-navigation position.

In accordance with 33 CFR 117.5, the bridge currently opens on signal for the passage of vessels. This deviation allows the swing span of the bridge to remain closed to navigation from 11 p.m. Sunday, April 17, 2011, through 5 a.m. on Monday, April 25, 2011, and from 11 p.m. on Sunday, May 8, 2011, through 5 a.m. on Tuesday, May 31, 2011.

The closure is necessary in order to perform maintenance and updates to the bridge's operating system while minimizing the exposure of personnel to hazards associated with performing work of a complicated nature in the dark. This maintenance is essential for the continued operation of the bridge. Notices will be published in the Eighth Coast Guard District Local Notice to Mariners and will be broadcast via the Coast Guard Broadcast Notice to Mariners System.

Navigation on the waterway is minimal at the bridge site. The very limited commercial traffic at the bridge site consists of commercial tugs with tows. There are only two companies that transit above the bridge. The bridge will be able to open for emergencies if necessary. There are no alternate waterway routes available. Based on experience and coordination with waterway users, it has been determined that this closure will not have a significant effect on vessels that use the waterway.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: March 31, 2011.

David M. Frank,

Bridge Administrator.

[FR Doc. 2011–8516 Filed 4–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126522–0640–02]

RIN 0648–XA362

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in the West Yakutat District of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in the West Yakutat District of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2011 total allowable catch (TAC) of pollock in the West Yakutat District of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), April 5, 2011, through 2400 hrs, A.l.t., December 31, 2011.

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

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

The 2011 TAC of pollock in the West Yakutat District of the GOA is 2,339 metric tons (mt) as established by the final 2011 and 2012 harvest specifications for groundfish of the GOA (76 FR 11111, March 1, 2011).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the 2011 TAC of pollock in the West Yakutat District of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 2,239 mt, and is setting aside the remaining 100 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in the West Yakutat District of the GOA.

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

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of pollock in the West Yakutat District of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of April 4, 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: April 6, 2011.

James P. Burgess,

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

[FR Doc. 2011–8568 Filed 4–6–11; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 69
Monday, April 11, 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 ENERGY

10 CFR Part 430

[Docket No. EERE–2008–BT–TP–0010]

Compliance Testing Procedures: Correction Factor for Room Air Conditioners

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Decision on petition for rulemaking.

SUMMARY: On November 15, 2010, the Department of Energy (DOE) received a petition for rulemaking from the Association of Home Appliance Manufacturers (AHAM). The petition requests the initiation of a rulemaking regarding compliance testing procedures for room air conditioners. The petition seeks temporary enforcement forbearance, or in the alternative, a temporary, industry-wide waiver or guidance, to allow the use of a data correction factor in compliance testing procedures for room air conditioners. In this document, DOE denies the petition as moot because the amended test procedure for room air conditioners and clothes dryers incorporates use of the correction factor requested in the AHAM petition.

DATES: The petition is denied as of April 11, 2011.

ADDRESSES: You may review copies of all materials related to this petition and the test procedure rulemaking for room air conditioners and clothes dryers at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Ms. Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC, 20585–0121, (202) 586–6590, e-mail: *ashley.armstong@ee.doe.gov*.

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–7796. E-mail: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* provides among other things, that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." (5 U.S.C. 553(e)). Pursuant to this provision of the APA, AHAM petitioned the Department of Energy for the issuance of a new rule to allow manufacturers of room air conditioners to use a correction factor that was not included in the regulations governing DOE's compliance testing procedures at that time. The petition also sought temporary enforcement forbearance, or a temporary industry-wide waiver or guidance, to allow use of this methodology. DOE published the petition for public comment until December 27, 2010, seeking views on whether it should grant the petition and undertake a rulemaking to consider the proposal contained in the petition. (75 FR 72739, Nov. 26, 2010).

In addition to a comment from AHAM reiterating support for their petition, DOE received a jointly filed comment from the Appliance Standards Awareness Project (ASAP) and Earth Justice regarding AHAM's petition. ASAP and Earth Justice were concerned that the correction factor is not appropriate and may not have a sound technical basis. ASAP and Earth Justice stated that the cooling capacity of a room air conditioner may actually be higher rather than lower when barometric pressure is lower than standard pressure (due to greater moisture content in the air, which generally increases latent heat removal). As a result, the correction factor, which adjusts the measured capacity upwards when barometric pressure for the test is lower than standard pressure, may actually correct the capacity in the wrong direction. ASAP and Earth Justice also commented that the correction factor referenced in AHAM's petition applies to test room conditions only where the barometric pressure is lower than standard pressure, but that it would seem appropriate that the correction factor should account for any deviation from standard barometric pressure regardless of the direction (*i.e.,* both higher and lower). (ASAP and Earth Justice, No. 42 at pp. 1–2)

ASAP and Earth Justice indicated their understanding that in the latest revision of ASHRAE Standard 37 (which applies to central air conditioners), the correction factor was removed when the committee could not find any reference as to where the correction factor originated or data demonstrating the problem of barometric pressure variation and how this problem could be addressed. ASAP and Earth Justice stated their understanding that the correction factor will be removed in the next revision of ASHRAE Standard 16. ASAP and Earth Justice also stated that DOE should fully investigate the issue in the test procedure rulemaking, which was ongoing at the time the comment was submitted, to ensure that the correction factor appropriately reflects the relationship between barometric pressure and measured total capacity. (ASAP and Earth Justice, No. 42 at pp. 1–2)

ASAP and Earth Justice commented that any use of a correction factor is contrary to DOE's regulations for room air conditioners to meet specific Energy Efficiency Ratio (EER) levels as prescribed under 10 CFR 430.23(f)(2) and 430.32(b), and determined in accordance with ASHRAE Standard 16–69. ASHRAE Standard 16–69 does not contain a correction factor to adjust the tested unit's capacity to a standard barometric pressure. Further, ASAP and Earth Justice stated that any deviation from DOE's test procedure regulations negates the effect of any demonstration of compliance with the applicable room air conditioner standards. (ASAP and Earth Justice, No. 42 at p. 2)

DOE notes that the removal of the correction factor in ASHRAE Standard 37 (which applies to central air conditioners) does not indicate that its use is inappropriate in ASHRAE Standard 16, which is used for rating of room air conditioners. Room air conditioners operate with a "wet" condenser in rating test conditions, because room air conditioners use the

condensate from the evaporator side of the product to enhance performance of the condenser. Central air conditioners, which are covered under ASHRAE Standard 37, generally do not have this feature and operate primarily with dry condensers. DOE notes that changes in the barometric pressure have an impact on the moist air conditions, and this may affect room air conditioner performance differently than it would affect central air conditioners because of the difference in condenser operation. This factor could lead to different efficiency measurement impacts of barometric pressure for these two types of products. DOE has not received any information from ASHRAE indicating that ASHRAE is considering revisions to Standard 16 at this time.

DOE also received additional information from AHAM supporting the inclusion of the barometric pressure correction factor in the calculation of cooling capacity from ASHRAE Standard 16. AHAM indicated that as atmospheric pressure drops, so does the air density and, therefore, the mass of air in a room. As atmospheric pressure drops, the efficiency of a unit would also drop because there would be less medium for heat transfer. "The performance of the cooling coil is considerably influenced, and the cooling capacity of the air supplied to the conditioned room is reduced, by altitude effects because air density reduces * * *. Air mass flow rate is probably the most important effect of barometric pressure changes upon system performance. It is the air mass flow rate that transfers heat between cooler coils or condensers and airstreams and removes the sensible and latent heat gains from the conditioned space. Therefore, it is of vital importance that the correct air density or specific volume be used in calculations." (William Peter Jones, Air Conditioning Applications and Design, 32 (2d Ed. 1997)). AHAM indicated that because barometric pressure is connected to the measured efficiency of the unit, multiple tests of the same unit, under slightly different barometric pressure conditions, will likely produce different results.

AHAM also provided data from a room air conditioner performance simulation using IMST–ART version 3.30 modeling software of five simulations, in each case progressively reducing the barometric pressure inputs by 1 in. Hg starting from standard barometric pressure (29.92 in. Hg). The results from this simulation, presented below in Table 1, show that the cooling capacity decreases as atmospheric pressure decreases.

TABLE 1—AHAM ROOM AIR CONDITIONER PERFORMANCE SIMULATION DATA

	1. Units	2. Case 1	3. Case 2	4. Case 3	5. Case 4	6. Case 5
Evaporator Inlet Pressure (Atmospheric Pressure Inputs).	psia	14.695	14.204	13.713	13.222	12.731
Condenser Inlet Pressure (Atmospheric Pressure Inputs).	psia	14.695	14.204	13.713	13.222	12.731
Condensation Temp.	°F	122.21	122.65	123.12	123.62	124.15
Evaporation Temp.	°F	47.867	47.689	47.511	47.33	47.144
Condensation Press.	psia	446.62	449.1	451.8	454.7	457.8
Evaporation Press.	psia	151.96	151.53	151.09	150.64	150.18
EER Fan/Pump Included		11	10.8	10.7	10.6	10.4
Cooling Capacity	Btu/h	11,740	11,670	11,590	11,500	11,420
Refrigerant		R410A	R410A	R410A	R410A	R410A

DOE recently published a final rule to amend the test procedure for room air conditioners and clothes dryers. (75 FR 972, Jan. 6, 2011). In the final rule, DOE noted that section 6.1.3 of ANSI/ASHRAE Standard 16–1983 (RA 2009) introduces a correction factor based on the test room condition's deviation from the standard barometric pressure of 29.92 inches (in.) of mercury (Hg) (101 kilopascal (kPa)). Section 6.1.3 of ANSI/ASHRAE Standard 16–1983 (RA 2009) states that the cooling capacity may be increased 0.8 percent for each in. of Hg below 29.92 in. of Hg (0.24 percent for each kPa below 101 kPa). For the reasons stated in the final rule, DOE amended the DOE test procedure to reference the relevant section of the ANSI/ASHRAE Standard and include use of the barometric pressure correction factor.

The amended test procedure was effective February 7, 2011 and applies prospectively. DOE notes that the Administrative Procedure Act defines a rule as being prospective in nature. 5 U.S.C. 551(4) ("'rule' means the whole or a part of an agency statement of general or particular applicability and future effect * * *") In addition, the Supreme Court has stated that absent express statutory authority, agencies cannot promulgate retroactive rules. *See Bowen* v. *Georgetown University Hospital,* 488 U.S. 204 (1988). The Energy Policy and Conservation Act of 1975, as amended, 42 U.S.C. 6291, *et seq.,* does not authorize DOE to specify retroactive application of any portion of the test procedure in a test procedure rulemaking.

For the reasons stated above, DOE denies AHAM's petition as moot.

Issued in Washington, DC, on April 4, 2010.

Sean A. Lev,

Acting General Counsel.

[FR Doc. 2011–8588 Filed 4–8–11; 8:45 am]

BILLING CODE 6450–01–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1224

[CPSC Docket No. CPSC–2011–0019]

Safety Standard for Portable Bed Rails: Notice of Proposed Rulemaking

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Section 104(b) of the Consumer Product Safety Improvement Act of 2008 ("CPSIA") requires the U.S. Consumer Product Safety Commission ("CPSC," "Commission," or "we") to promulgate consumer product safety standards for durable infant or toddler products. These standards are to be "substantially the same as" applicable voluntary standards or more stringent than the voluntary standard if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product. The Commission is proposing a more stringent safety

standard for portable bed rails that will further reduce the risk of injury associated with these products.[1]

DATES: Written comments must be received by June 27, 2011. Interested persons are requested to submit comments regarding information collection by May 11, 2011, to the Office of Information and Regulatory Affairs, OMB (*see* **ADDRESSES**).

ADDRESSES: Comments, identified by Docket No. CPSC–2011–0019, may be submitted by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (e-mail) except through *http://www.regulations.gov.*

Written Submissions

Submit written submissions in the following way:

• Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, U.S. Consumer Product Safety Commission, Room 502, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to *http://www.regulations.gov.* Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

Comments related to the Paperwork Reduction Act aspects of the instructional literature and marking requirements of the proposed rule should be directed to the Office of Information and Regulatory Affairs, OMB, Attn: CPSC Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Rohit Khanna, Project Manager, Office of Hazard Identification and Reduction, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7546; *rkhanna@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background and Statutory Authority

1. The Consumer Product Safety Improvement Act

The Consumer Product Safety Improvement Act of 2008, Public Law 110–314 ("CPSIA") was enacted on August 14, 2008. Section 104(b) of the CPSIA requires the Commission to promulgate consumer product safety standards for durable infant or toddler products. These standards are to be "substantially the same as" applicable voluntary standards or more stringent than the voluntary standard if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product. This document proposes a safety standard for portable bed rails. The proposed standard is substantially the same as the voluntary standard developed by ASTM International (formerly known as the American Society for Testing and Materials), ASTM F 2085–10a, "Standard Consumer Safety Specification for Portable Bed Rails," but we are proposing some modifications to strengthen the standard because these more stringent requirements would further reduce the risk of injury associated with portable bed rails.

2. Previous Commission Rulemaking Activity Concerning Portable Bed Rails

In the **Federal Register** of October 3, 2000 (65 FR 58968), we published an advance notice of proposed rulemaking ("ANPR") inviting written comments concerning the risks of injury associated with portable bed rails, regulatory alternatives discussed in the ANPR, other possible ways to address the risks of injury associated with portable bed rails, and the economic impacts of the regulatory alternatives. The ANPR was intended to initiate a rulemaking proceeding that could result in a rule banning portable bed rails that present an unreasonable risk of injury, and we issued the ANPR under our authority in the Federal Hazardous Substances Act ("FHSA"). Elsewhere in this issue of the **Federal Register**, the Commission has issued a notice that the Commission has terminated the rulemaking proceeding that it began under the FHSA because it has been superseded by the rulemaking required under section 104(b) of the CPSIA.

In May 2001, the ASTM published a standard, ASTM F 2085, "Standard Consumer Safety Specification for Portable Bed Rails." In October 2001, CPSC staff prepared a draft proposed standard, which included performance requirements to address entrapment hazards on portable bed rails. The Commission voted to direct CPSC staff to prepare a notice of proposed rulemaking ("NPR") based on its recommended standard. Thereafter, the ASTM Portable Bed Rail Subcommittee agreed to ballot a revision to ASTM F 2085 that was substantially the same as CPSC staff's recommended standard. Accordingly, we did not issue an NPR at that time. ASTM approved and published the revised standard in June 2003. In 2008, ASTM published another revision to the standard that included a structural integrity test to address fall incidents involving hinge lock mechanism failures. From 2009 to 2010, ASTM made and published minor revisions to the standard. The current edition of the standard is ASTM F 2085–10a, "Standard Consumer Safety Specification for Portable Bed Rails." The standard in this proposed rule would be more stringent in some respects than the voluntary standard ASTM F 2085–10a. The proposed modifications, if finalized, will further reduce the risk of death and injury associated with portable bed rails.

B. The Product

ASTM F 2085–10a defines a "portable bed rail" as a "portable railing installed on the side of an adult bed and/or on the mattress surface which is intended to keep a child from falling out of bed." The scope of the ASTM standard also states that a portable bed rail "is as a device intended to be installed on an adult bed to prevent children from falling out of bed." Portable bed rails are intended for children (typically from 2 to 5 years of age) who can get in and out of an adult bed unassisted. They include bed rails that only have a vertical plane that presses against the side of the mattress but does not extend over it (referred to as "adjacent type bed rails"), as well as bed rails that extend over the sleeping surface of the mattress (called "mattress-top bed rails").

A review of market information shows that there are products that differ from traditional, rigid portable bed rails in that they are constructed of nonrigid materials, such as foam or inflatable materials. Although these foam and inflatable products do not use the term "bed rails" in their packaging or

[1] The Commission voted 5–0 to approve publication of this notice of proposed rulemaking. Commissioner Nancy Nord filed a statement concerning this action which may be viewed on the Commission's Web site at *http://www.cpsc.gov/pr/statements.html* or obtained from the Commission's Office of the Secretary.

labeling, we believe that the products meet the definition of a portable bed rail and should be included in the scope of the voluntary standard. However, most performance requirements of ASTM F 2085–10a do not apply to these products because the standard was developed to address the hazards from portable bed rails constructed from rigid (wood/metal) materials. Accordingly, the proposed rule would revise ASTM F 2085–10a to include foam and inflatable products, but would require that only certain relevant provisions of the standard apply to such items.

Both portable bed rails made for a specific manufacturer's adult-size beds and "universal" bed rails that can attach to any adult-size bed are included in the scope of ASTM F 2085–10a. However, guard rails that are used with crib mattresses on toddler beds are not covered under the voluntary standard. They are addressed under the Consumer Safety Standard for Toddler Beds (April 28, 2010, 75 FR 22291). Other products that are not covered by ASTM F 2085–10a include: side rails that connect the headboard to the footboard and may or may not have any barrier purposes; conversion rails intended to convert a crib to a full-size bed; and adult-size beds where the rail is permanently attached to the bed (*i.e.,* bunk beds).

Additionally, the U.S. Food and Drug Administration ("FDA") has several regulations pertaining to hospital beds, including a regulation for pediatric hospital beds (21 CFR 880.5140). The FDA regulations, in general, identify a hospital bed as having (among other things) movable and latchable side rails. If a pediatric hospital bed is subject to regulation by the FDA as a medical device, then the bed rails on that pediatric hospital bed are outside the scope of this proposed rule.

C. ASTM Voluntary Standard

The ASTM standard for portable bed rails was first published in May 2001 (ASTM F 2085–01). This was a minimum standard with requirements for labeling but no performance requirements. The portable bed rails that met the 2001 standard typically were designed with two arms at right angles to the vertical portion of the rail. This type of portable bed rail was installed on a bed by inserting the arms between the mattress foundation and the mattress. These older style portable bed rails relied on friction between the arms and the foundation/mattress to stay in place. However, this type of design allowed the portable bed rail to be moved outward away from the mattress unintentionally if a force was applied in that direction. An outward force may result from activity by a child in the bed while the child is asleep or awake. Once the bed rail is moved outward, a gap could be created between the vertical portion of the rail and the side of the mattress. The primary hazard scenario would involve a child rolling into a gap between the mattress and portable bed rail and becoming entrapped. Once entrapped, the child could suffocate or strangle.

To address this hazard, the ASTM Subcommittee on Portable Bed Rails revised the standard in June 2003 (ASTM F 2085–03). ASTM F 2085–03 addressed the entrapment hazard by including a new section, "Openings Created by a Displacement," with requirements to deal with displacement of a portable bed rail. In 2008, ASTM published a revised standard (ASTM F 2085–10) that included a structural integrity test to address incidents involving hinge lock mechanism failures. From 2009 to 2010, ASTM made and published minor revisions to the standard. The current edition of the standard is ASTM F 2085–10a.

To assess the adequacy of ASTM F 2085–10a, we tested a variety of portable bed rails currently in the market. Several portable bed rails were certified to ASTM F 2085–10a by the Juvenile Products Manufacturers Association ("JPMA"). JPMA operates a program to certify portable bed rails to the voluntary standard. To obtain JPMA certification, manufacturers submit their products to an independent test laboratory for conformance testing to the most current voluntary standard. For portable bed rails that are assembled and installed in accordance with the manufacturer's instructions, we believe that the requirements to address structural integrity and prevent displacement from the mattress are adequate. However, if a portable bed rail is misassembled or misinstalled on the bed, it could present an entrapment hazard. ASTM F 2085–10a does not address misassemby or misinstallation of portable bed rails.

We also reviewed the British Standard Institution ("BSI") standard for bed rails, BS 7972:2001+A1:2009 Safety Requirements and Test Methods for Children's Bedguards for Domestic Use. The BSI standard primarily addresses entrapment and structural integrity, but also includes some requirements for warning labels. The BSI standard also contains a performance requirement that the bed rail remain attached to the bed after rolling a 30 lb cylinder into the bed rail. The test simulates a child rolling into the bed rail; the ASTM standard does not have an equivalent requirement. We conducted limited testing to compare this requirement with requirements in the ASTM standard that address potential entrapment hazards. Based on staff's review, we find that the ASTM standard is more stringent than the BSI standard because the ASTM test methods provide more stress to the portable bed rail and mattress interface when evaluating entrapment hazards.

D. Incident Data

1. Incident Reports

The CPSC Directorate for Epidemiology analyzed incident data related to portable bed rails from January 1, 2000 through March 31, 2010. We received reports of a total of 132 incidents related to portable bed rails. Among the 132 reported incidents, there were 13 fatalities, 40 nonfatal injuries, and 79 noninjury incidents. Of the 13 child fatalities reported involving portable bed rails, most children (9 out of 13) were under 1 year old; two were between 1 and 2 years old; and two children, both physically handicapped, were 6 years old. While all 13 incidents reported some sort of entrapment of the child between the portable bed rail and the mattress, no additional product- or scenario-specific information was available for five reports. Among the remaining eight incidents, two deaths resulted from portable bed rail displacement, when the portable bed rail partially pushed away from underneath the mattress and allowed the child to fall into the opening and get trapped. There were three cases of portable bed rail misassembly. In the first incident, the middle bar was absent, and the child rolled into the mesh and got wedged between the mattress and the rail. In the second incident, the middle bar was not inserted through the mesh sleeve, and the child's head slipped between the bottom edge of the mesh panel and the top edge of the mattress. In the third incident, the bottom horizontal bar was not attached to the vertical bar, resulting in a hazardous gap. In the remaining three fatality incidents, not enough information was available to determine the contributing factor(s) that led to the hazardous entrapment scenario. The beds used in all eight cases were adult-size.

A total of 40 nonfatal incidents associated with the use of a portable bed rail involved injury to a child. Eighty-three percent of the injured children were 2 years old or older. The majority of the injuries (28 out of 40, or 70 percent) were identified as fractures/contusions resulting from a fall when the portable bed rail became dislodged,

or lacerations/scratches on sharp or broken surfaces of the portable bed rail. The remaining injuries resulted from the child getting caught on a torn mesh panel of the rail; the child getting partially entrapped in a portable bed rail that was partly pushed out; and the child nearly choking on small parts (*e.g.,* hardware or labels) that separated from the portable bed rail. While no injuries were reported for the remaining 79 incidents, the incident scenarios indicate that injuries or fatalities potentially could have occurred.

2. Hazard Patterns

We considered the 132 incidents together to identify the hazard patterns associated with portable bed rail-related incidents. The hazard patterns can be grouped into the following categories:

• *Displacement of the portable bed rail*—Sixty-nine of the 132 incidents (52 percent) involved the displacement of the portable bed rail, where the portable bed rail pushed out from underneath the mattress and created an opening between the mattress and the rail. In cases where the opening was small, the child became entrapped in the space. In cases where the opening was wide or the rail dislodged completely, the child fell to the floor. There were two fatal incidents, where the portable bed rail had pushed out partially and entrapped the child. There were about 21 nonfatal injuries that resulted from displacement of the rail. A small proportion of the 69 incident reports provided enough information to indicate that, for some "double-rail" configurations (*i.e.,* a design that has two bed rails, one on each side of the mattress), failure of the push-pin or buckle lock mechanism (on the connecting bars/straps underneath the mattress) usually was the main cause of the portable bed rail displacement.

• *Worn or poor quality fabric on mesh panel*—Seventeen of the 132 incidents (13 percent) involved a tear in the mesh, the unraveling of the stitching around the mesh, or simply very loose fabric on the mesh panel. Most nonfatal incident reports in this category involved the child getting caught in the tear/hole (tooth, limb, or even head); loose thread from the stitching getting tightly wound around the child (finger or neck); and mesh coming completely loose, allowing the child to slide through the panel and fall. Many consumers in the incident reports expressed concern over the potential of the tears/holes in the mesh to become larger and increase the risk of strangulation.

• *Sharp surface*—Fourteen of the 132 incidents (11 percent) involved lacerations or scratches, or the potential thereof, on sharp surfaces of the portable bed rail. Some of the portable bed rails reportedly involved in these incidents had sharp surfaces to begin with, while in other incidents, sharp surfaces were created when parts of the portable bed rail broke away. Occasionally, depending upon the part that broke, the broken components created a potential fall hazard.

• *Hinge lock disengagement*—Eleven of the 132 incidents (8 percent) involved the hinge lock mechanism failing to remain locked to keep the side panel in an upright position. This allowed the child to fall out. Three out of the 11 incidents involving hinge lock mechanism failures resulted in injuries.

• *Misassembly*—Seven of the 132 incidents (5 percent) involved either misassembly or misinstallation of the portable bed rail. Misassembly resulted in three fatalities. In the first case, the middle bar was absent; in the second case, the middle bar was not inserted through the mesh sleeve; and in the third case, the bottom horizontal bar was not attached to the vertical bar. Examples of nonfatal incidents related to misinstallation included the use of a portable bed rail on a toddler bed, as well as the use of a portable bed rail with an extra thick mattress, which prevented the portable bed rail from attaching securely.

• *Miscellaneous Other or Unknown Issues*—Fourteen of the 132 incidents (11 percent) involved other problems not listed above. Six reports—including five fatalities—did not provide any product- or scenario-specific information. Three additional fatality reports provided insufficient information to draw any conclusions about why the portable bed rail was not flush with the mattress. The remaining five nonfatal incidents involved the potential for choking on small parts, such as loose hardware or labels; instability issues resulting from loose hardware; and inadequate design issues, such as extra-wide openings in nonmesh side panels or insufficient rail height.

E. Assessment of Voluntary Standard ASTM F 2085–10a and Description of Proposed Changes and the Proposed Rule

1. Assessment of Voluntary Standard ASTM F 2085–10a

Section 104(b) of the CPSIA requires the Commission to assess the effectiveness of the voluntary standard in consultation with representatives of consumer groups, juvenile product manufacturers, and other experts. CPSC staff has consulted with these groups regarding the ASTM voluntary standard, *Consumer Safety Specification for Portable Bed Rails,* throughout its development. Consultation with members of this subcommittee is ongoing. ASTM F 2085–10a contains several labeling and performance criteria. The standard addresses many of the same hazards associated with other durable nursery products, and includes requirements for lead in paints, sharp edges/sharp points, small parts, wood part splinters, structural integrity, openings, protrusions, and warning labels. For the eight fatal incidents associated with portable bed rails for which investigations by CPSC staff were completed, we identified two major contributing factors: (1) Improper installation, and (2) misassembly. It is also notable that 11 of the 13 deaths involved children under 2 years old. Portable bed rails, which are meant to be installed on an adult bed, are not intended for this age group. Placing a railing on the side of an adult bed does not make the adult bed safe for infants (*i.e.* convert an adult bed into a crib). Despite the current warning label cautioning against the use of this product with children under 2 years old, parents of infants continue to use this product with their infants.

Most portable bed rails currently in the market are difficult for consumers to assemble correctly, due to the number of components and the complexity of the fastening hardware. There were three fatal incidents involving misassembled portable bed rails and, based on our testing of sample portable bed rails, consumers are likely to have difficulty assembling and installing portable bed rails correctly. The proposed rule would contain new performance requirements and associated test methods to address misassembly of portable bed rails.

These proposed performance requirements should reduce the likelihood of portable bed rail misassembly. The proposed misassembly performance requirements would prevent portable bed rail entrapment fatalities that result from assembly of a product without critical assembly components (*i.e.,* any component of the portable bed rail that requires consumer assembly to meet the performance requirements); incorrectly installing the portable bed rail's fabric cover/mesh (if present); or inverting/interchanging parts of the portable bed rail. The addition in the standard of misassembly performance requirements will result in portable bed rail designs that will render the portable bed rail no longer functional if it is not assembled according to the manufacturer-intended

final assembly, or make it obvious to the consumer that the product is misassembled. While current portable bed rail designs do not meet the proposed misassembly requirements, we are aware of the technical feasibility of this requirement because we have developed and demonstrated to ASTM, two prototypes using common portable bed rails designs (adjacent style and mattress top) that meet the proposed requirements.

The proposed rule also would contain a new performance requirement and associated warning label for portable bed rail critical installation components to address issues related to misinstallation of portable bed rails. Although we are not aware of any deaths associated with portable bed rail misinstallation, we are aware of entrapment hazards caused by misinstallation. Furthermore, review and testing of market samples indicate that some consumers may have difficulty installing portable bed rails, which could lead to potentially hazardous conditions. Installation of a portable bed rail onto a bed can require complex or physically demanding adjustments to the portable bed rail, particularly when reaching between the mattress and mattress foundation. A portable bed rail that has been installed improperly could move away from the mattress and form a hazardous gap. Portable bed rail installation components, such as anchor plate and strap combinations, can be misplaced, or not used at all. The proposed performance requirement for critical installation components would increase the likelihood that such components are attached permanently to a structural component of the portable bed rail. In addition, a proposed new warning label for critical installation components would reinforce the importance of using the installation components when installing portable bed rails onto the bed and reduce the likelihood of misinstallation.

2. Proposed Changes to the ASTM Standard's Requirements

Consistent with section 104(b) of the CPSIA, the Commission, through this proposed rule, would establish a new 16 CFR part 1224, *Safety Standard for Portable Bed Rails.* The new part 1224 would incorporate by reference the requirements for portable bed rails in ASTM F 2085–10a with certain changes to specific provisions and additions to the standard. The proposed modifications and additions to the standard would reduce further the risk of injury associated with portable bed rails.

Part 1224 would consist of two sections: § 1224.1, *Scope, application, and effective date,* and § 1224.2, *Requirements for portable bed rails.*

To understand the proposed rule, it is helpful to view the current ASTM F 2085–10a standard for portable bed rails and our proposed modifications, along with the explanations provided in part E.2 of this preamble. The ASTM standard is available for viewing for this purpose during the comment period through this link: *http://www.astm.org/cpsc.htm.* For example, the proposed rule would create several new sections in ASTM F 2085–10a. To distinguish between the requirements that would be published in the Code of Federal Regulations, we describe those requirements as proposed § 1224.1 or proposed § 1224.2, and describe the new sections that the proposed rule would create in ASTM F 2085–10a as a "new section."

a. Scope, Application, and Effective Date (Proposed § 1224.1)

Proposed § 1224.1 would explain that part 1224 establishes a consumer product safety standard for portable bed rails manufactured or imported on or after a specific date. The date would be the effective date of a final rule, which is normally six months after date of publication of a final rule in the Federal Register.

b. Requirements for Portable Bed Rails (Proposed § 1224.2)

(i). Incorporation by Reference (Proposed § 1224.2(a)).

Proposed § 1224.2(a) would state that each portable bed rail, as defined in ASTM F 2085–10a, must comply with all applicable provisions of ASTM F 2085–10a, except as provided in proposed § 1224.2(b). Proposed § 1224.2(a) also would incorporate ASTM F 2085–10a by reference, and inform interested parties how they can obtain a copy of the standard or inspect the standard at the CPSC or at the National Archives and Records Administration.

(ii). Foam and Inflatable Products (Proposed § 1224.2(b)(1)).

Proposed § 1224.2(b)(1) would revise the scope section in ASTM F 2085–10a to include foam and inflatable products. A "foam bed rail" is defined as a portable bed rail constructed primarily of nonrigid materials, such as fabric or foam. An "inflatable bed rail" is defined as a portable bed rail constructed primarily of nonrigid material that requires air to be inflated into the product to achieve structure. Our review of market information indicates that there are products that differ from traditional, rigid portable bed rails in that they are constructed of foam or inflatable rubber materials and meet the definition of a portable bed rail under ASTM F 2085–10a. However, most performance requirements of ASTM F 2085–10a do not apply to these products because the standard was developed to address the hazards from portable bed rails that consist of rigid (wood/metal) materials. Accordingly, the proposed rule would state that the foam and inflatable portable bed rails must meet only the General Requirements of section 5; the performance requirement of subsection 6.3, *Enclosed Openings;* and the warning statements of subsection 9.3.1 of ASTM F 2085–10a because those requirements can be applied to foam and inflatable portable bed rail products.

(iii). Terminology (Proposed § 1224.2(b)(2)).

Proposed 1224.2(b)(2) would revise the terminology in section 3 of ASTM F 2085–10a by creating new terms to be numbered as new sections 3.1.10 through 3.1.14 of ASTM F 2085–10a. The new terms would be as follows:

Foam bed rail is a portable bed rail constructed primarily of nonrigid materials, such as fabric or foam;

Inflatable bed rail is a portable bed rail constructed primarily of nonrigid material that requires air to be inflated into the product to achieve structure;

Critical assembly component is any component of the portable bed rail that requires consumer assembly in order to meet the performance requirements of sections 6.1, *Structural Integrity,* 6.3 *Enclosed Openings;* 6.4, *Openings Created by Portable Bed Rail Displacement of Adjacent Style Portable Bed Rails;* 6.5, *Openings Created by Displacement of Mattress-Top Portable Bed Rails;* and 6.6, *Openings Created by Displacement of Portable Bed Rails Intended for Use on Specific Manufacturers' Beds* of ASTM F 2085–10a;

Critical installation component is any component of the portable bed rail that is used to attach the portable bed rail onto the bed; and

Misassembled/functional portable bed rail is a portable bed rail that has been assembled incorrectly but appears to function as a portable bed rail. Misassembly/functionality is determined by meeting one of the criteria listed in proposed section 6.9, *Determining Misassembled/Functional Portable Bed Rail,* of ASTM F 2085–10a.

The proposed rule would create these new terms because the Commission is proposing new requirements for foam and inflatable products. In addition, the

Commission is proposing new requirements to address misassembly and misinstallation of portable bed rails. Accordingly, the addition of the new terms will help testing laboratories understand the new performance requirements and associated test methods to reduce entrapment hazards associated with portable bed rails.

(iv). General Requirements (Proposed § 1224.2(b)(3)).

Proposed section 1224.2(b)(3) would create a new section 5.6 of ASTM F 2085–10a, *Critical Installation Components.* This new section of ASTM F 2085–10a (new section 5.6.1) would provide that critical installation components that are also critical assembly components and meet the definition of a misassembled/functional portable bed rail must be permanently affixed to a structural component(s) of the portable bed rail. If a critical installation component(s) is also a critical assembly component and may result in a misassembled/functional portable bed rail, a new section 5.6.2 of ASTM F 2085–10a would require that a portable bed rail not remain upright or that the vertical height must decrease by 6 inches at any point along the top rail when tested to the method for determining the acceptability of the vertical structure of a misassembled/functional portable bed rail. (The requirement regarding a portable bed rail not remaining upright or meeting certain vertical height requirements would be at a new section 6.10.1 of ASTM F 2085–10a, which we discuss later in section v of this document.) The addition of critical installation components would reduce the likelihood of portable bed rail misassembly in that a misassembled bed rail would no longer be functional without the critical installation components.

(v). Determining Misassembled/Functional Portable Bed Rail (Proposed § 1224.2(b)(4)(i) and (ii)).

Proposed § 1224.2(b)(4)(i) would create a new section 6.9 of ASTM F 2085–10a, *Determining Misassmbled/Functional Portable Bed Rail.* It would consider a portable bed rail to be a misassembled/functional portable bed rail if:

- The portable bed rail can be assembled without any critical assembly component (new section 6.9.1 of ASTM F 2085–10a);
- The portable bed rail can be assembled without the supplied fasteners, such as screws, nuts, or bolts that are not captive to a critical assembly component like the frame (new section 6.9.2 of ASTM F 2085–10a);
- The portable bed rail's fabric cover or mesh can be placed over the rigid frame structure without engaging critical parts of the frame as intended in final assembly (new section 6.9.3 of ASTM F 2085–10a), or
- The portable bed rail can be assembled by improper placement of any critical component, such as an inverted or an interchanged part, without permanent deformation or breakage (new section 6.9.4 of ASTM F 2085–10a).

To determine the acceptability of a misassembled/functional portable bed rail, proposed section 1224.2(b)(4)(ii) would set forth the requirements for a new section 6.10, *Determining Acceptability of Misassmbled/Functional Portable Bed Rail,* of ASTM F 2085–10a. The new section would provide that misassembled/functional portable bed rails must meet sections 6.10.1, 6.10.2, 6.10.3, or 6.10.4 of ASTM F 2085–10a. Under the proposed rule, a new section 6.10.1 of ASTM F 2085–10a would provide that the portable bed rail must not remain upright or the vertical height must decrease by 6 inches at any point along the top rail when tested to new section 8.7 (*Test Method for Determining Acceptability of Vertical Structure of a Misassembled/Functional Portable Bed Rail*) of ASTM F 2085–10a. This section would provide criteria to determine whether a misassembled portable bed rail lacks sufficient vertical structure.

A new section 6.10.2 of ASTM F 2085–10a would provide that the fabric cover or mesh attached to the bed rail must have a permanent sag that is a minimum of 3 inches after tested in accordance with new section 8.8 (*Test Method for Determining Fabric Sag Acceptability of a Misassembled/Functional Portable Bed Rail*) of ASTM F 2085–10a. A new section 6.10.3 of ASTM F 2085–10a would provide that a product will not be considered acceptable if the fabric cover will not fit over the frame without tearing. A new section 6.10.4 of ASTM F 2085–10a would provide that mating parts must clearly show misassembly by two parts overlapping and creating a minimum of a ½ inch protrusion out of the plane of the rail. These new sections would provide the criteria for testing laboratories to determine the sufficiency of visual cues for fabric mesh misassembly.

(vi). Test Equipment (Proposed § 1224.2(b)(5)(i)).

Proposed section 1224.2(b)(5)(i) would state that a force gauge must have a minimum range of 0 to 50 lb (222N) with a maximum tolerance of ± 0.25 lb (1.11N), as set forth under a new section 7.6 of ASTM F 2085–10a. The addition of this section will help clarify the manner in which the force will be applied under the proposed test methods discussed in section (vii) below.

(vii). Test Method for Determining Acceptability of Vertical Structure of a Misassembled/Functional Portable Bed Rail. (Proposed §§ 1224.2(b)(6)(i) and (ii)).

Proposed §§ 1224.2(b)(6)(i) and (ii) would require new test methods to address misassembly of portable bed rails. These proposed requirements would include a test method for determining the acceptability of the vertical structure of a misassembled/functional portable bed rail under a new section 8.7 of ASTM F 2085–10a, as well as a test method for determining fabric sag acceptability of a misassembled/functional portable bed rail under a new section 8.8 of ASTM F 2085–10a. These tests would provide a method for testing laboratories to determine if a misassembled portable bed rail lacks sufficient vertical structure and also determine the sufficiency of visual cues for portable bed misassembly.

Under a new section 8.7 of ASTM F 2085–10a, the proposed test method for determining acceptability of vertical structure of a misassembled/functional bed would require, if possible, an attempt to assemble the portable bed rail in a misassembled configuration(s), as described in new section 6.9 of ASTM F 2085–10a. The proposed test method also would include:

- Firmly securing the misassembled portable bed rail on a table top or other stationary flat surface using clamps (new section 8.7.2 of ASTM F 2085–10a). The clamps should be located 4 to 6 inches from the intersection of the portable bed rail legs to the vertical plane.
- Gradually applying a force of 10 lbs, using a ½ inch disc to the uppermost horizontal component of the rail in a downward direction at a location along the horizontal component most likely to vertically deform the portable bed rail; and applying the force over a period of 5 seconds, and holding the force for 10 seconds and releasing (new section 8.7.3 of ASTM F 2085–10a); and
- Repeating the steps in new sections 8.7.1 through 8.7.3 for all misassembly configurations (new section 8.7.4 of ASTM F 2085–10a).

The proposed test method for determining fabric sag acceptability of a misassembled/functional portable bed rail (new section 8.8 of ASTM F 2085–10a) would require, if possible, an attempt to assemble the portable bed rail

in a misassembled configuration(s), as described in new section 6.9 of ASTM F 2085–10a, and depicted in new Figure 8. The proposed test method would include:

- Gradually applying a force of 1 lb using a ½ inch disc on the fabric/mesh in any direction or location along the fabric/mesh that is most likely to cause it to come off of the frame; applying the force over a period of 5 seconds; and holding for an additional 10 seconds and releasing (new section 8.8.2 of ASTM F 2085–10a); and
- Repeating these steps for all misassembly configurations discovered in new section 6.9 of ASTM F 2085–10a (new section 8.8.3 of ASTM F 2085–10a).

(viii). Marking and Labeling. (Proposed § 1224.2(b)(7), (8), and (9).

Proposed section 1224.2(b)(7) would add a warning symbol

and the word "WARNING" prior to "Suffocation and Strangulation Hazard" under section 9.3.1.1 of ASTM F 2085–10a. This proposed addition would give the warning more emphasis.

Proposed section 1224.2(b)(8) would replace the existing marking under section 9.3.1.3 of ASTM F 2085–10a, which states: "Infants who cannot get in and out of an adult bed without help can be trapped between a mattress and a wall and suffocate. NEVER place infants in adult beds with or without a portable bed rail." The proposed warning would state instead: "Children who cannot get in and out of an adult bed without help can be trapped between a mattress and a wall and suffocate. NEVER place children younger than 2 years old in adult beds with or without a portable bed rail." Despite the current warning label cautioning against the use of this product with children under 2 years old, parents of infants continue to use this product with their infants. Accordingly, the revised language would emphasize the hazard presented to children younger than 2 years old when placed in adult beds.

Proposed section 1224.2(b)(9) would require critical installation components to be labeled with the entrapment hazard warning for portable bed rail use to warn of issues related to misinstallation of portable bed rails under a new section 9.4 of ASTM F 2085–10a. A new section 9.4 of ASTM F 2085–10a would require the entrapment hazard warning to be in contrasting colors, permanent, conspicuous, and sans serif-style font. The proposed warning would require in the entrapment hazard warning statement the safety alert symbol

and the words "WARNING—ENTRAPMENT HAZARD" to be not less than 0.20 in. (5 mm) high. The remainder of the text would consist of characters whose upper case must be at least 0.10 in. (2.5 mm) high. The warning would state: "NEVER use portable bed rail without installing this part onto bed. Incorrect installation can allow the portable bed rail to move away from mattress, which can lead to entrapment and death." Components such as a locking clamp on a mattress-top portable bed rail or an anchor plate/strap are critical installation components. If these components are not installed properly, the portable bed rail will not be secure and may move away from the mattress and can result in an entrapment hazard. The warning requirement would emphasize the importance of proper installation of key components.

(ix). Instructional Literature (Proposed § 1224.2(b)(10)). This proposed section would revise the language in section 11.1 of ASTM F 2085–10a to add the word "installation" among the topics in instructional literature. This proposed section would read: "Instructions must be provided with the portable bed rail and must be easy to read and understand. Assembly, installation, maintenance, cleaning, operating, and adjustment instructions and warnings, where applicable, must be included." This requirement would add clear instructional literature for installation components to provide consumers easy to understand information for securing portable bed rails on beds.

F. Request for Comments

This proposed rule begins a rulemaking proceeding under section 104(b) of the CPSIA to issue a consumer product safety standard for portable bed rails. We invite all interested persons to submit comments on any aspect of the proposed rule. Comments should be submitted in accordance with the instructions in the **ADDRESSES** section at the beginning of this notice.

G. Effective Date

The Administrative Procedure Act ("APA") generally requires that the effective date of a rule be at least 30 days after publication of the final rule. 5 U.S.C. 553(d). To allow time for manufacturers of portable bed rails to bring their products into compliance with the new requirements, the Commission intends that the standard would become effective six months after publication of a final rule. The Commission seeks comment on how long it would take manufacturers of portable bed rails to come into compliance with the rule.

H. Regulatory Flexibility Act

1. Introduction

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601–612, requires agencies to consider the impact of proposed rules on small entities, including small businesses. Section 603 of the RFA requires that we prepare an initial regulatory flexibility analysis and make it available to the public for comment when the general notice of proposed rulemaking is published. The initial regulatory flexibility analysis must describe the impact of the proposed rule on small entities and identify any alternatives that may reduce the impact. Specifically, the initial regulatory flexibility analysis must contain:

1. A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
2. A description of the reasons why action by the agency is being considered;
3. A succinct statement of the objectives of, and legal basis for, the proposed rule;
4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities subject to the requirements and the type of professional skills necessary for the preparation of reports or records; and
5. An identification, to the extent possible, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.

In addition, the initial regulatory flexibility analysis must contain a description of any significant alternatives to the proposed rule that would accomplish the stated objectives of the proposed rule and at the same time reduce the economic impact on small entities.

2. The Market

Typically, portable bed rails are produced and/or marketed by juvenile product manufacturers and distributors or by furniture manufacturers and distributors. Currently, there are at least 14 known manufacturers or importers supplying portable bed rails to the U.S. market. Ten are domestic manufacturers (71 percent) and three are domestic

importers (21 percent). The remaining firm has an unknown supply source, and there is no publicly available information regarding its size.

Under the U.S. Small Business Administration ("SBA") guidelines, a manufacturer of portable bed rails is small if it has 500 or fewer employees, and an importer is considered small if it has 100 or fewer employees. Based on these guidelines, nine of the domestic manufacturers and all of the domestic importers known to be supplying the U.S. market are small. There may be additional unknown small manufacturers and importers operating in the U.S. market as well.

The Juvenile Product Manufacturers Association ("JPMA") runs a voluntary certification program for several juvenile products. Five manufacturers supply portable bed rails to the U.S. market that are compliant with the ASTM standard. Among them, four are JPMA-certified as being compliant with the current ASTM voluntary standard, and one claims compliance with the ASTM standard. Of the importers, one is JPMA-certified, and one claims compliance. JPMA estimates that current annual sales of portable bed rails are approximately 750,000 units, and retail sales are approximately $20 million. This estimate is similar to a 2003 sales estimate provided by JPMA. No information is available about the average product life of portable bed rails; if, for example, portable bed rail sales are assumed to have remained constant and portable bed rails remain in use for three to five years, there might be 2.25 million to 3.75 million portable bed rails in use. National estimates of portable bed rail product injuries are not available because National Electronic Injury Surveillance System ("NEISS") data does not allow for clear identification of portable bed rail incidents. Therefore, the risk of injury associated with the number of products in use cannot be calculated.

3. Impact of the Proposal on Small Business

Out of the 14 firms currently known to be producing or selling portable bed rails in the United States, one is a large domestic manufacturer, nine are small domestic manufacturers, and three are small domestic importers; and there is insufficient information regarding the size or supply source of the remaining firm. The impact on the 12 small domestic firms could be significant. However, the impact of the proposed standard on small manufacturers could differ, based on whether their products are compliant with the voluntary ASTM F 2085–10a. Of the nine small domestic manufacturers, five produce portable bed rails that are certified as compliant by JPMA or claim to be in compliance with the voluntary standard. The four noncompliant manufacturers may require substantial modifications to meet both the ASTM standard and the proposed requirements. The costs associated with these modifications could include product design, development and marketing staff time, product testing, and focus group expenses. There may be increased costs of production as well, particularly if additional materials are required. The actual cost of such an effort is unknown but could be significant for some firms. However, the impact of these costs may be mitigated if they are treated as new product expenses and amortized.

The impact of the proposed standard on the five compliant firms may be less significant because they already comply with the voluntary standard. However, even ASTM-compliant portable bed rails currently on the market will require modifications to meet the proposed changes. Any product redesign would entail costs similar to those outlined for non-ASTM compliant firms. Some ASTM-compliant firms may opt to preassemble the critical assembly components rather than redesign their product. Preassembled products may require larger shipping boxes, and there may be higher shipping costs associated with shipping larger boxes. To the extent that retailers charge high stocking and inventory fees, firms may face additional costs. Manufacturers may be able to offset these fees if they are able to pass on some of the expense to consumers.

While preassembly may reduce product redesign costs, meeting a requirement that critical installation components be affixed permanently may also require some product redesign. There will be some costs associated with redesign. In addition, all manufacturers will need to modify existing warning labels. A new warning label poses a small burden because it represents a minor modification. Costs associated with the new warning label would be low because no new materials are used. At least one small manufacturer's product line consists entirely or primarily of nonrigid portable bed rails. This firm may need to alter the warning label but otherwise is not likely to be affected significantly by the proposed standard.

Of the three small domestic importers, two import portable bed rails that are certified compliant by JPMA or claim to be in compliance with the voluntary standard. All of these small importers would need to find an alternate source of portable bed rails if their existing supplier does not come into compliance with the new requirements of the proposed standard. The cost to importers may increase, and, in turn, they may pass on some of those increased costs to consumers. Some importers may respond to the rule by discontinuing the import of their portable bed rails. However, the impact of such a decision may be lessened by replacing the noncompliant portable bed rail with a complying product or another juvenile product. Deciding to import an alternative product would be a reasonable and realistic way for most importers to offset any lost revenue, given that most import a variety of products. However, for small importers whose product lines rely largely on portable bed rails, substituting another product may not be realistic. The impact on these small importers likely would be more significant.

4. Alternatives Regarding Impact on Small Business

If the current voluntary standard is adopted without any modifications, the impact on small businesses potentially could be reduced in terms of costs for manufacturers and importers because redesign would not be required. Small manufacturers and importers who are compliant with the voluntary standard would have a reduced burden. However, firms that are not in compliance with the ASTM standard may still need to make substantial product changes to meet ASTM F 2085–10a. A second alternative to reduce the impact on small businesses would be to set an effective date later than six months. This would allow suppliers additional time to modify or develop compliant portable bed rails and spread the associated costs over a longer period of time.

5. Conclusion of the Initial Regulatory Flexibility Analysis

It is possible that the proposed standard, if finalized, could have a significant impact on some small firms. The extent of these costs is unknown, but because product redevelopment would likely be necessary, it is possible that the costs could be large for some firms. Additionally, all manufacturers eventually will be subject to third party testing and certification requirements, as discussed in section L below. There will likely be some additional costs associated with third party testing and certification.

However, at least some costs are expected to be passed on to consumers without a reduction in the firms' ability to compete because of the special

features associated with these products. We invite comment on what these costs may be, whether they may be passed on to the consumer, and how these costs will impact small businesses. We also seek information on the effect on retailers (*e.g.,* the impact of increased package size on the number of units kept in stock).

I. Environmental Considerations

The Commission's environmental review regulation at 16 CFR part 1021 has established categories of actions that normally have little or no potential to affect the human environment and therefore do not require either an environmental assessment or an environmental impact statement. The proposed rule is within the scope of the Commission's regulation, at 16 CFR 1021.5(c)(1), which provides a categorical exclusion for rules that provide design or performance requirements for products. Thus, no environmental assessment or environmental impact statement for this rule is required.

J. Paperwork Reduction Act

This proposed rule contains information collection requirements that are subject to public comment and review by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). We describe the provisions in this section of the document with an estimate of the annual reporting burden. Our estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

We particularly invite comments on: (1) Whether the collection of information is necessary for the proper performance of the CPSC's functions, including whether the information will have practical utility; (2) the accuracy of the CPSC'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; (4) ways to reduce the burden of the collection of information on respondents, including the use of automated collection techniques, when appropriate, and other forms of information technology; and (5) estimated burden hours associated with label modification, including any alternative estimates.

Title: Safety Standard for Portable Bed Rails.

Description: The proposed rule would require each portable bed rail to comply with ASTM F 2085–10a, *Standard Consumer Safety Specification for Portable Bed Rails.* Sections 9, 10, and 11 of ASTM F 2085–10a contain requirements for marking and instructional literature.

Description of Respondents: Persons who manufacture or import portable bed rails.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

16 CFR section	Number of respondents	Frequency of responses	Total annual responses	Hours per response	Total burden hours
1224.2(a)	7	2	14	1	14

There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimates are based on the following:

Proposed § 1224.2(a) would require each portable bed rail to comply with ASTM F 2085–10a. Sections 9 and 11 of ASTM F 2085–10a contain requirements for marking, labeling, and instructional literature that are disclosure requirements, thus falling within the definition of "collections of information" at 5 CFR 1320.3(c).

Section 9.1.1 of ASTM F 2085–10a requires that the name and the place of business (city, state, mailing address, including zip code, or telephone number) of the manufacturer, importer, distributor, or seller be clearly and legibly marked on each product and its retail package. Section 9.1.2 of ASTM F 2085–10a requires a code mark or other means that identifies the date (month and year as a minimum) of manufacture.

There are 14 known firms supplying portable bed rails to the U.S. market. Seven of the 14 firms are known to produce labels that comply with these sections of the standard, so there would be no additional burden on these firms. The remaining seven firms are assumed to use labels on their products and their packaging but would need to make some modifications to their existing labels. The estimated time required to make these modification is about 1 hour per model. Each firm supplies an average of two different models of portable bed rails; therefore, the estimated burden hours associated with labels is 1 hour × 7 firms × 2 models per firm = 14 annual hours.

We estimate that the hourly compensation for the time required to create and update labels is $28.00 (Bureau of Labor Statistics, September 2010, all workers, goods-producing industries, sales, and office, Table 9). Therefore, the estimated annual cost to industry associated with the Commission-recommended labeling requirements is $392 ($28.00 per hour × 14 hours = $392).

Section 11.1 of ASTM F 2085–10a requires instructions to be supplied with the product. Portable bed rails are products that generally require assembly, and products sold without such information would not be able to compete successfully with products supplying this information. Under the OMB's regulations (5 CFR 1320.3(b)(2)), the time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the "normal course of their activities" are excluded from a burden estimate, where an agency demonstrates that the disclosure activities required to comply are "usual and customary." Therefore, because the CPSC is unaware of portable bed rails that: (a) Generally require some installation, but (b) lack any instructions to the user about such installation, we estimate tentatively that there are no burden hours associated with the instructions requirement in section 11.1 of ASTM F 2085–10a because any burden associated with supplying instructions with portable bed rails would be "usual and customary" and not within the definition of "burden" under the OMB's regulations. Based on this analysis, the proposed standard for portable bed rails would impose a burden to industry of 14 hours at a cost of $392 annually.

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted the information collection requirements of this rule to the OMB for review. Interested persons are requested to submit comments regarding information collection by May 11, 2011, to the Office

of Information and Regulatory Affairs, OMB (*see* **ADDRESSES**).

K. Preemption

Section 26(a) of the CPSA, 15 U.S.C. 2075(a), provides that where a "consumer product safety standard under [the CPSA]" is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury unless the state requirement is identical to the Federal standard. Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to the Commission for an exemption from this preemption under certain circumstances. Section 104(b) of the CPSIA refers to the rules to be issued under that section as "consumer product safety rules," thus implying that the preemptive effect of section 26(a) of the CPSA would apply. Therefore, a rule issued under section 104 of the CPSIA will invoke the preemptive effect of section 26(a) of the CPSA when it becomes effective.

L. Certification

Section 14(a) of the Consumer Product Safety Act ("CPSA") imposes the requirement that products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, be certified as complying with all applicable CPSC-enforced requirements. 15 U.S.C. 2063(a). Such certification must be based on a test of each product or on a reasonable testing program or, for children's products, on tests on a sufficient number of samples by a third party conformity assessment body accredited by the Commission to test according to the applicable requirements. As discussed in part K of this preamble, section 104(b)(1)(B) of the CPSIA refers to standards issued under that section, such as the rule for portable bed rails proposed in this notice, as "consumer product safety standards." Furthermore, the designation as "consumer product safety standards" subjects such standards to certain sections of the CPSA, such as section 26(a) of the CPSA, regarding preemption. By the same reasoning, such standards also would be subject to section 14 of the CPSA, regarding testing and certification. Therefore, any such standard would be considered a consumer product safety rule to which products subject to the rule must be certified.

Because portable bed rails are children's products, certifications of compliance must be based on testing conducted by a CPSC-approved third party conformity assessment body. In the future, we will issue a notice of requirements to explain how laboratories can become accredited as third party conformity assessment bodies to test to the new safety standard. We seek comment on the testing requirements of this standard, particularly comment on whether any further specificity is required for the testing procedures and equipment and comment on whether the testing requirements are reliable, replicable, and sufficiently specific to allow laboratories to set pass/fail criteria for compliance determinations. We also seek comment on what a testing program might entail for portable bed rails.

Portable bed rails also must comply with all other applicable CPSC requirements, such as the lead content and phthalate content requirements in sections 101 and 108 of the CPSIA; the tracking label requirement in section 14(a)(5) of the CPSA; and the consumer registration form requirements in section 104 of the CPSIA.

List of Subjects in 16 CFR Part 1224

Consumer protection, Imports, Incorporation by reference, Infants and children, Labeling, and Law enforcement.

Therefore, the Commission proposes to amend Title 16 of the Code of Federal Regulations by adding part 1224 to read as follows:

PART 1224—SAFETY STANDARD FOR PORTABLE BED RAILS

Sec.

1224.1 Scope, application, and effective date.
1224.2 Requirements for portable bed rails.

Authority: Sections 3 and 104 of Pub. L. 110–314, 122 Stat. 3016 (August 14, 2008).

§ 1224.1 Scope, application, and effective date.

This part 1224 establishes a consumer product safety standard for portable bed rails manufactured or imported on or after [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

§ 1224.2 Requirements for portable bed rails.

(a) Except as provided in paragraph (b) of this section, each portable bed rail as defined in ASTM F 2085–10a, *Standard Consumer Safety Specification for Portable Bed Rails,* approved October 1, 2010, must comply with all applicable provisions of ASTM F 2085–10a. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of this ASTM standard from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959 USA, phone: 610–832–9585; *http://www.astm.org/.* You may inspect copies at the Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone 301–504–7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(b) Comply with the ASTM F 2085–10a standard with the following additions:

(1) In addition to complying with section 1.4 of ASTM F 2085–10a, comply with the following:

(i) 1.4.1 *Foam and inflatable bed rails* need meet only the General Requirements of section 5, the performance requirement of 6.3 *Enclosed Openings,* and the warning requirement of section 9.3.1.

(ii) [Reserved]

(2) In addition to complying with section 3.1.9.1 of ASTM F 2085–10a, comply with the following:

(i) 3.1.10 *foam bed rail, n*—portable bed rail constructed primarily of nonrigid materials such as fabric or foam.

(ii) 3.1.11 *inflatable bed rail, n*—a portable bed rail constructed primarily of nonrigid material that requires air be inflated into the product to achieve structure.

(iii) 3.1.12 *critical assembly component, n*—any component of the portable bed rail that requires consumer assembly in order to meet the performance requirements of 6.1 *Structural Integrity,* 6.3 *Enclosed Openings,* 6.4 *Openings Created by Portable Bed Rail Displacement of Adjacent Style Portable Bed Rails,* 6.5 *Openings Created by Displacement of Mattress-Top Portable Bed Rails and* 6.6 *Openings Created by Displacement of Portable Bed Rails Intended for Use on Specific Manufacturers' Beds.*

(iv) 3.1.13 *critical installation component, n*—any component of the portable bed rail that is used to attach the portable bed rail onto the bed.

(v) 3.1.14 *misassembled/functional portable bed rail, n*—a portable bed rail that has been assembled incorrectly but appears to function as a portable bed rail. Misassembly/functionality is determined by meeting one of the criteria listed in 6.9.

(3) In addition to complying with section 5.5 of ASTM F F 2085–10a, comply with the following:

(i) 5.6 *Critical Installation Components* that are also *critical assembly* components and that meet the definition of a misassembled/functional portable bed rail must meet 5.6.1 or 5.6.2.

(A) 5.6.1 Critical installation components must be permanently affixed to a structural component(s) of the portable bed rail.

(B) 5.6.2 If a critical installation component(s) is also a critical assembly component and may result in a misassembled/functional portable bed rail, the portable bed rail must meet 6.10.1.

(4) In addition to complying with section 6.8 of ASTM F 2085–10a, comply with the following:

(i) 6.9 *Determining Misassembled/Functional Portable Bed Rail*—a portable bed rail must be considered a misassembled/functional portable bed rail if it meets one of the criteria in 6.9.1, 6.9.2, 6.9.3, or 6.9.4.

(A) 6.9.1 The portable bed rail can be assembled without any critical assembly component.

(B) 6.9.2 The portable bed rail can be assembled without the supplied fasteners, such as screws, nuts, or bolts that are not captive to a critical assembly component such as the frame.

(C) 6.9.3 The portable bed rail's fabric cover or mesh can be placed over the rigid frame structure without engaging parts of the frame as intended in final assembly.

(D) 6.9.4 The portable bed rail can be assembled by improper placement of any critical assembly component, such as an inverted or an interchanged part, without permanent deformation or breakage.

(ii) 6.10 *Determining Acceptability of Misassembled/Functional Portable Bed Rail*—Misassembled/Functional Portable Bed Rails must meet 6.10.1, 6.10.2, 6.10.3 or 6.10.4.

(A) 6.10.1 The portable bed rail must not remain upright or the vertical height must decrease by 6 inches at any point along the top rail when tested to 8.7.

(B) 6.10.2 The fabric cover or mesh must have a permanent sag a minimum of 3 inches after tested in accordance with 8.8.

(C) 6.10.3 The fabric cover will not fit over the frame without tearing.

(D) 6.10.4 Mating parts must clearly show misassembly by two parts overlapping and creating a minimum of a ½-inch protrusion out of the plane of the rail.

(5) In addition to complying with section 7.5 of ASTM F F 2085–10a, comply with the following:

(i) 7.6 *Force Gauge*—gauge must have a minimum range of 0 to 50 lb (222N) with a maximum tolerance of ± 0.25 lb (1.11N).

(ii) [Reserved]

(6) In addition to complying with section 8.6 of ASTM F 2085–10a, comply with the following:

(i) 8.7 *Test Method for Determining Acceptability of Vertical Structure of a Misassembled/Functional Portable Bed Rail:*

(A) 8.7.1 If possible, attempt to assemble the portable bed rail in a misassembled configuration(s) as defined in 6.9 *Determining Misassembled/Functional Portable Red Rail:*

(B) 8.7.2 Firmly secure the misassembled portable bed rail on a table top or other stationary flat surface using clamps. The clamps should be located 4 to 6 inches from the intersection of the portable bed rail legs to the vertical plane (see figure 8).

(C) 8.7.3 Gradually apply a force of 10 lb using a ½-inch disc to the uppermost horizontal component of the rail in a downward direction at a location along the horizontal component most likely to vertically deform the portable bed rail (see figure 8). Apply the force over a period of 5 seconds, hold the force for 10 seconds, and release.

(D) 8.7.4 Repeat 8.7.1 through 8.7.3 for all misassembly configurations discovered in 6.9.

(ii) 8.8 *Test Method for Determining Fabric Sag Acceptability of a Misassembled/Functional Portable Bed Rail:*

(A) 8.8.1 If possible, attempt to assemble the portable bed rail in a misassembled configuration(s) as defined in 6.9 *Determining Misassembled/Functional Portable Bed Rail.*

(B) 8.8.2 Gradually apply a force of 1 lb using a ½-inch disc on the fabric/mesh in any direction or location along the fabric/mesh that is most likely to cause it to come off of the frame (see figure 8). Apply the force over a period of 5 seconds, hold for an additional 10 seconds, and release.

(C) 8.8.3 Repeat 8.8.1 through 8.8.2 for all misassembly configurations discovered in 6.9.

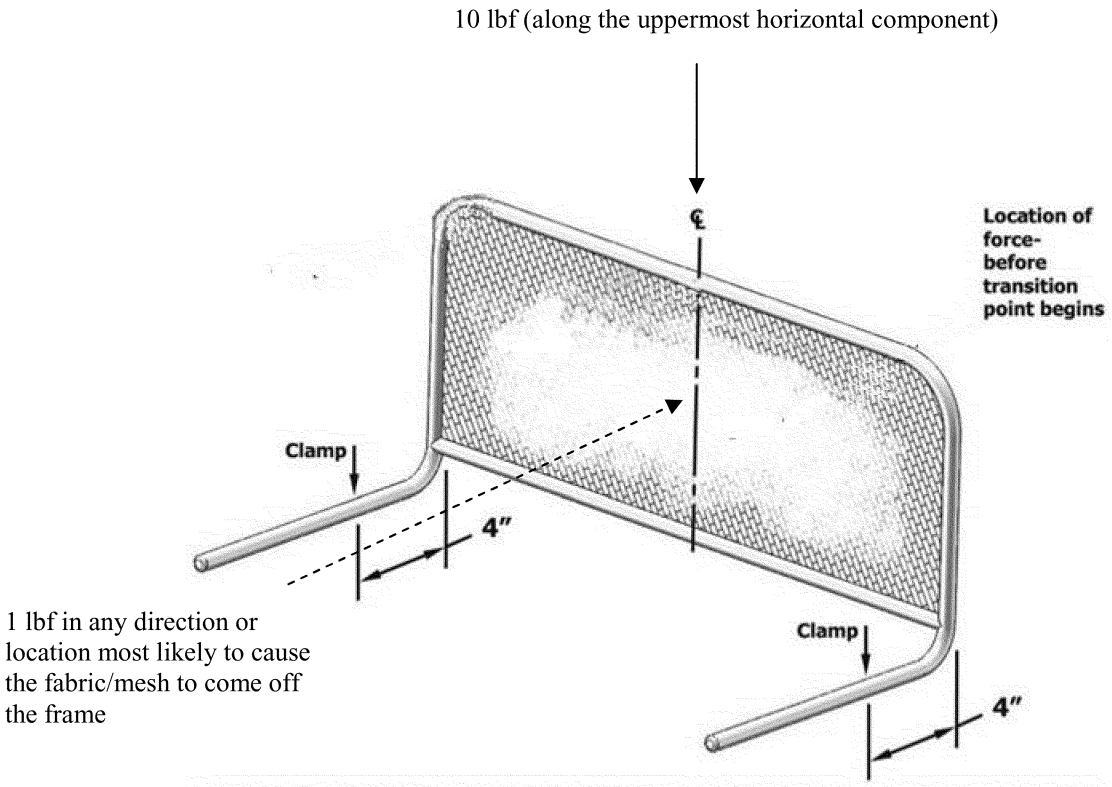

Figure 8: Determining misassembly/functional portable bed rail test setup

(7) Instead of complying with sections 9.3.1.1 of ASTM F 2085–10a, comply with the following:

(i) 9.3.1.1 ⚠ **WARNING**: Suffocation and Strangulation Hazard.

(ii) [Reserved]

(8) Instead of complying with sections 9.3.1.3.of ASTM F 2085–10a, comply with the following:

(i) 9.3.1.3 Children who cannot get in and out of an adult bed without help can be trapped between a mattress and a wall and suffocate. NEVER place children younger than 2 years old in adult beds with or without a portable bed rail.

(ii) [Reserved]

(9) In addition to complying with section 9.3.2.5 of ASTM F 2085–10a, comply with the following:

(i) 9.4 Critical installation components must be labeled with the entrapment hazard warning in 9.4.1. The entrapment hazard warning must be in contrasting colors, permanent, conspicuous, and sans serif-style font. In the entrapment hazard warning statement the safety alert symbol

"⚠"

and the words "WARNING—ENTRAPMENT HAZARD" must not be less than 0.20 in. (5 mm) high. The remainder of the text must be characters whose upper case must be at least 0.10 in. (2.5 mm) high.

(A) 9.4.1. The warning must including the following, exactly as stated below:

WARNING – ENTRAPMENT HAZARD

⚠ NEVER use portable bed rail without installing this part onto bed. Incorrect installation can allow bed rail to move away from mattress, which can lead to entrapment and death.

(B) [Reserved]

(ii) [Reserved]

(10) Instead of complying with section 11.1 of ASTM F 2085–10a, comply with the following:

(i) 11.1 Instructions must be provided with the portable bed rail and must be easy to read and understand. Assembly, installation, maintenance, cleaning, operating, and adjustment instructions and warnings, where applicable, must be included.

(ii) [Reserved]

Dated: April 6, 2011.

Todd A. Stevenson,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2011–8558 Filed 4–8–11; 8:45 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

Portable Bed Rails: Withdrawal of Advance Notice of Proposed Rulemaking

AGENCY: Consumer Product Safety Commission.

ACTION: Withdrawal of advance notice of proposed rulemaking.

SUMMARY: The U.S. Consumer Product Safety Commission ("Commission," "CPSC," or "we") is terminating a proceeding initiated for portable bed rails under the Federal Hazardous Substances Act ("FHSA"), which the Commission began with publication of an advance notice of proposed rulemaking ("ANPR") on October 3, 2000, 65 FR 58968. On August 14, 2008, the Consumer Product Safety Improvement Act of 2008 ("CPSIA") was enacted. Section 104(b) of the CPSIA requires the Commission to promulgate consumer product safety standards for durable infant or toddler products, which are to be "substantially the same as" applicable voluntary standards (or more stringent requirements if they would further reduce the risk of injury associated with the product). Elsewhere in this issue of the **Federal Register**, we are proposing a safety standard for portable bed rails in response to section 104(b) of the CPSIA. The proposed portable bed rail standard includes provisions that address the risks of injury identified in the ANPR.

DATES: The advanced notice of proposed rulemaking published on October 3, 2000 (65 59868) is withdrawn as of April 11, 2011.

FOR FURTHER INFORMATION CONTACT: Rohit Khanna, Project Manager, Office of Hazard Identification and Reduction, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7546; *rkhanna@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

In the **Federal Register** of October 3, 2000 (65 FR 58968), we published an advance notice of proposed rulemaking ("ANPR"), which initiated a rulemaking proceeding that could result in a rule banning portable bed rails that present an unreasonable risk of injury under the FHSA. After publication of the ANPR, we worked with the voluntary standards group, ASTM International (formerly known as the American Society for Testing and Materials), which added provisions in its standard for portable bed rails, ASTM F 2085, *Standard Consumer Safety Specification for Portable Bed Rails,* to address entrapment hazards. ASTM subsequently revised its standard to also address the structural integrity of bed rails. The current edition of the standard is ASTM F 2085–10a.

The Consumer Product Safety Improvement Act of 2008 ("CPSIA", Pub. L. 110–314) was enacted on August 14, 2008. Section 104(b) of the CPSIA requires the Commission to promulgate consumer product safety standards for durable infant or toddler products. These standards are to be "substantially the same as" applicable voluntary standards or more stringent than the voluntary standard if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product. Elsewhere in this issue of the **Federal Register**, we are publishing a proposed rule that would establish safety standards for portable bed rails that would incorporate by reference voluntary standard ASTM F 2085–10a, *Standard Consumer Safety Specification for Portable Bed Rails,* with certain modifications to strengthen the standard, making it more stringent and reducing the risk of injury associated with these products, including provisions that address foam and inflatable bed rail products, and new performance requirements to reduce the likelihood of misassembly and misinstallation of portable bed rails by consumers.

B. Withdrawal of the ANPR

The rulemaking that the Commission is now initiating under section 104(b) of the CPSIA proposes to establish new requirements for portable bed rails that will include the ASTM F 2085–10a, *Standard Consumer Safety Specification for Portable Bed Rails,* with modifications. Accordingly, we are withdrawing the October 3, 2000 ANPR and terminating that rulemaking.

Dated: April 6, 2011.

Todd S. Stevenson,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2011–8557 Filed 4–8–11; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2011–0182]

RIN 1625–AA08

Special Local Regulations for Marine Events; Patapsco River, Northwest Harbor, Baltimore, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish special local regulations during the "Baltimore Dragon Boat Challenge," a marine event to be held on the waters of the Patapsco River, Northwest Harbor, Baltimore, MD on June 25, 2011. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to temporarily restrict vessel traffic in a portion of the Patapsco River during the event.

DATES: Comments and related material must be received by the Coast Guard on or before April 26, 2011.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0182 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 Mr. Ronald Houck, U.S. Coast Guard Sector Baltimore, MD; telephone 410–576–2674, e-mail *Ronald.L.Houck@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

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

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0182), 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–2011–0182" 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–2011–0182" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

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

Background and Purpose

On June 25, 2011, the Baltimore Dragon Boat Club will sponsor Dragon Boat Races in the Patapsco River, Northwest Harbor, at Baltimore, MD. The event will consist of approximately 15 teams rowing Chinese Dragon Boats in heats of 2 or 3 boats for a distance of 500 meters. Due to the need for vessel control during the event, the Coast Guard will temporarily restrict vessel traffic in the event area to provide for the safety of participants, spectators and other transiting vessels

Discussion of Proposed Rule

The Coast Guard proposes to establish temporary special local regulations on specified waters of the Patapsco River, Northwest Harbor, in Baltimore, MD. The regulations will be in effect from 6 a.m. to 6 p.m. on June 25, 2011. In the case of inclement weather this marine event may be postponed and rescheduled for 6 a.m. to 6 p.m. on June 26, 2011. The regulated area includes all waters of the Patapsco River, Northwest Harbor, in Baltimore, MD, within an area bounded by the following lines of reference; bounded on the west by a line running along longitude 076°35′35″ W; bounded on the east by a line running along longitude 076°35′10″ W; bounded on the north by a line running along latitude 39°16′40″ N; and bounded on the south by the shoreline between the east and west lines of reference. The effect of this proposed rule will be to restrict general navigation in the regulated area during the event. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area. Vessel traffic will be allowed to transit the regulated area at slow speed between heats, when the Coast Guard Patrol Commander determines it is safe to do so. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

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.

Executive Order 12866 and Executive Order 13563

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this regulation will prevent traffic from transiting a portion of the Patapsco River during the event, the effect of this regulation will not be significant due to the limited duration that the regulated

area will be in effect and the extensive advance notifications that will be made to the maritime community via the Local Notice to Mariners and marine information broadcasts, so mariners can adjust their plans accordingly. Additionally, the regulated area has been narrowly tailored to impose the least impact on general navigation yet provide the level of safety deemed necessary. Vessel traffic will be able to transit the regulated area at slow speed between heats, when the Coast Guard Patrol Commander deems it is safe to do so.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the effected portions of the Patapsco River during the event.

Although this regulation prevents traffic from transiting a portion of the Patapsco River, Northwest Harbor during the event, this proposed rule will not have a significant economic impact on a substantial number of small entities for the following reasons. This proposed rule would be in effect for only a limited period. Vessel traffic will be able to transit the regulated area between heats, when the Coast Guard Patrol Commander deems it is safe to do so. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. 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 Coast Guard Sector Baltimore, MD. 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 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 effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National

Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves implementation of regulations within 33 CFR Part 100 applicable to organized marine events on the navigable waters of the United States that could negatively impact the safety of waterway users and shore side activities in the event area, and is categorically excluded from further analysis under paragraph 34(g) of the Commandant Instruction. This category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, canoe and sail board racing. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 100

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

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

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

Authority: 33 U.S.C. 1233.

2. Add a temporary section, § 100.35–T05–0182 to read as follows:

§ 100.35–T05–0182 Special Local Regulations for Marine Events; Patapsco River, Northwest Harbor, Baltimore, MD.

(a) *Regulated area.* The following locations are regulated areas: All waters of the Patapsco River, Northwest Harbor, within an area bounded by the following lines of reference: Bounded on the west by a line running along longitude 076°35′35″ W; bounded on the east by a line running along longitude 076°35′10″ W; bounded on the north by a line running along latitude 39°16′40″ N; and bounded on the south by the shoreline between the east and west lines of reference in Baltimore, MD. All coordinates reference Datum NAD 1983.

(b) *Definitions:* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector Baltimore.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations:* (1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area must: (i) Stop the vessel immediately when directed to do so by the Coast Guard Patrol Commander or any Official Patrol.

(ii) Proceed as directed by the Coast Guard Patrol Commander or any Official Patrol.

(d) Enforcement period: This section will be enforced as follows; (1) from 6 a.m. until 6 p.m. on June 25, 2011.

(2) In the case of inclement weather this marine event may be postponed and rescheduled for 6 a.m. to 6 p.m. on June 26, 2011.

(3) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

Dated: March 23, 2011.

Mark P. O'Malley,

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

[FR Doc. 2011–8519 Filed 4–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 110329229–1219–02]

RIN 0648–BA71

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Amendment 15 to the Atlantic Sea Scallop Fishery Management Plan

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 15 to the Atlantic Sea Scallop Fishery Management Plan (FMP), which was developed by the New England Fishery Management Council (Council). The Council submitted Amendment 15, incorporating the Final Environmental Impact Statement (FEIS) and the Initial Regulatory Flexibility Analysis (IRFA), for review by the Secretary of Commerce. NMFS has also published a Notice of Availability requesting comments from the public on Amendment 15 pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Amendment 15 was developed primarily to implement annual catch limits (ACLs) and accountability measures (AMs) to bring the Scallop FMP into compliance with requirements of the MSA as reauthorized in 2007. Amendment 15 includes additional measures recommended by the Council, including: A revision of the overfishing definition (OFD); modification of the essential fish habitat (EFH) closed areas under the Scallop FMP; adjustments to measures for the Limited Access General Category (LAGC) fishery; adjustments to the scallop research set-aside (RSA) program; and additions to the list of measures that can be adjusted by framework adjustments.

DATES:

Comments must be received by 5 p.m., Eastern Standard Time, by May 26, 2011.

ADDRESSES: An FEIS was prepared for Amendment 15 that describes the proposed action and its alternatives and provides a thorough analysis of the impacts of proposed measures and their alternatives. Copies of Amendment 15, including the FEIS and the IRFA, are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950. These documents are also available online at *http://www.nefmc.org.*

You may submit comments, identified by 0648–BA71, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov.*
- *Fax:* (978) 281–9135, Attn: Peter Christopher.
- *Mail:* Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Scallop Amendment 15 Proposed Regulations."

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not

submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule should be submitted to the Regional Administrator at the address above and to the Office of Management and Budget (OMB) by e-mail at *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Peter Christopher, Fishery Policy Analyst, phone (978) 281–9288, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

In January 2007, the MSA was reauthorized and included a new provision requiring each FMP to use ACLs to prevent overfishing, including measures to ensure accountability, should the ACLs be exceeded. For fishery resources that were determined to be overfished, the MSA requires that such measures be implemented by 2010. For fishery resources that are not overfished, such measures must be implemented by 2011. Scallop fishery management measures to comply with the MSA's ACL and AM requirements are required for 2011, because the scallop resource is not overfished. To meet this requirement, the Council initiated development of Amendment 15 on March 5, 2008, by publishing a Notice of Intent to develop Amendment 15 (73 FR 11888, March 5, 2008) and prepare an EIS to analyze the impacts of the proposed management alternatives. The Council intended that Amendment 15 would address three goals: (1) Bring the Scallop FMP into compliance with new requirements of the reauthorized MSA; (2) address excess capacity in the limited access scallop fishery; and (3) consider measures to adjust several aspects of the overall program to make the Scallop FMP more effective. Following the public comment period that ended on August 23, 2010, the Council adopted Amendment 15 on September 29, 2010. The Council voted to adopt most of the measures proposed in the amendment except permit stacking and leasing alternatives that had been designed to address excess capacity, after considering extensive written and oral public comment on the measures. Ultimately the Council rejected these measures due to concerns that the measures would have unacceptable negative economic and social impacts on the scallop fleet and fishing communities.

Amendment 15 would establish the mechanism for implementing ACLs and AMs, which in turn would generate scallop fishery specifications, including days-at-sea (DAS), access area trip allocations, and individual fishing quotas (IFQs). Amendment 15 does not include actual catch limits and fishery specifications. These specifications will be established through the separate action of Framework 22 to the FMP for fishing years (FYs) 2011, 2012, and 2013. Framework 22 includes specific measures that address the change from DAS, access areas, and trip allocations that became effective on March 1, 2011, to different allocations implemented under Framework 22. The Council adopted Framework 22 and submitted it to NMFS for review. NMFS' review of Framework 22 is on the same timeline as Amendment 15.

The Council has reviewed the Amendment 15 proposed regulations as drafted by NMFS and deemed them to be necessary and appropriate as required by section 303(c) of the MSA.

Recommended Management Measures

1. ACL Flow Chart

Amendment 15 would establish how the Scallop FMP would account for all catch in the scallop fishery and would include designations of Overfishing Limit (OFL), Acceptable Biological Catch (ABC), ACLs, and Annual Catch Targets (ACT) for the scallop fishery, as well as scallop catch for the Northern Gulf of Maine (NGOM), incidental, and State waters catch components of the scallop fishery. The scallop fishery assessment would determine the exploitable biomass, including an assessment of discard and incidental mortality (mortality of scallops resulting from interaction, but not capture, in the scallop fishery). Based on the assessment, OFL would be specified as the level of landings, and associated fishing mortality rate (F) that, above which, overfishing is occurring. OFL would account for landings of scallops in State waters by vessels without Federal scallop permits. The current assessment of the scallop fishery (SAW 50, 2010) determined that the F associated with the OFL is 0.38. Since discard and incidental mortality are accounted for in the scallop resource assessment and removed prior to setting ABC, the specification of ABC, ACL, and ACT, as well as the NGOM and incidental catch, are represented by landings as a proxy for catch. ABC would be equal to overall ACL, but to account for scientific uncertainty, ABC would be less than OFL, with an associated F that has a 25-percent probability of exceeding F associated with OFL (*i.e.,* a 75-percent probability of being below the F associated with OFL). SAW 50 determined that the F associated with the ABC/ACL is 0.32. Catch from the NGOM would be established at the ABC/ACL level, but would not be subtracted from ABC/ACL. Since this portion of the scallop fishery is not part of the scallop assessment, the catch would be added and specified as a separate Total Allowable Catch (TAC) in addition to ABC/ACL. After removing observer set-aside and RSA (1 percent of the ABC/ACL and 1.25 M lb (567 mt) (proposed in Amendment 15), respectively), Amendment 15 would establish separate sub-ACLs for the limited access (LA) and LAGC fisheries. To account for management uncertainty, Amendment 15 proposes ACTs for each fleet. For the LA fleet, the ACT would have an associated F that has a 25-percent chance of exceeding ABC. The F associated with this ACT is currently estimated to be 0.28. For the LAGC fleet, the ACT would be set equal to the LAGC fleet's sub-ACL.

2. Modification of the OFD

Amendment 15 proposes to modify the current OFD to provide for better management of the scallop fishery under area rotation. The proposed Hybrid OFD combines the overfishing threshold from the status quo overfishing definition for open areas with a time-averaged fishing mortality F approach for access areas. The F target in the open areas would be set at a level that is no higher than the overfishing threshold (currently F = 0.38). In access areas, it would be set annually at a level that results in F no higher than F_{MSY} when averaged over time with the F in that access area, including times when the access area was closed. The combined target F for all areas could be no higher than that which gives a 25-percent probability of exceeding the F associated with ABC (F = 0.32), which is currently calculated to be F = 0.28, taking into account all sources of F in the scallop fishery.

The current OFD and overfishing reference points are based on the assumption that F is spatially uniform. In the scallop fishery this assumption is inaccurate, because of unfished biomass in closed areas, variable Fs in access areas, and spatially variable fishing mortality in open areas. Under the current OFD, closed and access areas protect the scallop stock from

recruitment overfishing, but growth overfishing may occur in the open areas because the current OFD averages spatially across open and closed areas, *i.e.,* F is higher in open areas to compensate for the zero F in closed areas. The greater the fraction of scallops in the closed areas, the more ineffective the current OFD becomes. Additionally, when more biomass is within closed areas, the estimated whole-stock F may be more sensitive to recruitment and measurement error than to changes in effort. Therefore, while the scallop fishery's current OFD is consistent with MSA requirements, and has been effective at keeping the scallop fishery above the overfished level and preventing overfishing overall, certain resource and fishery conditions as described above may reduce the effectiveness of the FMP.

3. OFD Reference Points

The current OFD states that F_{MAX} will be used as a proxy for F_{MSY}. However, SAW 50 approved a direct estimate of F_{MSY}. Therefore, Amendment 15 would replace the current B_{MAX} and F_{MAX} with B_{MSY} and F_{MSY}. Final results from SAW 50 were available in August 2010, and both the Scallop Committee and the Council's Scientific and Statistical Committee (SSC) reviewed the results and agreed that the existing OFD should be updated to reflect new biological reference points based on B_{MSY} and F_{MSY}. Under Amendment 15, the new overfishing definition would read:

> If stock biomass is equal or greater than B_{MSY} as measured by an absolute value of scallop meat (mt) (estimated in 2009 at 125,358 mt scallop meat in the Georges Bank and Mid-Atlantic resource areas), overfishing occurs when F exceeds F_{MSY}, currently estimated as 0.38. If the total stock biomass is below B_{MSY}, overfishing occurs when F exceeds the level that has a 50-percent probability to rebuild stock biomass to B_{MSY} in 10 years. The scallop stock is in an overfished condition when stock biomass is below ½ B_{MSY}, and in that case overfishing occurs when F is above a level expected to rebuild in 5 years, or above zero when the stock is below ¼ B_{MSY}.

The proposed changes to the OFD would also require revisions of the current framework provisions in the scallop fishery regulations at 50 CFR 648.55. Under the current OFD, the framework adjustment process included provisions that ensure that measures achieve optimum yield (OY) on a continuing basis. These provisions were established as part of Amendment 10 to the FMP because of the potential inconsistency between rotational area management and use of a spatially-average OFD, whereby open area fishing mortality may be elevated relative to the condition of the resource in open areas, thus preventing OY from being achieved. Because the proposed OFD drastically reduces the risk of inappropriate open area fishing levels, due to application of the threshold F to drive open area fishing levels, the framework provisions specifically designed to adjust Council recommendations to ensure that OY is achieved are no longer necessary.

4. Scientific Uncertainty and ABC Control Rule

Amendment 15 includes two different assessments of scientific uncertainty, based on the following scientific parameters that are utilized in scallop resource and fishery assessments:

- Growth;
- Maturity and fecundity;
- Shell height/meat weight relationship;
- Natural mortality;
- Catch data;
- Discards and discard mortality;
- Incidental mortality;
- Commercial shell height data;
- Commercial and survey gear selectivity;
- Commercial and survey dredge efficiency;
- Stock-recruitment relationship; and
- Density dependence.

The first assessment of scientific uncertainty is qualitative and is based on the level of uncertainty, importance, and effect of the parameters. Uncertainty, importance, and effect of the parameters on the scallop resource and fishery assessment are characterized numerically on a scale of low to high. This first assessment of scientific uncertainty would provide managers with an indication of the overall level of scientific uncertainty, which would help determine a buffer between the OFL and ABC. The Council concluded in Amendment 15 that scientific uncertainty in the scallop resource and fishery is low.

The second consideration of scientific uncertainty enables the Council to establish ABC that has a low risk of exceeding OFL. Based on the parameters for determining scientific uncertainty, an analytical model developed by the PDT specifies the probability of exceeding the OFL at a specified F associated with the corresponding catch level. Using this model, and given the overall low level of scientific uncertainty, the ABC control rule would set ABC at a level that has a 25-percent probability of exceeding OFL (*i.e.,* a 75-percent probability that it will not exceed OFL). This value could be modified through the framework adjustment process.

5. State Waters Catch, NGOM TAC, and Incidental Catch

Scallop catch from State waters by vessels not issued a Federal scallop permit is a relatively small component of overall scallop catch, and the scallop resource in State waters is not part of the Federal scallop resource survey. To account for scallop landings from State waters, the Council's Scallop Plan Development Team (PDT) will estimate landings annually, based on available State waters landings information, and include it in the specification of OFL. The amount of scallop landings in State waters would then be specified as a separate level of landings that would be compared to actual landings each year, and adjusted as necessary in subsequent years. This component of overall catch is not specified as an ACL and has no associated AM, since there is no Federal authority to adjust catch by vessels without a Federal permit.

Scallop catch in the NGOM would be specified similar to State waters scallop catch, except that the NGOM landings level would be based on historical landings or available resource surveys in the NGOM, and would be included in the specification of ABC. While there is no Federal survey in the NGOM, independent surveys have been conducted, and if continued, would provide survey information for NGOM landings specifications each year. Although this component of overall scallop catch is not formally an ACL, an overage is accounted for in the subsequent year through a reduction of the landings limit that is equal to the overage from the prior year.

Incidental catch has been estimated to be 50,000 lb (24,948 kg), and data continue to support this value, based on historical and predicted landing levels. Incidental catch would be removed from ABC prior to establishing the research and observer set-asides and ACLs for the limited access and LACG IFQ fleets. This component of overall scallop catch does not have a specific AM, but if incidental catch is higher than predicted, the landings limit would be adjusted in the subsequent year(s) by removing more incidental catch from ABC.

6. Separate ACLs for the LA and LAGC IFQ Fleets as Sub-ACLs

The LA and LAGC IFQ fleets would be allocated landings as sub-ACLs of the overall scallop fishery ACL with the same allocation values that were established under Amendment 11 to the FMP: LA vessels would be allocated 94.5 percent of the ABC/ACL landings; and LAGC IFQ vessels would be

allocated 5.5 percent of the ABC/ACL landings. Both allocations would be made after deducting incidental catch and research and observer set-asides from ABC. Sub-ACLs were established for these two fleets so that AMs would be based on each fleet's harvest relative to its own ACL, without requiring that one fleet would be penalized for an overage of the other. Both fleets would have carryover provisions (existing for the LA and proposed under Amendment 15 for the LAGC fleet) and RSA catch could be carried over into the subsequent year. For the purpose of accounting relative to ABC and ACL, landings from carryover DAS, IFQ, or TAC would apply to the FY in which they are landed (*i.e.,* not to the FY for which they were allocated).

7. Management Uncertainty and ACT

Amendment 15 proposes that management uncertainty in the scallop fishery mainly results from the uncertainty associated with carryover DAS, vessel upgrades and replacements, and open area catch under DAS. The uncertainty associated with these measures results from a difference between estimated vessel efficiency and landings per unit effort (LPUE), and realized efficiency and LPUE during the course of the fishing year. Management uncertainty for the LAGC IFQ fleet is considered very low because it would result from landings in excess of a vessel's IFQ, which can be audited and accounted for through data reviews each year. Although ACT could be specified for the LAGC fishery, it would be equal to the fleet's ACL initially, unless revised by the Council. An ACT for the LA fleet to account for management uncertainty would be set at a level with an associated F that has a 25-percent probability of exceeding ABC, which is currently 0.28.

8. AMs for the LA Fleet

The primary AM for the LA fleet requires a DAS reduction for the fleet in open areas that would approximate the catch overage of the ACT. Using the ACT for determining the overage is designed to account for management uncertainty and to better prevent vessels from exceeding the fleet's ACL. The DAS reduction would be distributed evenly to limited access vessels. For example, an overage of 1,500,000 lb (680 mt) would have a DAS equivalent of 625 DAS, based on an LPUE of 2,400 lb (1.1 mt) per DAS. Divided across 327 full-time vessels, the DAS reduction per vessel would be 1.9 DAS. Part time vessel DAS would be reduced by 0.76 DAS (40 percent of the full time deduction) and occasional vessel DAS would be reduced by 0.16 DAS (1/12th of the full time deduction). Part time and occasional proportional deductions are consistent with the way that DAS are assigned in the fishery. The AM would take effect in the fishing year following the fishing year in which the ACL was exceeded. Since the AM would apply mid-year, vessels may have already used more DAS in that fishing year than are ultimately allocated after applying the AM. If this occurs, a vessel that exceeds the DAS it is allocated after the AM is applied would have the amount of DAS used in excess of the vessel's final DAS allocation after the AM is applied deducted from its DAS allocation in the subsequent fishing year. For example, a vessel initially allocated 32 DAS in 2011 uses all 32 DAS prior to application of the AM. If, after application of the AM, the vessel's DAS allocation is reduced to 31 DAS, the vessel's DAS in 2012 would be reduced by 1 DAS.

9. LA Fleet AM Exception

Even if the ACL is exceeded, triggering the AM for the LA fleet, the F associated with the fleet's ACL may not be exceeded if, in retrospect, some of the assumptions for determining the ACL, such as LPUE relative to the status of the resource or the biomass were underestimated. Since the overall goal of the ACL is to ensure that F limits are not exceeded, enacting an AM would not be necessary if the F limits are not exceeded. To address this, Amendment 15 includes an exception provision (called a "disclaimer" in the amendment) that would stop the AM from taking effect if, in an analysis of the preceding fishing year before the AM goes into effect, the actual F resulting from the fishery in the prior year was one standard deviation below the overall F for the fleet's ACL. With an F = 0.28 for the ACL, one standard deviation below would be F = 0.24. If the fishery's F is below 0.24, the AM would not be implemented. However, if the fishery's F is 0.24 or above, the AM would take effect. When fishery data are available after the FY ends, and before the AM takes effect, the Scallop PDT will evaluate the fishery, determine the F and would recommend through the Council whether or not the AM should be implemented. To ensure compliance with applicable laws, the Regional Administrator would have discretion to implement the exception or implement the AM in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553 *et seq.,* after considering the Council's recommendation.

The application of the AM described in item 8 above, and the AM exception described in this item 9, would be considered at the same time to ensure that multiple adjustments of DAS do not occur in one fishing year, if possible. The decision to implement the AM or the AM exception would be made by the Regional Administrator on or about September 30 of each year.

10. Increase of LAGC IFQ ACL if LA AM Exception Is Enacted

If the LA fleet's AM exception is enacted, a portion of landings would be re-distributed to the LAGC fleet for equity purposes. Under the exception, the LA fleet would have exceeded its ACL, but no AM would be put in place, as described in item 9 above. Because the LA fleet still would have harvested more scallops than allocated, without being held accountable, an inequity would be created. Had the ACL been higher, commensurate with the analysis of the prior fishing year, those "extra" scallops could have been distributed to the LAGC IFQ fleets as well. To account for the inequity, the LAGC IFQ fleet would be allocated 5.5 percent of the LA fleet's overage of its ACL. The additional allocation to the LAGC IFQ fleet would be distributed through adjustment of IFQs, upon implementation of the exception on or about September 30 of each year. An amount equivalent to the amount allocated to the LAGC IFQ fleet would be deducted from the LA ACL. The deduction would not affect the LA fleet's ACT or DAS allocations, but would establish a lower threshold for the LA fishery for triggering AMs.

11. AM for the LAGC IFQ Fleet

Amendment 15 proposes that, if an LAGC vessel exceeds its IFQ, its IFQ would be reduced by the amount equal to the overage as soon as possible in the fishing year immediately following the fishing year in which the IFQ overage occurred. Since the AM would apply mid-year, vessels may have already used more IFQ in that fishing year than is ultimately allocated after applying the AM. If this occurs, a vessel that exceeds the IFQ it is allocated after the AM is applied would have the amount of IFQ landed in excess of the vessel's final IFQ allocation after the AM is applied deducted from its IFQ allocation in the subsequent fishing year. For example, a vessel with an initial IFQ of 1,000 lb (453.6 kg) in 2010 landed 1,200 lb (544.3 kg) of scallops in 2010, and is initially allocated 1,300 lb (589.7 kg) of scallops in 2011. That vessel would be subject to an IFQ reduction equal to 200 lb (90.7 kg) to account for the 200 lb (90.7 kg) overage in 2010. If that vessel lands 1,300 lb (589.7 kg) of scallops in 2011 prior to application of the 200 lb

(90.7 kg) deduction as the AM, the vessel would be subject to a deduction of 200 lb (90.7 kg) in 2012.

For vessels involved in a temporary IFQ transfer, the entire deduction shall apply to the vessel that acquired IFQ, not the transferring vessel. A vessel that has an overage that exceeds its IFQ in the subsequent fishing year shall be subject to an IFQ reduction in subsequent years until the overage is paid back. For example, a vessel with an IFQ of 1,000 lb (454 kg) in each year over a 3-year period, that harvests 2,500 lb (1,134 kg) of scallops the first year, would have a 1,500-lb (680-kg) IFQ deduction, so that it would have zero pounds to harvest in year 2, and 500 lb (227 kg) to harvest in year 3. A vessel that has a "negative" IFQ balance, as described in the example, could lease or transfer IFQ to balance the IFQ, provided there are no sanctions or other enforcement penalties that would prohibit the vessel from acquiring IFQ.

Applying the AM to an individual vessel's IFQ was considered appropriate because the Council determined that individual vessel overages of IFQ would be the only cause of exceeding the ACL for the IFQ fleet. A vessel that has an overage in one FY that exceeds its entire IFQ in the subsequent FY would be required to take IFQ reductions in subsequent years until the overage is paid back. For example, a vessel with an IFQ of 1,000 lb (454 kg) in each year over a 3-year period, that harvests 2,500 lb (1,134 kg) of scallops the first year, would have a 1,500-lb (680-kg) IFQ deduction, so that it would have zero pounds to harvest in year 2, and 500 lb (227 kg) to harvest in year 3. A vessel that has a "negative" IFQ balance, as described in the example, could lease IFQ to balance the IFQ, provided there are no sanctions or other enforcement actions that would prohibit the vessel from acquiring IFQ. These automatic IFQ deductions do not excuse a vessel from any enforcement actions that may be applicable for the overage. The Council determined that this individual-vessel AM would be more equitable than penalizing others in the fleet for single-vessel overages. The Council incorporated ACT into the LAGC IFQ fleet allocation, but chose not to apply any management uncertainty buffer for the fleet at this time. This could be adjusted through the framework process if an ACT is needed to address management uncertainty.

12. Yellowtail Flounder (YTF) Sub-ACL

To account for YTF catch in the scallop fishery, Amendment 15 would establish sub-ACLs (called "sub" ACLs to reflect that these ACLs are part of the overall ACL established in the NE Multispecies FMP). for the Southern New England/Mid-Atlantic (SNE/MA) and Georges Bank (GB) YTF sub-ACLs for the scallop fishery. The amount of YTF estimated to be harvested annually would depend on the scallop DAS and access area allocations, and could be adjusted through the NE Multispecies FMP framework adjustment process.

13. YTF Sub-ACL AM

Areas within the GB and SNE/MA YTF stock areas that have been pre-identified would close to scallop fishing in the FY following a FY in which the YTF sub-ACL for the scallop fishery is exceeded. These areas were identified during the final development of Amendment 15 as the statistical areas that have high bycatch of YTF in the scallop fishery. For the GB YTF stock, the closure would be in statistical area 562, which extends from just west of Closed Area II (CAII), through that closed area, and to the southeast of that closed area. In addition, a small portion of statistical area 525 within the CAII access area would also be closed. For the SNE/MA YTF stock, statistical areas 537, 539, and 613 would close under the YTF AM. Coordinates of these YTF AM closed areas are included in the proposed regulations in this proposed rule. A chart depicting the areas is in the Amendment 15 FEIS (*see* **ADDRESSES**). The Council decided that the statistical areas included in each YTF AM would close to LA vessels only; LAGC vessels would be exempt from these closures if fishing in an exempted area authorized under the NE Multispecies FMP, because these exemptions were created because bycatch of YTF in the LAGC fishery is extremely low. However, any YTF catch by LAGC vessels as they continue to fish would count toward that stock area's sub-ACL for the scallop fishery (and would contribute to an overage of the sub-ACL for the scallop fishery). The YTF closure AM would be effective in the scallop FY directly following the year in which the YTF sub-ACL is exceeded. By January 15 of each year, NMFS would determine whether the YTF sub-ACL is expected to (or has been) exceeded that year. NMFS would announce the closure to the scallop fleet as soon as possible following the determination, and the closure would take effect on March 1. The Council also specified that if the scallop fishery exceeds its YTF allocation in 2010 (specified under the NE Multispecies FMP), and that causes the entire applicable YT ACL to be exceeded for the 2010 fishing year, the scallop fishery will be subject to the applicable YTF AM. To implement the YTF AM for the 2011 fishing year, NMFS would determine the length of the closure as specified below, beginning when Amendment 15 is effective, if approved. For the 2012 fishing year and beyond, the YTF closure AM areas would remain closed for the length of time specified in the following tables, and would be in place for one fishing year only:

SNE/MA YT Closure AM Duration for Specified Overage

Percent overage of YTF sub-ACL	Length of closure
1–2	March.
3–5	March through April.
6–8	March through May.
9–12	March through June.
13–14	March through July.
15	March through August.
16	March through September.
17	March through October.
18	March through November.
19	March through January.
20 and higher	March through February.

GB YT Closure AM Duration for Specified Overage in Years When the CAII Access Area Is Open

Percent overage of YTF sub-ACL	Length of closure
1	March through May.
2–24	March through June.
25–38	March through July.
39–57	March through August.
58–63	March through September.
64–65	March through October.
66–68	March through November.
69	March through December.
70 and higher	March through February.

GB YT Closure AM Duration for Specified Overage in Years When the CAII Access Area Is Closed

Percent overage of YTF sub-ACL	Length of closure
1	March through May.
2	March through June.
3	March through July.
4–5	March through August.
6 and higher	March through February.

14. Monitoring the YTF Sub-ACL

In order to more effectively monitor YTF bycatch in open areas, the daily vessel monitoring system (VMS) catch report that is currently required in access areas only would be required for all scallop trips in all areas. Vessel operators would be required to report the following information: Fishing

vessel trip report (FVTR) serial number; date fish caught; total pounds of scallop meats kept; total pounds of YTF kept; total pounds of YTF discarded; and total pounds of all other fish kept. Vessels would be required to submit VMS catch reports for every day fished by 9 a.m. of the day following the day on which fishing occurred, consistent with access area catch reporting.

15. LAGC IFQ Vessel Possession Limit Increase

IFQ scallop vessels would be allowed to harvest 600 lb (272.2 kg) of shucked scallops or 75 bu (26.4 hL) of in-shell scallops per trip, an increase of 200 lb (90.7 kg) or 25 bu (8.8 hL) per trip from the current 400-lb (181.4-kg) or 50-bu (17.6-hL) possession/trip limit. This alternative would address concerns that the current possession limit is not economically feasible due to increased costs. The 600-lb (272.2-kg) possession limit is not expected to change the "small boat" nature of the LAGC fishery, and would remain consistent with the Council's vision for LAGC vessels, while enabling vessel owners to maintain profits under rising costs. The increase is also consistent with the conservation objectives of the FMP because landings are constrained by the IFQ allocations.

16. IFQ Carryover

Amendment 15 proposes to allow IFQ vessels that have unused IFQ at the end of the FY to carry over up to 15 percent of their unused IFQ to the subsequent FY. Any IFQ that was leased by but not used by a vessel could also be carried over by the vessel that acquired the IFQ (for monitoring and accounting purposes, leased-in IFQ is used first, in the order acquired). For accounting purposes, the combined total of all vessels' IFQ carry-over shall be added to the LAGC IFQ fleet's applicable ACL for the carry-over year. Any IFQ carried over that is landed in the carry-over fishing year shall be counted against the ACL specified in paragraph (a)(4)(i) of this section, as increased by the total carry-over for all LAGC IFQ vessels, as specified in paragraph (h)(2)(v)(B).

17. Increase the IFQ Vessel Cap to 2.5 Percent

This proposed measure would increase the 2-percent IFQ cap per vessel to 2.5 percent of the total IFQ allocation to allow more flexibility and promote efficiency for vessels in fishing IFQs available to them. IFQ that is carried over would not contribute to the vessel's 2.5-percent IFQ cap because the carryover is a temporary increase of the vessel's IFQ based on underharvest the prior year. Because there is also a 5-percent overall cap on how much IFQ on entity may own, a vessel owner would now be permitted to own only two vessels to meet the 5-percent ownership cap, rather than having to own more than two vessels. This alternative would provide increased flexibility to vessel owners to more effectively and efficiently fish their IFQs.

18. Permanent IFQ Transfers Separate From LAGC IFQ Permit

This alternative would allow LAGC IFQ permit owners to permanently transfer some or all of their quota allocation, independent of their IFQ permit, to another LAGC IFQ permit holder while retaining the permit itself. This measure would enable vessel owners additional flexibility to buy or sell IFQ without impacting other permits on their vessel. This allowance would only apply to IFQ permit holders that do not also have a LA scallop permit to prevent crossover of IFQ allocations between the two IFQ fleets that have separate allocations.

19. Revision of the EFH Closed Areas

To establish compatibility with the NE Multispecies FMP, Amendment 15 would modify the EFH closed areas in the Scallop FMP by removing the four EFH closed areas that were implemented in Amendment 10 to the Scallop FMP, and it would replacing them with EFH closed areas that are identical to the EFH closed areas implemented under the NE Multispecies FMP. These areas are the Closed Area I (CAI), Closed Area II (CAII), Nantucket Lightship, Western Gulf of Maine, Jeffrey's Bank, and Cashes Ledge Habitat Closed Areas. Coordinates for the area are provided in the proposed regulations in this proposed rule. A chart depicting the areas is in the FEIS for Amendment 15 (*see* **ADDRESSES**). These areas would be closed to scallop fishing (and closed to all mobile bottom-tending gear under the NE Multispecies FMP) to minimize the adverse impacts of scallop fishing. This change in the EFH closed areas under the Scallop FMP would make the EFH closed areas consistent between the Scallop FMP and the NE Multispecies FMP, as intended under Joint Frameworks 16 to the Scallop FMP and 39 to the NE Multispecies FMP (Joint Framework 16/39) (69 FR 63460, November 2, 2004). With inconsistent areas, the scallop access areas in CAI, CAII, and the NLCA are inconsistent with the area rotation program established under the Scallop FMP because they are restricted to areas smaller than designed. These areas were originally implemented under that action, but were vacated by a Federal Court order resulting from a lawsuit on Joint Framework 16/39. That order specified that the EFH closed areas could only be changed through an FMP amendment. This proposed action would address the inconsistency while the Council continues to develop EFH measures under Phase 2 of its Omnibus EFH Amendment.

20. Establish Third-Year Default Measures Through the Biennial Framework Process

Fishery specifications in the scallop fishery are generally set every 2 years, through the biennial framework adjustment process. This alternative would extend the fishery specification process to include a third year of allocation measures that would be effective if subsequent framework actions are delayed. Currently, measures from the prior year roll over to the next FY while the implementation of the new set of management measures is pending. However, the measures that roll over are often not appropriate for the status of the resource. By setting the measures for the third year in the framework, the measures are more likely to be appropriate for the condition of the fishery and resource. Third-year measures would need to be set with sufficient precaution to take into account the uncertainty associated with projections for the third year. The third-year measures would be superseded by the measures developed in the biennial framework adjustment for that year as soon as it is implemented.

21. New Frameworkable Measures

The following measures would be added to the current list of measures that can be adjusted under the Scallop FMP by framework action.

Modify the LAGC possession limit: The possession limit for LAGC vessels could be modified upward or downward by framework action. The intent is that any modification of the possession limit would not modify the nature of the LAGC fleet and would be consistent with the Council's vision to maintain a small-vessel fleet under LAGC provisions. While the Council specified in the Amendment 15 document that the possession limit adjustments could be done for IFQ vessels, it also determined that the regulations should specify that possession limit adjustments could be made through the framework process for all LAGC vessels, including LAGC NGOM and Incidental vessels.

Adjustment to aspects of ACL management: This action proposes a

new management strategy under ACL management that will use many new measures. All of the measures specified in this action would be able to be modified through framework actions. The specific ACL-related measures that could be modified by framework include: Modifying associated definitions and specification of OFL, ABC, ACLs and ACTs, all of which are specifically intended to be changed in future frameworks or specification packages as new information becomes available about the resource and fishery; buffers identified for management uncertainty or scientific uncertainty (ABC control rule); AMs for scallop ACLs and other sub-ACLs allocated to the scallop fishery; monitoring and reporting requirements associated with ACLs; timing of AM measures; and adoption of sub-ACLs for other species that are not currently part of this program.

Adjusting EFH Closed Area Management Boundaries

The framework action proposing the boundary change would include an analysis of the impacts of the specific boundaries considered. This additional framework authority would not allow adoption of new EFH closed areas.

Adjusting RSA Allocation

Amendment 15 proposes to allocate 1.25 million lb (567 mt) of scallops for RSA, regardless of the total projected catch for the fishery. In the future, the value could be increased or decreased by framework action.

22. Changes to the Scallop RSA Program

Amendment 15 includes several adjustments designed to improve the RSA Program so that it is more efficient, and so that awards under the Federal grants process can be provided near or before the start of the scallop FY on March 1. The following improvements are proposed:

Announce (Publish) Federal Funding Opportunity (FFO) as Early as Possible

Amendment 15 proposes that the announcement of the funding opportunity should be published as soon as possible in the year preceding the year in which research would be conducted. If this results in more timely reviewing and processing of awards, this would maximize time for research and compensation trips before the end of the FY. This would be facilitated by the Amendment 15 proposal to allocate 1.25 M lb (567 mt) to RSA program annually (*see* below).

Enable Multi-Year Awards

Currently, research priorities, TACs for RSAs, and approved research projects are limited to 1 year. Amendment 15 would allow RSA proposals and compensation to span up to 2 years, corresponding with the biennial framework process. Projects could be awarded for 1 or 2 years. Under this alternative, applicants could apply for RSA for the first year, second year, or both. This alternative would increase flexibility for the applicant, provide funding for some longer term projects, and potentially reduce time and resources spent on the application and review process.

Establish RSA Allocation as a Fixed Amount of Pounds Rather Than a Percent of Total Catch

Currently 2 percent of access area TACs and open area DAS are set aside for the RSA program. That amount of TAC and DAS varies depending on the total TAC and DAS for the fishery. Amendment 15 would modify the scallop RSA program so that 1.25 M lb (567 mt) would be set aside for the RSA program. In addition, open area RSA would be awarded in pounds rather than DAS. Total projected catch for the fishery may vary from year to year, but the amount of catch set-aside for research would be constant at 1.25 M lb (567 mt), unless changed through a framework adjustment. Assuming a projected catch of about 50 million lb (22,680 mt) for the fishery, 1.25 M lb (567 mt) equals about 2.5 percent. This is higher than recent levels to recognize the importance of research and scallop resource surveys for the success of the area rotation program, but would not create a separate pool of RSA for scallop resource surveys.

Allocating this fixed amount could enable the grant awards to be issued earlier, because the amount of TAC available for research would be known in advance and would not change from year to year. The specific areas that would have available RSA would be identified in the framework, but RSA awards could still be made before approval of the framework, based on total scallop pounds needed to fund the research. Recipients could either choose to wait for NMFS approval of the framework to begin compensation fishing within approved access areas, or could begin compensation fishing in open areas prior to approval of the framework. The intent of this alternative is to help improve timeliness of the scallop RSA program. This should only be an issue for the first year of a framework, because area-specific RSA pounds will be known for the second year of the framework action.

Rollover of Unused RSA Pounds to Compensate Awarded Projects

Amendment 15 includes a provision that specifies that if updated analyses suggest that the price per pound estimates used in the FFO were low, and if all RSA TAC is not allocated, NMFS could allocate unused TAC to compensate awarded projects or to expand a project rather than having that RSA go unused. Amendment 15 proposes that if there is RSA TAC available after all awards are made, a project that was already awarded RSA would be permitted to apply for additional TAC to expand its research project or for compensation if the actual scallop price per pound was less than estimated. The implementation details of this proposal were not specified in Amendment 15. Therefore, under the authority of section 305(d) of the MSA, NMFS proposes that this provision would enable NMFS to provide the opportunity for reallocation of available RSA pounds as part of the original FFO for the project. The FFO would specify the conditions under which a project that has been awarded RSA could be provided additional RSA pounds as supplemental compensation to account for lower-than-expected scallop price or for expansion of the approved project.

Extension for Harvesting RSA Compensation

Currently all RSA TAC has to be harvested by the end of the FY for which it is awarded. This measure would allow an RSA award recipient to harvest RSA compensation TAC for up to 3 months (*i.e.,* prior to June 1) into the subsequent FY. Allowing vessels involved in RSA projects to harvest RSA TAC into the next FY would provide flexibility for participating vessels and researchers, and is consistent with carryover provisions for the fishery as a whole.

Specify Regulations From Which RSA Projects Would be Exempt

Amendment 15 proposes a list of the scallop management measures from which RSA funded projects may be exempt. The researcher would need to list the measures the project is proposed to be exempt from in the RSA proposal. The researcher would not need to apply for an exempted fishing permit (EFP) to be exempt from the following restrictions: Crew restrictions; seasonal closures in access areas; and the requirement to return to port if fishing in more than one area. These exemptions would be issued by the

Regional Administrator through a letter of authorization. The exemptions would be issued for research trips under the applicable RSA project. RSA compensation fishing trips would not be eligible for exemption from these restrictions because compensation trips are intended only to provide researchers with the ability to collect funds through normal fishing operations.

Increase Public Input on RSA Proposals

Although the Council recommended that the Council's Scallop Advisory Panel members play a more prominent role in setting research priorities and reviewing proposals, no proposed regulations are necessary to effectuate that recommendation. NMFS would seek more input from the Council's Scallop Advisors through the next solicitation for scallop RSA proposals. Review of RSA projects under the Federal grants program is limited to individuals who do not have any relationship or vested interest in proposed research.

Public comments are being solicited on Amendment 15 and its incorporated documents through the end of the comment period stated in this proposed rule (*see* **DATES**). NMFS has also published a Notice of Availability, with a comment period ending May 23, 2011, (76 FR 16595, March 24, 2011). All comments received by May 23, 2011, whether specifically directed to Amendment 15 or the proposed rule for Amendment 15, will be considered in the approval/disapproval decision on Amendment 15. Comments received after that date will not be considered in the decision to approve or disapprove Amendment 15. To be considered, comments must be received by close of business on the last day of the comment period; that does not mean postmarked or otherwise transmitted by that date.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Scallop FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

This proposed rule contains a revision to a current collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). Public reporting burden for this collection of information, the expansion of the VMS catch report to all areas (OMB Control Number 0648–0491), is estimated to average 2 min per response. This estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to OMB by e-mail at *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285 and to the Regional Administrator at the address provided in the **ADDRESSES** section of this proposed rule.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

An IRFA has been prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA consists of the relevant analyses, including the draft IRFA, included in Amendment 15, and the preamble to this proposed rule. A summary of the analysis follows.

Statement of Objective and Need

This action proposes to implement ACL and AMs for the scallop fishery, as well as other measures to improve management of the scallop fishery. A description of the management measures, why this action is being considered, and the legal basis for this action are contained in the preamble of this proposed rule and are not repeated here.

Description and Estimate of Number of Small Entities to Which the Rule Would Apply

The proposed regulations would affect vessels with LA and LAGC scallop permits. The FEIS for Amendment 15 provides extensive information on the number and size of vessels and small businesses that would be affected by the proposed regulations, by port and State. There were 313 vessels that obtained full-time LA permits in 2010, including 250 dredge, 52 small-dredge and 11 scallop trawl permits. In the same year, there were also 34 part-time LA permits in the sea scallop fishery. No vessels were issued occasional scallop permits. By the start of FY 2010, the first year of the LAGC IFQ program, 362 IFQ permits (including 40 IFQ permits issued to vessels with a LA scallop permit), 127 NGOM, and 294 incidental catch permits were issued. Since all scallop permits are limited access, vessel owners would only cancel permits if they decide to stop fishing for scallops on the permitted vessel permanently or if they transfer IFQ to another IFQ vessel and permanently relinquish the vessel's scallop permit. This is likely to be infrequent due to the value of retaining the permit. As such, the number of scallop permits could decline over time, but would likely be less than 10 permits per year.

The RFA defines a small business entity in any fish-harvesting or hatchery business as a firm that is independently owned and operated and not dominant in its field of operation (including its affiliates), with receipts of up to $4 million annually. The vessels in the Atlantic sea scallop fishery are considered small business entities because all of them grossed less than $3 million according to the dealer's data for FYs 1994 to 2009. In FY 2009, total average revenue per full-time scallop vessel was just over $1 million, and total average scallop revenue per general category vessel was just under $80,000. The IRFA for this and prior Scallop FMP actions has not considered individual entity ownership of multiple vessels. More information about common ownership is being gathered, but the effects of common ownership relative to small v large entities under the RFA is still unclear and will be addressed in future analyses.

The Small Business Association (SBA) suggests two criteria to consider in determining the significance of regulatory impacts; namely, disproportionality and profitability. The disproportionality criterion compares the effects of the regulatory action on small versus large entities (using the SBA-approved size definition of "small entity"), not the difference between segments of small entities. Amendment 15 is not expected to have significant regulatory impacts on the basis of the disproportionality criterion, because all entities are considered to be small entities in the scallop fishery and, therefore, the proposed action would not place a substantial number of small entities at a significant competitive disadvantage relative to large entities. A summary of the economic impacts

relative to the profitability criterion is provided below under "Economic Impacts of Proposed Measures and Alternatives."

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action would implement an expansion of current VMS catch reporting that would require all LA, LAGC IFQ, and LAGC NGOM scallop vessels to report YTF catch (kept and discards) and all other species kept (including scallops) on all scallop trips. Such reports would have to be submitted for each day fished by 9 a.m. of the day following the day on which the fishing activity occurred. Currently this requirement applies only to access area scallop trips. The expansion of the requirement to all areas would increase the current burden cost of 333 hours at a total cost of $4,995 to 1,000 hours at a total cost of $15,000 for all scallop vessels combined. The expansion is needed to monitor YTF bycatch relative to the sub-ACL for YTF proposed under Amendment 15. Amendment 15 does not duplicate, overlap, or conflict with any other Federal law.

Economic Impacts of Proposed Measures and Alternatives

A summary of the economic impacts of proposed and alternative measures is provided below. Detailed economic impact analysis is provided in Section 5.4 and Appendix III of the FEIS for Amendment 15 (*see* **ADDRESSES**).

Each vessel within the same permit category (*i.e.,* full-time, part-time, and occasional) is allocated the same number of DAS and access area trips. LAGC IFQ vessels receive 5.5 percent of the projected catch after research and observer set-asides are removed, and IFQs are proportionately allocated based on a percent share of the 5.5-percent fleetwide allocation. Therefore, those measures that affect overall projected landings will have proportional impacts on all the participants because allocations for all vessels will be adjusted up or down in the same percentage. Some of the other proposed measures are specific to each fishery, however, and they will result in differential impacts, as discussed below for each individual action. In summary, although some specific measures proposed in Amendment 15, such as the hybrid OFD, catch limits, and AMs could have some negative impacts on the revenues and profits from the scallop fishery in the short-term, the benefits from the other proposed alternatives, including the measures that would reduce scientific or management uncertainty, the modification of the EFH areas, modifications to the LAGC possession limits and other related measures are expected to offset in part or in full these short-term negative effects. As a result, the aggregate economic impacts of Amendment 15 measures, combined, in the short-term are likely to range from small negative impacts to small positive impacts. The proposed action is not expected to have significant impacts on the viability of the vessels, because these impacts are estimated to be relatively small. In addition, even with negative impacts, the profit rate is estimated to exceed 20 percent of the gross revenue in the scallop industry, providing for short-term cash reserves to finance operations through several months or years until the positive effects of the regulations start paying off. In the long-term, the economic impacts of the combined measures on the participants of the scallop are expected to be positive.

Economic Impacts of the Individual Measures

Amendment 15 includes ACLs and AMs to bring the Scallop FMP into compliance with requirements of the MSA as reauthorized in 2007. Although the Council discussed various ways of establishing ACLs throughout the development of Amendment 15, the only alternative was to take no action. Alternatives to proposed AMs would have implemented AMs a full year after the end of the fishing year in which the overage occurred. The Council considered two alternatives to the proposed revision of the OFD. One alternative maintained the current OFD and another based the OFD on a resource-wide and time-averaged approach. The Council's decision to modify the essential fish habitat (EFH) closed areas under the Scallop FMP had only the alternative to take no action. The Council considered several alternatives to the various adjustments to measures for the LAGC fishery and determined that additional alternatives were not necessary. Specifically, the Council considered various increases to the LAGC IFQ fishery possession limit, no increase to the maximum IFQ a vessel can be allocated, no allowance to carry over IFQ from one fishing year to the next, no allowance to transfer IFQ separately from the IFQ permit, and a suite of measures to regulate the formation of community fishing associations. The Council also considered several alternatives to the proposed adjustments to the scallop RSA program, including separating set-aside TAC for scallop resource surveys, and various ways of allocating RSA TAC that remains available after all approved projects are awarded in a particular year. Since the Council can only establish framework measures for those measures that are included in the FMP already, the only alternative to the proposed additions to the list of measures that can be adjusted by framework adjustments is to not add measures or add only a subset of the measures. Under the MSA, NMFS can only approve or disapprove management measures recommended by the Council. Therefore, NMFS cannot replace proposed alternatives with other measures considered by not adopted by the Council.

1. Compliance With MSA

ACL Structure and Subcomponents

This new requirement is expected to have long-term economic benefits on the fishery by helping to ensure that catch limits (ACLs) are set at or below ABC, in order to prevent the resource from being overfished and overfishing from occurring. Buffers for scientific and management uncertainty would reduce the risk of fishery exceeding its ACL, thus reducing the risk of overfishing the scallop resource, with positive impacts on the overall scallop yield, revenues, and total economic benefits from the fishery. Establishing catch limits is expected to result in a similar landings stream compared to the status quo management. Even if the landing streams changed as a result of the new measures, the risk to the resource from overfishing due to scientific or management uncertainty would be minimized under the proposed measures, because these sources of uncertainty are better accounted for. This, in turn, is expected to keep the landings and economic benefits relatively more stable and reduce the uncertainty in business decisions over the long-term. The separation of an ACL into two sub-ACLs with associated ACTs is expected to have positive impacts on the scallop fishery and its subcomponents. Separating the two fleets with separate ACLs prevents one component of the fishery from impacting the catch levels of the other. This would prevent negative economic impacts from spreading from one fleet to the other. There are no alternatives that would generate higher economic benefits for the participants of the scallop fishery. Under the No Action alternative, there is a risk of overfishing the resource due to the scientific and management uncertainty that is not adequately addressed currently. Existing measures do not have well-defined accountability and payback mechanisms

if catch limits are exceeded due to these sources of uncertainty, which could result in continual reductions in allocations, effort levels, and trips.

2. Implementation of AMs

LA AMs would consist of the use of an ACT, and an overall DAS reduction to account for any overages. The deduction would be applied in the second FY following the FY in which the overage occurred (*e.g.,* an overage in FY 2011 would result in a DAS reduction in FY 2013). The overall economic impacts in the short-term on the participants of the scallop fishery depend on whether or not the ACT prevents an ACL overage. Exceeding the ACL in one year will have positive economic impacts on the participants of the scallop fishery in that year, but it would be followed by negative impacts in the year in which the AM is applied, since DAS would be deducted based on the level of the overage. The short-term impacts averaged over the applicable years would be neutral or small. The proposed action also includes a disclaimer for when the LA AM would not be triggered, even if the LA sub-ACL exceeded. If there is no biological harm, and updated estimates of F are actually lower than what was projected, there will be no reason for a DAS reduction in the subsequent year. This would minimize or even eliminate any potentially negative impacts, since the AM would not be implemented.

For the LAGC fishery, if an individual vessel exceeds its IFQ (including leased IFQ), the amount of IFQ equal to the overage would be deducted from the vessel's IFQ in the FY following the FY in which the overage occurred. Similarly, this action proposes that if the NGOM component of the fishery exceeds the overall hard-TAC (equal to the NGOM ACL) after all data is final, then the hard TAC could be reduced by the amount equal to the overage in the following FY. Exceeding the vessel's IFQ in one year will have positive economic impacts in that year, followed by negative impacts in the year in which the deduction is applied, so the short-term impacts averaged over these 2 years would be neutral or small. The measures would help reduce the risks of exceeding ACLs and would have positive impacts on the scallop yields and economic impacts from the fishery as a whole over the long-term.

The Council also considered making the AMs effective in the second year following FY in which the overage occurred. This would have very similar economic impacts to the proposed application of AMs, except that the negative impacts would be delayed for 1 year.

3. Trigger of LA AM Disclaimer and Allocations to the LAGC

If the LA AM disclaimer is triggered, 5.5 percent of the difference between the exceeded LA sub-ACL and the actual LA landings will be allocated to the LAGC fleet the following FY. This measure would have positive economic impacts on the LAGC vessels and prevent the LA fishery from receiving a higher share of the total catch than allocated to them by Amendment 15 provisions. The no action alternative would generate negative economic impacts compared to the proposed action, because it would not provide the LAGC fleet with similar additional catch.

4. ACLs and AMs for YTF

The proposed AM for the YTF sub-ACL, if the scallop fishery exceeds the sub-ACL, is a seasonal closure of areas that have been pre-identified to have high YTF bycatch rates. The applicable area would be closed in the subsequent FY for a specified period of time to only LA scallop vessels (LAGC vessels would be exempt from the closure). This measure could increase fishing costs and have negative impacts on the scallop revenues and profits if the effort is moved to less productive areas with lower LPUE, or to areas with a predominance of smaller scallops with a lower price. Implementation of the closure in the subsequent year, rather than in-season, would prevent derby style fishing and minimize the negative impacts on prices and revenues associated with it. Exempting LAGC trips from this AM would prevent high distributional impacts for LAGC vessels that have a dependence on fishing within the proposed closure areas in SNE waters.

The alternative that would close an entire YTF stock area would have greater negative impacts on scallop revenues and profits compared to options that would close only specific portions of areas with high YTF bycatch. Higher negative impacts result from a very large portion of the scallop fishery being closed compared to discrete areas under the proposed alternative. Economic benefits from minimizing YTF bycatch in the year following an overage under the stock wide area closure alternatives would accrue over the long term if YTF stocks improve and the likelihood of scallop fishery closures is reduced. However, the proposed measure provides nearly the same bycatch reduction for YTF because the areas are where the highest YTF bycatch occurs in the scallop fishery. The immediate economic benefits of the proposed measure therefore outweighs the long term potential benefits associated with the stock wide closure. The alternatives that would institute either a fleet maximum DAS or an individual maximum number of DAS that can be used in a stock area for year 3 to account for an overage of the YTF sub-ACL in year 1 could reduce the negative impacts on scallop revenues, costs, and total economic benefits by preventing derby fishing and allowing more time for the scallop fleet to make adjustments for exceeding the YTF ACLs. However, it would apply penalties to the whole fleet for overages that may have been caused by only a part of the fleet. In addition, these options could increase the administration costs by making it necessary to monitor DAS-used by YTF stock areas, which would require additional reporting and recordkeeping requirements.

5. Measures to Adjust the OFD

The adoption of the hybrid OFD could result in a reduction in revenues and profits compared to no action alternative in the short to medium term. During the first 10 years of implementation, average scallop revenue per vessel net of trips costs are expected to decline by about 5.8 percent. This alternative is expected have positive economic impacts over the long-term, however, since this definition will provide more flexibility to meet the area rotation objectives and is expected to increase catch by 10 percent with larger average scallop size. In addition, this alternative could potentially reduce area swept, thus would reduce adverse effects on bycatch, seabed habitats, and EFH, with indirect positive impacts on the scallop fishery. For example, a reduction in bycatch would prevent triggering YTF AM measures, and the negative impacts on scallop landings and revenues associated with such a measure. This could offset some of the short-term potentially negative economic impacts from the hybrid OFD.

The status quo OFD is estimated to result in higher revenues and profits in the short-term compared to the hybrid overfishing definition. This alternative was not selected by the Council because it is not consistent with the spatial management of the scallop fishery, has higher risks for the scallop resource, and lower economic benefits for the scallop fishery over the long-term compared to the proposed measure.

6. IFQ Carryover

The proposed carryover provision would allow LAGC IFQ vessels to carry up to 15 percent of a vessel's IFQ, including leased IFQ, to the following FY, if the vessel has unused IFQ at the end of the FY. This would provide flexibility and safety-at-sea benefits in the case of unforeseen circumstances or bad weather that prevents the vessel from using all of its IFQ. As a result, this would give opportunity to vessels to land their unused quote in the next year with positive economic impacts for vessels, the LAGC fishery, and overall scallop revenue and profits.

The no action alternative would have smaller economic benefits compared to the proposed option because it would not allow IFQ to be carried over into the subsequent FY. The Council also considered allowing a vessel's entire IFQ to be carried over, which would have provided higher immediate economic benefits than the proposed option. However, transferring a larger portion or the entire amount of the unused quota could increase management uncertainty, which could result in application of an ACT, set below the ACL, to serve as a buffer to protect against the uncertainty. This overall reduction for the following FY would have negative impacts on the quota allocations and economic benefits in future years.

7. Modification of the LAGC IFQ Vessel Possession Limit

An increase in the general category possession limit from 400 lb (181.4 kg) to 600 lb (272.2 kg) is expected to reduce the fishing time and trip costs, because it would increase trip efficiency and reduce steaming time over the course of the FY. In addition, it could increase profits for these vessels or offset the cost of elevated fuel prices. As a result, the proposed option is expected have positive economic impacts on the scallop fishery compared to the no action alternative.

Alternatives to the proposed action included eliminating the possession limit and increasing it to 1,000 lb (454 kg) per trip. These alternatives would produce higher benefits than the proposed option by maximizing trip revenue compared to fishing costs. However, this alternative could change the nature of the LAGC fishery from a small scale fishery to a full-time operation like the LA fishery, which would run counter to the FMP's objective of preserving the small scale nature of the fishery for the LAGC fleet. It may result in consolidation that would eliminate operations with smaller IFQs or that have less total share of the IFQ fishery. This alternative was not selected because the Council continues to support the LAGC fishery as a small vessel fishery, consistent with its goals and vision for the fishery as developed under Amendment 11 to the FMP.

8. Increase in the Maximum IFQ per Vessel

The proposed action to change the 2-percent maximum quota per vessel to 2.5 percent would provide more flexibility to vessels to adjust their harvest levels to changes in the scallop resource conditions. In addition, since a vessel owner could meet the 5-percent ownership cap by owning only two vessels, it would eliminate ownership costs associated with multiple vessels. The proposed increase to a 2.5-percent cap would, therefore, have positive impacts on profitability. The no action alternative for increasing the maximum IFQ per vessel would not improve flexibility and would have negative economic impacts associated with costs of vessel ownership compared to the proposed action.

9. Allowing LAGC Quota To Be Split From IFQ Permits

The proposed measure to allow the IFQ to be split from the IFQ permit would improve flexibility and facilitate movement of quota between fishermen. It would also increase the likelihood that all IFQ will be harvested, thereby reducing management uncertainty. It would allow fishermen to combine their allocations and to benefit from an economically viable operation when the allocations of some vessels are too small to make scallop fishing profitable. The proposed measure is therefore likely to have positive impacts on revenues and profits for the participants of the IFQ fishery.

The Council rejected an alternative that would have allowed quota to be transferred between the LA/IFQ fleet and IFQ-only fleet. This alternative would have resulted in larger economic benefits for LAGC vessels because it would provide another source of IFQ. However, this option was not chosen by the Council mostly due to concerns about the difficulty of monitoring mixed quota from the two categories, since they are allocated quota from two separate pools.

Under the no action alternative, LAGC vessels that want to permanently transfer quota have to purchase LAGC permit as well as all the other permits a vessel has, which makes purchasing of LAGC IFQ very expensive. It also is a deterrent to engaging in permanent transfers, since some owners would prefer to retain the permits for other fisheries. The no action alternative, therefore, would have reduced benefits compared to the proposed action.

10. Measures to Address EFH Closed Areas

The proposed option would modify the EFH areas closed to scallop gear under Scallop Amendment 10 to be consistent with NE Multispecies Amendment 13, and eliminate the areas closed for EFH under Amendment 10. As a result, effort could be allocated to CAI (where the scallops are larger and yield is higher), instead of allocating more open area effort in areas with potentially lower catch rates. This is estimated to have positive impacts on the scallop resource and future yield, and to increase the scallop revenues by about $8 million (assuming a price of $7.00 per lb) per year. Fishing in more productive areas would also reduce the fishing costs. Therefore, the proposed measure is expected to have positive impacts on revenues and profits from the scallop fishery. The Council considered taking no action, but such action would have lower economic benefits than the proposed action, since it would not provide access to portions of the scallop resource that would improve yield and reduce fishing costs.

11. Measures to Improve RSA Program

These alternatives are expected to have positive indirect economic benefits for the sea scallop fishery by improving the timing and administration of the RSA program. Having dedicated resources for funding research to survey access areas will improve the Council's ability to allocate the appropriate amount of effort to prevent overfishing and optimize yield. Exempting RSA projects (if identified in the proposal) from crew restrictions, the seasonal closure in Elephant Trunk, and the requirement to return to port if fishing in more than one area will allow more flexibility and more effective research. If, as a result of these measures, the program can be more streamlined, and worthwhile projects can occur with fewer obstacles, better and more timely research will result in indirect benefits to the scallop resource and yield and will increase economic benefits from the scallop fishery. Several alternatives were considered by the Council, but they all would have similar impacts. Therefore, the proposed measures are based on policy decisions that reflect the most efficient and effective way of implementing the RSA Program.

12. Third-Year Default Measures in the Framework Adjustment Process and Addition to the List of Frameworkable Items in the FMP

The proposed action includes adding a third year of specifications to the framework process in order to prevent outdated measures from getting implemented due to the delay in the implementation of the 2-year framework actions. It would serve as a "safety mechanism" to prevent against "No Action" rollovers during implementation delays. These "No Action" rollover measures complicate management of the scallop fishery, do not make sense for the industry, and may cause undesired negative effects or require further management intervention. Therefore, including third-year specifications would alleviate some of the implementation issues caused by the time lag between the FY and the time when the survey data becomes available. Since the measures that are created for year 3 will result in landings more consistent with the updated scallop biomass estimates and PDT recommendations, this action is expected to have positive indirect effects on the participants of the scallop fishery. There are no other alternatives that would result in larger economic benefits.

Expanding the list of adjustable framework items would allow the Council to more easily adjust the allocations according to the resource conditions and as needed in terms of research priorities or to make further changes to benefit EFH. As a result, these measures are expected to have positive impacts on the scallop fishery and its participants. There are no other alternatives that would result in larger economic benefits.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: April 4, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.4, paragraphs (a)(2)(i) introductory text, and (a)(2)(ii)(A) are revised to read as follows:

§ 648.4 Vessel permits.

(a) * * *

(2) * * *

(i) *Limited access scallop permits.* Any vessel of the United States that possesses or lands more than 600 lb (272.2 kg) of shucked scallops, or 50 bu (17.6 hL) of in-shell scallops per trip South of 42°20′ N. Lat., or 75 bu (26.4 hL) of in-shell scallops per trip North of 42°20′ N. Lat, or possesses more than 100 bu (35.2 hL) of in-shell scallops seaward of the VMS Demarcation Line, except vessels that fish exclusively in State waters for scallops, must have been issued and carry on board a valid limited access scallop permit.

* * * * *

(ii) * * *

(A) *Individual fishing quota LAGC permit.* To possess or land up to 600 lb (272.2 kg) of shucked meats, or land up to 75 bu (26.4 hL) of in-shell scallops per trip, or possess up to 100 bu (35.2 hL) of in-shell scallops seaward of the VMS demarcation line, a vessel must have been issued an individual fishing quota LAGC scallop permit (IFQ scallop permit). Issuance of an initial IFQ scallop permit is contingent upon the vessel owner submitting the required application and other information that demonstrates that the vessel meets the eligibility criteria specified in paragraph (a)(2)(ii)(D) of this section.

* * * * *

3. In § 648.10, paragraphs (e)(5)(i), (e)(5)(ii), (f)(4)(i), and (h)(8) are revised to read as follows:

§ 648.10 VMS and DAS requirements for vessel owners/operators.

* * * * *

(e) * * *

(5) * * *

(i) A vessel subject to the VMS requirements of § 648.9 and paragraphs (b) through (d) of this section that has crossed the VMS Demarcation Line under paragraph (a) of this section is deemed to be fishing under the DAS program, the LAGC IFQ or NGOM scallop fishery, or other fishery requiring the operation of VMS as applicable, unless prior to leaving port, the vessel's owner or authorized representative declares the vessel out of the scallop, NE multispecies, or monkfish fishery, as applicable, for a specific time period. NMFS must be notified by transmitting the appropriate VMS code through the VMS, or unless the vessel's owner or authorized representative declares the vessel will be fishing in the Eastern U.S./Canada Area, as described in § 648.85(a)(3)(ii), under the provisions of that program.

(ii) Notification that the vessel is not under the DAS program, the LAGC IFQ or NGOM scallop fishery, or any other fishery requiring the operation of VMS, must be received by NMFS prior to the vessel leaving port. A vessel may not change its status after the vessel leaves port or before it returns to port on any fishing trip.

* * * * *

(f) * * *

(4) * * *.

(i) The owner or operator of a limited access, LAGC IFQ, or LAGC NGOM vessel that fishes for, possesses, or retains scallops, and is not fishing under a NE Multispecies DAS or sector allocation, must submit reports through the VMS, in accordance with instructions to be provided by the Regional Administrator, for each day fished, including open area trips, access area trips as described in § 648.60(a)(9), and trips accompanied by a NMFS-approved observer. The reports must be submitted for each day (beginning at 0000 hr and ending at 2400 hr) and not later than 0900 hours of the following day. Such reports must include the following information:

(A) FVTR serial number;

(B) Date fish were caught;

(C) Total pounds of scallop meats kept;

(D) Total pounds of yellowtail flounder kept;

(E) Total pounds of yellowtail flounder discarded; and

(F) Total pounds of all other fish kept.

* * * * *

(h) * * *

(8) Any vessel issued a limited access scallop permit and not issued an LAGC scallop permit that possesses or lands scallops; any vessel issued a limited access scallop and LAGC IFQ scallop permit that possesses or lands more than 600 lb (272.2 kg) of scallops; any vessel issued a limited access scallop and LAGC NGOM scallop permit that possesses or lands more than 200 lb (90.7 kg) of scallops; any vessel issued a limited access scallop and LAGC IC scallop permit that possesses or lands more than 40 lb (18.1 kg) of scallops; any vessel issued a limited access NE multispecies permit subject to the NE multispecies DAS program requirements that possesses or lands regulated NE multispecies, except as provided in §§ 648.10(h)(9)(ii), 648.17, and 648.89; any vessel issued a limited access monkfish permit subject to the monkfish DAS program and call-in requirement that possesses or lands monkfish above the incidental catch trip limits specified in § 648.94(c); and any vessel issued a limited access red crab permit subject to the red crab DAS program and call-in requirement that possesses or lands red

crab above the incidental catch trip limits specified in § 648.263(b)(1) shall be deemed to be in its respective DAS program for purposes of counting DAS and will be charged DAS from its time of sailing to landing, regardless of whether the vessel's owner or authorized representative provides adequate notification as required by paragraphs (e) through (h) of this section.

* * * * *

4. In § 648.11, paragraphs (g)(1) and (g)(2)(ii) are revised to read as follows:

§ 648.11 At-sea sea sampler/observer coverage.

* * * * *

(g) * * *

(1) *General.* Unless otherwise specified, owners, operators, and/or managers of vessels issued a Federal scallop permit under § 648.4(a)(2), and specified in paragraph (b) of this section, must comply with this section and are jointly and severally responsible for their vessel's compliance with this section. To facilitate the deployment of at-sea observers, all sea scallop vessels issued limited access permits fishing in open areas or Sea Scallop Access Areas, and LAGC IFQ vessels fishing under the Sea Scallop Access Area program specified in § 648.60, are required to comply with the additional notification requirements specified in paragraph (g)(2) of this section. When NMFS notifies the vessel owner, operator, and/or manager of any requirement to carry an observer on a specified trip in either an Access Area or Open Area as specified in paragraph (g)(3) of this section, the vessel may not fish for, take, retain, possess, or land any scallops without carrying an observer. Vessels may only embark on a scallop trip in open areas or Access Areas without an observer if the vessel owner, operator, and/or manager has been notified that the vessel has received a waiver of the observer requirement for that trip pursuant to paragraphs (g)(3) and (g)(4)(ii) of this section.

(2) * * *

(ii) *LAGC IFQ vessels.* LAGC IFQ vessel owners, operators, or managers must notify the NMFS/NEFOP by telephone by 0001 hr of the Thursday preceding the week (Sunday through Saturday) that they intend to start a scallop trip in an access area. If selected, up to two Sea Scallop Access Area trips that start during the specified week (Sunday through Saturday) can be selected to be covered by an observer. NMFS/NEFOP must be notified by the owner, operator, or vessel manager of any trip plan changes at least 48 hr prior to vessel departure.

* * * * *

5. In § 648.14, paragraphs (i)(1)(ii), (i)(1)(iii)(A)(*1*)(*iii*), (i)(1)(iii)(A)(*2*)(*iii*), (i)(1)(iii)(A)(*3*) introductory text, (i)(4)(i)(A), (i)(4)(ii)(B), and (i)(4)(iii)(B) are revised, paragraph (i)(2)(viii) is added, and paragraph (i)(3)(iii)(E) is removed as follows:

§ 648.14 Prohibitions.

* * * * *

(i) * * *

(1) * * *

(ii) *Gear and crew requirements.* Have a shucking or sorting machine on board a vessel while in possession of more than 600 lb (272.2 kg) of shucked scallops, unless that vessel has not been issued a scallop permit and fishes exclusively in State waters.

(iii) * * *

(A) * * *

(*1*) * * *

(*iii*) The scallops were harvested by a vessel that has been issued and carries on board an IFQ scallop permit and is properly declared into the IFQ scallop fishery or is properly declared into the NE multispecies or Atlantic surfclam or quahog fishery and is not fishing in a sea scallop access area.

* * * * *

(*2*) * * *

(*iii*) The scallops were harvested by a vessel that has been issued and carries on board an IFQ scallop permit issued pursuant to § 648.4(a)(2)(ii)(A), is fishing outside of the NGOM scallop management area, and is properly declared into the general category scallop fishery or is properly declared into the NE multispecies or Atlantic surfclam or quahog fishery and is not fishing in a sea scallop access area.

* * * * *

(*3*) In excess of 600 lb (272.2 kg) of shucked scallops at any time, 50 bu (17.6 hL) of in-shell scallops per trip South of 42°20′ N. Lat. and shoreward of the VMS Demarcation Line, or 75 bu (26.4 hL) of in-shell scallops per trip North of 42°20′ N. Lat and shoreward of the VMS demarcation line, or 100 bu (35.2 hL) in-shell scallops seaward of the VMS Demarcation Line, unless:

* * * * *

(2) * * *

(viii) Fish for scallops in, or possess scallops or land scallops from, the yellowtail flounder accountability measure closed areas specified in § 648.64 during the period specified in the notice announcing the closure and based on the closure table specified in § 648.64 .

* * * * *

(4) * * *

(i) * * *

(A) Fish for or land per trip, or possess at any time, in excess of 600 lb (272.2 kg) of shucked, or 75 bu (26.4 hL) of in-shell scallops per trip, or, or 100 bu (35.2 hL) in-shell scallops seaward of the VMS Demarcation Line, unless the vessel is carrying an observer as specified in § 648.11 while participating in the Area Access Program specified in § 648.60 and an increase in the possession limit is authorized by the Regional Administrator and not exceeded by the vessel, as specified in §§ 648.52(g) and 648.60(d)(2).

* * * * *

(ii) * * *

(B) Have an IFQ allocation on an IFQ scallop vessel of more than 2.5 percent of the total IFQ scallop TAC as specified in § 648.53(a)(5).

* * * * *

(iii) * * *

(B) Apply for an IFQ transfer that will result in the receiving vessel having an IFQ allocation in excess of 2.5 percent of the total IFQ scallop TAC.

* * * * *

6. In § 648.51, paragraphs (d)(1) and (e) introductory text are revised to read as follows:

§ 648.51 Gear and crew restrictions.

* * * * *

(d) * * *

(1) Shucking machines are prohibited on all limited access vessels fishing under the scallop DAS program, or any vessel in possession of more than 600 lb (272.2 kg) of scallops, unless the vessel has not been issued a limited access scallop permit and fishes exclusively in State waters.

* * * * *

(e) *Small dredge program restrictions.* Any vessel owner whose vessel is assigned to either the part-time or Occasional category may request, in the application for the vessel's annual permit, to be placed in one category higher. Vessel owners making such request may be placed in the appropriate higher category for the entire year, if they agree to comply with the following restrictions, in addition to, and notwithstanding other restrictions of this part, when fishing under the DAS program described in § 648.53:

* * * * *

7. In § 648.52, paragraph (a) is revised to read as follows:

§ 648.52 Possession and landing limits.

(a) A vessel issued an IFQ scallop permit that is declared into the IFQ scallop fishery as specified in § 648.10(b), or on a properly declared

NE multispecies, surfclam, or ocean quahog trip and not fishing in a scallop access area, unless as specified in paragraph (g) of this section or exempted under the State waters exemption program described in § 648.54, may not possess or land, per trip, more than 600 lb (272.2 kg) of shucked scallops, or possess more than 75 bu (26.4 hL) of in-shell scallops shoreward of the VMS Demarcation Line. Such a vessel may land scallops only once in any calendar day. Such a vessel may possess up to 100 bu (35.2 hL) of in-shell scallops seaward of the VMS demarcation line on a properly declared IFQ scallop trip, or on a properly declared NE multispecies, surfclam, or ocean quahog trip and not fishing in a scallop access area.

* * * * *

8. In § 648.53,

a. The section heading and paragraphs (a), (b) introductory text, (b)(1), (b)(4), (c), (d), (g), (h)(2)(iii), (h)(3)(i)(A), (h)(3)(i)(B), (h)(3)(i)(C), (h)(4) introductory text, (h)(5)(ii), (h)(5)(iii), and (h)(5)(iv) are revised,

b. Paragraphs (h)(2)(v), and (h)(2)(vi) are added; and

c. Paragraphs (a)(5), (a)(6), and (a)(9), (b)(2), and (b)(4)(i) are removed and reserved

The revisions and additions read as follows:

§ 648.53 Acceptable biological catch (ABC), annual catch limits (ACL), annual catch targets (ACT), DAS allocations, and individual fishing quotas.

(a) *Scallop fishery ABC.* The ABC for the scallop fishery shall be established through the framework adjustment process specified in § 648.55 and is equal to the overall scallop fishery ACL. The ABC/ACL shall be divided as sub-ACLs between limited access vessels, limited access vessels that are fishing under a limited access general category permit, and limited access general category vessels as specified in paragraphs (a)(3) and (a)(4) of this section, after deducting the scallop incidental catch target TAC specified in paragraph (a)(2) of this section, observer set-aside specified in paragraph (g)(1) of this section, and research set-aside specified in § 648.56(d).

(1) ABC/ACL for fishing years 2011 through 2013 shall be:

(i) *2011.* To be determined.

(ii) *2012.* To be determined.

(iii) *2013.* To be determined.

(2) *Scallop incidental catch target TAC.* The incidental catch target TAC for vessels with incidental catch scallop permits is to be determined for fishing years 2011, 2012, and 2013.

(3) *Limited access fleet sub-ACL and ACT.* The limited access scallop fishery shall be allocated 94.5 percent of the ACL specified in paragraph (a)(1) of this section, after deducting incidental catch, observer set-aside, and research set-aside, as specified in this paragraph (a). ACT for the limited access scallop fishery shall be established through the framework adjustment process described in § 648.55. DAS specified in paragraph (b) of this section shall be based on the ACTs specified in paragraph (a)(3)(ii) of this section.

(i) The limited access fishery sub-ACLs for the 2011 through 2013 fishing years are:

(A) *2011.* To be determined.

(B) *2012.* To be determined.

(C) *2013.* To be determined.

(ii) The limited access fishery ACTs for the 2011 through 2013 fishing years are:

(A) *2011.* To be determined.

(B) *2012.* To be determined.

(C) *2013.* To be determined.

(4) *LAGC fleet sub-ACL.* The sub-ACL for the LAGC IFQ fishery shall be equal to 5.5 percent of the ACL specified in paragraph (a)(1) of this section, after deducting incidental catch, observer set-aside, and research set-aside, as specified in this paragraph (a). The LAGC IFQ fishery ACT shall be equal to the LAGC IFQ fishery's ACL. The ACL for the LAGC IFQ fishery for vessels issued only a LAGC IFQ scallop permit shall be equal to 5 percent of the ACL specified in paragraph (a)(1) of this section, after deducting incidental catch, observer set-aside, and research set-aside, as specified in this paragraph (a). The ACL for the LAGC IFQ fishery for vessels issued both a LAGC IFQ scallop permit and a limited access scallop permit shall be 0.5 percent of the ACL specified in paragraph (a)(1) of this section, after deducting incidental catch, observer set-aside, and research set-aside, as specified in this paragraph (a).

(i) The ACLs for the 2011 through 2013 fishing years for LAGC IFQ vessels without a limited access scallop permit are:

(A) *2011.* To be determined.

(B) *2012.* To be determined.

(C) *2013.* To be determined.

(ii) The ACLs for the 2011 through 2013 fishing years for vessels issued both a LAGC and a limited access scallop permit are:

(A) *2011.* To be determined.

(B) *2012.* To be determined.

(C) *2013.* To be determined.

(b) *DAS allocations.* DAS allocations for limited access scallop trips in all areas other than those specified in § 648.59 shall be specified through the framework adjustment process, as specified in § 648.55, using the ACT specified in paragraph (a)(3)(ii) of this section. A vessel's DAS, shall be determined and specified in paragraph (b)(4) of this section by dividing the total DAS specified in the framework adjustment by the LPUE specified in paragraph (b)(1) of this section, then dividing by the total number of vessels in the fleet.

(1) *Landings per unit effort (LPUE).* LPUE is an estimate of the average amount of scallops, in pounds, that the limited access scallop fleet lands per DAS fished. The estimated LPUE is the average LPUE for all limited access scallop vessels fishing under DAS, and shall be used to calculate DAS specified in paragraph (b)(4) of this section, the DAS reduction for the AM specified in paragraph (b)(4)(ii) of this section, and the observer set-aside DAS allocation specified in paragraph (g)(1) of this section. LPUE shall be:

(i) *2011.* To be determined.

(ii) *2012.* To be determined.

(iii) *2013.* To be determined.

* * * * *

(4) Each vessel qualifying for one of the three DAS categories specified in the table in this paragraph (b)(4) (full-time, part-time, or occasional) shall be allocated the maximum number of DAS for each fishing year it may participate in the open area limited access scallop fishery, according to its category, excluding carryover DAS in accordance with paragraph (d) of this section. DAS allocations shall be determined by distributing the portion of ACT specified in paragraph (a)(3)(ii), as reduced by access area allocations, as specified in § 648.59, and dividing that among vessels in the form of DAS calculated by applying estimates of open area LPUE specified in paragraph (b)(1) of this section. Part-time and occasional scallop vessels shall be equal to 40 percent and 8.33 percent of the full-time DAS allocations, respectively. The annual open area DAS allocations for each category of vessel for the fishing years indicated are as follows:

DAS category	2010
Full-time	38
Part-time	15
Occasional	3

(i) [Reserved]

(ii) *Accountability measures (AM).* Unless the limited access AM exception is implemented accordance with the provision specified in paragraph (b)(4)(iii) of this section, if the ACL specified in paragraph (a)(3)(i) of this section is exceeded for the applicable fishing year, the DAS specified in paragraph (b)(4) of this section for each

limited access vessel shall be reduced by an amount equal to the amount of landings in excess of the ACL divided by the applicable LPUE for the fishing year in which the AM will apply as specified in paragraph (b)(1) of this section, then divided by the number of scallop vessels eligible to be issued a full-time limited access scallop permit. For example, assuming a 300,000-lb (136-mt) overage of the ACL in 2011, an open area LPUE of 2,500 lb (1.13 mt) per DAS in 2012, and 313 full-time vessels, each full time vessel's DAS would be reduced by 0.38 DAS (300,000 lb (136 mt)/2,500 lb (1.13 mt) per DAS = 120 lb (0.05 mt) per DAS/313 vessels = 0.38 DAS per vessel). Deductions for part-time and occasional scallop vessels shall be equal to 40 percent and 8 percent of the full-time DAS deduction, respectively, as calculated pursuant to this paragraph (b)(4)(ii). The AM shall take effect in the fishing year following the fishing year in which the overage occurred. For example, landings in excess of the ACL in fishing year 2011 would result in the DAS reduction AM in fishing year 2012. If the AM takes effect, and a limited access vessel uses more open area DAS in the fishing year in which the AM is applied, the vessel shall have the DAS used in excess of the allocation after applying the AM deducted from its open area DAS allocation in the subsequent fishing year. For example, a vessel initially allocated 32 DAS in 2011 uses all 32 DAS prior to application of the AM. If, after application of the AM, the vessel's DAS allocation is reduced to 31 DAS, the vessel's DAS in 2012 would be reduced by 1 DAS.

(iii) *Limited access AM exception*—(A) If it is determined by NMFS in accordance with paragraph (b)(4)(ii) of this section, that the fishing mortality rate associated with the limited access fleet's landings in a fishing year is less than 0.24, the AM specified in paragraph (b)(4)(ii) of this section shall not take effect. The fishing mortality rate of 0.24 is the fishing mortality that is one standard deviation below the fishing mortality rate for the scallop fishery ACL, currently estimated at 0.28.

(B) If the limited access AM exception described in this paragraph (b)(4)(iii) is invoked, the Regional Administrator shall increase the sub-ACL for the LAGC IFQ fleet specified in paragraph (a)(4)(i) of this section by the amount of scallops equal to 5.5 percent of the amount of scallop landings in excess of the limited access fleet's ACL specified in paragraph (a)(3)(i) of this section. The applicable sub-ACL for the limited access fleet specified in paragraph (a)(3)(i) of this section shall be reduced by the amount equivalent to the increase in the sub-ACL for LAGC IFQ specified pursuant to this paragraph (b)(4)(iii)(B). For example, if the limited access fishery ACL is exceeded by 1 million lb (453.6 mt), but the exception is invoked, the LAGC sub-ACL shall be increased, and the limited access fleet's ACL decreased, by 55,000 lb (24.9 mt) (1 million lb (453.6 mt) × 5.5% (0.055) = 55,000 lb (24.9 mt). The ACL adjustments in this paragraph (b)(4)(iii)(B) shall take effect in the fishing year immediately following the fishing year in which the overage of the ACL occurred. For example, for an ACL overage in the 2011 fishing year, the adjustments due to implementation of the exception would be implemented in the 2012 fishing year.

(iv) *Limited access fleet AM and exception provision timing.* The Regional Administrator shall determine whether the limited access fleet exceeded its ACL specified in paragraph (a)(3)(i) of this section by July of the fishing year following the year for which landings are being evaluated. On or about July 1, the Regional Administrator shall notify the New England Fishery Management Council (Council) of the determination of whether or not the ACL for the limited access fleet was exceeded, and the amount of landings in excess of the ACL. Upon this notification, the Scallop Plan Development Team (PDT) shall evaluate the overage and determine if the fishing mortality rate associated with total landings by the limited access scallop fleet is less than 0.24. On or about September 1 of each year, the Scallop PDT shall notify the Council of its determination, and the Council, on or about September 30, shall make a recommendation, based on the Scallop PDT findings, concerning whether to invoke the limited access AM exception. If NMFS concurs with the Scallop PDT recommendation to invoke the limited access AM exception, in accordance with the APA, the limited access AM shall not be implemented. If NMFS does not concur, in accordance with the APA, the limited access AM shall be implemented as soon as possible after September 30 each year.

* * * * *

(c) *Adjustments in annual DAS allocations.* Annual DAS allocations shall be established for 3 fishing years through biennial framework adjustments as specified in § 648.55. If a biennial framework action is not undertaken by the Council and implemented by NMFS before the beginning of the third year of each biennial adjustment, the third-year measures specified in the biennial framework adjustment shall remain in effect for the next fishing year. If a new biennial or other framework adjustment is not implemented by NMFS by the conclusion of the third year, the management measures from that third year would remain in place until a new action is implemented. The Council may also recommend adjustments to DAS allocations or other measures through a framework adjustment at any time.

(d) *End-of-year carry-over for open area DAS.* With the exception of vessels that held a Confirmation of Permit History as described in § 648.4(a)(2)(i)(J) for the entire fishing year preceding the carry-over year, limited access vessels that have unused Open Area DAS on the last day of February of any year may carry over a maximum of 10 DAS, not to exceed the total Open Area DAS allocation by permit category, into the next year. DAS carried over into the next fishing year may only be used in Open Areas. Carry-over DAS are accounted for in setting the ACT for the limited access fleet, as specified in paragraph (a)(3)(ii) of this section. Therefore, if carry-over DAS result or contribute to an overage of the ACL, the limited access fleet AM specified in paragraph (b)(4)(ii) of this section would still apply, provided the AM exception specified in paragraph (b)(4)(iii) of this section is not invoked.

* * * * *

(g) *Set-asides for observer coverage.* (1) To help defray the cost of carrying an observer, 1 percent of the ABC/ACL specified in paragraph (a)(1) of this section shall be set aside to be used by vessels that are assigned to take an at-sea observer on a trip. The total TAC for observer set aside is 273 mt in fishing year 2011, 289 mt in fishing year 2012, and 287 mt in fishing year 2013. This 1 percent is divided proportionally into access areas and open areas, as specified in § 648.60(d)(1) and (g)(2), respectively.

(2) *DAS set-aside for observer coverage.* For vessels assigned to take an at-sea observer on a trip other than an Access Area Program trip, the open-area observer set-aside TACs are 139 mt, 161 mt, and 136 mt for fishing years 2011, 2012, and 2013, respectively. The DAS set-aside shall be determined by dividing these amounts by the LPUE specified in paragraph (b)(1)(i) of this section for each specific fishing year. The DAS set-aside for observer coverage is 137 DAS for the 2011 fishing year, 133 DAS for the 2012 fishing year, and 112 DAS for the 2013 fishing year. A vessel carrying an observer shall be compensated with reduced DAS accrual

rates for each trip on which the vessel carries an observer. For each DAS that a vessel fishes for scallops with an observer on board, the DAS shall be charged at a reduced rate, based on an adjustment factor determined by the Regional Administrator on an annual basis, dependent on the cost of observers, catch rates, and amount of available DAS set-aside. The Regional Administrator shall notify vessel owners of the cost of observers and the DAS adjustment factor through a permit holder letter issued prior to the start of each fishing year. This DAS adjustment factor may also be changed during the fishing year if fishery conditions warrant such a change. The number of DAS that are deducted from each trip based on the adjustment factor shall be deducted from the observer DAS set-aside amount in the applicable fishing year. Utilization of the DAS set-aside shall be on a first-come, first-served basis. When the DAS set-aside for observer coverage has been utilized, vessel owners shall be notified that no additional DAS remain available to offset the cost of carrying observers. The obligation to carry and pay for an observer shall not be waived if set-aside is not available.

(h) * * *

(2) * * *

(iii) *Contribution percentage.* A vessel's contribution percentage shall be determined by dividing its contribution factor by the sum of the contribution factors of all vessels issued an IFQ scallop permit. Continuing the example in paragraph (h)(1)(ii)(D) of this section, the sum of the contribution factors for 380 IFQ scallop vessels is estimated, for the purpose of this example, to be 4.18 million lb (1,896 mt). The contribution percentage of the above vessel is 1.45 percent (60,687 lb (27,527 kg)/4.18 million lb (1,896 mt) = 1.45 percent). The contribution percentage for a vessel that is issued an IFQ scallop permit and that has permanently transferred all of its IFQ to another IFQ vessel, as specified in paragraph (h)(5)(ii) of this section, shall be equal to 0 percent.

* * * * *

(v) *End-of-year carry-over for IFQ.* (A) With the exception of vessels that held a confirmation of permit history as described in § 648.4(a)(2)(ii)(L) for the entire fishing year preceding the carry-over year, LAGC IFQ vessels that have unused IFQ on the last day of February of any year may carry over up to 15 percent of the vessel's original IFQ and transferred (either temporary or permanent) IFQ into the next fishing year. For example, a vessel with a 10,000 lb (4,536 kg) IFQ and 5,000 lb (2,268 kg) leased IFQ may carry over 2,250 lb (1,020 kg) of IFQ (*i.e*, 15 percent of 15,000 lb (6,804 kg) into the next fishing year if it landed 12,750 lb (5,783 kg) (*i.e.,* 85 percent of 15,000 lb (6,804 kg) of scallops or less in the preceding fishing year. Using the same IFQ values from the example, if the vessel landed 14,000 lb (6,350 kg) of scallops, it could carry over 1,000 lb (454 kg) of scallops into the next fishing year.

(B) For accounting purposes, the combined total of all vessels' IFQ carry-over shall be added to the LAGC IFQ fleet's applicable ACL for the carry-over year. Any IFQ carried over that is landed in the carry-over fishing year shall be counted against the ACL specified in paragraph (a)(4)(i) of this section, as increased by the total carry-over for all LAGC IFQ vessels, as specified in this paragraph (h)(2)(v)(B).

(vi) *AM for the IFQ fleet.* If a vessel exceeds its IFQ, including all temporarily and permanently transferred IFQ, in a fishing year, the amount of landings in excess of the vessel's IFQ, including all temporarily and permanently transferred IFQ, shall be deducted from the vessel's IFQ as soon as possible in the fishing year following the fishing year in which the vessel exceeded its IFQ. If the AM takes effect, and an IFQ vessel lands more scallops than allocated after the AM is applied, the vessel shall have the IFQ landed in excess of its IFQ after applying the AM deducted from its IFQ in the subsequent fishing year. For example, a vessel with an initial IFQ of 1,000 lb (453.6 kg) in 2010 landed 1,200 lb (544.3 kg) of scallops in 2010, and is initially allocated 1,300 lb (589.7 kg) of scallops in 2011. That vessel would be subject to an IFQ reduction equal to 200 lb (90.7 kg) to account for the 200 lb (90.7 kg) overage in 2010. If that vessel lands 1,300 lb (589.7 kg) of scallops in 2011 prior to application of the 200 lb (90.7 kg) deduction, the vessel would be subject to a deduction of 200 lb (90.7 kg) in 2012. For vessels involved in a temporary IFQ transfer, the entire deduction shall apply to the vessel that acquired IFQ, not the transferring vessel. A vessel that has an overage that exceeds its IFQ in the subsequent fishing year shall be subject to an IFQ reduction in subsequent years until the overage is paid back. For example, a vessel with an IFQ of 1,000 lb (454 kg) in each year over a 3-year period, that harvests 2,500 lb (1,134 kg) of scallops the first year, would have a 1,500-lb (680-kg) IFQ deduction, so that it would have zero pounds to harvest in year 2, and 500 lb (227 kg) to harvest in year 3. A vessel that has a "negative" IFQ balance, as described in the example, could lease or transfer IFQ to balance the IFQ, provided there are no sanctions or other enforcement penalties that would prohibit the vessel from acquiring IFQ.

(3) * * *

(i) * * *

(A) Unless otherwise specified in paragraphs (h)(3)(i)(B) and (C) of this section, a vessel issued an IFQ scallop permit or confirmation of permit history shall not be issued more than 2.5 percent of the TAC allocated to the IFQ scallop vessels as described in paragraphs (a)(3)(ii) and (iii) of this section.

(B) A vessel may be initially issued more than 2.5 percent of the TAC allocated to the IFQ scallop vessels as described in paragraphs (a)(3)(ii) and (iii) of this section, if the initial determination of its contribution factor specified in accordance with § 648.4(a)(2)(ii)(E) and paragraph (h)(2)(ii) of this section, results in an IFQ that exceeds 2.5 percent of the TAC allocated to the IFQ scallop vessels as described in paragraphs (a)(3)(ii) and (iii) of this section. A vessel that is allocated an IFQ that exceeds 2.5 percent of the TAC allocated to the IFQ scallop vessels as described in paragraphs (a)(3)(ii) and (iii) of this section, in accordance with this paragraph (h)(3)(i)(B), may not receive IFQ through an IFQ transfer, as specified in paragraph (h)(5) of this section.

(C) A vessel initially issued a 2008 IFQ scallop permit or confirmation of permit history, or that was issued or renewed a limited access scallop permit or confirmation of permit history for a vessel in 2009 and thereafter, in compliance with the ownership restrictions in paragraph (h)(3)(i)(A) of this section, is eligible to renew such permit(s) and/or confirmation(s) of permit history, regardless of whether the renewal of the permit or confirmations of permit history will result in the 2.5 percent IFQ cap restriction being exceeded.

* * * * *

(4) *IFQ cost recovery.* A fee, not to exceed 3 percent of the ex-vessel value of IFQ scallops harvested, shall be collected to recover the costs associated with management, data collection, and enforcement of the IFQ program. The owner of a vessel issued an IFQ scallop permit and subject to the IFQ program specified in this paragraph (h), shall be responsible for paying the fee as specified by NMFS in this paragraph (h)(4). An IFQ scallop vessel shall incur a cost recovery fee liability for every landing of IFQ scallops. The IFQ scallop

permit holder shall be responsible for collecting the fee for all of its vessels' IFQ scallop landings, and shall be responsible for submitting this payment to NMFS once per year. The cost recovery fee for all landings, regardless of ownership changes throughout the fishing year, shall be the responsibility of the official owner of the vessel, as recorded in the vessel permit or confirmation of permit history file, at the time the bill is sent.

* * * * *

(5) * * *

(ii) *Permanent IFQ transfers.* Subject to the restrictions in paragraph (h)(5)(iii) of this section, the owner of an IFQ scallop vessel not issued a limited access scallop permit may transfer IFQ permanently to or from another IFQ scallop vessel. Any such transfer cannot be limited in duration and is permanent, unless the IFQ is subsequently transferred to another IFQ scallop vessel, other than the originating IFQ scallop vessel, in a subsequent fishing year. If a vessel permanently transfers its entire IFQ to another vessel, the LAGC IFQ scallop permit shall remain valid on the transferring vessel, unless the owner of the transferring vessel cancels the IFQ scallop permit. Such cancellation shall be considered voluntary relinquishment of the IFQ permit, and the vessel shall be ineligible for an IFQ scallop permit unless it replaces another vessel that was issued an IFQ scallop permit. The Regional Administrator has final approval authority for all IFQ transfer requests.

(iii) *IFQ transfer restrictions.* The owner of an IFQ scallop vessel not issued a limited access scallop permit that has fished under its IFQ in a fishing year may not transfer that vessel's IFQ to another IFQ scallop vessel in the same fishing year. Requests for IFQ transfers cannot be less than 100 lb (46.4 kg), unless that value reflects the total IFQ amount remaining on the transferor's vessel, or the entire IFQ allocation. IFQ can be transferred only once during a given fishing year. A transfer of an IFQ may not result in the sum of the IFQs on the receiving vessel exceeding 2.5 percent of the TAC allocated to IFQ scallop vessels. A transfer of an IFQ, whether temporary or permanent, may not result in the transferee having a total ownership of, or interest in, general category scallop allocation that exceeds 5 percent of the TAC allocated to IFQ scallop vessels. Limited access scallop vessels that are also issued an IFQ scallop permit may not transfer to or receive IFQ from another IFQ scallop vessel.

(iv) *Application for an IFQ transfer.* The owner of a vessel applying for a transfer of IFQ must submit a completed application form obtained from the Regional Administrator. The application must be signed by both parties (transferor and transferee) involved in the transfer of the IFQ, and must be submitted to the NMFS Northeast Regional Office at least 30 days before the date on which the applicants desire to have the IFQ effective on the receiving vessel. The Regional Administrator shall notify the applicants of any deficiency in the application pursuant to this section. Applications may be submitted at any time during the scallop fishing year, provided the vessel transferring the IFQ to another vessel has not utilized any of its own IFQ in that fishing year. Applications for temporary transfers received less than 45 days prior to the end of the fishing year may not be processed in time for a vessel to utilize the transferred IFQ prior to the expiration of the fishing year for which the IFQ transfer, if approved, would be effective.

(A) *Application information requirements.* An application to transfer IFQ must contain at least the following information: Transferor's name, vessel name, permit number, and official number or State registration number; transferee's name, vessel name, permit number, and official number or State registration number; total price paid for purchased IFQ; signatures of transferor and transferee; and date the form was completed. In addition, applications to transfer IFQ must indicate the amount, in pounds, of the IFQ allocation transfer, which may not be less than 100 lb (45 kg), unless that value reflects the total IFQ amount remaining on the transferor's vessel, or the entire IFQ allocation. Information obtained from the transfer application will be held confidential, and will be used only in summarized form for management of the fishery.

(B) *Approval of IFQ transfer applications.* Unless an application to transfer IFQ is denied according to paragraph (h)(5)(iii)(C) of this section, the Regional Administrator shall issue confirmation of application approval to both parties involved in the transfer within 30 days of receipt of an application.

(C) *Denial of transfer application.* The Regional Administrator may reject an application to transfer IFQ for the following reasons: The application is incomplete; the transferor or transferee does not possess a valid limited access general category permit; the transferor's vessel has fished under its IFQ prior to the completion of the transfer request; the transferor's or transferee's vessel or IFQ scallop permit has been sanctioned, pursuant to a final administrative decision or settlement of an enforcement proceeding; the transfer will result in the transferee's vessel having an allocation that exceeds 2.5 percent of the TAC allocated to IFQ scallop vessels; the transfer will result in the transferee having a total ownership of or interest in general category scallop allocation that exceeds 5 percent of the TAC allocated to IFQ scallop vessels; or any other failure to meet the requirements of the regulations in 50 CFR 648. Upon denial of an application to transfer IFQ, the Regional Administrator shall send a letter to the applicants describing the reason(s) for the rejection. The decision by the Regional Administrator is the final agency decision, and there is no opportunity to appeal the Regional Administrator's decision. An application that was denied can be resubmitted if the discrepancy(ies) that resulted in denial are resolved.

8. Section 648.55 is revised to read as follows:

§ 648.55 Framework adjustments to management measures.

(a) At least Biennially, the Council shall assess the status of the scallop resource, determine the adequacy of the management measures to achieve scallop resource conservation objectives, and initiate a framework adjustment to establish scallop fishery management measures for the 2-year period beginning with the scallop fishing year immediately following the year in which the action is initiated. The PDT shall prepare a Stock Assessment and Fishery Evaluation (SAFE) Report that provides the information and analysis needed to evaluate potential management adjustments. The framework adjustment shall establish OFL, ABC, ACL, ACT, DAS allocations, rotational area management programs, percentage allocations for limited access general category vessels in Sea Scallop Access Areas, scallop possession limits, AMs, and other measures to achieve FMP objectives and limit fishing mortality. The Council's development of rotational area management adjustments shall take into account at least the following factors: General rotation policy; boundaries and distribution of rotational closures; number of closures; minimum closure size; maximum closure extent; enforceability of rotational closed and re-opened areas; monitoring through resource surveys; and re-opening criteria. Rotational

Closures should be considered where projected annual change in scallop biomass is greater than 30 percent. Areas should be considered for Sea Scallop Access Areas where the projected annual change in scallop biomass is less than 15 percent.

(b) The preparation of the SAFE Report shall begin on or about June 1 of the year preceding the fishing year in which measures will be adjusted.

(c) *OFL, ABC, ACL, ACT, and AMs.* The Council shall specify OFL, ABC, ACL, ACT, and AMs, as applicable, for each year covered under the biennial or other framework adjustment.

(1) *OFL.* OFL shall be based on an updated scallop resource and fishery assessment provided by either the Scallop PDT or a formal stock assessment. OFL shall include all sources of scallop mortality and shall include an upward adjustment to account for catch of scallops in State waters by vessels not issued Federal scallop permits. The fishing mortality rate (F) associated with OFL shall be the threshold F, above which, overfishing is occurring in the scallop fishery. The F associated with OFL shall be used to derive specifications for ABC, ACL, and ACT, as specified in paragraphs (a)(2) through (5) of this section.

(2) The specification of ABC, ACL, and ACT shall be based upon the following overfishing definition: The F shall be set so that in access areas, averaged for all years combined over the period of time that the area is closed and open to scallop fishing as an access area, it does not exceed the established F threshold for the scallop fishery; in open areas it shall not exceed the F threshold for the scallop fishery; and for access and open areas combined, it is set at a level that has a 75-percent probability of remaining below the F associated with ABC, as specified in paragraph (c)(2) of this section, taking into account all sources of fishing mortality in the limited access and LAGC fleets of the scallop fishery.

(3) *ABC.* The Council shall specify ABC for each year covered under the biennial or other framework adjustment. ABC shall be the catch that has an associated F that has a 75-percent probability of remaining below the F associated with OFL. ABC shall be equal to ACL for the scallop fishery.

(4) *Deductions from ABC.* Incidental catch, equal to the value established in § 648.53(a)(2), shall be removed from ABC/ACL. One percent of ABC/ACL shall be removed from ABC/ACL for observer set-aside. Scallop catch equal to the value specified in § 648.56(d) shall be removed from ABC/ACL for research set-aside. These deductions for incidental catch, observer set-aside, and research set-aside, shall be made prior to establishing ACLs for the limited access and LAGC fleets, as specified in paragraph (c)(4) of this section.

(5) *Sub-ACLs for the limited access and LAGC fleets.* The Council shall specify sub-ACLs for the limited access and LAGC fleets for each year covered under the biennial or other framework adjustment. After applying the deductions as specified in paragraph (a)(4) of this section, a sub-ACL equal to 94.5 percent of the ABC/ACL shall be allocated to the limited access fleet. After applying the deductions as specified in paragraph (a)(4) of this section, a sub-ACL of 5.5 percent of ABC/ACL shall be allocated to the LAGC fleet, so that 5 percent of ABC/ACL is allocated to the LAGC fleet of vessels that do not also have a limited access scallop permit, and 0.5 percent of the ABC/ACL is allocated to the LAGC fleet of vessels that have limited access scallop permits. This specification of sub-ACLs shall not account for catch reductions associated with the application of AMs or adjustment of the sub-ACL as a result of the disclaimer provision as specified in § 648.53(b)(4)(iii).

(6) *ACT for the limited access and LAGC fleets.* The Council shall specify ACTs for the limited access and LAGC fleets for each year covered under the biennial or other framework adjustment. The ACT for the limited access fishery shall be set at a level that has an associated F with a 75-percent probability of remaining below the F associated with ABC/ACL. The LAGC ACT shall be set equal to the LAGC sub-ACL as specified in paragraph (a)(5) of this section.

(7) *AMs.* The Council shall specify AMs for the limited access and LAGC fleets for each year covered under the biennial or other framework adjustment. For the limited access scallop fleet, AMs result in a DAS reduction for each limited access scallop vessel as specified in § 648.53(b)(4)(ii). For the LAGC scallop fleet, AMs result in an IFQ deduction for each vessel issued a LAGC scallop permit as specified in § 648.53(h)(2)(vi).

(d) *Yellowtail flounder sub-ACL.* The Council shall specify the yellowtail flounder sub-ACL allocated to the scallop fishery through the framework adjustment process specified in § 648.90.

(e) *Third-year default management measures.* The biennial framework action shall include default management measures that shall be effective in the third year unless replaced by the measures included in the next biennial framework action. If the biennial framework action is not published in the **Federal Register** with an effective date on or before March 1, in accordance with the Administrative Procedure Act, the third-year measures shall be effective beginning March 1 of each fishing year until the framework adjustment is implemented, or for the entire fishing year if the framework adjustment is completed or is not implemented by NMFS for the third year. The framework action shall specify the measures necessary to address inconsistencies between specifications and allocations for the period after March 1 but before the framework adjustment is implemented for that year. In the case of third-year measures of a biennial adjustment being implemented, if no framework adjustment has been implemented by March 1 of the following year, the measures from the preceding year shall continue to be in effect until replaced by subsequent action.

(f) After considering the PDT's findings and recommendations, or at any other time, if the Council determines that adjustments to, or additional management measures are necessary, it shall develop and analyze appropriate management actions over the span of at least two Council meetings. To address interactions between the scallop fishery and sea turtles and other protected species, such adjustments may include proactive measures including, but not limited to, the timing of Sea Scallop Access Area openings, seasonal closures, gear modifications, increased observer coverage, and additional research. The Council shall provide the public with advance notice of the availability of both the proposals and the analyses, and opportunity to comment on them prior to and at the second Council meeting. The Council's recommendation on adjustments or additions to management measures must include measures to prevent overfishing of the available biomass of scallops and ensure that OY is achieved on a continuing basis, and must come from one or more of the following categories:

(1) Total allowable catch and DAS changes;

(2) Shell height;

(3) Offloading window reinstatement;

(4) Effort monitoring;

(5) Data reporting;

(6) Trip limits;

(7) Gear restrictions;

(8) Permitting restrictions;

(9) Crew limits;

(10) Small mesh line;

(11) Onboard observers;

(12) Modifications to the overfishing definition;
(13) VMS Demarcation Line for DAS monitoring;
(14) DAS allocations by gear type;
(15) Temporary leasing of scallop DAS requiring full public hearings;
(16) Scallop size restrictions, except a minimum size or weight of individual scallop meats in the catch;
(17) Aquaculture enhancement measures and closures;
(18) Closed areas to increase the size of scallops caught;
(19) Modifications to the opening dates of closed areas;
(20) Size and configuration of rotational management areas;
(21) Controlled access seasons to minimize bycatch and maximize yield;
(22) Area-specific trip allocations;
(23) TAC specifications and seasons following re-opening;
(24) Limits on number of area closures;
(25) Set-asides for funding research;
(26) Priorities for scallop-related research that is funded by a TAC or DAS set-aside;
(27) Finfish TACs for controlled access areas;
(28) Finfish possession limits;
(29) Sea sampling frequency;
(30) Area-specific gear limits and specifications;
(31) Modifications to provisions associated with observer set-asides; observer coverage; observer deployment; observer service provider; and/or the observer certification regulations;
(32) Specifications for IFQs for limited access general category vessels;
(33) Revisions to the cost recovery program for IFQs;
(34) Development of general category fishing industry sectors and fishing cooperatives;
(35) Adjustments to the Northern Gulf of Maine scallop fishery measures;
(36) VMS requirements;
(37) Increases or decreases in the LAGC possession limit;
(38) Adjustments to aspects of ACL management;
(39) Adjusting EFH closed area management boundaries or other associated measures; and
(40) Any other management measures currently included in the FMP.

(g) The Council may make recommendations to the Regional Administrator to implement measures in accordance with the procedures described in this section to address gear conflict as defined under § 600.10 of this chapter. In developing such recommendation, the Council shall define gear management areas, each not to exceed 2,700 mi^2 (6,993 km^2), and seek industry comments by referring the matter to its standing industry advisory committee for gear conflict, or to any ad hoc industry advisory committee that may be formed. The standing industry advisory committee or ad hoc committee on gear conflict shall hold public meetings seeking comments from affected fishers and develop findings and recommendations on addressing the gear conflict. After receiving the industry advisory committee findings and recommendations, or at any other time, the Council shall determine whether it is necessary to adjust or add management measures to address gear conflicts and which FMPs must be modified to address such conflicts. If the Council determines that adjustments or additional measures are necessary, it shall develop and analyze appropriate management actions for the relevant FMPs over the span of at least two Council meetings. The Council shall provide the public with advance notice of the availability of the recommendation, the appropriate justification and economic and biological analyses, and opportunity to comment on them prior to and at the second or final Council meeting before submission to the Regional Administrator. The Council's recommendation on adjustments or additions to management measures for gear conflicts must come from one or more of the following categories:
(1) Monitoring of a radio channel by fishing vessels;
(2) Fixed-gear location reporting and plotting requirements;
(3) Standards of operation when gear conflict occurs;
(4) Fixed-gear marking and setting practices;
(5) Gear restrictions for specific areas (including time and area closures);
(6) VMS;
(7) Restrictions on the maximum number of fishing vessels or amount of gear; and
(8) Special permitting conditions.

(h) The measures shall be evaluated and approved by the relevant committees with oversight authority for the affected FMPs. If there is disagreement between committees, the Council may return the proposed framework adjustment to the standing or ad hoc gear conflict committee for further review and discussion.

(i) Unless otherwise specified, after developing a framework adjustment and receiving public testimony, the Council shall make a recommendation to the Regional Administrator. The Council's recommendation must include supporting rationale and, if management measures are recommended, an analysis of impacts and a recommendation to the Regional Administrator on whether to publish the framework adjustment as a final rule. If the Council recommends that the framework adjustment should be published as a final rule, the Council must consider at least the following factors and provide support and analysis for each factor considered:
(1) Whether the availability of data on which the recommended management measures are based allows for adequate time to publish a proposed rule, and whether regulations have to be in place for an entire harvest/fishing season;
(2) Whether there has been adequate notice and opportunity for participation by the public and members of the affected industry, consistent with the Administrative Procedure Act, in the development of the Council's recommended management measures;
(3) Whether there is an immediate need to protect the resource or to impose management measures to resolve gear conflicts; and
(4) Whether there will be a continuing evaluation of management measures adopted following their promulgation as a final rule.

(j) If the Council's recommendation includes adjustments or additions to management measures, and if, after reviewing the Council's recommendation and supporting information:
(1) The Regional Administrator approves the Council's recommended management measures, the Secretary may, for good cause found pursuant to the Administrative Procedure Act, waive the requirement for a proposed rule and opportunity for public comment in the **Federal Register**. The Secretary, in doing so, shall publish only the final rule. Submission of a recommendation by the Council for a final rule does not affect the Secretary's responsibility to comply with the Administrative Procedure Act; or
(2) The Regional Administrator approves the Council's recommendation and determines that the recommended management measures should be published first as a proposed rule, the action shall be published as a proposed rule in the **Federal Register**. After additional public comment, if the Regional Administrator concurs with the Council recommendation, the action shall be published as a final rule in the **Federal Register**; or
(3) The Regional Administrator does not concur, the Council shall be notified, in writing, of the reasons for the non-concurrence.

(k) Nothing in this section is meant to derogate from the authority of the Secretary to take emergency action

under section 305(c) of the Magnuson-Stevens Act.

9. Section 648.56 is revised to read as follows:

§ 648.56 Scallop research.

(a) Annually, the Council and NMFS shall prepare and issue an announcement of Federal Funding Opportunity (FFO) that identifies research priorities for projects to be conducted by vessels using research set-aside as specified in §§ 648.53(b)(3) and 648.60(e), provides requirements and instructions for applying for funding of a proposed RSA project, and specifies the date by which applications must be received. The FFO shall be published as soon as possible by NMFS and shall provide the opportunity for applicants to apply for projects to be awarded for 1 or 2 years by allowing applicants to apply for RSA funding for the first year, second year, or both.

(b) Proposals submitted in response to the FFO must include the following information, as well as any other specific information required within the FFO: A project summary that includes the project goals and objectives, the relationship of the proposed research to scallop research priorities and/or management needs, project design, participants other than the applicant, funding needs, breakdown of costs, and the vessel(s) for which authorization is requested to conduct research activities.

(c) NMFS shall make the final determination as to what proposals are approved and which vessels are authorized to take scallops in excess of possession limits, or take additional trips into Open or Access Areas. NMFS shall provide authorization of such activities to specific vessels by letter of acknowledgement, letter of authorization, or Exempted Fishing Permit issued by the Regional Administrator, which must be kept on board the vessel.

(d) Available RSA allocation shall be 1.25 million lb (567 mt) annually, which shall be deducted from the ABC/ACL specified in § 648.53(a) prior to setting ACLs for the limited access and LAGC fleets, as specified in § 648.53(a)(3)(i) and (a)(4)(i), respectively. Vessels participating in approved RSA projects shall be allocated an amount of scallop pounds that can be harvested in open areas, and an amount of pounds that can be harvested in each access area. In addition to open areas each year, the specific access areas that would have available RSA shall be specified through the framework process and identified in § 648.60. In a year in which a framework adjustment is under review by the Council and/or NMFS, NMFS shall make RSA awards prior to approval of the framework, if practicable, based on total scallop pounds needed to fund each research project. Recipients may begin compensation fishing in open areas prior to approval of the framework, or wait until NMFS approval of the framework to begin compensation fishing within approved access areas.

(e) If all RSA TAC is not allocated in a fishing year, and proceeds from compensation fishing for approved projects fall short of funds needed to cover a project's budget due to a lower-than-expected scallop price, unused RSA allocation can be provided to that year's awarded projects to compensate for the funding shortfall, or to expand a project, rather than having that RSA go unused. NMFS shall identify the process for the reallocation of available RSA pounds as part of the FFO for the RSA program. The FFO shall specify the conditions under which a project that has been awarded RSA could be provided additional RSA pounds as supplemental compensation to account for lower-than-expected scallop price or for expansion of the project, timing of reallocation, and information submission requirements.

(f) A vessels participating in research may harvest RSA through May 31 of the subsequent fishing year if it, combined with other participating vessels, if any, is unable to harvest all of the awarded RSA in the fishing year for which the RSA pounds were awarded.

(g) Vessels conducting research under an approved RSA project may be exempt from crew restrictions specified in § 648.51, seasonal closures of access areas specified in § 648.59, and the restriction on fishing in only one access area during a trip specified in § 648.60(a)(4). The RSA project proposal must list which of these measures for which an exemption is required. An exemption shall be provided by Letter of Authorization issued by the Regional Administrator. RSA compensation fishing trips and combined compensation and research trips are not eligible for these exemptions.

(h) Upon completion of scallop research projects approved pursuant to this section and the applicable NOAA grants review process, researchers must provide the Council and NMFS with a report of research findings, which must include at least the following: A detailed description of methods of data collection and analysis; a discussion of results and any relevant conclusions presented in a format that is understandable to a non-technical audience; and a detailed final accounting of all funds used to conduct the sea scallop research.

10. In § 648.60, paragraph (a)(5)(iii) is removed and reserved, and paragraphs (a)(9), (c)(3), and (e)(1) are revised to read as follows:

§ 648.60 Sea scallop area access program requirements.

(a) * * *

(9) *Reporting.* The owner or operator must submit reports through the VMS, as specified in § 648.10(f)(4)(i).

* * * * *

(c) * * *

(3) The vessel owner/operator must report the termination of the trip prior to entering the access area if the trip is terminated while transiting to the area, or prior to leaving the Sea Scallop Access Area if the trip is terminated after entering the access area, by VMS e-mail messaging, with the following information: Vessel name, vessel owner, vessel operator, time of trip termination, reason for terminating the trip (for NMFS recordkeeping purposes), expected date and time of return to port, and amount of scallops on board in pounds;

* * * * *

(e) * * *

(1) Research set-aside may be harvested in an access area that is open in the applicable fishing year, as specified in § 648.59.

* * * * *

11. Section 648.61 is revised to read as follows:

§ 648.61 EFH closed areas.

(a) No vessel fishing for scallops, or person on a vessel fishing for scallops, may enter, fish in, or be in the EFH Closure Areas described in paragraphs (a)(1) through (6) of this section, unless otherwise specified. A chart depicting these areas is available from the Regional Administrator upon request.

(1) *Western GOM Habitat Closure Area.* The restrictions specified in paragraph (a) of this section apply to the Western GOM Habitat Closure Area, which is the area bounded by straight lines connecting the following points in the order stated:

WESTERN GOM HABITAT CLOSURE AREA

Point	N. lat.	W. long.
WGM4	43°15′	70°15′
WGM1	42°15′	70°15′
WGM5	42°15′	70°00′
WGM6	43°15′	70°00′
WGM4	43°15′	70°15′

(2) *Cashes Ledge Habitat Closure Area.* The restrictions specified in

paragraph (a) of this section apply to the Cashes Ledge Habitat Closure Area, which is the area bounded by straight lines connecting the following points in the order stated:

CASHES LEDGE HABITAT CLOSURE AREA

Point	N. lat.	W. long.
CLH1	43°01′	69°03′
CLH2	43°01′	68°52′
CLH3	42°45′	68°52′
CLH4	42°45′	69°03′
CLH1	43°01′	69°03′

(3) *Jeffrey's Bank Habitat Closure Area.* The restrictions specified in paragraph (a) of this section apply to the Jeffrey's Bank Habitat Closure Area, which is the area bounded by straight lines connecting the following points in the order stated:

JEFFREY'S BANK HABITAT CLOSURE AREA

Point	N. lat.	W. long.
JB1	43°40′	68°50′
JB2	43°40′	68°40′
JB3	43°20′	68°40′
JB4	43°20′	68°50′
JB1	43°40′	68°50′

(4) *Closed Area I Habitat Closure Areas.* The restrictions specified in paragraph (a) of this section apply to the Closed Area I Habitat Closure Areas, Closed Area I—North and Closed Area I—South, which are the areas bounded by straight lines connecting the following points in the order stated:

CLOSED AREA I—NORTH HABITAT CLOSURE AREA

Point	N. lat.	W. long.
CI1	41°30′	69°23′
CI4	41°30′	68°30′
CIH1	41°26′	68°30′
CIH2	41°04′	69°01′
CI1	41°30′	69°23′

CLOSED AREA I—SOUTH HABITAT CLOSURE AREA

Point	N. lat.	W. long.
CIH3	40°55′	68°53′
CIH4	40°58′	68°30′
CI3	40°45′	68°30′
CI2	40°45′	68°45′
CIH3	40°55′	68°53′

(5) *Closed Area II Habitat Closure Area.* The restrictions specified in this paragraph (a) apply to the Closed Area II Habitat Closure Area (also referred to as the Habitat Area of Particular Concern), which is the area bounded by straight lines connecting the following points in the order stated:

CLOSED AREA II HABITAT CLOSURE AREA

Point	N. lat.	W. long.
CIIH1	42°10′	67°20′
CIIH2	42°10′	67°9.3′
CIIH3	42°00′	67°0.5′
CIIH4	42°00′	67°10′
CIIH5	41°50′	67°10′
CIIH6	41°50′	67°20′
CIIH1	42°10′	67°20′

(6) *Nantucket Lightship Habitat Closure Area.* The restrictions specified in paragraph (a) of this section apply to the Nantucket Lightship Habitat Closure Area, which is the area bounded by straight lines connecting the following points in the order stated:

NANTUCKET LIGHTSHIP HABITAT CLOSED AREA

Point	N. lat.	W. long.
NLH1	41°10′	70°00′
NLH2	41°10′	69°50′
NLH3	40°50′	69°30′
NLH4	40°20′	69°30′
NLH5	40°20′	70°00′
NLH1	41°10′	70°00′

(b) *Transiting.* A vessel may transit the EFH Closure Areas as defined in paragraphs (a)(1) through (6) of this section, unless otherwise restricted, provided that its gear is stowed in accordance with the provisions of § 648.23(b). A vessel may transit the CAII EFH closed area, as defined in paragraph (a)(6) of this section, provided there is a compelling safety reason to enter the area and all gear is stowed in accordance with the provisions of § 648.23(b).

12. In § 648.62, paragraph (b)(3) is added to read as follows:

§ 648.62 Northern Gulf of Maine (NGOM) scallop management area.

* * * * *

(b) * * *

(3) If the TAC specified in paragraph (b)(1) of this section is exceeded, the amount of NGOM scallop landings in excess of the TAC specified in paragraph (b)(1) of this section shall be deducted from the NGOM TAC for the subsequent fishing year, as soon as practicable, once scallop landings data for for the NGOM fishery is available.

* * * * *

13. Section 648.64 is added to subpart D to read as follows:

§ 648.64 Yellowtail Flounder Sub-ACLs and AMs for the Scallop Fishery.

(a) As specified in § 648.55(d), and pursuant to the biennial framework adjustment process specified in § 648.90, the scallop fishery shall be allocated a sub-ACL for the Georges Bank and Southern New England/Mid-Atlantic stocks of yellowtail flounder. The sub-ACL for the 2011 through 2013 fishing years are as follows:

(1) *2011.* To be determined.

(2) *2012.* To be determined.

(3) *2013.* To be determined.

(b) *Georges Bank Accountability Measure.* (1) If the Georges Bank yellowtail flounder sub-ACL for the scallop fishery is exceeded, the area defined by the following coordinates shall be closed to scallop fishing by vessels issued a limited access scallop permit for the period of time specified in paragraph (b)(2) of this section:

GEORGES BANK YELLOWTAIL CLOSURE

Point	N. lat.	W. long.
GBYT AM 1	41°50′	66°51.94′
GBYT AM 2	40°30.75′	65°44.96′
GBYT AM 3	40°30′	66°40′
GBYT AM 4	40°40′	66°40′
GBYT AM 5	40°40′	66°50′
GBYT AM 6	40°50′	66°50′
GBYT AM 7	40°50′	67°00′
GBYT AM 8	41°00′	67°00′
GBYT AM 9	41°00′	67°20′
GBYT AM 10	41°10′	67°20′
GBYT AM 11	41°10′	67°40′
GBYT AM 12	41°50′	67°40′
GBYT AM 1	41°50′	66°51.94′

(2) *Duration of closure.* The Georges Bank yellowtail flounder accountability measure closed area shall remain closed for the period of time, not to exceed one fishing year, as specified for the corresponding percent overage of the Georges Bank yellowtail flounder sub-ACL, as follows:

(i) For years when the Closed Area II Sea Scallop Access Area is open, the closure duration shall be:

Percent overage of YTF sub-ACL	Length of closure
1	March through May.
2–24	March through June.
25–38	March through July.
39–57	March through August.
58–63	March through September.
64–65	March through October.
66–68	March through November.
69	March through December.
70 and higher	March through February.

(ii) For fishing years when the Closed Area II Sea Scallop Access Area is

closed to scallop fishing, the closure duration shall be:

Percent overage of YTF sub-ACL	Length of closure
1	March through May.
2	March through June.
3	March through July.
4–5	March through August.
6 and higher	March through February.

(c) *Southern New England/Mid-Atlantic Accountability Measure.* (1) If the Southern New England/Mid-Atlantic yellowtail flounder sub-ACL for the scallop fishery is exceeded, the area defined by the following coordinates shall be closed to scallop fishing by vessels issued a limited access scallop permit for the period of time specified in paragraph (c)(2) of this section:

SOUTHERN NEW ENGLAND YELLOWTAIL CLOSURE

Point	N. lat.	W. long.
SNEYT AM 1	41°28.4′	71°10.25′
SNEYT AM 2	41°28.57′	71°10′
SNEYT AM 3	41°20′	71°10′
SNEYT AM 4	41°20′	70°50′
SNEYT AM 5	41°20′	70°30′
SNEYT AM 6	41°18′	70°15′
SNEYT AM 7	41°17.69′	70°12.54′
SNEYT AM 8	41°14.73′	70°00′
SNEYT AM 9	39°50′	70°00′
SNEYT AM 10	39°50′	71°00′
SNEYT AM 11	39°50′	71°40′
SNEYT AM 12	40°00′	71°40′
SNEYT AM 13	40°00′	73°00′
SNEYT AM 14	40°41.23′	73°00′
SNEYT AM 15	41°00′	71°55′
SNEYT AM 16	41°00′	71°40′
SNEYT AM 17	41°20′	71°40′
SNEYT AM 18	41°21.15′	71°40′

(2) *Duration of closure.* The Southern New England/Mid-Atlantic yellowtail flounder accountability measure closed area shall remain closed for the period of time, not to exceed one fishing year, as specified for the corresponding percent overage of the Southern New England/Mid-Atlantic yellowtail flounder sub-ACL, as follows:

Percent overage of YTF sub-ACL	Length of closure
1–2	March.
3–5	March and April.
6–8	March through May.
9–12	March through June.
13–14	March through July.
15	March through August.
16	March through September.
17	March through October.
18	March through November.
19	March through January.
20 and higher	March through February.

(d) *Exemption for LAGC IFQ vessels.* Vessels issued an LAGC IFQ permit and fishing under the LAGC IFQ scallop fishery shall be exempt from the closure(s) specified in paragraphs (b) and (c) of this section. Yellowtail bycatch by such vessels shall be counted against the applicable yellowtail flounder sub-ACL specified in paragraph (a) of this section.

(e) *Process for implementing the AM.* On or about January 15 of each year, the Regional Administrator shall determine whether a yellowtail flounder sub-ACL was exceeded, or is projected to be exceeded, by scallop vessels prior to the end of the scallop fishing year ending on February 28/29. The determination shall include the amount of the overage or projected amount of the overage, specified as a percentage of the overall sub-ACL for the applicable yellowtail flounder stock, in accordance with the values specified in paragraph (a) of this section. The Regional Administrator shall implement the AM in accordance with the APA and notify owners of limited access scallop vessels by letter identifying the length of the closure and a summary of the yellowtail flounder catch, overage, and projection that resulted in the closure.

(f) *AM for the 2011 fishing year.* AMs shall be applied in the 2011 fishing year for any overage of the applicable yellowtail flounder stock's total ACL in the 2010 fishing year in accordance with the APA. If a 2010 yellowtail flounder subcomponent catch allocation was exceeded in the 2010 fishing year, and that overage caused the total yellowtail flounder ACL for that stock specified in accordance with § 648.90(a)(4) and § 648.90(a)(6) to be exceeded, the Regional Administrator shall implement the yellowtail flounder AM closure for the area, as defined in paragraph (b)(1) or (c)(1) of this section as soon as practicable after the effective date of this regulation. The closure shall be effective on the date specified by the Regional Administrator and the area shall remained closed for a period of time equal to the period of time specified in paragraphs (b)(2)(i)(A), (b)(2)(i)(B), or (c)(2) of this section, as applicable. For example, if the overage is 3 to 5 percent for the Southern New England/Mid-Atlantic yellowtail stock, and the closure is effective beginning July 15, 2011, the closure shall remain in effect through September 15, 2011, a 2-month period equivalent to the March–April, 2-month closure specified in paragraph (c)(2) of this section.

[FR Doc. 2011–8444 Filed 4–8–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 76, No. 69
Monday, April 11, 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

Submission for OMB Review; Comment Request

April 5, 2011.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Marketing Service

Title: Tobacco Reports.

OMB Control Number: 0581–0004.

Summary of Collection: The Tobacco Statistics Act of 1929 (7 U.S.C. 501–508) provides for the collection and publication of statistics of tobacco by USDA with regard to quantity of leaf tobacco in all forms in the United States and Puerto, owned by or in the possession of dealers, manufacturers, growers' cooperative associations, and others with the exception of the original growers of the tobacco. The information furnished under the provisions of this Act shall be used only for statistical purposes for which it is supplied.

Need and Use of the Information: The basic purpose of the information collection is to ascertain the total supply of unmanufactured tobacco available to domestic manufacturers and to calculate the amount consumed in manufactured tobacco products. This data is also used for the calculation of production quotas for individual types of tobacco and for price support calculations. Without the information USDA would not be able to disseminate marketing information as directed and authorized in the Act.

Description of Respondents: Business or other for-profit.

Number of Respondents: 57.

Frequency of Responses: Reporting: Quarterly.

Total Burden Hours: 204.

Agricultural Marketing Service

Title: Regulations Governing the Voluntary Grading of Shell Eggs.

OMB Control Number: 0581–0128.

Summary of Collection: The Agricultural Marketing Act of 1946 (60 Stat. 1087–1091, as amended; 7 U.S.C. 1621–1627) (AMA) directs and authorizes the Department to develop standards of quality, grades, grading programs, and services to enable a more orderly marketing of agricultural products so trading may be facilitated and so consumers may be able to obtain products graded and identified under USDA programs. The Agricultural Marketing Service (AMS) carries out regulations, which provide a voluntary program for grading shell eggs on the basis of U.S. standards, grades, and weight classes. In addition, the shell egg industry and users of the products have requested that other types of voluntary services be developed and provided under these regulations. This program is voluntary where respondents would need to request or apply for the specific service they wish.

Need and Use of the Information: Only authorized representatives of the USDA use the information collected. The information is used to administer, conduct and carry out the grading services requested by the respondents. If the information were not collected, the agency would not be able to provide the voluntary grading service authorized and requested by congress, provide the types of services requested by industry, administer the program, ensure properly grade-labeled products, calculate the cost of the service or collect for the cost furnishing service.

Description of Respondents: Business or other for profit.

Number of Respondents: 600.

Frequency of Responses: Reporting: On occasion; Semi-annually; Monthly; Annually; Other (daily).

Total Burden Hours: 5,254.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–8490 Filed 4–8–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

April 5, 2011.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection

techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Utilities Service

Title: Public Television Digital Transition Grant Program

OMB Control Number: 0572–0134

Summary of Collection: The Omnibus Appropriations Act (Pub. L. 108–7) provided grant funds in the Distance Learning and Telemedicine Grant Program budget, the Consolidated Appropriations Act (Pub. L. 108–199) and the Consolidated Appropriations Act, 2005 (Pub. L. 108–447) provided additional funds for public broadcasting systems to meet the digital transition. As part of the nation's transition to digital television, the Federal Communications Commission (FCC) required all television broadcasters to initiate the broadcast of a digital television signal and to cease analog television broadcasts on February 18, 2009. While stations must broadcast its main transmitter signal in digital, many rural stations often have translators serving small or isolated areas and some of these have not completed the transition to digital or fully converted its production and studio equipment to digital. Because the FCC deadline did not apply to translators, they are allowed to continue broadcasting in analog. The digital transition also created some service gaps where households receiving an analog signal cannot receive a digital signal. For these reasons the grant program has continued past the FCC digital transition deadline of June 2009. The Rural Utilities Service (RUS) will develop and issue requirements for the grant program to finance the conversion of television services from analog to digital broadcasting for public television stations serving rural areas.

Need and Use of the Information: Applicants will submit grant applications to RUS for review. The information will consist of the following: Standard Form (SF) 424, "Application for Federal Assistance, executive summary, evidence of eligibility and compliance with other Federal statutes and any other supporting documentation. RUS will use the information to score and rank applications for funding. Scoring will consist of three categories: Rurality; per capita income; and special disadvantaging factors facing the station's transition plans. If this information is not collected, there would be no basis for awarding grant funding.

Description of Respondents: Not-for-profit institutions; State, Local or Tribal Government

Number of Respondents: 40

Frequency of Responses: Reporting: On occasion

Total Burden Hours: 950

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–8491 Filed 4–8–11; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Davy Crockett National Forest Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of Public Meeting, Davy Crockett National Forest Resource Advisory Committee.

SUMMARY: In accordance with the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. L. 106–393), [as reauthorized as part of Public Law 110–343] and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of Agriculture, Forest Service, Davy Crockett National Forest Resource Advisory Committee (RAC) meeting will meet as indicated below.

DATES: The Davy Crockett National Forest RAC meeting will be held on May 5, 2011.

ADDRESSES: The Davy Crockett National Forest RAC meeting will be held at the Davy Crockett Ranger Station located on State Highway 7, approximately one-quarter mile West of FM 227 in Houston County, Texas. The meeting will begin at 6 p.m. and adjourn at approximately 8 p.m. A public comment period will begin at 7:45 p.m.

FOR FURTHER INFORMATION CONTACT: Gerald Lawrence, Jr., Designated Federal Officer, Davy Crockett National Forest, 18551 State Hwy. 7 E., Kennard, TX 75847: Telephone: 936–655–2299 ext. 225 or e-mail at: *glawrence@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The Davy Crockett National Forest RAC proposes projects and funding to the the Secretary of Agriculture under Section 203 of the Secure Rural Schools and Community Self Determination Act of 2000, (as reauthorized as part of Public Law 110–343). The purpose of the May 5, 2011 meeting is the following: proposal and approval of new Title II and Stewardship proposals, deadlines for obligating funding, and current project status. These meetings are open to the public. The public may present written comments to the RAC. Each formal RAC meeting will also have time, as identified above, persons wishing to comment and time available, the time for individual oral comments may be limited.

Gerald Lawrence, Jr.,

Designated Federal Officer, Davy Crockett National Forest RAC.

[FR Doc. 2011–8503 Filed 4–8–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2005–0044]

Not Applying the Mark of Inspection Pending Certain Test Results

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice; Request for comment.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing its intention to change its procedures and withhold a determination as to whether meat and poultry products are not adulterated, and thus eligible to enter commerce, until all test results that bear on the determination have been received. Inspection program personnel periodically sample products for adulterants to verify an establishment's regulatory compliance. The Agency's practice has been to allow these products to bear the mark of inspection, and to enter commerce, even though the test results have not been received. FSIS has asked, but has not required, official establishments to maintain control of products represented by a sample pending test results.

Because establishments, including official import inspection

establishments, are not consistently maintaining control of product, despite FSIS's request that they do so, adulterated product is entering commerce. Therefore, FSIS is announcing its tentative determination not to apply the mark of inspection until negative results are available and received for any testing for adulterants conducted by the Agency. FSIS invites comments on this proposed change in policy and procedures. FSIS will evaluate comments received in response to this notice. In a subsequent **Federal Register** notice, FSIS will respond to the comments it receives. FSIS will make any appropriate changes to the policy and procedures based on comments, and in that subsequent **Federal Register** notice will announce the effective date of the new policy.

DATES: The Agency must receive comments by July 11, 2011.

ADDRESSES: Comments may be submitted by either of the following methods:

Federal eRulemaking Portal: This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov*. Follow the online instructions at that site for submitting comments.

Mail, including diskettes or CD–ROMs, and hand-delivered or courier-delivered items: Send to Docket Clerk, U.S. Department of Agriculture (USDA), FSIS, Room 2–2127, George Washington Carver Center, 5601 Sunnyside Avenue, Mailstop 5474, Beltsville, MD 20705–5474.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2006–0044. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov*.

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

All comments submitted in response to this proposal, as well as background information used by FSIS in developing this document, will be available for public inspection in the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, Director, Policy Issuances Division, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, Room 6065, South Building, 1400 Independence Ave., SW., Washington, DC 20250–3700; telephone (202) 720–0399; fax (202) 690–0486.

SUPPLEMENTARY INFORMATION:

Background

FSIS is responsible for protecting the nation's meat and poultry supply by making sure that it is safe, wholesome, not adulterated, and properly labeled and packaged. FSIS operates under authority provided by the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*) (the Acts). These statutes prohibit anyone from selling, transporting, offering for sale or transportation, or receiving for transportation in commerce, any adulterated or misbranded meat or poultry products (21 U.S.C. 610 and 458).

There are nine parts to the definition of "adulterated" in the FMIA and eight in the PPIA. Most relevant to product testing are subparagraphs (1) and (2)(A) of 21 U.S.C. 601(m) and 453(g). 21 U.S.C. 601(m)(1) and 453(g)(1) provide that product is adulterated if it bears or contains any poisonous or deleterious substance that may render it injurious to health. Therefore, a ready-to-eat meat or poultry product found positive for a pathogen, or a raw ground or other raw non-intact beef product found positive for *E. coli* O157:H7, is adulterated under these statutory provisions. In addition, if food contact surfaces are found positive for *Listeria monocytogenes,* ready-to-eat product produced on these surfaces is adulterated under 9 CFR 430.4(a). 21 U.S.C. 601(m)(2)(A) and 453(g)(2)(A) provide that a meat or poultry product is adulterated if it bears or contains any added poisonous or added deleterious substance by reason of administration of any substance to the live animal. Therefore, if FSIS tests carcasses for residues of animal drugs that have been administered to the live animal and finds unacceptable levels, the product would be adulterated under these statutory provisions. FSIS testing conducted for pathogens and residues that would adulterate product under the provisions above are the primary focus of the actions outlined in this notice.

In addition, the term "adulterated" includes product from which any valuable constituent has been in whole or in part omitted or abstracted; for which any substance has been substituted; or to which any substance has been added or mixed or packed so as to increase its bulk or weight, reduce its quality or strength, or make it appear better or of greater value than it is (21 U.S.C. 601(m)(8) and 453(g)(8)). This type of adulteration is referred to as "economic adulteration". FSIS testing that indicates product is economically adulterated would be subject to the actions outlined in this document. However, because FSIS conducts minimal testing for economic adulteration, this notice does not elaborate on such testing.

The FMIA and PPIA also provide that meat and poultry products must bear an official inspection legend (21 U.S.C. 601(n)(12) and 453(h)(12)) in order to enter commerce. FSIS must be able to determine that product is not adulterated in order to apply the mark of inspection (21 U.S.C. 606 and 457(a)). FSIS inspection personnel conduct a range of activities to determine whether product is adulterated (9 CFR 417.8). Among these activities is testing for adulterants.

FSIS's practice is to allow meat and poultry products to be packaged and labeled with the mark of inspection pending receipt of results of tests done by FSIS. Currently, FSIS requests, but does not require, that establishments maintain control of all product represented by any samples taken until the Agency receives the results of the sampling. Establishments are not required to maintain such control and may ship product before test results are available. If the establishment introduces the product into commerce, and the test result for that product is positive for a pathogen or other adulterant, FSIS will request that the establishment recall the product. If the establishment refuses to recall the product, FSIS will move to detain and, if necessary, seize it.

Reason for This Notice

The Agency has questioned for some time whether it should continue to allow product to leave the establishment, albeit subject to a recall, before relevant test results are received. On December 12, 2002, FSIS held a public meeting in Washington, DC, to both inform the public about the recall process and to solicit recommendations on recalls from establishments whose product is subject to recall, from public health agencies, and from those who represent the public health interests of consumers. The agenda for this meeting included a discussion on withholding the decision to apply the mark of inspection until FSIS test results are available. Presenters and commenters raised concerns about the effect such a policy would have on small and very small establishments. FSIS took these comments into account in the cost

benefit analysis of this policy discussed below.

On June 2–3, 2004, FSIS presented a subcommittee of the National Advisory Committee on Meat and Poultry Inspection (NACMPI) with the following question for discussion: Should FSIS delay a decision on granting the mark of inspection to product that has been tested by FSIS for the presence of an adulterant until it has received the results of the testing? The committee made a number of recommendations to the Agency but was unable to come to consensus on the question of not applying the mark of inspection until FSIS verification test results are available. The committee recommended that the Agency continue to encourage plants to develop a plan for holding products when they are sampled for adulterants. The committee further recommended that FSIS provide guidance to plants regarding holding products, and that FSIS work with the industry on strategies to mitigate some of the practical problems associated with holding products.

In June 2005, the Agency again requested advice from the NACMPI. The Agency asked the committee for suggestions on the most effective way to provide guidance to industry on holding product that has been tested for pathogens by FSIS, especially to small and very small plants. The Committee considered the issue and its impact on small and very small establishments and made a number of recommendations to the Agency. The Committee recommended: (a) That FSIS refrain from issuing any guidance at that time but instead review a draft of voluntary guidelines that representatives from across the meat and poultry industry had written to ensure that they conform to applicable laws, regulations, and policies; (b) that industry issue its guidelines after FSIS review and work with the Agency to ensure widespread distribution of these guidelines, especially to small and very small plants; and (c) that FSIS monitor the effectiveness of the industry guidance on an ongoing basis and take appropriate actions, ranging from recommendations for improving the guidelines to formal Agency action.

In 2005, the Agency carefully considered the committee's recommendations and decided not to pursue a change in policy that would require establishments to hold product pending FSIS test results and to await the outcome of the industry-issued voluntary guidance on best practices for maintaining control of product while awaiting FSIS' test results. The Agency made this decision because of the difficulties a policy change could present for some small and very small establishments.

In September 2005, a coalition of trade associations issued a guidance document, "Industry Best Practices for Holding Tested Products." This best practices document included, among many other things, suggestions to aid small and very small establishments in planning for and maintaining control of product pending FSIS pathogen test results. FSIS assisted the trade associations in disseminating the guidance document to all official establishments.

The Agency conducted an initial assessment of the voluntary guidance document's effectiveness and presented its findings to the NACMPI at its meeting on May 23–24, 2006. The assessment examined FSIS test data for the calendar years 2003 through 2005 and the first quarter of 2006 and grouped the data by establishment size and pathogen. This initial assessment found that in the first quarter of 2006, establishments were holding between approximately 80% and 100% of all meat and poultry products until receiving Agency test results, and that establishments of all sizes were increasingly holding more product pending receipt of Agency test results every year between 2003 and 2006, with large establishments holding almost all tested product every year since 2003. The brief, 9-month period from the issuance of the industry guidelines was not sufficient for the Agency to ascertain the effectiveness of these guidelines, however.[1] The Agency continues to monitor verification test results and the circumstances that result in recalls. Based on evaluation of 2007–2009 data, the Agency has noted that establishments releasing product into commerce before receiving test results continues to be a problem.

In 2007 there were 14 Class I recalls as a result of FSIS testing; in 2008 there were 19 Class I recalls; and in 2009 there were 11 Class I recalls. In 2007 seven of the Class I recalls were for *E. coli* O157:H7 and seven for *Listeria monocytogenes* (Lm). In 2008, seven of the Class I recalls were for *E. coli* O157:H7 and twelve for Lm. In 2009, eight of the Class I recalls were for *E. coli* O157:H7 and three were for Lm. As discussed in the cost and benefits discussion below, one such recall was associated with two illnesses. There were no recalls for Salmonella in Ready-to-Eat (RTE) product between 2007–2009. These recalls occurred because establishments that produced the product that tested positive released the product into commerce while test results were pending. Even though the number of Class I recalls went down in 2009 compared to 2007 and 2008, there is still product entering commerce before test results are received. FSIS is currently analyzing the 2010 recall data. 2010 data show the proportion of the industry (by size) that holds product until test results are received to be similar to those from the 2006 study.

These findings have led the Agency to conclude that despite voluntary compliance efforts, adulterated products are continuing to enter commerce and that establishments' failure to hold or maintain control of product pending FSIS test results endangers public health. Not allowing product to move into commerce until the results of any testing for adulterants done by FSIS become available would eliminate this concern.

In June 2008, the American Meat Institute (AMI) sent a letter to the Under Secretary for Food Safety stating that the organization supported the Agency requiring companies to hold or control product tested by FSIS until the results are known. AMI also stated that it did not support Agency retention of any FSIS tested product. Rather, AMI supported requiring a company to utilize its own, effective control measures to ensure the product is not used or distributed for sale before the test results are known.

On October 19, 2009, AMI sent another letter to Secretary of Agriculture Vilsack again stating that the organization supported a policy that would require companies to hold or control product tested by FSIS until the test results are known.

In March of 2010, the USDA Office of Inspector General issued an audit report of the FSIS National Residue Program for Cattle. In that audit, the OIG recommended that establishments should not be allowed to release potentially adulterated product before residue test results are confirmed. The proposed change in policies and procedures will address that recommendation.

FSIS does have a current policy whereby carcasses tested for bovine spongiform encephalopathy (BSE) must be controlled by the establishment and are not permitted to enter commerce until test results are received. FSIS implemented this policy in response to the first discovery of a BSE-positive cow in December 2003. FSIS issued a **Federal Register** notice on January 12,

[1] A summary of the Agency's analysis of the industry guidelines is available electronically at *http://www.fsis.usda.gov/OPPDE/NACMPI/May2006/Test_and_Hold_Report_NACMPI.pdf.*

2004 (69 FR 1892), announcing that the Agency would not apply the mark of inspection to any animal carcass tested for BSE until after the Agency determined that the test results were negative. This policy, which continues in effect, is consistent with policy and procedures that FSIS has tentatively decided to implement, as discussed in the next section.

New Policy

For the reasons discussed above, FSIS intends to implement a new policy with respect to the application of the mark of inspection that would in effect require establishments to maintain control of product tested for adulterants by FSIS and not allow such products to enter commerce until negative test results are received. Therefore, should FSIS implement this new policy, the policy would cover non-intact raw beef product or intact raw beef product intended for non-intact use that is tested for *E. coli* O157:H7. Also, the policy would cover any ready-to-eat products tested for *Listeria monocytogenes, E. coli* O157:H7, or Salmonella s. Similarly, this policy would cover ready-to-eat product that passed over food contact surfaces that have been tested for the presence of *Listeria monocytogenes* and *Salmonella,* pending receipt of negative test results. This policy would not cover raw meat or poultry products tested for *Salmonella* or other pathogens that FSIS has not designated as adulterants in those products.

Should FSIS implement this new policy, it would also apply to livestock carcasses subject to FSIS testing for such veterinary drugs as antibiotics, sulfonamides, or avermectins or the feed additive carbadox. Because of the significant number of poultry carcasses in a lot, the economic effect of holding such a lot, and because historically, FSIS has not seen residue problems in poultry tested for residues, such product would not need to be held from commerce pending negative test results.

FSIS requests comments on whether the policy that product cannot be released into commerce before negative test results are receive should also apply to tests conducted by establishments.

New Procedures

FSIS recognizes that the mark of inspection is pre-printed on the package label of many products, and that it is most efficient to allow the product to be packaged and labeled with the printed mark of inspection as part of the production process. FSIS intends to continue to allow meat and poultry establishments to package and label products sampled and tested for adulterants with the mark of inspection pending negative Agency test results, but, if FSIS adopts this change, these products will not be able to enter commerce until negative test results become available. The pre-shipment review of records associated with the production lot will not be complete without the pending test results. Under this new policy, FSIS inspection program personnel will continue to provide each establishment with notification before sampling product or food contact surfaces to allow the establishment time to hold product that is represented by the sample.

Consistent with current policies, should FSIS implement this new policy, establishments would be able to move product to locations other than the production facility so long as the establishment maintains control of the product and maintains the integrity of the lot under company seal. If the establishment moves the product to other locations, it would not be able to transfer ownership of the product until negative test results become available. Inspection program personnel would notify the establishment when product could move into commerce based on negative FSIS test results.

Considerations for Holding Product Tested for Pathogens or Residues

For *E. coli* O157:H7, prior to FSIS's sampling, inspection program personnel inform the establishment that it is responsible for defining the sampled lot. Under current policy and under this new policy, some factors or conditions that the establishment should consider in defining the sampled lot include any scientific, statistically based sampling programs for *E. coli* O157:H7 that the establishment uses to distinguish between segments of production; Sanitation Standard Operating Procedures (Sanitation SOPs) or any other prerequisite programs used to control the spread of *E. coli* O157:H7 cross-contamination between raw beef components during production; processing interventions that limit or control *E. coli* O157:H7 contamination; and the use of beef manufacturing trimmings and other raw ground beef components or rework carried over from one production period to another.

FSIS does not recognize "clean-up to clean-up" alone as a supportable basis for distinguishing one portion of production of raw beef product from another portion of production. Rather, establishments should consider whether the same source materials are used during different production periods.

For testing of ready-to-eat product or contact surfaces for *Listeria monocytogenes* or for testing such product for *Salmonella,* inspection program personnel also inform the establishment that it is responsible for determining the lot. In contrast to *E. coli* O157:H7, for these types of testing, the sampled lot is generally considered the ready-to-eat product that is produced from clean-up to clean-up because the product typically undergoes consistent cooking and other lethality procedures during the production period.

For livestock carcasses subject to scheduled FSIS residue testing or residue testing conducted by the establishment or other entity, establishments would need to hold the sampled carcasses under this new policy. For this testing, the carcasses would not receive the mark of inspection until negative test results are received.

Consistent with current policy, under this new policy, exporting countries would continue to need to complete all forms of inspection (including receiving lab results) before applying the mark of inspection and signing a certificate for export of products to the United States. Also consistent with current policy, the foreign countries would continue to certify on official health certificates how much product in a shipment represents the lot based on the product and its processing method (e.g., HACCP Processing categories, Product Species).

Comments Regarding This New Policy

The National Meat Association (NMA), representing seven other trade associations: The American Association of Meat Processors (AAMP), the Eastern Meat Packers Association (EMPA), the National Cattlemen's Beef Association (NCBA), the National Turkey Association (NTA), the North American Meat Processors Association (NMPA), and the Southwest Meat Association (SMA), submitted a letter in anticipation of this notice to FSIS.

NMA raised a number of issues about the prospective adoption of a revised FSIS hold and test policy. The letter asked how FSIS would address the issue of products with a shelf life less than the amount of time required to conduct the analysis. The letter also asked how small and very small establishments that produce product for same-day delivery would be affected by this policy, and how FSIS could justify economic impacts such as interruption of business and loss of customers.

FSIS recognizes the concern that some very small establishments might lose some product because of a short shelf life, as well as experience some inability

to satisfy customer orders, resulting in a short-term disruption in business activities. FSIS appreciates the concern. However, the Agency believes the new policy would not cause significant loss of product because FSIS inspection program personnel provide establishments with notification before they collect samples to provide the establishment time to plan accordingly. Furthermore, establishments may produce small production lots when they are subject to FSIS testing. In addition, many establishments already maintain control of product pending test results. FSIS welcomes comments on additional ways establishments and FSIS can address this concern. Also, FSIS intends to provide outreach activities for small and very small establishments, such as Webinars or Podcasts, as necessary. FSIS will also make compliance guidelines available.

In addition, NMA asked how FSIS will ensure that all products that should be held have indeed been held. If the policy is adopted after evaluating the comments, FSIS will issue necessary instructions to its field force on how to verify that establishments are maintaining control of product pending test results for adulterants. Similarly, FSIS would develop Agency procedures to promptly inform the establishment that product is not adulterated and thus may enter commerce when negative results become available.

NMA also noted that some recalls occur because the establishment did not properly hold all products associated with a tested sample. FSIS acknowledges that this new policy, if implemented as planned, will not guarantee establishments correctly identify the sampled lot. However, FSIS will continually evaluate the policy to provide updated instructions to inspection program personnel and guidance to establishments so that lots sampled for pathogens by FSIS do not enter commerce.

Finally, the letter asked whether FSIS intended to mandate 100% testing at establishments that do not currently test but receive tested trim, such as raw ground beef at grinders. FSIS does not require such testing and does not intend to require such testing in the future. However, all establishments are required to conduct on-going verification activities to ensure that their HACCP plans are effectively implemented (9 CFR 417.4(a)(2)).

I. Expected Benefits of the Action

The Agency expects benefits from this policy to accrue to consumers, Government and to industry.

If an establishment fails to hold a product when FSIS tests for a pathogen, and the test is positive, the establishment will be asked to recall the product. Because the pathogens for which FSIS does testing represent an immediate threat to human health, the recall would be classified as a Class I recall.[2] Table 1 shows Class I recalls (2007–2009) for FSIS testing that are included in the universe for the Test and Hold policy analysis. These recalls were for *E. coli* O157:H7, *Listeria monocytogenes,* and *Salmonella* in RTE product. In 2007 there were 14 Class I recalls as a result of FSIS testing; in 2008 there were 19 Class I recalls; and in 2009 there were 11 Class I recalls. In 2007 seven of the Class I recalls were for *E. coli* O157:H7 and seven for *Listeria monocytogenes* (*Lm*). In 2008, seven of the Class I recalls were for *E. coli* O157:H7 and twelve for *Listeria monocytogenes* (*Lm*). In 2009, eight of the Class I recalls were for *E. coli* O157:H7 and three were for *Listeria monocytogenes* (*Lm*). There were no recalls for Salmonella in Ready-to-Eat (RTE) product between 2007–2009 for FSIS testing.

TABLE 1—CLASS 1 RECALLS INCLUDED IN TEST AND HOLD POLICY UNIVERSE DERIVED FROM FSIS TESTS

[2007–2009]

Year and type	*E. coli* O157:H7	*Listeria monocytogenes*	*Salmonella*	*Total*
2007:				
FSIS	7	7	0	14
2008:				
FSIS	7	12	0	19
2009:				
FSIS	8	3	0	11
Total	22	22	0	44

Note: Data source FSIS recall division.

If the combination of industry and government costs per recall on average is $1 million,[3] then the total annual cost of FSIS recalls could be on average as high as $15 million per year.[4]

Considering costs to retailers as well as manufacturers and State, local, and Federal authorities, a class I recall may cost as much as $3 million to $5 million.[5] Using a conservative estimate, if the actual cost of a recall for industry and government combined is closer to $3 million than $5 million,[6] then the annual cost of the recall (the benefit of avoiding these recalls) could be as high as $44.0 million annually. FSIS requests comment on these estimates and the total costs to industry and government associated with USDA Class I recalls.

In addition to the cost savings attributed to avoiding recalls described above, firms generally suffer a loss of sales, at least temporarily, following a Class I or Class II recall. This alone does not result in a social cost, but rather a social transfer, as other firms will step

[2] There are three classes of recalls. *Class I:* A health hazard situation where there is a reasonable possibility that the use of the product will cause serious, adverse health consequences; *Class II:* A health hazard situation where there is a remote probability of adverse health consequences from the use of the product; and *Class III:* A situation where the use of the product will not cause adverse health consequences.

[3] "Preliminary Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis of the Proposed Rules to Ensure the Safety of Juice and Juice Products" (63 FR 24258; May 1, 1998).

[4] The annual figure of $15 million is derived by summing the total number of FSIS recalls for 2007–2009 from Table 1, then multiplying the total by $1 million which is the average cost per recall for industry and government. That figure is then divided by 3 to get the annual amount. (14 + 19 + 11 = 44 * 1M = 44M/3 = $14.7 M per year).

[5] "Preliminary Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis of the Proposed Rules to Ensure the Safety of Juice and Juice Products" (63 FR 24258; May 1, 1998).

[6] Ibid.

forward to capture sales lost by the recalling firm. However, in addition to the resources invested in recalling the product, the recalling firm may incur additional advertising costs to recapture the loss of sales plus the flow of future sales, which is a social cost. Additionally, there can be a loss of reputation for the manufacturer and the brand associated with recalls that may affect future sales.

Consumer

FSIS expects the consumer to benefit from: (1) Reduced incidence of adulterated product being released into commerce, (2) fewer recalls resulting in higher confidence and acceptability of products, and (3) lower levels of illness. This new policy will lead to increased consumer confidence and acceptance of product through reduced recalls and negative press.[7]

Government

FSIS expects there to be a reduction in the number of recalls, and, therefore, the Agency expects to benefit from lower Agency costs for recalls and recovery of adulterated product because of: (1) Reduced inspection program personnel activities at Federal establishments (2) reduced overtime hours for FSIS staff, and (3) reduced staff travel to establishments after recalls to conduct Food Safety Assessments (FSA) and recall effectiveness checks. These expenses would include air, train, or car travel; lodging; and per diem expenses for meals. In addition, FSIS should have less need to disseminate information about food recalls through press releases and recall releases.

Industry

Under this policy change, the meat and poultry processing and slaughter industries will benefit from fewer recalls and negative press. As the number of recalls declines, there will likely be: (1) An increase in consumers' confidence, (2) reduced costs for recalls, (3) greater consumer acceptance of products.

Initially, preventing adulterated product from going into commerce should reduce operating costs. Operating costs will be lower because companies will be less likely to have a recall and experience the adverse impacts to business reputation as well as the product loss associated with a recall. Avoiding adverse impacts on business reputation is an indirect benefit.

Imported Product

There were 9 Class I recalls of FSIS tested imported product for the 2007–2009 (Table 1) time period, 4 for *E. coli* O157:H7 and 5 for *Listeria monocytogenes.* One recall occurred in 2007 for *Lm* and eight in 2008 (4 for *E. coli* O157:H7 and 4 for *Lm*). There are no recalls from FSIS testing for imported product in 2009. All of these recalls are included within the universe described in Table 1 and therefore are included in the Benefits section within this analysis.

Human Health Benefits

Introduction

The Centers for Disease Control and Prevention (CDC) has estimated that Shiga toxin-producing *E. coli* O157:H7 infections cause 63,000 illnesses annually in the United States, resulting in more than 2,138 hospitalizations and 20 deaths.[8] Economic Research Service (ERS) estimates that the annual economic cost of illness caused by *E. coli* O157:H7 is $478 million (in 2009 dollars) for all cases, not just for foodborne cases.

The occurrence of recalls demonstrates that pathogens have been present on raw meat and poultry products distributed in commerce under FSIS' existing approach. These pathogens represent a hazard to human health. Thus, public health likely will benefit because meat and poultry products will be held until results of pathogen tests are returned as negative. If test results are positive, the product will be destroyed, or further processed to destroy the pathogen, rather than having to be recalled. This change will thus reduce foodborne pathogens in products that are released into commerce. The economic health benefits are expected to be small relative to the economic benefits of avoided recalls.

To reach this conclusion FSIS analyzed both the actual illnesses from the universe described in Table 1 and estimated future illnesses averted as a result of this change. We discuss in Section A (Potential averted illnesses from this policy using actual case data) the research conducted by the Economic Research Service (ERS) for each of the pathogens, *E. coli* O157:H7, *Listeria monocytogenes,* and *Salmonella,* as well as their associated costs per case.[9]

A. Potential Averted Illnesses From This Policy Using Actual Case Data

(1) During 2007–2009, there were 22 recalls for *E. coli* O157:H7 from FSIS testing. None of these recalls resulted in any illnesses according to the Office of Public Health Science (OPHS) data. The ERS estimate excludes a number of other potential costs, such as those for special education, nursing homes, travel, childcare, and pain and suffering. Illnesses for *E. coli* O157:H7 are divided into seven severity levels depending on whether the patient visits a physician or not, develops Hemolytic Uremic Syndrome (HUS) or not, develops End-stage renal disease or not, and finally whether death occurs. ERS estimates $6,510 as the average cost per case.[10]

(2) During 2007–2009 there were 22 recalls for *Listeria monocytogenes* from FSIS testing. Only one of these recalls was associated with illnesses. In 2008, there were two illnesses, one of which was fatal, when a customer consumed chicken salad that had been released into commerce before the FSIS test results were returned as positive. We know that the cost of *Lm* illnesses with hospitalization ranges from $10,815 (moderate) to $30,000 (severe). Ninety-five percent of all hospitalized *Lm* cases are severe. The economic value of a life ranges between $6 and $7 million based on the value of statistical life (VSL) economic literature in 2001 dollars. Benefits from averting the two illnesses had the establishment held the product until the test results returned a positive would be $60,000 ($30,000 * 2), or $20,000 annually, and the benefit from averting the fatality would range from $5.7 to $6.8 million. The mid-point of the benefit from averting the death is $6.25 million or $2.1 million annually.

[7] Ollinger, Michael, working paper. "Many economists have examined the effects of reputation loss and the production of unsafe food. Packman (1998) argues that the negative publicity generated from a recall can erode prior investments in reputation and brand capital. Economists (Thomsen and McKenzie, 2001; Pruitt and Peterson; Salin and Hooker) found that firms that voluntarily recalled contaminated meat and poultry products suffered a decline in long run profitability (*i.e.,* significant declines in stock prices). A number of studies (Piggott and Marsh, 2004; Marsh, Schroeder, and Mintert, 2004) determined that adverse meat and poultry food safety events led to temporary declines in meat and poultry consumption. Thomsen, Shiptsova, and Hamm (2006) established that sales of branded frankfurter products declined more than 20 percent after product recalls."

[8] Scallan E. Hoekstra RM, Angulo FJ, Tauxe RV, Widdowson MA, Roy SL, et al. Foodborne illness acquired in the United States—major pathogens. Emerg Infect Dis. 2011 Jan: [Epub ahead of print] Table 2 of this report provides foodborne STEC O157: H7 illnesses at: 63,153, with 90% confidence of (17,587–149,631). Table 3 of this report provides STEC O157:H7 hospitalizations at 2,138, with 90% confidence of (549–4,614) and deaths of 20, with 90% confidence of (0–113).

[9] ERS cost calculator can be found on their Web site at *http://www.ers.usda.gov.*

[10] The cost per illness for the seven severity levels is between $30 (for an individual who did not obtain medical care) and $7.2 million for a patient who died from Hemolytic Uremic Syndrome (HUS).

Actual annual benefits during 2007–2009 for *Lm* would be $2.10 million.

(3) There were no recalls from FSIS testing for *Salmonella* in RTE product during 2007–2009. Research has shown that the cost per case of a *Salmonella* illness is $18,000.[11]

B. Estimated Averted Illnesses From This Policy

FSIS has developed a model [12] to estimate annual illnesses averted per positive sample, from holding FSIS tested product until testing results are returned. This model is based on 2007–2009 recall data, as well as the OPHS illness data occurring from these recalls.[13] The model estimates expected illnesses by accounting for volume of product recalled and "time in days" between the dates of production of adulterated product until the date of recall of that adulterated product. If the Agency proceeds with this new policy, the FSIS model estimated the upper 95% confidence bound of averted *E. coli* O157:H7 illnesses to be approximately 2.61 for a three-year period (based on the 2007–2009 data). FSIS estimated human health benefits, based on averting these 2.61 *E. coli* O157:H7 illnesses to be approximately $5,664 annually. ($6,510 * 2.61/3)

Using similar methodology and an estimated number of illnesses of 0.18 for *Listeria monocytogenes* and .57 for *Salmonella* in RTE product, the annual *cost is $1,800 and* $3,420, respectively. For the three pathogens, *E. coli* O157:H7, *Listeria monocytogenes,* and *Salmonella,* human health benefits are estimated from the model to be approximately $10,884 annually. See Table 2.

TABLE 2—HUMAN HEALTH BENEFITS FROM ACTUAL RECALLS AND ESTIMATED MODEL

[2007–2009]

Pathogen	Cost per CASE	Actual CASES 2007–2009	Actual annual benefit 2007–2009	FSIS estimated cases averted (Model) 2007–2009 **	Annual benefit (Model)
E. coli O157:H7	$6,510	0	0	2.61	$5,664
Listeria Monocytogenes	30,000	2	$20,000	.18	1,800
Salmonella	18,000	0	0	.57	3,420
Death (Annual) *	6.25	1	2.1 M	.....	.....
Total	.....	.....	2.1 M	3.36	10,884

* Note: LM is known to have a high death rate and as such one death is included in the expectation of benefits from illnesses averted. The cost of 2 LM illnesses ($60,000) is accounted for in the Model.

** Table 3 of the Model (Appendix) estimates illnesses for 10 years. To make the numbers comparable we used estimated illnesses from the model/10 * 3 to derive the numbers in this column.

Total human health benefits from the FSIS model and actual reported illnesses combined would be approximately $2.11 million annually ($2.1 M + $10,884). Differences may be due to rounding.

Residue Benefits

Microbiological hazards are expected to drive the cost-benefit analysis because they result in an attributable short term, low (morbidity) to high (morbidity) impact consequences that can be realistically estimated.

The cost-benefit analysis for chemical hazards on the other hand is difficult to quantify. The negative health effects of exposure to low levels of chemicals are long term and multifactorial. Single exposure to low levels of chemicals or cumulative exposure can contribute to negative health effects 10, 20, or more years later; for example, cancer. Of course, over such long periods of time, individuals are exposed to a variety of hazards making it impossible to quantify the contribution of the chemical exposure to societal and medical costs. The approach for conducting a cost benefit analysis for single incidents of contamination at levels that cause immediate morbidity/mortality, i.e., where the health effects are readily attributable to the exposure, is comparable to microbiological hazards.

The Environmental Protection Agency (EPA) [14] and the Food and Drug Administration (FDA) conduct risk assessments to establish what level of chemical residues are acceptable.[15] They consider acute and chronic exposure scenarios to set residue limits and include a wide margin of safety in their calculations. Meat, poultry, and egg products with chemical residues that exceed the tolerances or other limits set, or for which no scale level has been set, by EPA and FDA are adulterated and unsafe for human consumption.

Summary of Benefits

The annual benefits from this policy change come from:

(1) Reduced costs of recalls, $15 million to $44 million,

(2) Actual averted death, $2.1 million as shown in Table 2 and

(3) Estimated Averted illnesses for *E. coli* O157:H7, *Listeria moncytogenes* and *Salmonella* of $10,884 as shown in Table 2.

Total benefits from this policy change are estimated to range between $17.1 million and $46.1 million annually.

II. Expected Costs of the Action

FSIS prepared a paper in September, 2006 to provide data on trends in the industry practice of holding meat and poultry products pending results of

[11] See "Prevention of *Salmonella* Enteritidis in Shell Eggs During Production, Storage, and Transportation" (74 FR 33030, July 9, 2009).

[12] See Appendix 1: "Development of model for predicting averted illnesses due to *E. coli* O157:H7 from Test and Hold" and Appendix 2: "Data used in Analysis." A copy of these documents is available for viewing in the FSIS Docket Room and on the FSIS Web site as related documents associated with this docket.

[13] OPHS data was used for the model that contained illnesses from all recalls and all sources. This included Outbreak, Illness, FSIS Test, and Establishment Test. This was done only for the purpose of estimating the rational expectation of future illnesses averted by this policy.

[14] Drugs are used on plants as well as in/on animals, so some of the chemicals regulated by EPA are drugs (for example antibiotics and antifungals). EPA establishes safe methods of use for chemicals (drugs, pesticides, fungicides, etc) and sets the allowable residual levels in the environment, water and air resulting from use, based on the risk to people through direct and indirect exposure to the residues.

[15] See General Accounting Office (GAO) report "Chemical Risk Assessment: Selected Federal Agencies' Procedures, Assumptions, and Policies", GAO–01–810, August 2001.

[16] A summary of the FSIS's analysis is available electronically at *http://www.fsis.usda.gov/OPPDE/*

FSIS microbiological testing.[16] Identifying trends in industry holding practices provides a context and baseline for any future evaluation of the effects of holding product pending test results. FSIS examined test data for the calendar years 2003 through 2005, as well as data for the first eight months of 2006, and grouped data by establishment size and pathogen. Specifically, FSIS examined the hold/release information included with FSIS testing results for the following pathogens in five different groups: (1) *E. coli* O157:H7 in raw, non-intact beef produced by domestic official establishments,[17] (2) *E. coli* O157:H7 in domestically-produced ready-to-eat (RTE) meat and poultry; (3) *Salmonella* in domestically-produced RTE meat and poultry; (4) *Listeria monocytogenes* (*Lm*) in domestically-produced RTE meat and poultry; and (5) *Lm* on food-contact surfaces in establishments that produce RTE meat and poultry products.

A. Domestic Product

(1) Micro Testing

FSIS found the following results of meat and poultry product being held by establishments prior to receiving FSIS test results. Table 3 shows the results by establishment size for the first 8 months of year 2006 for the five test groups described above.

TABLE 3—PERCENT OF PRODUCT BEING HELD BY ESTABLISHMENT SIZE FOR 2006 JAN–AUG

[In percent]

	Large	Small	Very small	Unknown
Group 1	100	83	79	57
Group 2	100	93	88	100
Group 3	100	90	82	93
Group 4	99	91	82	93
Group 5	100	97	88	—

Group 1: Percent of raw, non-intact beef Products held after Agency *E. coli* O157:H7 Sampling.
Group 2: Percent of RTE Products held after Agency *E. coli* O157:H7 Sampling.
Group 3: Percent of RTE Products held after Agency *Salmonella* Sampling.
Group 4: Percent of RTE Products held after Agency *Lm* Product Sampling.
Group 5: Percent of RTE Products held after Agency *Lm* Food Contact Surface Sampling.
Note: This data is the latest available data for product held in establishments from FSIS testing. Study by the Office of Program, Evaluation, Enforcement, and Review (OPEER.).

Based on evaluation of recent data, the Agency has noted that establishments releasing product into commerce before receiving test results continues to be a problem.

However, using the percentage numbers from Table 3 for the first eight months of 2006 will provide a basis for establishing the costs for 2007–2009 to hold product until test results are returned.

Table 4 shows the number of Federally inspected meat and poultry establishments by establishment size and illustrates in columns 3 and 4, based on the results from Table 3, the number of establishments currently holding product, as well as the number of establishments that will need to hold product as a result of this policy change.

TABLE 4—FEDERAL INSPECTED MEAT/POULTRY ESTABLISHMENTS.

Establishment size	Number of establishments *	Holds product	Does not hold product
(1)	(2)	(3)	(4)
LARGE	362	362	0
SMALL	2,366	1,964–2,295	71–402
VERY SMALL	2,900	2,291–2,552	348–609
UNKNOWN	578	329–578	0–249
TOTAL	6,206	4,946–5,787	419–1,260

* Source: Performance Based Inspection System (PBIS) 1/3/2008. There has been no substantial change in establishment numbers.
The data provided in Table 3 are used to calculate the number of establishments holding product (column 3) and the number of establishments not holding product (column 4).

Across establishment size, between 79 percent and 100 percent of establishments already hold product pending test results and between zero and 21 percent will need to hold product pending test results.

Based on the percentage results shown in Table 4, FSIS assumes for cost purposes only that all 362 large establishments are holding all tested product for results. Approximately 71–402 small establishments, 348–609 very small establishments, and between 0 and 249 unknown size establishments do not hold tested product and will be affected by this new policy. Table 4, column 4 shows the range of establishments that will have to hold product pending negative test results before FSIS will award the USDA mark of inspection. A total of between 419 and 1,260 federally inspected meat and poultry establishments will be affected by this policy change. There will be no additional costs to any of the large establishments as they are assumed to hold all tested product. FSIS expects

NACMPI/May2006/Test_and_Hold_Report_NACMPI.pdf.

that among the remaining establishments that do not hold tested product, there will be an adjustment of lot size to accommodate necessary storage capacity at the establishment prior to an FSIS test.

FSIS conducted further research on all FSIS tests conducted in the year 2007. Combining the percentages of product held from Table 3 and the estimates of common lot sizes from the following Table 5, FSIS reached certain conclusions about the additional pounds of product that would need to be held by the small and very small establishments, which is shown in Table 6.

TABLE 5—ESTIMATED LOT SIZES BY ESTABLISHMENT SIZE

Establishment size	Lot (pounds) size produced	Average lot (pounds) size tested *
LARGE	2,000–30,000	2,000
SMALL	1,000–10,000	1,000
VERY SMALL	50–2,000	50–60

Source: Common Industry Practice and expert elicitation.
* Tested lots are smaller than typical production lot sizes.

FSIS estimates the common industry practice for average lot sizes tested to be approximately 2,000 pounds at large establishments, 1,000 pounds at small establishments, and between 50–60 pounds at very small establishments. As a result of the above lot size estimations, there may be a certain number of small and very small establishments that will incur costs relative to additional storage (recurring costs) or for capital equipment (one-time costs), in order to hold tested product.

TABLE 6—ADDITIONAL COST PER ESTABLISHMENT TO HOLD ESTIMATED POUNDS OF PRODUCT

	Lbs to be held by establishment	Days product to be held	Cost per establishment store product
LARGE	0	3–8	$0
SMALL	4,511	3–8	5,000
V/SMALL	1,329	3–8	1,000
UNKNOWN	1,011	3–8	1,000

Source: FSIS/OPEER/OCIO data.
Cost per commercial freezer @ $5,000 per 300 cu. ft. for small establishments. Cost of stand-up freezer for very small establishments @ $1,000.

Factors affecting this cost impact include: (1) The amount of product needed to be handled and placed into storage; (2) the average number of days of storage; (3) the number of times per year that tests occur; and (4) the cost per day in handling and storage.

The costs shown in Table 6 would predominately be one-time capital expenditures to purchase freezers for storage of tested product. There would be a small amount of electricity charges to operate the refrigeration units, but we do not anticipate that they would be significant. Labor costs would also be minimal to accommodate the additional product stored. Additionally, FSIS recognizes the concern of some very small establishments that they could lose some product because of the product's short shelf life, and that an establishment could experience some inability to satisfy customer orders, resulting in a short-term disruption in business activities.[18] FSIS does not have sufficient information to include costs associated with this disruption in the analysis, but we request comments on these costs and on additional ways establishments and FSIS can address the effect this policy may have on small and very small establishments that produce product with a short shelf life.

Table 7 combines the results of tables 4, 5 and 6 and shows that the estimated total costs to all small and very small (and unknown) establishments that do not hold product domestically would range between $703,000 and $2.87 million.

TABLE 7—TOTAL ONE-TIME COST PER ESTABLISHMENT SIZE

Establishment size	Number establishments affected Table 5 (col. 1)	Cost/Est. to store product Table 7 (column 4)	One-time total cost to hold product *	Annualized 7%–10 years
Large	0	$0	$0	$0
Small	71–402	5,000	$355K–$2.01M	$50,541–$299,000
Very Small	348–609	1,000	$348K–$609K	$49,545–$86,700
Unknown	0–249	1,000	$0–$249K	$0–$17,227

[17] In this paper, FSIS did not examine results from the recently initiated FSIS baseline testing of beef trim for *E. coli* O157:H7 and Salmonella.

TABLE 7—TOTAL ONE-TIME COST PER ESTABLISHMENT SIZE—Continued

Establishment size	Number establishments affected Table 5 (col. 1)	Cost/Est. to store product Table 7 (column 4)	One-time total cost to hold product *	Annualized 7%–10 years
Total	419–1,260		$703,000–$2.87 M	$100,000–$408,600

* NOTE: Total cost to hold product is result of # of Establishments affected * cost/Est to store product.

(2) Residue Testing

The National Residue Program (NRP) consists of two sampling plans: Domestic and import. These plans are further divided to facilitate the management of chemical residues such as veterinary drugs, pesticides, and environmental contaminants in meat, poultry, and egg products. The domestic sampling plan includes both a scheduled sampling program that is derived statistically by an interagency (FSIS, EPA, and FDA) technical team and by inspector-generated sampling in which samples are collected by in-plant veterinarians when they suspect an animal presented for slaughter may have violative levels of chemical residues. The import re-inspection sampling plan verifies the equivalence of inspection systems of exporting countries. FSIS inspectors collect samples randomly from imported products, and the intensity of sampling increases when products fail to meet U.S. requirements.

Residue Costs

In CY 2008, under the National Residue Plan, there were 22,709 FSIS residue samples completed. An additional 135,552 inspector-generated samples were taken. The number of samples includes those taken in-plant, taken from show animals, taken by inspectors or OPEER personnel as part of their regular work, and as part of state programs.

The average range of days between a sample arriving at the lab and the report being available is generally 3–10 working days. Some screen results are available the same day by Kidney Inhibition Swab (KIS) tests, while other tests may take longer than 10 days.

The Agency does not anticipate any substantial cost impact from additional storage space requirements for FSIS residue testing. For establishment residue testing, the establishment as part of its HACCP program should already be holding any tested carcasses. The Agency asks for comments on possible additional storage space requirements.

Products will have a reduced shelf-life at retail as a result of carcasses being held pending FSIS and establishment test results. Some beef product that has been residue tested and held for three to ten days will lose freshness and will need to be frozen. Over the past nine years, on average, the difference in fresh vs. frozen beef prices is approximately $0.054 a pound.[19] The worst case scenario for loss of business revenue for dairy cows, used for beef estimation purposes, would be approximately $39,500.[20] While these lost revenue estimates are a worst case scenario, we also estimate the range for reduced beef sales to be between $19,700 and $39,500. The Agency requests comments on reduced sales.

Additionally, roaster pig carcasses could go rancid and would also need to be frozen. Some product will go to secondary markets, such as renderers, pet foods, and fertilizer product. For roaster pigs, we estimate a worst case scenario loss of business at approximately $92,400.[21] The lower estimate for roaster pigs is $46,200. The Agency requests comments on reduced sales revenues.

TABLE 8—LOSS OF REVENUES FOR DOMESTIC BEEF AND ROASTER PIGS DUE TO RESIDUE TEST AND HOLD POLICY

Establishment size	Beef number of establishments	Beef $$ lost	Roaster pigs number of establishments	Roaster pigs $$ lost
Large	132	$1,264	4	$601
Small	810	7,900	85	13,860
Very Small	3,164	30,099	467	77,616
Unknown	25	237	2	323
Total	4,131	39,500	558	92,400

Source of data: Data Analysis Integration Group (DAIG) and Office of Policy and Program Development (OPPD)/Risk Management Division.

B. Imported Product

Imported Re-Inspection Sampling Plan

Import Inspection Personnel are to sample imported ready-to-eat (RTE) meat and poultry products produced in foreign establishments. Analyses will include *Listeria monocytogenes* and *Salmonella* testing for all RTE products, and *E. coli* O157:H7 for cooked beef patties and dry or semi-dry fermented sausages.

Ready-to-eat cooked meat or poultry product is subjected to microbial sampling at the port-of-entry. This includes any product that is intended to be consumed without any further safety preparation steps. Import inspection personnel do not sample products for *Listeria monocytogenes* or *Salmonella* that are labeled with cooking

[19] Beef price data provided by the Economic Research Service, USDA. The data is for 90% lean beef, not carcasses and can be interpreted as cents per pound or dollars per cwt of product.

[20] Estimation of worst case business loss for dairy cows: Total number of animals selected for dairy cows (300) * 4 (number of chemicals sampled) * average lbs of animal (609) = total lbs to be held * price difference per lb. from fresh to frozen ($0.054)

[21] Estimation of worst case business loss for roaster pigs: Total number of animals selected for roaster pigs 300 * 4 (number of chemicals sampled) * average lbs of animal (70) = total lbs to be held * price per lb. ($1.10)

instructions or "Not Fully Cooked". These products are not considered RTE and are not sampled under this program.

Table 9 describes the two different types of tests that are conducted on imported product, (1) micro testing, and (2) residue testing (column 1). Column 2 shows the number of samples where product was held, while column 3 shows the number of samples where the product was not held. Column 4 shows the number of samples for which the available data do not show whether or not the product was held. Column 5 is the total of all tests taken on imported product (sum of columns 2, 3 & 4). Column 6 is the percentage of tested product that is currently being held.

TABLE 9—PERCENT OF IMPORTED PRODUCT HELD THAT HAS BEEN FSIS TESTED

[By lots]

Type	Held	Not held	Not indicated	Total	Percentage product currently held
(1)	(2)	(3)	(4)	(5)	(6)
Micro	1,994	1,799	88	3,881	51.4
Residues	2,320	2,490	493	5,303	43.7

Source: FSIS International Policy Division.

Table 10 shows the type of samples (column 1) and the number of FSIS samples taken (column 2). The average lot size derived by dividing the total pounds of product presented for import in 2008 by the total lots presented for import in 2008 is shown in column 3 (3,270,643,817/210,592). Column 4 and 5 are percentage of product currently held and percentage of product to be held. Column 6 and 7 represent the total pounds to be held and the cost of holding that product. The cost of holding imported product when this policy becomes effective will range from approximately $757,000 to $832,000.[22] The Agency asks for comments on costs of storage.

TABLE 10—COST TO HOLD IMPORTED FSIS TESTED PRODUCT

Type	Number of FSIS samples	Average lot size	Percent product now held	Additional percent of product to be held *	Total pounds to be held	Cost for holding product
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Microbial	3,881	15,530	51.4	48.6	29,292,158	$292,922
Residue	5,303	15,530	43.7	56.3	46,366,197	463,662
Total	.....	.....	.....	.....	.....	756,584

Note: Cost is based on storage of product for up to 30 days @ $.01/pound.
Source: FSIS—International Policy Division.
* Column 5 is the additional percentage of product that will need to be held once this policy becomes effective. (100% − column 4 percentage)

Summary of Annual Costs:

Total Domestic Product—$100,000–$408,600.

Loss of Business Revenue—$66,000–$131,900.

Total Import Product—$757,000–$832,000.

Total Cost: $923,000–$1.4 million.

Estimated annual benefits range between $17.1 million and $46.1 million and exceed the estimated costs. Annual net benefits range between $16.2 million and $44.7 million.

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[22] The storage cost data was not robust, therefore a cost + 10% range was cited. Adding the 10% leads to a storage cost of $832,242.

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

Done at Washington, DC, on: April 5, 2011.

Alfred V. Almanza,

Administrator.

Appendix 1

FSIS is planning to require product to be held when FSIS test for pathogens. (*E coli* O157:H7 in ground and trim beef products, and *Salmonella* and *Listeria monocytogenes* (*LM*) in ready-to-eat (RTE) products), until the test result is reported negative. Benefits from averted illnesses from this policy thus would accrue if it were the case that instead of holding tested product that was contaminated, the product was released before a positive result was found and portions of that product would have been consumed, which would have led to illness. It takes 6 days before samples are confirmed to contain *E. coli* O157:H7 (1 day for sending the sample from the establishment to the laboratory and 5 days once the sample arrives in the laboratory); for the other two pathogens it takes 8 days. The expected decreased risk of illness (the estimated benefits) to consumers by the execution of this policy is estimated by modeling the observed relationship of reported illnesses due to *E. coli* O157:H7, *Listeria monocytogenes* (*LM*) and *Salmonella* associated with recent recalls (2007–2009), with the number of days before the recall and the amount of product associated with the recall. From this model, the expected number of illnesses that would occur for product recalled x days after sampling can be estimated. There are many assumptions implicit in the model, for example, the recalled volume might not reflect the actual volume of product for which consumers were exposed. One would expect, though, that the longer time between the recall date and manufactured date, the more the exposure and thus the greater opportunity for illness from the product. Thus, it is expected that illnesses would increase if volume increases or days before recall increase, given everything else being equal; that is, the number of illnesses is an increasing function of volume and days. In Appendix 2 are the data used in the analysis, consisting of 75 cases, within 2007–2009, for which product volume, days between manufactured and recall dates, and illnesses associated with the recall were available.[23]

Besides estimates of illnesses associated with potential recalls, there are 4 factors that need to be accounted for in estimating the potential benefits that would be realized from the test and hold policy:

(1) The number of establishments that would not be holding product if not for the policy;

(2) The volume of the product being held;

(3) The number of tests expected to be conducted, yearly; and

(4) The expected proportion of tests that would be positive.

Another assumption made is that large establishments (as determined from FSIS' HACCP size classification) already hold product when it is being tested and thus this policy will not result in averted illnesses from this sector of the industry. It is only assumed that some HACCP-size small and very small establishments will need to hold product that otherwise would not have, and thus will have averted illnesses as a result of this policy.

Regarding the proportion of tests expected to be positive, the proportion could be a function of the volume of product per test that is held. However, a test consists of an analysis of a certain amount of material, which is assumed constant; thus for modeling the potential benefits, it is assumed that this proportion is independent of volume. The percentage of positive test results that would be seen in the future is assumed to be equal to that observed for the years 2007–2009 (up to the middle of November). The percentage of positive results depends upon the HACCP size of the establishment (Table 1) as well as the particular test. For LM, since FSIS tests multiple samples per "unit" (unit = a collection of samples for product and food contact surfaces, excluding other environment samples), the results below report the percentage of units that had at least one positive result, since even one positive result from these samples leads to a determination of an adulterated product that would be subject to recall.

TABLE 1—NUMBERS OF TESTS AND NUMBERS AND PERCENTS POSITIVE BY HACCP SIZE AND TEST-TYPE, FROM 2007–2009 (MID-NOVEMBER), COVERING 34.5 MONTHS, FOR ALL FSIS' TESTS ON GROUND AND TRIM BEEF FOR *E. coli* O157:H7 AND READY-TO-EAT (RTE) PRODUCT FOR SALMONELLA AND LISTERIA MONOCYTOGENES (LM)

Size	*E. coli* O157:H7		*Salmonella*		*LM**		Other *LM*	
	Test	Positive	Test	Positive	Test	Positive	Test	Positive
Small	17,772	115	17,898	7	671	19	17,630	90
		0.65%		0.039%		2.83%		0.51%
Very small	20,313	74	12,821	10	125	6	12,735	41
		0.36%		0.078%		4.80%		0.32%

* LM numbers refer to the number of units (set of product and food contact surface samples, from which any positive would lead to declaration of product adulteration).

For *LM,* estimating the number of tests and percent of those that would be positive and lead to held product, the numbers for the two types of *LM* sampling are added together. Thus, for example, for the small size establishments, it is assumed that there are 17,630 + 671 tests for Lm of which 90 + 19 of them were positive.

For *Salmonella* and *Listeria* testing, it is assumed that the number of samples used in the past would remain the same. In this case, the number of positive results that would lead to holding product that otherwise would not have been is determined by just multiplying the number of test times the expected percentage of positive results, times a factor that represents the fraction of establishments that would not be holding product if not for this rule. This percentage is taken from Table 4 of the main report, which provides the percentages of establishments by HACCP size category that hold product for the different types of sampling. As mentioned above, it is assumed that all large establishments would hold product and thus do not contribute in the analysis presented here. For *Salmonella,* the assumed percentages of the tested small and very small establishments that hold product are 90% and 82% respectively (Table 4 of the main report). For *LM,* since either a positive result for a food contact surface

[23] Recalls cited in Table 1 in the main report do not include all *E. coli* O157:H7 recalls. Rather, Table 1 includes only those recalls based on FSIS or establishment *E. coli* O157:H7 positive test results. The data used for modeling include all recalls of relevant FSIS regulated product besides those indentified in Table 1 of the main report, such as recalls resulting from outbreaks or state laboratory testing.

or product leads to recall, the lower percentages establishments holding product of the groups associated with *LM* testing from Table 4 of the main report are assumed. That is, it is assumed that percentages of the tested small and very small establishments that hold product are 91% and 82% respectively (Table 4 of the main report, group 4). Thus the number of positive samples over a 10-year period associated with product that would not have been held if not for the proposed regulation is 10Q(1-w)12/34.5 where Q is the number of positive results for 34.5 months given above in Table 1, and w is the fraction of establishments that already hold product (Table 4 of the main report).

For *E. coli* O157:H7 sampling, since FSIS' sampling plan calls for sampling each establishment once a month, the number of establishments assumed are the number that are being sampled presently. There are 570 and 884 small and very small size establishments, respectively, that were sampled. From Table 4 of the Notice it is assumed that 17% and 21% of them, respectively, are not presently holding product. In addition 5 establishments were sampled for which the size was not known for which (from Table 4 of the main report) is assumed that an expected 43% did not hold product. These 5 establishments are assumed to be distributed between the small and very small establishments by the ratio of 570/(884 + 570). Thus, after calculations, it is assumed that 98 small and 187 very small establishments presently do not hold product for *E. coli* O157:H7 sampling. Since for *E. coli* O157:H7 testing, it is assumed that every establishment will be tested once a month, for 10 years, the expected number of positive tests in the next 10 years per establishment is 10(12)p, where p equals 0.65% for small establishments and 0.36% for very small establishments (Table 1 above). This number is multiplied by the number of establishments assumed involved, which would be equal to 98 for the small establishments and 187 for the very small establishments to derive the expected number of positive tests in a 10-year period, K.

Regarding the number of pounds that would be held, FSIS policy permits the number of pounds likely to be subjected to being tested and held to be small since the establishment will be given prior notification of the test and will, most likely, prepare smaller amounts of product for testing. As discussed in the economic analysis (Table 6), it is anticipated that, for small establishments, the product volume held would be on average 1000 pounds, and for very small establishments, the held volume will be on average 50–60 pounds. In the analysis, 60 pounds was used.

The estimated number of averted illnesses is estimated by multiplying the expected number of positive results in 10 years times the expected number of illnesses averted per positive test resulting in a recall x days after the manufacturing date, where x equals 6 for *E. coli* O157:H7 and equals 8 for the other two pathogens. For modeling this expected number of averted illnesses, as mentioned above, it is assumed that number of illnesses associated with a positive test is an increasing function of the volume of the recalled product and the days after the initial manufactured date of the product. Specifically, a general model considered was:

$$\text{Illness} \sim \text{Poisson}(\lambda)$$

$$\ln(\lambda) = g(v, x)) + \varepsilon \qquad (1)$$

where v = volume, x = days, g is a function with parameters: a, b, c, * * *, whose values are to be estimated from the data in the appendix, and ε is random variable, with expected value equal to 0, and standard deviation equal to σ. Estimated values were obtained using the non-linear mixed effects model of PC–SAS version 9.1 (PROC NLMIXED). For this procedure, ε is assumed to be distributed as a normal distribution, since this is the only option permitted. The procedure maximizes the marginal likelihood function, integrated over the distribution of ε. Thus λ is distributed as a lognormal distribution, and the expected value of the number of illnesses, given v and x, is

$$\text{Ill}(v, x) = E(\#\ \text{illnesses}|v, x) = e^{g(v,x)+\sigma^2/2}. \qquad (2)$$

The benefit for a given volume, B(v, x), and days before recall, x, is obtained by:

$$B(v, x) = (\text{Ill}(v, x) - \text{Ill}(v, 0))K. \qquad (3)$$

where K is the number of expected positive tests for the next 10 years for product that would not be held if not for the requirement. For small HACCP size establishments, it is assumed v = 1000 pounds; for very small size establishment, v = 60 pounds. And as mentioned above, for *E. coli* O157:H7, x = 6 days and for *Salmonella* and *LM,* x = 8 days.

Comparisons of models used to estimate g and σ are based on the log-likelihood ratio test, where the distribution of the difference of statistics, L = −2 log(likelihood), for two models being compared is approximated by the appropriate chi-square distribution.

To help determine the form of g, the function of independent variables associated with the variable 'days' between the date of manufacturing and recall and the volume of the recalled product, Figure 1 presents graphs of the natural logarithm of the ratio of the number of illnesses divided by product volume, ln(illnesses/volume), versus days (right side) and versus the natural logarithm of days + 1, ln(days +1) (left side). When the number of illnesses was 0, the value assigned was −14. The smooth lines are spline curve,

constructed using the default options of the S-Plus® for Windows, version 8.1. The graph on the right indicates the high degree of influence the data point with days = 365 could have on a model predicting number of illnesses using days as an independent variable. This point would have less influence if ln(days+1) were used instead of days as an independent variable.

Figure 2 provides a graph of ln(#illness/(days+1)) versus ln(volume). When the number of illnesses is zero, a value of -5.5 was assigned. The dark smoothed line is the quadratic fit; the dashed-dotted red line is the curve derived from fitting: $a + \ln(be^{-c\ln(v)} + ce^{b\ln(v)})$, a function borrowed from one used to describe cell population growth assuming two phases: A lag phase and an exponential phase.

These figures suggest a model for estimating the number of illnesses as a function of ln(volume) and ln(days+1) be based on a Poisson regression with log-link a function of ln(days+1) and ln(volume), plus a random error (Equation 1). It is assumed that g is the full quadratic function of these variables:

$$g(v, x) = a + b\ln(v) + c\ln(x+1) + d[\ln(v)]^2 + e[\ln(x+1)]^2 + f\ln(v)\ln(x+1) \qquad (4)$$

where b, c, d, e, and f are constants, and a depends upon the pathogen. For the full model in Equation 4, the model has 9 parameters (including σ) since there are three "intercepts" being estimated, one for each pathogen.

Table 2 presents differences of values of L for selected models from the value obtained from the full quadratic model given in Equation 4, excluding the 2 outlier data points identified. All models converged by the G-convergence criterion (gradient) using the default quasi-Newton optimization technique.

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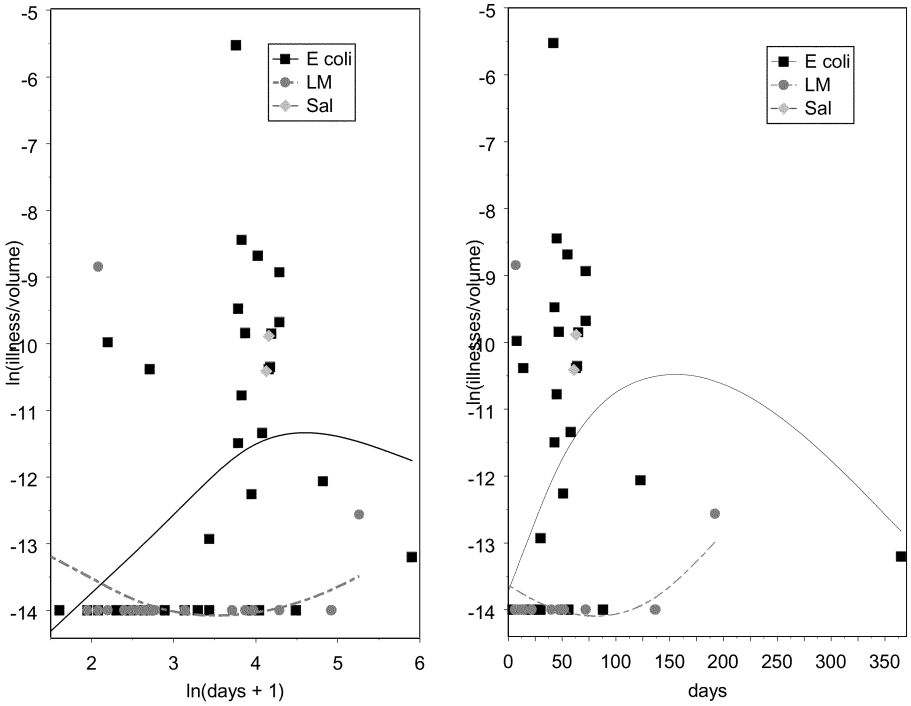

Figure 1: Plot of ln(# illnesses/volume) versus ln(days +1) and days. When # illnesses = 0, assigned value = -14. Smooth line is the spline fit (from S-Plus ® graphics procedure).

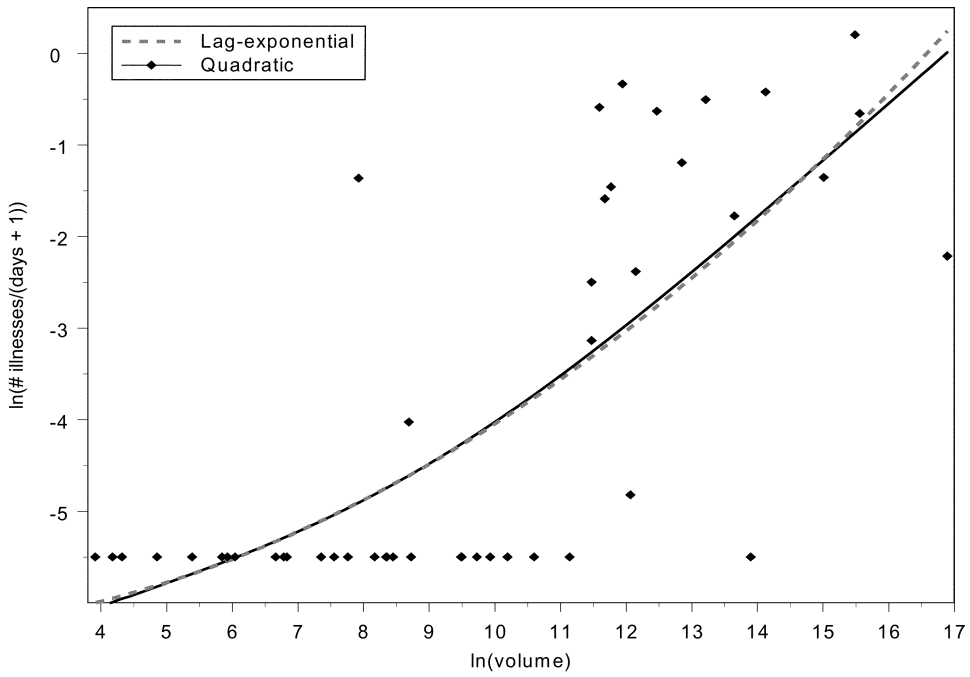

Figure 2: Plot of ln(# illnesses/(days +1)) versus ln(volume) for *E coli* O157:H7 illnesses. When # illnesses = 0, assigned value = -5.5. The dark smoothed line is the quadratic fit and the dotted red line is the curve derived from fitting: $a + \ln(be^{-c\ln(v)} + ce^{b\ln(v)})$.

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TABLE 2—L = −2 LOG(LIKELIHOOD) FOR SELECTED MODELS FROM THE VALUE OBTAINED FROM THE FULL QUADRATIC MODEL GIVEN IN EQUATION 4. MODELS ARE DESIGNATED BY FREE PARAMETERS NOT ASSIGNED TO BE ZERO, IN EQUATION 4

Model	Number of parameters	L = −2 log likelihood
Linear model (a, b, c, σ)	6	208.8
(a, b, c, d, σ)	7	207.8
(a, b, c, f, σ)	7	207.2
(a, b, c, e, σ)*	7	206.6
(a, b, c, d, f, σ)	8	207.4
(a, b, c, d, e, σ)	8	206.7
(a, b, c, e, f, σ)	8	206.6
Full model	9	206.6

* Model M1.

From Table 2, it appears that the linear model provides the best fitting parsimonious model. The model that includes e − the coefficient of the square of ln(x+1), decreases L by 2.22, with 1 degree of freedom, which under normal theory would be significant with p-value equal to 0.136. The value of e was estimated to be negative; however the term $c\ln(x+1) + e[\ln(x+1)]^2$ is greater than zero for x < 4989 which is well outside the range of concern. Thus, for our purposes, the function g (Equation 4) for M1 is an increasing function of the variable days in the region of concern, and thus can be used. Because the p-value is not large, this model cannot be rejected, thus an estimate associated with this model, M1, is also considered in order to help evaluate the range of uncertainty of the estimates and to see the impact of the more complicated model. Table 3 provides the estimates of averted illnesses.

TABLE 3—ESTIMATED ILLNESSES AND TOTAL AVERTED COSTS (TAC) OVER 10 YEARS TOGETHER WITH UPPER 95% CONFIDENCE LIMIT FOR THE TWO MODELS CONSIDERED. ESTIMATES DERIVED USING MIXED EFFECT MODEL WITH ASSUMPTION OF LOGNORMAL DISTRIBUTION (SEE EQUATIONS 2 AND 3)

Statistic	Estimate linear model	Upper 95% limit linear model	Estimate M1 model	Upper 95% limit M1 model
Tot ill for Sal	0.7	1.9	0.5	1.7
Tot ill for LM	0.3	0.6	0.4	1.0

TABLE 3—ESTIMATED ILLNESSES AND TOTAL AVERTED COSTS (TAC) OVER 10 YEARS TOGETHER WITH UPPER 95% CONFIDENCE LIMIT FOR THE TWO MODELS CONSIDERED. ESTIMATES DERIVED USING MIXED EFFECT MODEL WITH ASSUMPTION OF LOGNORMAL DISTRIBUTION (SEE EQUATIONS 2 AND 3)—Continued

Statistic	Estimate linear model	Upper 95% limit linear model	Estimate M1 model	Upper 95% limit M1 model
Tot ill for E coli	5.6	8.7	4.0	10.6

The residuals of these models do not appear to be normally distributed, based on the QQ plots (for both the linear and model M1) given in Figure 3, with occasional large residuals. The QQ plots take on the appearance it does because of many results with no illnesses. However, the models provide estimated values of λ (Equation 1) that are close to the actual illnesses, thus, conditionally, the goodness-of-fit, as determined by the closeness of the estimated value of λ and the number of illnesses is good. Using a chi-square approximation, of the square of the difference between the estimated λ and the actual number of illnesses, divided by λ, for the linear model, the sum of these terms over the 75 observations is 14.3; for all recalls for which the illnesses are reported as zero, the largest estimated value of λ is 1.04, which is not inconsistent; the largest difference is about 2, which occurs for a recall that reported 11 illnesses for which the estimated value of λ is 9.06. This data point is the one with the largest residual (top right corner of the top graph of Figure 3). For the model M1, the chi-square statistic is slightly larger (20.4 because for one recall with 1 reported illness, the estimated value of λ is 0.06 (whereas for the linear model the estimated value of λ is 0.10); thus the chi-square statistic associated with this observation is large, causing the larger chi-square statistic compared to that for the linear model.

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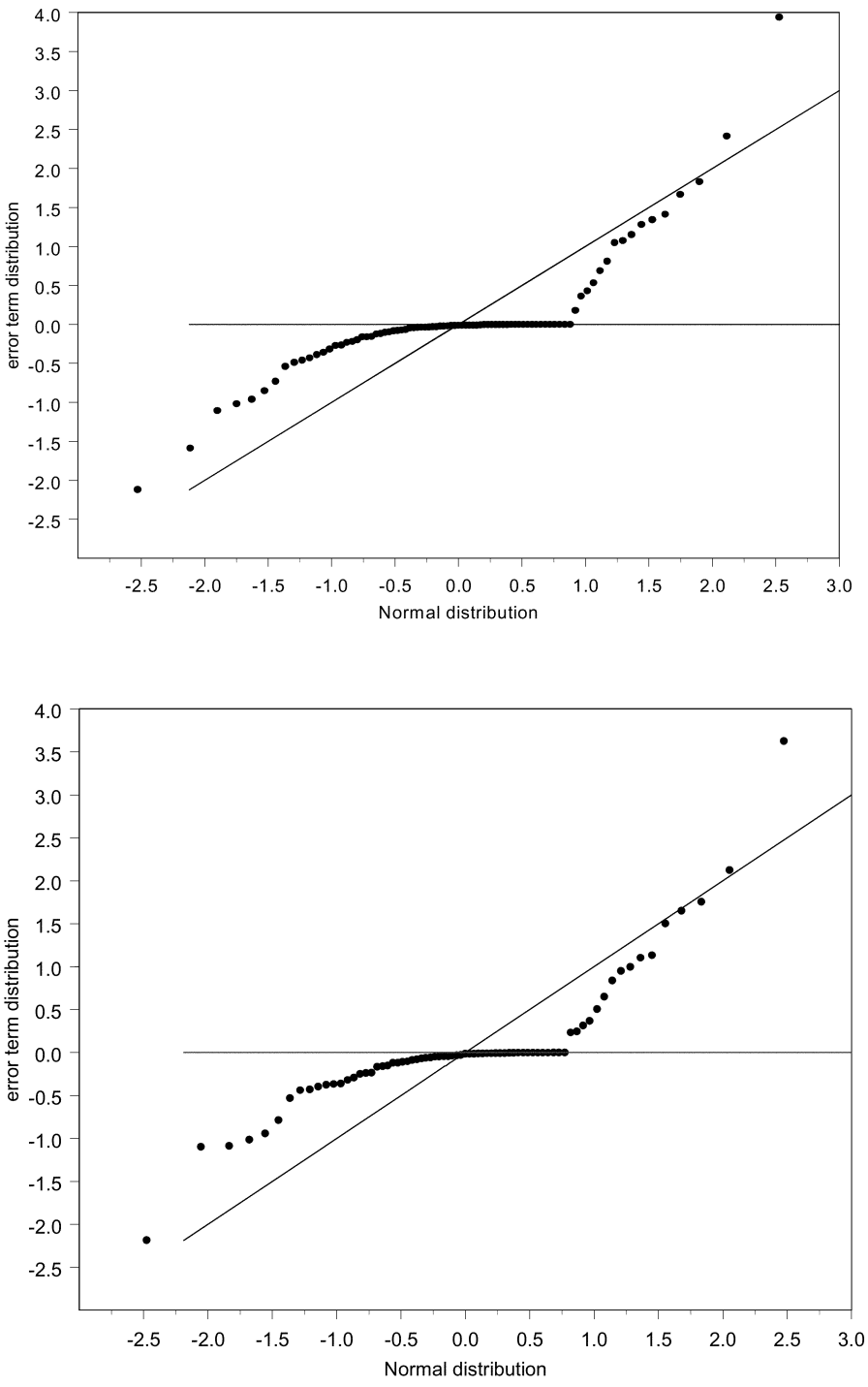

Figure 3: QQ plot of Bayes estimates of ε's of Equation 1, using linear model (top) and model M1 (bottom) (See Table 2 for definition), assuming normal distribution.

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In conclusion, the estimates of the averted illnesses are highly uncertain because of the small number of data points and the high degree of variability of these data, leading to statistical uncertainty regarding the predicted number of illnesses given a model and uncertainty regarding the best model to use for estimating the number of averted illnesses. However, from the above models, it appears that, with 95% confidence, the expected number of illnesses would be, on average, no more than about 1 illness per year averted, over the 10 years, with expected total averted costs as much as about $120,000, depending upon the model used.

These estimates though reflect (only) expectations, and do not include the possibilities of averted cost for a given expected value. There is a distinct probability that one of these averted illnesses could result in severe, long

term illness, or death. In that case the averted costs would be substantially larger than the expected costs that are being estimated above.

Appendix 2: Data Used in Analysis

Assigned days before recall	Volume (lbs)	Reported illnesses	Pathogen
4	50	0	E coli.
4	65	0	E coli.
4	375	0	E coli.
6	128	0	E coli.
6	219	0	E coli.
6	345	0	E coli.
6	884	0	E coli.
6	1900	0	E coli.
6	4663	0	E coli.
6	6152	0	E coli.
7	75	0	E coli.
7	925	0	E coli.
9	26669	0	E coli.
10	4240	0	E coli.
11	780	0	E coli.
13	13275	0	E coli.
14	16743	0	E coli.
17	13150	0	E coli.
22	1560	0	E coli.
26	1084384	0	E coli.
30	68670	0	E coli.
50	2340	0	E coli.
50	4200	0	E coli.
50	20460	0	E coli.
52	420	0	E coli.
56	39973	0	E coli.
88	3516	0	E coli.
55	5920	1	E coli.
123	173554	1	E coli.
45	95927	2	E coli.
8	107943	5	E coli.
64	188000	6	E coli.
72	95898	6	E coli.
14	259230	8	E coli.
30	3300000	8	E coli.
43	117500	9	E coli.
58	845000	10	E coli.
42	2758	11	E coli.
72	129000	17	E coli.
65	380000	20	E coli.
51	5700000	27	E coli.
47	545699	29	E coli.
45	153630	33	E coli.
365	21700000	40	E coli.
63	1360000	42	E coli.
43	5300000	54	E coli.

Assigned days before recall	Volume (lbs)	Reported illnesses	Pathogen
6	1591	0	LM.
7	16	0	LM.
7	285	0	LM.
7	290	0	LM.
7	4535	0	LM.
7	6970	0	LM.
8	130	0	LM.
8	172	0	LM.
8	290	0	LM.
8	750	0	LM.
8	39514	0	LM.
10	6907	0	LM.
11	872	0	LM.
11	70400	0	LM.
12	140	0	LM.
13	930	0	LM.
14	207	0	LM.
15	5250	0	LM.
22	564	0	LM.
40	2268	0	LM.

Assigned days before recall	Volume (lbs)	Reported illnesses	Pathogen
47	28610	0	LM.
52	3590	0	LM.
72	1	0	LM.
136	2184	0	LM.
137	3780	0	LM.
137	10368	0	LM.
192	286320	2	LM.
61	466236	14	Sal.
63	825769	42	Sal.

[FR Doc. 2011–8408 Filed 4–8–11; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Hiawatha East Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Hiawatha East Resource Advisory Committee will meet in Sault Ste. Marie, Michigan. 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 is to hold the first meeting of the newly formed committee.

DATES: The meeting will be held on May 5, 2011, and will begin at 6 p.m.

ADDRESSES: The meeting will be held at Best Western Sault Ste. Marie, 4281 I–75 Business Spur, Sault Ste. Marie, MI 49783. Written comments should be sent to Janel Crooks, Hiawatha National Forest, 2727 North Lincoln Road, Escanaba, MI 49829. Comments may also be sent via e-mail to *HiawathaNF@fs.fed.us,* or via facsimile to 906–789–3311.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Hiawatha National Forest, 2727 North Lincoln Road, Escanaba, MI. Visitors are encouraged to call ahead to 906–786–4062 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Janel Crooks, RAC coordinator, USDA, Hiawatha National Forest, 2727 North Lincoln Road, Escanaba, Michigan 49862; (906) 786–4062; E-mail *HiawathaNF@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. The following business will be conducted: (1) Introductions of all committee members, replacement members and Forest Service personnel. (2) Selection of a chairperson by the committee members. (3) Receive materials explaining roles of the RAC and process for considering and recommending Title II projects; and (4) Public Comment. 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.

Dated: April 4, 2011.

Stevan J. Christiansen,

Designated Federal Officer.

[FR Doc. 2011–8506 Filed 4–8–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

West Virginia Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The West Virginia Resource Advisory Committee will meet in Elkins, West Virginia. 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 is for the committee to consider new project proposals.

DATES: The meeting will be held on April 21, 2011, and will begin at 1 p.m.

ADDRESSES: The meeting will be held at the Monongahela National Forest Supervisor's Office, 200 Sycamore Street, Elkins, WV 26241. Written comments should be sent to Kate Goodrich-Arling at the same address. Comments may also be sent via e-mail to *kgoodricharling@fs.fed.us,* or via facsimile to 304–637–0582.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Monongahela National Forest, 200 Sycamore Street, Elkins, WV 26241.

FOR FURTHER INFORMATION CONTACT: Kate Goodrich-Arling, RAC coordinator, USDA, Monongahela National Forest, 200 Sycamore Street, Elkins, WV 26241; (304) 636–1800; E-mail *kgoodricharling@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. The following business will be conducted: (1) Review and approval or amendment of notes from previous meeting (2) Consider new project proposals; and (3) Public Comment. 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.

Dated: April 4, 2011.

Clyde N. Thompson,

Designated Federal Officer.

[FR Doc. 2011–8505 Filed 4–8–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Madera County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Madera County Resource Advisory Committee will be meeting in North Fork, California on April 20th 2011. The purpose of the meeting will be to review the funding schedule for projects identified for approval at the

March 30, 2011 meeting and to assign project monitoring responsibilities for the remainder of the year. The Madera County Resource Advisory Committee met in North Fork, California on March 30th 2011. The purpose of that meeting was to discuss and then vote on submitted proposals for funding as authorized under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L.110–343) for expenditure of Payments to States Madera County Title II funds.

DATES: The meeting will be held on April 20th, 2011.

ADDRESSES: The meetings will be held at the Bass Lake Ranger District, 57003 Road 225, North Fork, California 93643. Send written comments to Julie Roberts, Madera County Resource Advisory Committee Coordinator, c/o Sierra National Forest, Bass Lake Ranger District, at the above address, or electronically to *jaroberts@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Julie Roberts, Madera County Resource Advisory Committee Coordinator, (559) 877–2218 ext. 3159.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring Payments to States Madera County Title II project matters to the attention of the Committee may file written statements with the Committee staff before or after the meetings.

Dated: April 4, 2011.

Dave Martin,

District Ranger.

[FR Doc. 2011–8511 Filed 4–8–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

El Dorado County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The El Dorado County Resource Advisory Committee will meet in Placerville, California. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The RAC will prioritize a list of projects for funding in FY 2011 and FY 2012. The RAC may also be voting to recommend projects for funding.

DATES: The meeting will be held on April 25, 2011, beginning at 6 p.m.

ADDRESSES: The meeting will be held at the Ed Dorado Center of Folsom Lake College, Community Room, 6699 Campus Drive, Placerville, CA 95667. Written comments should be sent to Frank Mosbacher, Forest Supervisor's Office; 100 Forni Road; Placerville, CA 95667. Comments may also be sent via e-mail to *fmosbacher@fs.fed.us,* or via facsimile to 530–621–5297.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 100 Forni Road; Placerville, CA 95667. Visitors are encourages to call ahead to 530–622–5061 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Frank Mosbacher, Public Affairs Officer, Eldorado National Forest Supervisors Office, (530) 621–5268. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: The RAC will prioritize a list of projects for funding in FY 2011 and FY 2012. The RAC may also be voting to recommend projects for funding. More information will be posted on the Eldorado National Forest Web site *http://www.fs.fed.us/r5/eldorado.* A public comment opportunity will be made available following the business activity. Future meetings will have a formal public input period for those following the yet to be developed public input process.

Dated: March 30, 2011.

Frank Mosbacher,

Acting Forest Supervisor.

[FR Doc. 2011–8195 Filed 4–8–11; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

[Docket No. NRCS–2011–0011]

Notice of Proposed Changes to the National Handbook of Conservation Practices for the Natural Resources Conservation Service

AGENCY: Natural Resources Conservation Service (NRCS).

ACTION: Notice of availability of proposed changes in the NRCS National Handbook of Conservation Practices for public review and comment.

SUMMARY: Notice is hereby given of the intention of NRCS to issue a series of revised conservation practice standards in the National Handbook of Conservation Practices. These standards include: Alley Cropping (Code 311), Anionic Polyacrylamide (PAM) Application (Code 450), Conservation Crop Rotation (Code 328), Cover Crop (Code 340), Dam (Code 402), Dam, Diversion (Code 348), Farmstead Energy Improvement (Code 374), Forest Stand Improvement (Code 666), Irrigation Ditch Lining (Code 428), Irrigation Pipeline (Code 430), Irrigation Reservoir (Code 436), Irrigation System, Microirrigation (Code 441), Irrigation System, Sprinkler (Code 442), Irrigation System, Surface and Subsurface (Code 443), Irrigation System, Tailwater Recovery (Code 447), Irrigation Water Management (Code 449), Mulching (Code 484), Pipeline (Code 516), Pond (Code 378), Pumping Plant (Code 533), Renewable Energy System (Code 671), Residue and Tillage Management, Mulch Till (Code 345), Residue and Tillage Management No Till/Strip Till/Direct Seed (Code 329), Residue and Tillage Management, Ridge Till (Code 346), Residue Management, Seasonal (Code 344), Silvopasture Establishment (Code 381), Tree/Shrub Establishment (Code 612), Waste Recycling (Code 633), Windbreak/Shelterbelt—Establishment (Code 380), and Woody Residue Treatment (formerly Forest Slash Treatment) (Code 384).

NRCS State Conservationists who choose to adopt these practices for use within their States will incorporate them into section IV of their respective electronic Field Office Technical Guide. These practices may be used in conservation systems that treat highly erodible land (HEL) or on land determined to be a wetland. Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 requires NRCS to make available for public review and comment all proposed revisions to conservation practice standards used to carry out HEL and wetland provisions of the law.

DATES: *Effective Date:* This is effective April 11, 2011.

Comment Date: Submit comments on or before May 11, 2011. Final versions of these new or revised conservation practice standards will be adopted after the close of the 30-day period, and after consideration of all comments.

ADDRESSES: Comments should be submitted, identified by Docket Number NRCS–2011–0011, using any of the following methods:

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

• *E-mail: Anetra.Harbor@wdc.usda.gov.* Include Docket Number NRCS–2011–0011 or "comment on practice standards" in the subject line of the message.

• *Mail:* Comment Submissions, Attention: Anetra L. Harbor, Policy Analyst, Resource Economics, Analysis and Policy Division, Department of Agriculture, Natural Resources Conservation Service, George Washington Carver Center, Room 1–1112D, Beltsville, Maryland 20705.

All comments received will become a matter of public record and will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Wayne Bogovich, National Agricultural Engineer, Conservation Engineering Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6136 South Building, Washington, DC 20250.

Electronic copies of these standards can be downloaded or printed from the following Web site: *ftp://ftp-fc.sc.egov.usda.gov/NHQ/practice-standards/federal-register/.* Requests for paper versions or inquiries may be directed to Wayne Bogovich, National Agricultural Engineer, Conservation Engineering Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6136 South Building, Washington, DC 20250.

SUPPLEMENTARY INFORMATION: The amount of the proposed changes varies considerably for each of the Conservation Practice Standards addressed in this notice. To fully understand the proposed changes, individuals are encouraged to compare these changes with each standard's current version as shown at: *http://www.nrcs.usda.gov/technical/Standards/nhcp.html.* To aid in this comparison, following are highlights of the proposed revisions to each standard:

Alley Cropping (Code 311)—A new Purpose of "Develop Renewable Energy Systems" and accompanying additional Criteria were added.

Anionic Polyacrylamide (PAM) Application (Code 450)—A new Purpose of "Reduce Energy Use" and accompanying Criteria were added.

Conservation Crop Rotation (Code 328)—A new Purpose of "Reduce Energy Use" and accompanying Criteria were added to reduce energy by introducing legumes into the rotation to reduce synthetic nitrogen inputs and using crops with less consumptive water use. Where the practice applies was clarified. Criteria for a positive trend in organic matter from the General Criteria were changed to Additional Criteria to improve soil quality. Additional criteria were added to the Operation and Maintenance to evaluate the cropping sequence to ensure the objectives are being achieved.

Cover Crop (Code 340)—The Definition was revised to exclude harvesting the cover crop. An annual crop planted for harvest is covered under Conservation Cropping Rotation (Code 328). The purpose to produce supplemental forage was removed. A Purpose and accompanying Criteria were added to promote biological nitrogen fixation and "Reduce Energy Use" by using legume cover crops. Additional Operation and Maintenance criteria were added to evaluate the onsite application of the practice to ensure the planned purposes are achieved.

Dam (Code 402)—A new Purpose of "Develop Renewable Energy Systems" and accompanying additional Criteria were added.

Dam, Diversion (Code 348)—A new Purpose of "Develop Renewable Energy Systems" and accompanying additional Criteria were added.

Farmstead Energy Improvement (Code 374)—The title was changed from "On-Farm Equipment Efficiency Improvements" to "Farmstead Energy Improvement." The Definition was changed. A new Purpose of "Reduce Energy Use" and accompanying Criteria were added. Technologies with corresponding industry standards were added to the Criteria section.

Forest Stand Improvement (Code 666)—A new Purpose of "Develop Renewable Energy Systems" and accompanying additional Criteria were added.

Irrigation Ditch Lining (Code 428)—A new Purpose of "Reduce Energy Use" and accompanying Criteria were added.

Irrigation Pipeline (Code 430)—New Purposes of "Reduce Energy Use" and "Develop Renewable Energy Systems" along with accompanying Criteria were added.

Irrigation Reservoir (Code 436)—New Purposes of "Reduce Energy Use" and "Develop Renewable Energy Systems" along with accompanying Criteria were added.

Irrigation System, Microirrigation (Code 441)—The Unit was changed from (No. & Ac.) to (Ac.). A new Purpose of "Reduce Energy Use" and accompanying Criteria were added. The filter permissible design head loss was changed, and a requirement for an Irrigation Water Management Plan was added.

Irrigation System, Sprinkler (Code 442)—A new Purpose of "Reduce Energy Use" and accompanying Criteria were added.

Irrigation System, Surface and Subsurface (Code 443)—A new Purpose of "Reduce Energy Use" and accompanying Criteria were added.

Irrigation System, Tailwater Recovery (Code 447)—A new Purpose of "Reduce Energy Use" and accompanying additional Criteria were added.

Irrigation Water Management (Code 449)—A new Purpose of "Reduce Energy Use" and accompanying additional Criteria were added.

Mulching (Code 484)—A new Purpose of "Reduce Energy Use" and accompanying additional Criteria were added. Criteria were added to the Operation and Maintenance section of the standard to evaluate the effectiveness of the practice to achieve the planned purpose(s).

Pipeline (Code 516)—New Purposes of "Reduce Energy Use" and "Develop Renewable Energy Systems" along with accompanying Criteria were added.

Pond (Code 378)—A new Purpose of "Develop Renewable Energy Systems" and accompanying additional Criteria were added.

Pumping Plant (Code 533)—A new Purpose of "Reduce Energy Use" and accompanying additional Criteria were added. The Criteria Applicable to All Purposes removed criteria for Photovoltaic Panels, Windmills, and Water Powered Pumps (hydraulic rams), and removed Additional Criteria Applicable to the Improvement of Energy Efficiency.

Renewable Energy System (Code 671)—This is a new conservation practice standard for the purpose of "Develop Renewable Energy Systems."

Residue and Tillage Management, Mulch Till (Code 345)—A new Purpose of "Reduce Energy Use" and accompanying additional Criteria were added. The revision combined Additional Criteria for wind and water erosion into one set of criteria. Criteria were added to the Operation and Maintenance section of the practice to evaluate on-site performance of the practice to determine if the purpose(s) are being achieved.

Residue and Tillage Management No Till/Strip Till/Direct Seed (Code 329)—A new Purpose of "Reduce Energy Use" and accompanying additional Criteria were added. Additional Criteria to Reduce Sheet/Rill Erosion; Reduce Wind Erosion; and Reduce Soil Particulate Emissions were combined

into one set of criteria. The Operation and Maintenance had additions to evaluate the function of the practice onsite to ensure the purpose(s) is/are achieved.

Residue and Tillage Management, Ridge Till (Code 346)—A new Purpose of "Reduce Energy Use" and accompanying additional Criteria were added. Criteria were added to the Operation and Maintenance section of the standard to evaluate the effectiveness of the practice to achieve the planned Purpose(s).

Residue Management, Seasonal (Code 344)—A new Purpose of "Develop Renewable Energy Systems" and accompanying additional Criteria were added to provide crop residues for biofuel feedstocks and additional criteria to harvest crop residues for biofuel feedstocks for renewable energy production. Where Practice Applies section was revised to include all cropland where biomass is removed for biofuel feedstocks. Additional Operation and Maintenance criteria were added to evaluate the onsite application of the practice to ensure the planned purposes are achieved.

Silvopasture Establishment (Code 381)—A new Purpose of "Develop Renewable Energy Systems" and accompanying additional Criteria were added.

Tree/Shrub Establishment (Code 612)—A new Purpose of "Develop Renewable Energy Systems" and accompanying additional Criteria were added.

Waste Recycling (Code 633)—The title was changed from "Waste Utilization" to "Waste Recycling." A new Purpose of "Reduce Energy Use" and accompanying Criteria were added. The application is more focused to processing and recycling agriculture waste material into a valuable by-product.

Windbreak/Shelterbelt—Establishment (Code 380)—A new Purpose of "Reduce Energy Use" and accompanying additional Criteria were added.

Woody Residue Treatment (formerly Forest Slash Treatment) (Code 384)—The title was changed from "Forest Slash Treatment" to "Woody Residue Treatment." A new Purpose of "Develop Renewable Energy Systems" and accompanying additional Criteria were added.

Signed this 4th day of April 2011, in Washington, DC.

Dave White,

Chief, Natural Resources Conservation Service.

[FR Doc. 2011–8483 Filed 4–8–11; 8:45 am]

BILLING CODE 3410–16–P

BROADCASTING BOARD OF GOVERNORS

Government in the Sunshine Act Meeting Notice

DATE AND TIME: Thursday, April 14, 2011; 4 p.m.

PLACE: Radio Free Asia Headquarters, 2025 M St., NW., Washington, DC 20036.

SUBJECT: Notice of Meeting of the Broadcasting Board of Governors.

SUMMARY: The Broadcasting Board of Governors (BBG) will meet at the time and location listed above. The BBG will receive a Prague trip report, receive and consider a report from the Board's Strategy and Budget Committee on the status of the current regional reviews, receive and consider a report from the Board's Governance Committee on matters pertaining to future Agency organizational structures, receive a report from the International Broadcasting Bureau Director, and receive programming coverage updates by the Voice of America, Radio Free Asia, and the Middle East Broadcasting Networks. The meeting is open to public observation via streamed webcast, both live and on-demand, on the BBG's public Web site at *http://www.bbg.gov.*

CONTACT PERSON FOR MORE INFORMATION: Persons interested in obtaining more information should contact Paul Kollmer-Dorsey at (202) 203–4545.

Paul Kollmer-Dorsey,

Deputy General Counsel.

[FR Doc. 2011–8673 Filed 4–7–11; 11:15 am]

BILLING CODE 8610–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: Automated Export System (AES).

OMB Control Number: 0607–0152.

Form Number(s): AES, AES*Direct,* AES*Weblink.*

Type of Request: Revision of a currently approved collection.

Burden Hours: 791,607.

Number of Respondents: 288,747.

Average Hours per Response: 3 minutes per AES record.

Needs and Uses: The Census Bureau requires mandatory filing of all export information via the Automated Export System (AES). This requirement is mandated through Public Law 107–228, of the Foreign Trade Relations Act of 2003. This law authorizes the Secretary of Commerce with the concurrences of the Secretary of State and the Secretary of Homeland Security to require all persons who file export information according to Title 13, United States Code (U.S.C.), Chapter 9, to file such information through the AES.

The AES record provides the means for collecting data on U.S. exports. Title 13, U.S.C., Chapter 9, Sections 301–307, mandates the collection of these data. The regulatory provisions for the collection of these data are contained in the FTR, Title 15, Code of Federal Regulations (CFR), Part 30. The official export statistics collected from these tools provide the basic component for the compilation of the U.S. position on merchandise trade. These data are an essential component of the monthly totals provided in the U.S. International Trade in Goods and Services Press Release, a principal economic indicator and a primary component of the Gross Domestic Product (GDP).

These data collected from the AES record are also used for export control purposes under Title 50, U.S.C., Export Administration Act, to detect and prevent the export of certain items by unauthorized parties or to unauthorized destinations or end users.

The information collected via the AES shows what is being exported (description and commodity classification number), how much is exported (quantity, shipping weight, and value), how it is being exported (mode of transport, exporting carrier, and whether containerized), from where (state of origin and port of export), to where (port of unloading and country of ultimate destination), and when a commodity is exported (date of exportation). The identification of the U.S. Principal Party in Interest (USPPI) shows who is exporting goods for consumption (control purposes), while the USPPI and/or the forwarding or other agent information provides a contact for verification of the information.

The proposed changes will require the addition of new data elements in the AES as well as modifications to current data elements. The fields that will be added/modified are conditional data elements. Therefore, these data elements will only be required if that element applies to the specific shipment being exported. In addition, AES filings will be mandatory for shipments of all used self-propelled vehicles and household

goods regardless of value or country of destination.

The additional data elements include name and address of the end user, and ultimate consignee type. The addition of these conditional fields will support the export control initiative of enforcement agencies by helping to detect and prevent the export of items by unauthorized parties or to unauthorized destinations or end users. However, these conditional data elements will have limited impact on burden response time since entering information for the end user and consignee type is based on the knowledge the exporter has at the time of export. Therefore, if that information is not known, the filer is not required to report the information.

Additional data elements that will be included are license applicant address, license value, and country of origin. Also, the equipment number field will be revised to require the container number for all containerized cargo. For shipments where a license is required, the address of the license applicant will be required to be reported. The license value per commodity classification will be required to be reported in addition to the value that is currently captured in the AES. Currently, only six percent of records filed require a license. For shipments where the origin of the commodity is foreign, the country of origin will be required to be reported. Currently, 17 percent of records filed contain goods of foreign origin. For shipments where the method of transportation (MOT) is containerized vessel cargo, the container number will be required to be reported in the equipment number field. Currently, 19 percent of records filed are reported as containerized. Individually, completing these conditional fields will not affect respondent burden significantly. Each additional field affects only a percentage of the shipments that are required to be reported in the AES. The mandatory requirement to file used self-propelled vehicles as defined in Title 19, CFR, § 192.1 will increase the number of shipments requiring an AES record by approximately three percent. The increase in required filings for household goods is negligible. This is due to the fact that shipments of household goods have been historically low. Although the number of shipments that will have to be filed will increase slightly, it is critical to capture this information for the purposes of export control under Title 50, U.S.C., Export Administration Act, to detect and prevent the export of certain items by unauthorized parties or to unauthorized destinations or end users.

The revisions should not affect the average three-minute response time for the completion of the AES record. The additional time required to complete new fields in the AES record is offset by constant advances in technology and heightened knowledge of filers since the implementation of mandatory electronic filing in 2008.

The Census Bureau will allow the trade community to continue using the current AES until the actual implementation of the revised Foreign Trade Regulations (FTR) occurs. Implementation of the revised FTR is expected to take place in the fourth quarter of 2011 or the first quarter of 2012. On January 21, 2011, the Census Bureau published the Notice of Proposed Rulemaking (RIN Number 0607–AA50) in the **Federal Register** to notify the trade community of proposed revisions to the FTR.

The information is used by the Federal Government and the private sector. The Federal Government uses every data element on the AES record for statistical purposes, export control, and/or to obtain data to avoid taking additional surveys.

Data collected from the AES serves as the official record of export transactions. In addition, the mandatory use of the AES enables the U.S. Government to produce more accurate export statistics. Currently, the mandatory use of the AES allows the BIS and the CBP to enforce the Export Administration Regulations for the detection and prevention of exports of high technology commodities to unauthorized destinations; the enforcement of the International Traffic in Arms Regulations (ITAR) by the U.S. Department of State; and the validation of the Kimberly Process Certificate for the export of rough diamonds. The Census Bureau delegated the authority to enforce the FTR to the BIS's Office of Export Enforcement along with the Department of Homeland Security's (DHS) CBP and Immigrations and Customs Enforcement (ICE).

Other Federal agencies use these data to develop the components of the merchandise trade figures used in the calculations for the balance of payments and GDP accounts to evaluate the effects of the value of U.S. exports; to plan and examine export promotion programs and agricultural development and assistance programs; and to prepare for and assist in trade negotiations under the General Agreement on Tariffs and Trade. Collection of these data also eliminate the need for conducting additional surveys for the collection of information as the AES shows the relationship of the parties to the export transaction (as required by the Bureau of Economic Analysis). These AES data are also used by the Bureau of Labor Statistics as a source for developing the export price index and by the U.S. Department of Transportation for administering the negotiation of reciprocal arrangements for transportation facilities between the United States and other countries.

A collaborative effort amongst the Census Bureau, the National Governors' Association and other data users resulted in the development of export statistics requiring the state of origin to be reported on the AES. The information collected enables state governments to focus activities and resources on fostering exports of the kinds of goods that originate in their states.

Export statistics collected from the AES aid private sector companies, financial institutions, and transportation entities in conducting market analysis and market penetration studies for the development of new markets and market-share strategies. Port authorities, steamship lines, steamship freight conferences, airlines, aircraft manufacturers, and air transport associations use these data for measuring the volume and effect of air or vessel shipments and the need for additional or new types of facilities.

Affected Public: Business or other for-profit.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13, U.S.C., Chapter 9, Sections 301–307; Title 15, Code of Federal Regulations (CFR), Part 30.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: April 5, 2011.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–8472 Filed 4–8–11; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration (ITA).

Title: Information for Self-Certification under FAQ 6 of the United States—European Union Safe Harbor Privacy Framework.

OMB Control Number: 0625–0239.

Form Number(s): ITA–4149.

Type of Request: Regular submission (extension of a currently approved information collection).

Burden Hours: 350.

Number of Respondents: 500.

Average Hours per Response: 20–40 minutes.

Needs and Uses: In response to the European-Union Directive on Data Protection that restricts transfers of personal information from Europe to countries whose privacy practices are not deemed "adequate," the U.S. Department of Commerce has developed a "Safe Harbor" framework that will allow U.S. organizations to satisfy the European Directive's requirements and ensure that personal data flows to the United States are not interrupted. The Safe Harbor framework bridges the differences between the European Union (EU) and U.S. approaches to privacy protection. The complete set of Safe Harbor documents and additional guidance materials may be found at *http://export.gov/safeharbor.* As of December 10, 2010, 2,415 U.S. organizations have been placed on the Safe Harbor List. Organizations that have signed up to this list are deemed "adequate" under the Directive and do not have to provide further documentation to European officials. This list will be used by EU organizations to determine whether further information and contracts will be needed for a U.S. organization to receive personally identifiable information. This list is necessary to make the Safe Harbor accord operational, and was a key demand of the Europeans in agreeing that the Principles were providing "adequate" privacy protection.

Affected Public: Business or other for-profit organizations.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov.*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk Officer, Fax number (202) 395–5167 or via the Internet at *Wendy_L._Liberante@omb.eop.gov.*

Dated: April 5, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–8492 Filed 4–8–11; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; Survey of Building and Zoning Permit Systems

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 June 10, 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 Erica Filipek, U.S. Census Bureau, MCD, CENHQ Room 7K181, 4600 Silver Hill Road, Washington, DC 20233, telephone (301) 763–5161 (or via the Internet at *Erica.Mary.Filipek@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to request a three-year extension of a currently approved collection of the Form C–411, Survey of Building and Zoning Permit Systems. The Census Bureau produces statistics used to monitor activity in the large and dynamic construction industry. These statistics help state and local governments and the Federal Government, as well as private industry, to analyze this important sector of the economy. The accuracy of the Census Bureau statistics regarding the amount of construction authorized depends on data supplied by building and zoning officials throughout the country.

The Census Bureau uses the Survey of Building and Zoning Permit Systems to obtain information from state and local building permit officials needed for updating the universe of permit-issuing places. The questions pertain to the legal requirements for issuing building or zoning permits in the local jurisdictions. Information is obtained on such items as geographic coverage and types of construction for which permits are issued.

The universe of permit-issuing places is the sampling frame for the Building Permits Survey (BPS) and the Survey of Construction (SOC). These two sample surveys provide widely used measures of construction activity, including the economic indicators Housing Units Authorized by Building Permits and Housing Starts.

II. Method of Collection

The form is sent to a jurisdiction when the Census Bureau has reason to believe that a new permit system has been established or an existing one has changed, based on information from a variety of sources including survey respondents, regional councils and the Census Bureau's Geography Division which keeps abreast of changes in corporate status. Responses typically approach 85 percent.

III. Data

OMB Number: 0607–0350.

Form Number: C–411. You can obtain information on the proposed content at this Web site: *http://www.census.gov/mcd/clearance.*

Type of Review: Regular submission.

Affected Public: State and Local Governments.

Estimated Number of Respondents: 2,000 per year.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 500 hours.

Estimated Total Annual Cost: The cost to the respondents is estimated to

be $12,170 based on an average hourly salary of $24.34 for local government employees. This estimate was taken from the Census Bureau's Annual Survey of Government Employment for 2009.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 5, 2011.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–8474 Filed 4–8–11; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Proposed Information Collection; Comment Request; Survey of EDA Grant Process Improvement

AGENCY: Economic Development Administration, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before June 10, 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 Kenneth M. Kukovich, EDA PRA Liaison, Office of Management Services, Economic Development Administration, Department of Commerce, HCHB Room 7227, 1401 Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4965; fax: (202) 501–0766; e-mail: *kkukovich@eda.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The mission of the Economic Development Administration (EDA) is to lead the federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy. In 2010, EDA made improvements in its grant application process. The proposed short survey of five to ten questions will help EDA assess the effectiveness and overall customer satisfaction with the improvements to the grant application process and to make any necessary adjustments. EDA would like to conduct surveys of approximately 300 applicants every three months.

II. Method of Collection

Web-based survey.

III. Data

OMB Control Number: None.

Form Number(s): None.

Type of Review: Regular submission (new information collection).

Affected Public: Not for-profit institutions; state or local governments.

Estimated Number of Respondents: 300.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 200.

Estimated Total Annual Cost to Public: $0.

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: April 5, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–8493 Filed 4–8–11; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648- XA352

Marine Mammals; File No. 15537

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

ACTION: Notice of availability of an Environmental Assessment.

SUMMARY: The National Marine Fisheries Service (NMFS) announces the availability of the Environmental Assessment (EA) prepared in response to a public display permit application received from the Institute for Marine Mammal Studies (IMMS), P.O. Box 207, Gulfport, MS 39502 (Dr. Moby Solangi, Responsible Party).

DATES: Written or telefaxed comments must be received on or before May 11, 2011.

ADDRESSES: The EA is available for review online at *http://www.nmfs.noaa.gov/pr/permits/review.htm* or upon written request or by appointment in the following office:

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.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by e-mail to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. 15537 in the subject line of the e-mail comment.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Amy Sloan, (301) 713–2289.

SUPPLEMENTARY INFORMATION: On May 20, 2010, notice was published in the **Federal Register** (75 FR 28239) that a request for a permit was received by the above-named applicant under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216). The applicant is requesting a permit to take releasable stranded California sea lions (two males and six females) from west coast stranding facilities for public display purposes. By this notice, NMFS requests public comment on the EA associated with this action.

Dated: April 6, 2011.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–8576 Filed 4–8–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA359

Fisheries of the South Atlantic; South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a meeting of the Council Coordination Committee of the Fishery Management Councils.

SUMMARY: The South Atlantic Fishery Management Council (Council) will host a meeting of the Council Coordination Committee in Charleston, SC. *See* **SUPPLEMENTARY INFORMATION.**

DATES: The meeting will take place May 3–5, 2011. *See* **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the Doubletree Guest Suites Hotel, 181 Church St., Charleston, SC 29401; telephone: (843) 408–8733 or (843) 577–2644.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405; telephone: (843) 571–4366 or toll free (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION:

Members of the Council Coordination Committee (CCC), consisting of the Regional Fishery Management Council (RFMC) chairs, vice chairs and executive directors, will meet from 1:30 p.m.–5:30 p.m. on May 3, 2011; 8 a.m.–5:30 p.m. on May 4, 2011; and 8 a.m.–1 p.m. on May 5, 2011.

Agenda

Tuesday, May 3, 2011, 1:30 p.m.–5:30 p.m.

Welcome comments and open session with Councils; Council reports on the status of implementing the Magnuson-Stevens Act provisions and other current activities of interest including: annual catch limits; ending overfishing; rebuilding plans status updates; catch shares; and the allocation of fishery resources.

Wednesday, May 4, 2011, 8 a.m.–5:30 p.m.

Members of the CCC will receive updates and discuss: Fiscal Year (FY) 2011 and FY2012 budgets and additional grant funds; performance measures status; National Environmental Policy Act (NEPA) issues; a status report on Executive Order 13563 (Improving Regulation and Regulatory Review); the National Bycatch Report; the National Catch Share Policy Status; the Marine Protected Area (MPA) network and council participation; the Marine Recreational Information Program (MRIP) and use of MRIP data for recreational in-season adjustments; and Law Enforcement issues, including NOAA General Counsel (GC) penalty schedules.

Thursday, May 5, 2011, 8 a.m.–1 p.m.

Members of the CCC will be briefed on: United States Coast Guard (USCG) issues; National Ocean Council/Coastal and Marine Spatial Planning; the National Scientific and Statistical Committee (SSC) Workshop; and Outreach efforts of NOAA Fisheries and the Regional Fishery Management Councils.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (*see* **ADDRESSES**) 3 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Dated: April 5, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–8450 Filed 4–8–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: United States Patent and Trademark Office (USPTO).

Title: Response to Office Action and Voluntary Amendment Forms (formerly Electronic Response to Office Action and Preliminary Amendment Forms).

Form Number(s): PTO–1960, 1957, 1966, 1771, 1822.

Agency Approval Number: 0651–0050.

Type of Request: Revision of a currently approved collection.

Burden: 96,752 hours annually.

Number of Respondents: 224,183 responses per year.

Avg. Hours per Response: The USPTO expects that it will take the public approximately 10 minutes (0.17 hours) to 35 minutes (0.58 hours) to gather the necessary information, create the document, and submit the completed request, depending upon the type of request and the method of submission (electronic or paper).

Needs and Uses: This collection of information is required by the Trademark Act, 15 U.S.C. 1051 *et seq.,* which provides for the Federal registration of trademarks, service marks, collective trademarks and servicemarks, collective membership marks, and certification marks. Individuals and businesses that use such marks, or intend to use such marks, in interstate commerce may file an application to register their marks with the USPTO. In some cases, the USPTO issues Office Actions to applicants requesting missing information, or advising applicants of the refusal to register the mark. Applicants may also supplement their applications by providing further information voluntarily in the form of a Voluntary Amendment.

The information in this collection is a matter of public record and is used by

the public for a variety of private business purposes related to establishing and enforcing trademark rights. The information is available at USPTO facilities and can also be accessed at the USPTO Web site.

Affected Public: Business or other for-profit.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Nicholas A. Fraser, e-mail: *Nicholas_A._Fraser@omb.eop.gov.*

Once submitted, the request will be publicly available in electronic format through the Information Collection Review page at *http://www.reginfo.gov.*

Paper copies can be obtained by:

• *E-mail: InformationCollection@uspto.gov.* Include "0651–0050 copy request" in the subject line of the message.

• *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Written comments and recommendations for the proposed information collection should be sent on or before May 11, 2011 to Nicholas A. Fraser, OMB Desk Officer, via e-mail to *Nicholas_A._Fraser@omb.eop.gov,* or by fax to 202–395–5167, marked to the attention of Nicholas A. Fraser.

Dated: April 6, 2011.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer.

[FR Doc. 2011–8502 Filed 4–8–11; 8:45 am]

BILLING CODE 3510–16–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Addition

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed addition to the Procurement List.

SUMMARY: The Committee is proposing to add a service to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must be Received On or Before: 5/9/2011.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

For Further Information or to Submit Comments Contact: Patricia Briscoe, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed addition, the entities of the Federal Government identified in this notice will be required to procure the service listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service to the Government.

2. If approved, the action will result in authorizing small entities to furnish the service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the product and services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following service is proposed for addition to Procurement List for performance by the nonprofit agency listed:

Services

Service Type/Service Location: Base Operation Support Service, Department of Public Works, Fort George D. Meade, MD.

NPA: Melwood Horticultural Training Center, Upper Marlboro, MD.

Contracting Activity: Department of the Army, Mission and Installation Contracting Command, Fort Eustis, VA.

End of Certification

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2011–8438 Filed 4–8–11; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2010–0088]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Durable Nursery Products Exposure Survey

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The U.S. Consumer Product Safety Commission ("CPSC" or "Commission") is announcing that a proposed collection of information has been submitted to the Office of Management and Budget ("OMB") for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by May 11, 2011.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: CPSC Desk Officer, FAX: 202–395–6974, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified by Docket No. CPSC–2010–0088. In addition, written comments also should be submitted in *http://www.regulations.gov* under Docket No. CPSC–2010–0088, or by mail/hand delivery/courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923. For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* A copy of the draft survey is available at *http://www.regulations.gov* under Docket No. CPSC–2010–0088, Supporting and Related Materials.

FOR FURTHER INFORMATION CONTACT: Linda Glatz, Division of Policy and Planning, Office of Information Technology, Consumer Product Safety Commission, 4330 East West Highway,

Bethesda, MD 20814, 301–504–7671, *lglatz@cpsc.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, the CPSC has submitted the following proposed collection of information to OMB for review and clearance: Durable Nursery Products Exposure Survey.

On August 14, 2008, the Consumer Product Safety Improvement Act ("CPSIA") (Pub. L. 110–314) was enacted. Section 104 of the CPSIA (referred to as the "the Danny Keysar Child Product Safety Notification Act") (15 U.S.C. 2056a), requires the Commission to study and develop safety standards for infant and toddler products. Such durable infant and toddler products include, but are not limited to: Full-size cribs and nonfull-size cribs; toddler beds; high chairs, booster chairs, and hook-on chairs; bath seats; gates and other enclosures for confining a child; play yards; stationary activity centers; infant carriers; strollers; walkers; swings; and bassinets and cradles. The Commission is required to evaluate the currently existing voluntary standards for durable infant or toddler products and promulgate a mandatory standard substantially the same as, or more stringent than, the applicable voluntary standard.

In evaluating the current voluntary standards, CPSC staff requires certain additional data to assess the potential future impacts of the CPSIA mandatory efforts on durable infant and toddler products. The draft Durable Nursery Products Exposure Survey ("DNPES" or "survey") is a national probability sample of households with children five years old and younger, designed to determine the prevalence of durable infant and toddler product ownership in households, as well as the frequency and manner of use of such products. In particular, the survey will seek information regarding ownership characteristics; the life cycle of the products; and consumer behaviors and perceptions regarding such products. The survey will gather information on the characteristics and usage patterns of 24 categories of durable infant or toddler products and solicit information on accidents or injuries associated with those products. The information collected from the DNPES will help inform the Commission's evaluation of consumer products and product use, by providing insight and information into consumer perceptions and usage patterns. In addition to assisting the Commission's rulemaking efforts, such information will also support ongoing voluntary standards activities in which the Commission participates, compliance and enforcement efforts, as well as information and education campaigns. The data also will help identify consumer safety issues that need additional research. Understanding better how these products are used by consumers will help the Commission address potential hazards and assess the sufficiency of current voluntary standards.

A small group of respondents (37) from different backgrounds (including both English and Spanish speakers) were asked to participate in cognitive testing (for the telephone survey) or usability testing (for the Web version of the survey) to provide extensive feedback regarding the clarity of specific questions. Results of the cognitive and usability testing were used to revise the survey instruments, but will not be included in the survey results for the main data collection. A mail paper screener will be sent to 16,667 families to determine whether sampled respondents are eligible for full DNPES participation. Eligible respondents who have children ages 0 to 5 years in their household will have Web- and computer-assisted telephone interviewing ("CATI") survey options for completing the full extended DNPES. The DNPES will include approximately 24 categories with questions about different infant or toddler products, but each respondent will be limited to a maximum of three categories. The CATI and Web programs will also ensure that each respondent's questions are limited to the portions of the survey for which they have been selected.

In the **Federal Register** of August 19, 2010 (75 FR 51245), the CPSC published a 60-day notice requesting public comment on the proposed collection of information. No comments were received. However, CPSC staff, on its own initiative, modified the burden hours to reflect more accurately the estimated burden of the collection of information based on feedback received from respondents of the cognitive and usability tests.

Each cognitive interview or usability test takes approximately one hour, for an estimated total of 37 burden hours. The initial mail paper screener for the main data collection will be sent to approximately 16,667 households and will take approximately five minutes (.083333 hours) to complete. An estimated 2,000 eligible respondents will be selected for telephone extended interviews (1,500 respondents) or Web surveys (500 respondents). Each interview or survey will take approximately 35 minutes (.583333 hours) to complete. Although the staff initially contemplated approximately 30 minutes per interview or survey, and four product categories per respondent, that number was revised to 35 minutes per interview or survey, with a three product limit per respondent, based on responses to the cognitive testing and usability testing. The total estimated burden for all respondents is 2,592.6 hours, rounded up to 2,593 hours (167 hours more than the 2,426 hours previously proposed). The total cost to the respondents for the total burden is estimated to be $71,659 ($5,138 more than the $66,521 previously proposed), based on an hourly rate of $27.42 (all workers in private industry in Table 9 of the June 2010 Employer Costs for Employee Compensation, Bureau of Labor Statistics ("BLS")). The hourly rate data has been updated to correspond with the most recently available BLS data.

The estimated cost to the federal government is $1,026,763. Since the study extends over three years, however, the estimated annualized cost of the information collection requirements to the government is $342,254.33, rounded down to $342,254, for the three-year period. This sum includes contractors to implement and conduct the DNPES survey ($729,093), 21 staff months ($297,670) at an average level of GS–14 step 5 (($119,238/.701) ÷ 12 months) × 21 months), using a 70.1 percent ratio of wages and salary to total compensation from Table 1 of the June 2010 Employer Costs for Employee Compensation, published by the Bureau of Labor Statistics.

Dated: April 6, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–8514 Filed 4–8–11; 8:45 am]

BILLING CODE 6355–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Information Collection; Submission for OMB Review, Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the "Corporation"), has submitted a public information collection request (ICR) entitled "AmeriCorps Application Instructions: State Commissions, State and National Competitive, National Professional Corps, Indian Tribes, States and Territories without Commissions, and State and National Planning" to the

Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, (44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Ms. Amy Borgstrom at (202) 606–6930. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 565–2799 between 8:30 a.m. and 5 p.m. eastern time, Monday through Friday.

ADDRESSES: Comments may be submitted, identified by the title of the information collection activity, to the Office of Information and Regulatory Affairs, Attn: Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service, by any of the following two methods within 30 days from the date of publication in this **Federal Register**:

(1) By fax to: (202) 395–6974, Attention: Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service; and

(2) Electronically by e-mail to: *smar@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Comments

A 60-day public comment Notice was published in the **Federal Register** on February 4, 2011. This comment period ended April 5, 2011. No public comments were received from this Notice.

Description: The Corporation seeks to renew and revise the current AmeriCorps State and National Application Instructions. The Application Instructions are being revised for increased clarity and to comply with new requirements regarding performance measurement set forth in the Edward M. Kennedy Serve America Act. The Application Instructions will be used in the same manner as the existing Application Instructions. The Corporation also seeks to continue using the current Application Instructions until the revised Application Instructions are approved by OMB. The current form is due to expire on May 31, 2012.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: AmeriCorps State and National Application Instructions.

OMB Number: 3045–0047.

Agency Number: None.

Affected Public: Nonprofit organizations, State, Local and Tribal.

Total Respondents: 654 applicants.

Frequency: Annually.

Average Time per Response: 24 hours to apply.

Estimated Total Burden Hours: 15,696 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Dated: April 5, 2011.

Lois Nembhard,

Deputy Director, AmeriCorps State and National.

[FR Doc. 2011–8554 Filed 4–8–11; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF EDUCATION

[CFDA Number: 84.184Y]

Funding Priorities, Requirements, and Definitions

AGENCY: Office of Safe and Drug-Free Schools, Department of Education.

ACTION: Notice of proposed priorities, requirements, and definitions.

SUMMARY: The Assistant Deputy Secretary for Safe and Drug-Free Schools proposes priorities, requirements, and definitions under the Safe and Supportive Schools program. The Assistant Deputy Secretary may use one or more of these priorities, requirements, and definitions for competitions in fiscal year (FY) 2011 and later years. The Assistant Deputy Secretary intends to use the priorities, requirements, and definitions to awards grants to State educational agencies (SEAs) to support statewide measurement of, and targeted programmatic interventions to improve, conditions for learning in order to help schools improve student safety and health.

DATES: We must receive your comments on or before May 11, 2011.

ADDRESSES: Address all comments about this notice to Bryan Williams, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, Room 10120, Washington, DC 20202–6450.

If you prefer to send your comments by e-mail, use the following address: *bryan.williams@ed.gov.* Please include the term "Safe and Supportive Schools—Comments on FY 2011 Proposed Priorities" in the subject line of your message.

FOR FURTHER INFORMATION CONTACT: Bryan Williams (202) 245–7883 or by e-mail: *bryan.williams@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service, toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this notice. To ensure that your comments have maximum effect in developing the notice of final priorities, requirements, and definitions, we urge you to identify clearly the specific proposed priority, requirement, or definition that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed priorities, requirements, and definitions. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this notice in room 10120, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please

contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Purpose of Program: Through the Safe and Supportive Schools program, the Department awards grants to SEAs to support statewide measurement of, and targeted programmatic interventions to improve, conditions for learning in order to help schools improve student safety and health. *Program Authority:* 20 U.S.C. 7131. *Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 84, 85, 97, 98, and 99. (b) The regulations in 34 CFR part 299.

Proposed Priorities

This notice contains three proposed priorities. *Background:* Our Nation's schools should be safe and secure settings where children can learn and grow to their full potential. Unfortunately, data suggests that significant levels of violence, bullying, and other problems in schools create conditions that negatively affect learning. The most recent data on school crime and safety indicate that while the incidence of violent crimes in schools decreased from 1992 to 2008, students are now more likely to experience non-fatal crimes (including theft, simple assault, aggravated assault, rape, and sexual assault) in school than outside of school.[1] During the 2007–2008 school year, 85 percent of public schools in the United States reported that at least one crime occurred at their school.[2] In addition, based on more recently reported data, 25 percent of public schools reported that bullying occurred among students on a daily or weekly basis, and 34 percent of teachers agreed or strongly agreed that student misbehavior interfered with their teaching.[3]

Disruptive aggressive behaviors such as bullying and violence create a hostile school environment that can interfere with the academic performance and mental health of students who are victims of or witnesses to such aggressive behaviors. Students who are exposed to high levels of aggressive behavior and violence at school are more likely to disengage from school[4] and to experience clinical levels of mental and emotional disorders than are students who experience either no or low levels of violence at school.[5] Students who are bullied are also more likely to become truant from school[6] and have lower academic performance.[7] Research also indicates that the majority of school shooters had been previously bullied.[8] Disruptive and aggressive behaviors in the classroom, and the resulting suspensions and expulsions, also diminish teachers' instructional time and students' learning time. Of the 271,800 serious disciplinary actions that were taken during the 2007–2008 school year for physical attacks or fights, 79 percent were out-of-school suspensions lasting five days or more.[9]

Preparing students for success requires learning environments that help all students to be engaged in their classrooms, schools, and communities. Students learn best when they are in a school environment with, among other things, positive relationships between adults and students; the absence of violence, bullying, harassment, and substance abuse; and readily available physical and mental health supports and services. Research has shown that students who report high levels of school connectedness also report lower levels of emotional distress, violence, suicide attempts, and drug use.[10]

Safe and supportive school environments also provide greater opportunities for family and community engagement in students' learning and strengthening the role of schools as centers of communities.

To ensure that schools are safe places for students to learn and to formulate intervention and prevention strategies, schools should understand the issues they face and the conditions that may influence student risk behaviors. As such, comprehensive needs assessments of conditions for learning—including assessments of school engagement, school safety, and the school environment—can provide educators with the data needed to design and target interventions to improve conditions in schools.

Safe and Supportive Schools grants were first implemented in FY 2010, using priorities similar to the priorities proposed in this notice. Our experience with grantees from this cohort is that developing a comprehensive approach to improving conditions for learning is critical to helping all students be safe, healthy, and supported in their classrooms, schools, and communities. We propose the following priorities to increase the capacity of States, local educational agencies (LEAs), and schools to create safe, healthy, and supportive learning environments.

Proposed Priority 1—Grants to States To Improve Conditions for Learning

Under this proposed priority the Department supports grants to SEAs for projects that take a systematic approach to improving conditions for learning in eligible schools (as defined in this notice) through (a) an improved measurement system that assesses conditions for learning, which must include school safety, and (b) the implementation of programmatic interventions that address problems identified by data.

Proposed Priority 2—Inclusion of School Engagement and School Environment in Needs Assessments Measuring Conditions for Learning

To meet this proposed priority, the applicant must propose to implement a measurement system that uses valid and reliable instruments to gather comprehensive data on school engagement and the school environment from students in order to assess conditions for learning.

Proposed Priority 3—Family and Staff Inclusion in Needs Assessments Measuring School Engagement

To meet this proposed priority, the applicant must propose to implement a measurement system that uses valid and reliable instruments to gather comprehensive data from school staff and from students' families or guardians that can be used to assess school engagement.

Types of Priorities:

[1] U.S. Department of Education. National Center for Education Statistics. Indicators of School Crime and Safety: 2010.

[2] Dinkes, R., Kemp, J., Baum, K. and Snyder, T.D. (2009). Indicators of School Crime and Safety: 2010 (NCES 2011–012/NCJ 230812) National Center for Education Statistics, Institute for Education Sciences, U.S. Department of Education, and Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice. Washington, DC: US Government Printing Office.

[3] U.S. Department of Education. National Center for Education Statistics. Indicators of School Crime and Safety: 2010.

[4] Bowen, N.K. & Bowen, G.L. (1999). Effects of crime and violence in neighborhoods and schools on the school behaviors and performance of adolescents. Journal of Adolescent Research, 14, 319–342.

[5] Flannery, D.J., Wester, K.L. & Singer, M.I. (2004). Impact of exposures to violence in school on child and adolescent mental health and behavior. Journal of Community Psychology. 32, 559–573.

[6] Smith, P.K. & Sharp, S. (1994). The problem of school bullying. In P.K. Smith & S. Sharp (Eds.) School Bullying: Insights and Perspectives. New York, NY: Routledge, pp. 1–19.

[7] Glew, G., Fan, F., Katon, W., Rivara, F., Kernic, M. (2005). Bullying, psychosocial adjustment, and academic performance in elementary school. Arch Pediatr Adolesc Med, 159, 1026–1031.

[8] Leary, M.R., Kowalski, R.M., Smith, L., & Phillips, S. (2003). Teasing, rejection, and violence: Case studies of the school shootings. Aggressive Behavior, 29, 202–214.

[9] U.S. Department of Education. National Center for Education Statistics. 2007–2008 Survey on Crime and Safety (SSOCS), 2008.

[10] Blum, R.W & Libbey, H.P. (2004). School Connectedness—Strengthening Health and Education Outcomes for Teenagers. Journal of School Health. 74, 231–232.

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Proposed Requirements

Background: The purpose of the Safe and Supportive Schools program is to support SEAs in the statewide measurement of, and targeted programmatic interventions to improve, conditions for learning in order to help schools improve student safety and health. Schools need complete and accurate data to determine where resources are most needed and to design effective programs. For example, while incident data can be used to determine the frequency of safety incidents, they cannot fully measure perceptions or attitudes, and those data are usually limited to those incidents that come to the attention of school personnel. In addition, these data rarely include students, staff, and parent perceptions of school safety, student engagement, and the learning environment.

We believe that supplementing incident data with survey or other data is critical to informing and guiding efforts to improve conditions for learning. Many States and LEAs already use a variety of surveys to track State-level or LEA-level trends; however, improvements are needed to ensure that the survey measures are valid and reliable and that the surveys provide schools with sufficient data to inform decision making.

In order to improve conditions for learning, we believe that sufficient high-quality data are required to identify need, allocate resources, and implement and expand effective programs that meet the needs of students.

Proposed Requirements:

The Assistant Deputy Secretary for Safe and Drug-Free Schools proposes the following program, application, administrative, and eligibility requirements for this program. We may apply one or more of these requirements in any year in which this program is in effect.

Program Requirements:

1. *Measurement System.*

(a) Each grantee must implement a measurement system that—

(1) Collects survey data and incident data (as defined in this notice) from participating LEAs that have a combined student enrollment of no less than 20 percent of the State's total student enrollment;

(2) Collects student survey data from eligible schools (as defined in this notice) to assess conditions for learning, which include, at a minimum, data on school safety;

(3) Uses survey sampling procedures that collect data from a representative sample of the students in grades 9 and above within the eligible schools surveyed;

(4) Uses valid and reliable survey instruments (as defined in this notice);

(5) Collects the required survey data from all eligible schools in participating LEAs within the first 12 months of the project period and again during the final 12 months of the project period;

(6) Collects the required survey data from each eligible school selected to implement programmatic interventions (as defined in this notice) in each year of the project period;

(7) Collects incident data (as defined in this notice) from all eligible schools in participating LEAs in each year of the project period; and

(8) Provides data that can be summarized in ways that will engage school staff and families or guardians in discussions of the results.

2. *School Safety Scores.*

(a) Each grantee must generate a school safety score (as defined in this notice) for each eligible school in its participating LEAs, using student survey data and incident data (as defined in this notice) both of which are disaggregated by school, within the first 12 months of the project period and again during the final 12 months of the project period;

(b) Additionally, each grantee must generate a school safety score for each eligible school selected to implement programmatic interventions (as defined in this notice), using student survey data and incident data (as defined in this notice) both of which are disaggregated at the school level, in each year of the project period; and

(c) Each grantee must publicly report school safety scores for each eligible school in its participating LEAs after the initial year and after the final year of the project period, and for each year of the project period, for eligible schools selected to implement programmatic interventions. To satisfy this requirement, each grantee must—

(i) Prior to the start of each school year, post school safety scores, generated from current data, on the Internet in a manner that is easily accessible to the general public; and

(ii) Within the first 12 months of the project period, post the formula used to generate school safety scores on the Internet in a manner that is easily accessible to the general public.

3. *Implementing Programmatic Interventions and Technical Assistance Strategies.* Each grantee must—

(a) In consultation with its participating LEAs, and using criteria that incorporate student survey data and incident data from the measurement system, the list of persistently lowest-achieving schools (as defined in this notice), or both, select eligible schools in need of programmatic interventions (as defined in this notice);

(b) In consultation with its participating LEAs, implement programmatic interventions (as defined in this notice) in a number of eligible schools, located in participating LEAs, totaling no more than 20 percent of the total number of eligible schools in the State, to ensure that programmatic interventions are of sufficient size and scope;

(c) Provide its participating LEAs and eligible schools with technical assistance in using survey data to drive school improvement, including on using data to assess areas in need of improvement, and on identifying programmatic interventions to address these areas; and

(d) Use at least 80 percent of the grant funds awarded in project years two, three, and four to carry out programmatic interventions (as defined in this notice) and related technical assistance.

Note: For the purposes of these proposed program requirements, grantees may implement programmatic interventions that serve any student within an eligible school, including students in grades 8 and below. Grantees are not required to survey students in grades 8 and below.

Application Requirements:

In its application, an applicant must—

(a) Identify the LEAs that will participate in the proposed project. If the LEAs that will participate have not

been identified by the time the application is submitted, the applicant must provide a description of the process it will use to select LEAs to participate;

(b) Describe the process it will use to consult with participating LEAs in developing a formula to be used in generating school safety scores required under the program;

(c) Describe its plan to maintain, improve, or build State-level capacity to conduct the following activities:

(1) Developing, adapting, or adopting valid and reliable survey instruments.

(2) Administering surveys using established sampling and administration methodologies that ensure adequate school-level representation and high response rates.

(3) Tracking costs by major component (e.g., student survey data collection).

(4) Safeguarding the privacy and confidentiality of the survey respondents and complying with the requirements of the Protection of Pupil Rights Amendment, 20 U.S.C. 1232h; 34 CFR part 98 in collecting survey data and with the requirements of the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g; and 34 CFR part 99 in collecting any survey or incident data containing personally identifiable information;

(d) Provide a brief description of the specific constructs to be included on any survey instruments;

(e) Explain the strategies it will use to identify and address any anticipated challenges (including statutory or regulatory requirements) involved in collecting the required data in the participating LEAs. At a minimum, each applicant must identify and address anticipated barriers to obtaining high response rates for surveys;

(f) Describe how it will use the summaries of the data collected from the measurement system and the school safety scores to engage families and guardians in a discussion of the findings; to examine how a school's setting, policies, and practices promote or inhibit student safety from physical violence; and to examine how a school's setting, policies, and practices might reduce disruptive behaviors and suspensions and expulsions;

(g) Describe how it will provide technical assistance to participating LEAs and their schools on the use, meaning, and application of required survey data and incident data (as defined in this notice);

(h) Describe the strategies it will use to consult with participating LEAs in order to identify and implement programmatic interventions (as defined in this notice) in identified schools that respond to needs identified through the analysis of data collected through the measurement system; and

(i) Comply with the requirements of any evaluation of the program conducted by the Department, including by sharing all data collected through the measurement system with the Department or an evaluator selected by the Department.

Administrative Requirement:

Although programmatic interventions will be delivered at the LEA level, the SEA must retain administrative direction and fiscal control for the project.

Eligibility Requirements:

Eligible applicants under this program are SEAs, as defined by section 9101(41) of the ESEA.

Proposed Definitions:

The Assistant Deputy Secretary for Safe and Drug-Free Schools proposes the following definitions for this program. We may apply one or more of these definitions in any year in which this program is in effect.

Conditions for learning means the school setting, which includes, at a minimum, school safety, and which may include school environment and school engagement.

Eligible school means any school that includes 9th grade, 10th grade, 11th grade, or 12th grade.

Incident data means data from incident reports by school officials including, but not limited to, truancy rates; the frequency, seriousness, and incidence of violence and drug-related offenses resulting in suspensions and expulsions; and the incidence and prevalence of drug use and violence by students in schools.

Moderate evidence means evidence from previous studies whose designs can support causal conclusions (i.e., studies with high internal validity) but have limited generalizability (i.e., moderate external validity), or studies with high external validity but moderate internal validity.

Persistently lowest-achieving schools means, as determined by the State, (a)(1) any Title I school in improvement, corrective action, or restructuring that (i) is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or (ii) is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and (2) any secondary school that is eligible for, but does not receive, Title I funds that (i) is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or (ii) is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

To identify the persistently lowest-achieving schools, a State must take into account both: (i) The academic achievement of the "all students" group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (ii) the school's lack of progress on those assessments over a number of years for the "all students" group.

Programmatic intervention means any program, strategy, activity, service, or policy for school or community settings that prevents and reduces youth crime, violence, harassment, bullying, and the illegal use of drugs, alcohol, and tobacco; creates positive relationships between students and adults; promotes parent and community engagement; promotes the character, social, and emotional development of students; provides or improves access to social services; enables school communities to manage student behaviors effectively while lowering suspensions and expulsions; promotes readiness and emergency management for schools; or provides other needed social and emotional supports for students. Programmatic interventions should be based on the best available evidence, including, where available, strong evidence (as defined in this notice) or moderate evidence (as defined in this notice).

School engagement means participation in school-related activities, and the quality of school relationships, which may include relationships between and among administrators, teachers, parents, and students.

School environment means the school setting relating to the physical plant, the fairness and adequacy of disciplinary procedures, the academic environment, and student health, including the available physical and mental health supports and services, as supported by relevant research and an assessment of validity.

School safety means the safety of school settings, such as the incidence of harassment, bullying, violence, and substance use, as supported by relevant research and an assessment of validity.

School safety score means a number calculated with a formula, developed by the State in consultation with LEAs and applied uniformly to all eligible schools in participating LEAs within the State, that uses survey data and incident data (as defined in this notice) collected by a measurement system and that can be used to make school comparisons.

Strong evidence means evidence from previous studies whose designs can support causal conclusions (*i.e.,* studies with high internal validity), and studies that in total include enough of the range of participants and settings to support scaling up to the State, regional, or national level (*i.e.,* studies with high external validity).

Valid and reliable survey instruments mean intact sets of survey questions that have been demonstrated statistically to produce results that are both consistently and accurately measuring appropriate concepts of interest for the age groups surveyed.

Final Priorities, Requirements, and Definitions:

We will announce the final priorities, requirements, and definitions in a notice in the **Federal Register**. We will determine the final priorities, requirements, and definitions after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing additional priorities, requirements, and definitions subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use one or more of these proposed priorities, requirements, and definitions, we invite applications through a notice in the **Federal Register.**

Executive Order 12866: This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this proposed regulatory action.

The potential costs associated with this proposed regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this proposed regulatory action, we have determined that the benefits of the proposed priorities, requirements, and definitions justify the costs.

We have determined, also, that this proposed regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Discussion of Costs and Benefits:

The potential costs associated with the proposed priorities and requirements are minimal while the potential benefits are significant.

Grantees may anticipate costs related to developing and implementing a measurement system, including data collection, analysis, and reporting. Grantees may also anticipate costs in implementing programs in schools, and providing training and technical assistance to staff in participating LEAs. Finally, grantees will experience costs when traveling to mandatory training events sponsored by the Department. However, all of these costs may be included in the grant budget and, therefore, will have little or no financial impact on the applicant.

The benefit of the proposed priorities, definitions, and requirements is that grantees will develop a measurement system that uses incident and survey data to support statewide measurement of conditions for learning. The grantee can use this information to identify and support the most at-risk schools and communities, thereby improving school safety and increasing the likelihood of academic success for students in these schools. Grantees will be able to tailor their approach based on the specific needs of each school, using data from the measurement system to drive resource and programming decisions. Training and technical assistance will be provided for staff, and will increase the grantee's overall performance and sustainability efforts. In summary, a comprehensive effort to improve conditions for learning will help to promote student safety, health, and well-being, and increase our capacity to create safe, healthy, and drug-free learning environments.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

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: April 5, 2011.

Kevin Jennings,

Assistant Deputy Secretary for Safe and Drug-Free Schools.

[FR Doc. 2011–8461 Filed 4–8–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students With Disabilities

AGENCY: U.S. Department of Education, Office of Special Education and Rehabilitative Services, Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities.

ACTION: Notice of an open meeting and public hearing.

SUMMARY: The notice sets forth the schedule and agenda of the meeting of the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities. The notice also describes the functions of the Commission. Notice of the meeting is required by section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of its opportunity to attend.

DATES: Open Meeting: May 3–4, 2011. Public Hearing: May 4, 2011.

TIME: May 3, 2011: The open meeting will occur from 8:30 a.m.–5 p.m. May 4, 2011: The open meeting will occur from 8:30 a.m.–3:30 p.m. The public hearing will take place from 4 p.m. to 9 p.m.

ADDRESSES: The Blackwell Inn and Conference Center, 2110 Tuttle Park Place, Columbus, Ohio 43210.

FOR FURTHER INFORMATION CONTACT: Elizabeth Shook, Program Specialist, Office of Special Education and Rehabilitative Services, United States Department of Education, 550 12th Street, SW., Washington, DC 20202;

telephone: (202) 245–7642, fax: 202–245–7638.

SUPPLEMENTARY INFORMATION: The Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities (the Commission) is established under Section 772 of the Higher Education Opportunity Act, Public Law 110–315, dated August 14, 2008. The Commission is established to conduct a comprehensive study, which will—(I) "assess the barriers and systemic issues that may affect, and technical solutions available that may improve, the timely delivery and quality of accessible instructional materials for postsecondary students with print disabilities, as well as the effective use of such materials by faculty and staff; and (II) make recommendations related to the development of a comprehensive approach to improve the opportunities for postsecondary students with print disabilities to access instructional materials in specialized formats in a time frame comparable to the availability of instructional materials for postsecondary nondisabled students."

In making recommendations for the study, "the Commission shall consider—(I) how students with print disabilities may obtain instructional materials in accessible formats within a time frame comparable to the availability of instructional materials for nondisabled students; and to the maximum extent practicable, at costs comparable to the costs of such materials for nondisabled students; (II) the feasibility and technical parameters of establishing standardized electronic file formats, such as the National Instructional Materials Accessibility Standard as defined in Section 674(e)(3) of the Individuals with Disabilities Education Act, to be provided by publishers of instructional materials to producers of materials in specialized formats, institutions of higher education, and eligible students; (III) the feasibility of establishing a national clearinghouse, repository, or file-sharing network for electronic files in specialized formats and files used in producing instructional materials in specialized formats, and a list of possible entities qualified to administer such clearinghouse, repository, or network; (IV) the feasibility of establishing market-based solutions involving collaborations among publishers of instructional materials, producers of materials in specialized formats, and institutions of higher education; (V) solutions utilizing universal design; and (VI) solutions for low-incidence, high-cost requests for instructional materials in specialized formats."

The Commission will meet in open session on Tuesday and Wednesday, and will discuss the content of the Commission report. The Commission will also address unresolved issues that have previously been discussed by the Commission's four task forces. The Commission will also receive briefings from subject matter experts on several different topics of interest.

The purpose of the public hearing is for the Commission to receive information from its stakeholders on issues pertaining to accessible instructional materials in postsecondary education. The public hearing session will address issues related to law, technology, the market model, and low-incidence/high-cost materials. Additionally, the public hearing will focus on individual experiences related to accessible instructional materials in postsecondary education.

Detailed minutes of the meeting and hearing, will be available to the public within 14 days of the meeting. Records are kept of all Commission proceedings and are available for public inspection at the Office of Special Education and Rehabilitative Services, United States Department of Education, 550 12th Street, SW., Washington, DC 20202, Monday–Friday during the hours of 8 a.m. to 4:30 p.m.

Additional Information

Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.,* interpreting services, assistive listening devices, or material in alternative format) should notify Elizabeth Shook at (202) 245–7642, no later than April 22, 2011. We will make every attempt to meet requests for accommodations after this date, but, cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Participants who wish to comment at the public hearing are encouraged to register in advance by calling Janet Gronneberg at CAST at 781–245–2212 (voice) or 781–245–9320 (TTY) or *jgronneberg@cast.org* by April 22, 2011. The Commission requests that organizations with multiple participants designate no more than one individual to speak on its behalf. Participants who register in advance, including remote participants, must report to the hearing registration desk at least thirty minutes prior to their scheduled time. A period of time will be reserved for individuals who choose to not register in advance. Participation in the hearing for unregistered participants will be subject to availability. Comments should be limited to five minutes per person or organization, but participants have the option of supplementing their testimony with written statements that will be part of the official hearing record. Technology to facilitate PowerPoint presentations will be available.

Members of the public who would like to offer comments as part of the public hearing remotely may submit written comments to *AIMCommission@ed.gov* or by mail to Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities, 550 12th St., SW., Room PCP–5113, Washington, DC 20202. All submissions will become part of the public record. Members of the public also have the option of participating in the open meeting and public hearing remotely. Remote access will be provided via an Internet Webinar service utilizing VoiP (Voice Over Internet Protocol). Login information will be provided via the Commission's public listserv at *pscpublic@lists.cast.org* and posted at the following site: *http://www2.ed.gov/about/bdscomm/list/aim/index.html.*

Electronic Access to this Document: You may 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/index.html.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–866–512–1800; or in the Washington, DC area at 202–512–0000.

Dated: April 6, 2011.

Alexa Posny,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 2011–8510 Filed 4–8–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995), intends to extend for three years, an information collection request with the Office of Management and Budget (OMB). Comments are invited on: (a) Whether the extended collection of information

is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before June 10, 2011. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Richard Langston, U.S. Department of Energy, MA–61, 1000 Independence Avenue, SW., Washington, DC 20585 or by fax at (202) 586–1305 or by e-mail at *Richard.Langston@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to: Richard Langston, U.S. Department of Energy, MA–61, 1000 Independence Avenue, SW., Washington, DC 20585.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) *OMB No.:* 1910–4100; (2) *Information Collection Request Title:* Procurement Requirements; (3) *Type of Review:* Renewal; (4) *Purpose:* Under 48 CFR Part 952 and Subpart 970.52, DOE must collect certain types of information from those seeking to do business with the Department or those awarded contracts by the Department. (5) *Annual Estimated Number of Respondents:* 7,539; (6) *Annual Estimated Number of Total Responses:* 7,539 (7) *Annual Estimated Number of Burden Hours:* 896,209 hours; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $67,215,675.

Statutory Authority: 42 U.S.C. 2201.

Issued in Washington, DC, on April 5, 2011.

David Boyd,

Acting Director, U.S. Department of Energy, Office of Procurement and Assistance Management, Office of Management.

[FR Doc. 2011–8592 Filed 4–8–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

DOE/NSF High Energy Physics Advisory Panel

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the DOE/NSF High Energy Physics Advisory Panel (HEPAP). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, June 23, 2011; 10 a.m.–6 p.m. Friday, June 24, 2011; 8:30 a.m.–2 p.m.

ADDRESSES: Hilton Washington DC/Rockville, Executive Meeting Center, 1750 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: John Kogut, Executive Secretary; High Energy Physics Advisory Panel; U.S. Department of Energy; SC–25/Germantown Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290; Telephone: (301) 903–1298.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance on a continuing basis to the Department of Energy and the National Science Foundation on scientific priorities within the field of high energy physics research.

Tentative Agenda: Agenda will include discussions of the following:

Thursday, June 23, 2011 and Friday, June 24, 2011

- Discussion of Department of Energy High Energy Physics Program.
- Discussion of National Science Foundation Elementary Particle Physics Program.
- Reports on and Discussion of Topics of General Interest in High Energy Physics.
- Public Comment (10-minute rule).

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Panel, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact John Kogut by phone: (301) 903–1298 or e-mail: *John.Kogut@science.doe.gov.* You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Panel will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available on the High Energy Physics Advisory Panel Web site at *http://science.energy.gov/hep/hepap/.*

Issued at Washington, DC, on April 5, 2011.

LaTanya Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2011–8590 Filed 4–8–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC11–59–000.

Applicants: LS Power Equity Partners, LP, LS Power Associates, L.P., LSP Gen Investors, L.P., LS Power Partners, L.P., LS Power Equity Partners PIE I, L.P., Arlington Valley, LLC, Griffith Energy LLC, Star West Generation LLC.

Description: LS Power Equity Partners, L.P., *et al.* Application for Authorization of Transaction under section 203 of the Federal Power Act, and Request for Expedited Consideration.

Filed Date: 04/01/2011.

Accession Number: 20110401–5197.

Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2614–004.

Applicants: ENMAX Energy Marketing, Inc.

Description: ENMAX Energy Marketing Inc. request for Category 1 status and an updated Market Power Analysis.

Filed Date: 04/01/2011.

Accession Number: 20110401–5200.

Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3147–001.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.17(b): J143 GIA Errata to be effective 3/19/2011.

Filed Date: 04/01/2011.

Accession Number: 20110401–5127.

Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3262–000.

Applicants: Trans Bay Cable LLC.
Description: Trans Bay Cable LLC submits tariff filing per 35.13(a)(2)(iii: Tariff Volume 1, Transmission Owner Tariff to be effective 3/31/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5000.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3263–000.
Applicants: Western Reserve Energy Services, LLC.
Description: Western Reserve Energy Services, LLC submits tariff filing per 35.12: Petition for Acceptance of Initial Tariff, Waivers and Blanket Authority to be effective 6/4/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5002.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3264–000.
Applicants: PJM Interconnection, L.L.C., Virginia Electric and Power Company.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Interconnection Service Agreement No. 2444 between Dominion and TrAILCo to be effective 4/11/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5030.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3265–000.
Applicants: American Transmission Systems, Incorporation, PJM Interconnection, L.L.C.
Description: American Transmission Systems, Incorporated submits tariff filing per 35.13(a)(2)(iii: Interconnection Agmt between AMP & First Energy on behalf of ATSI—SA No. 2852 to be effective 6/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5062.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3266–000.
Applicants: American Transmission Systems, Incorporation, PJM Interconnection, L.L.C.
Description: American Transmission Systems, Incorporated submits tariff filing per 35.13(a)(2)(iii: Interconnection Agmt between Buckeye & First Energy for ATSI—SA No. 2853 to be effective 6/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5064.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3267–000.
Applicants: Lavalley Energy, LLC.
Description: Lavalley Energy, LLC submits tariff filing per 35.1: Lavalley Energy FERC Electric Tariff to be effective 4/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5070.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3268–000.
Applicants: American Transmission Systems, Incorporation, PJM Interconnection, L.L.C.
Description: American Transmission Systems, Incorporated submits tariff filing per 35.13(a)(2)(iii: Interconnection Agmt between CPP & First Energy for ATSI—SA No. 2854 to be effective 6/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5071.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3269–000.
Applicants: ISO New England Inc., Connecticut Light and Power Company, Western Massachusetts Electric Company, New England Power Company.
Description: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: NU–NGRID NEEWS Regional CWIP Recovery to be effective 6/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5110.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3270–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Revisions to the Tariff Attach L & RAA Sched 17 to add CPP as a Trans. Owner to be effective 6/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5165.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3271–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Revisions to the TOA Attachment A to add CPP as a Transmission Owner to be effective 6/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5172.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3273–000.
Applicants: RJF–Morin Energy, LLC.
Description: RJF–Morin Energy, LLC submits tariff filing per 35.1: RJF–Morin Energy FERC Electric Tariff to be effective 4/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5205.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3274–000.
Applicants: Entergy Arkansas, Inc.
Description: Entergy Arkansas, Inc. submits tariff filing per 35.13(a)(2)(iii: OATT Amendments to Recover Ice Storm Costs to be effective 6/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5206.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3275–000.
Applicants: Niagara Mohawk Power Corporation.
Description: Niagara Mohawk Power Corporation submits Notice of Cancellation of the Second Revised Service Agreement No. 1154 with Project Orange Associates, LLC.
Filed Date: 04/01/2011.
Accession Number: 20110401–0201.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3276–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 04–01–11 MRES to be effective 6/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5247.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3277–000.
Applicants: Sky River LLC.
Description: Sky River LLC submits tariff filing per 35.1: Sky River LLC's Open Access Transmission Tariff to be effective 4/2/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5256.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3278–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits tariff filing per 35.13(a)(2)(iii: WAPA RS 45, RS 672, RS 673 to be effective 6/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5271.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3279–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 04–01–11 Schedule 37 to be effective 6/1/2011.
Filed Date: 04/01/2011.
Accession Number: 20110401–5289.
Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3280–000.
Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35: 04–01–2011 NDEX Compliance Filing to be effective 6/1/2011.

Filed Date: 04/01/2011.

Accession Number: 20110401–5290.

Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3281–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 4–1–2011 Module F to be effective 6/1/2011.

Filed Date: 04/01/2011.

Accession Number: 20110401–5294.

Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Docket Numbers: ER11–3282–000.

Applicants: Alcoa Power Generating Inc.

Description: Alcoa Power Generating Inc. submits tariff filing per 35.1: APGI—CRT TSA Rate Schedule to be effective 4/2/2011.

Filed Date: 04/01/2011.

Accession Number: 20110401–5310.

Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES11–22–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Application of The Midwest Independent Transmission System Operator, Inc under section 204 of the Federal Power Act To Issue Securities.

Filed Date: 04/01/2011.

Accession Number: 20110401–5157.

Comment Date: 5 p.m. Eastern Time on Friday, April 22, 2011.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RR11–1–000.

Applicants: Southwest Power Pool Regional Entity, Nebraska Public Power District.

Description: Petition of Southwest Power Pool Regional Entity for Review of Decision of North American Electric Reliability Corporation in RR11–1.

Filed Date: 03/31/2011.

Accession Number: 20110331–5331.

Comment Date: 5 p.m. Eastern Time on Thursday, April 21, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 4, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–8522 Filed 4–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–3263–000]

Western Reserve Energy Services, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Western Reserve Energy Services, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is April 25, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 4, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–8523 Filed 4–8–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9292–3]

New York State Prohibition of Discharges of Vessel Sewage; Receipt of Petition and Tentative Affirmative Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice—Receipt of petition and tentative affirmative determination.

SUMMARY: Notice is hereby given that, pursuant to Clean Water Act, Section 312(f)(3) (33 U.S.C. 1322(f)(3)), the State of New York has determined that the protection and enhancement of the quality of the New York State areas of the Long Island Sound requires greater environmental protection, and has petitioned the United States Environmental Protection Agency, Region 2, for a determination that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for those waters, so that the State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters.

New York State has proposed to establish a "Vessel Waste No-Discharge Zone" for the Long Island Sound that encompasses approximately 760 square miles, includes the open waters, harbors, bays and navigable tributaries of the Sound and a portion of the East River, from the Hell Gate Bridge in the west to the northern bounds of Block Island Sound in the east. It excludes waters of Mamaroneck Harbor, Huntington-Northport Bay Complex, Port Jefferson Complex, Hempstead Harbor and Oyster Bay/Cold Spring Harbor Complex, which have been previously designated as No Discharge Zones.

DATES: Comments regarding this tentative determination are due by May 11, 2011.

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

- *E-mail: chang.moses@epa.gov.* Include "Comments on Tentative Affirmative Decision for NYS LIS NDZ" in the subject line of the message.
- *Fax:* 212–637–3891.
- *Mail and Hand Delivery/Courier:* Moses Chang, U.S. EPA Region 2, 290 Broadway, 24th Floor, New York, NY 10007–1866. Deliveries are only accepted during the Regional Office's normal hours of operation (8 a.m. to 5 p.m., Monday through Friday, excluding federal holidays), and special arrangements should be made for deliveries of boxed information.

FOR FURTHER INFORMATION CONTACT: Moses Chang, (212) 637–3867, e-mail address: *chang.moses@epa.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that the State of New York (NYS or State) has petitioned the United States Environmental Protection Agency, Region 2, (EPA) pursuant to section 312(f)(3) of Public Law 92–500 as amended by Public Law 95–217 and Public Law 100–4, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the NYS areas of the Long Island Sound (LIS or Sound). Adequate pumpout facilities are defined as one pumpout station for 300–600 boats under the Clean Vessel Act: Pumpout Station and Dump Station Technical Guidelines (**Federal Register**, Vol. 59, No. 47, March 10, 1994).

The Long Island Sound is one of the nation's premier water bodies, and supports a variety of possible uses—fish and shellfisheries, fish spawning areas, breeding grounds, valuable wildlife habitats, bathing beaches, commercial and recreational boating, and a profusion of recreational resources.

In 1985, recognizing the Sound's ecological and economic value, New York State partnered with Connecticut and the EPA to create and support the Long Island Sound Study (LISS). The Sound was recognized as an Estuary of National Significance under the Clean Water Act in 1988, and as such, is one of the nation's twenty-eight (28) National Estuary Programs.

The ecological, economic, and recreational resources provided by the Long Island Sound are vulnerable to the effects of poor water quality. The Sound was once home to some of the most productive shellfish beds in the nation, but many have now closed due to pathogen, low dissolved oxygen, and excessive nutrient contamination.

The State of Connecticut designated the Connecticut portion of the Long Island Sound as a No-Discharge Zone (NDZ) in 2007. Previously established No-Discharge Zones in both New York State and Connecticut have made important reductions in vessel waste as a source of water pollution in the Long Island Sound. Degradation of any area, however, affects the whole. Extending the No-Discharge Zone designation to the remainder of the Long Island Sound would therefore be a positive component of an overall strategy to protect and improve these waters and would create a unified approach to vessel waste for the entirety of this waterbody.

In order for EPA to determine that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the New York State areas of the Long Island Sound, the State must demonstrate that the pumpout-to-vessel ratio does not exceed 1:300. In its petition, the State described the recreational and commercial vessels that use the Sound, and the pumpout facilities that are available for their use.

The recreational vessel population, 11,693, was estimated using 2008 recreational vessel registrations. In addition to recreational vessels, the Sound is used by commercial vessels. The majority of commercial vessels are small fishing vessels, tankers, tugs, or barges. Because the small fishing vessels are comparably sized to the bulk of recreational vessels, they can make use of the existing vessel pumpouts that are available for recreational vehicles. The small commercial vessel population, 500, was estimated based on aerial photographs used to develop the 1996 Statewide Clean Vessel Plan. The figures for recreational and small commercial vessels were then compared to the number of pumpouts available to determine the applicable ratio and whether the requirement is met. There are fifty-two (52) pumpout facilities funded by the Clean Vessel Assistance Program (CVAP) in the relevant areas of the Sound. Of those, twenty-six (26) discharge to a holding tank and twenty-six (26) discharge to a municipal wastewater treatment plant. There are also sixteen (16) other (non-CVAP funded) pumpouts available for recreational and small commercial vessels that either discharge to a holding tank or to a municipal wastewater

treatment plant. Therefore, the total number of pumpouts available for the 12,193 recreational and small commercial vessels that use the Sound is sixty-eight (68), and the pumpout-to-vessel ratio for those vessels is 1:179.3 (68:12,193).

The number of large commercial vessels was estimated using the following information sources: ballast manifests; U.S. Coast Guard assessments; phone contacts with ferries, cruise ships, the State University of New York (SUNY), and the Port Authority of New York and New Jersey. On any given day, the numbers of large vessels in the New York waters of the Long Island Sound is very low, partially due to complex navigational issues. Tankers, tugs, cruise ships and barges have access to mobile pumpout facilities (i.e., "honey-dipper" trucks or boats) as they do in Connecticut, or may access pumpout facilities at their home port, outside of the region, eliminating the need for services within the Sound.

Ferries constitute the greatest need for pumpouts for large commercial vessels. The New London to Orient Point Ferry does not discharge to LIS waters. It pumps waste from its ferries into the New London City sewer system. The Bridgeport to Port Jefferson Ferry could discharge its waste into a sewage system operated by either the Town of Port Jefferson, or Suffolk County, and the ferry company is in the process of negotiating an agreement to do so. In the interim, septic truck services are readily available for pumpout while the ferries are docked in Bridgeport. SUNY Maritime College's large vessel is equipped with a marine sanitation device (MSD) that it discharges to the open sea or when docked in its home port at Fort Schuyler. SUNY may install a sewer pipe on the pier so that the vessel can discharge to the municipal system. In the interim, septic truck services are readily available for pumpout when in port at Fort Schuyler.

A list of the facilities, phone numbers, locations, hours of operation, water depth and fee is provided as follows:

LIST OF PUMPOUTS IN THE LIS NDZ PROPOSED AREA

No.	Name	Location	Contact information	Dates/days/hours of operation	Water depth (feet)	Fee
1	Wright Island Marina	Milton Harbor, New Rochelle.	914–235–8013	Memorial Day to Labor Day; daily; 9 a.m.–5 p.m.	10	$5.00.
2	Nichols Yacht Yard, Inc	Mamaroneck Harbor, Mamaroneck.	914–698–6065	Apr 15–Oct 15; daily; 9 a.m.–5 p.m..	8	Free.
3	Village of Mamaroneck—Harbor Island East and West Basin.	Mamaroneck Harbor, Mamaroneck.	914–777–7703; VHF 16	Apr-Nov; Mon–Sun (in season); 24 hours.	8.5	Free.
4	City of Rye—Municipal Boat Basin.	Milton Harbor, Rye	914–967–2011; VHF 16	Apr 1–Oct 31; Mon–Sun; 8 a.m.–8 p.m.	5	Free.
5	Town of Huntington—Cold Spring Harbor Replace.	Cold Spring Harbor, Huntington.	631–351–3049; VHF 9	May 1–Oct 31; Mon–Sun; 8 a.m.–8 p.m.	6	Free.
6	Village of Greenport—Boat Engine Replacement.	Greenport Harbor, Greenport.	631–477–2385; VHF 9	May 1–Oct 31; Mon–Sun; 8 a.m.–5 p.m.	N/A	$5.00.
7	Port of Egypt Marine, Inc.	Southold Bay, Southold	631–765–2445	Apr–Nov; Mon–Sun; 7:30 a.m.–5 p.m.	4	$5.00.
8	Claudio's Marina	Greenport Harbor, Greenport.	631–477–0355; VHF 9	Apr 1–Nov 1; Mon–Sun; 8 a.m.–5 p.m.	10	Free.
9	Albertson Marine Inc	Southold Bay, Southold	631–765–3232; VHF 16 & 18.	Apr–Dec (Closed Sundays, Jan–Mar); Mon–Sun, 8 a.m.–5 p.m. (Sun 9 a.m.–3 p.m.).	5	$5.00.
10	Fishers Island Yacht Club Boat.	Southold Bay, Fisher's Island.	631–788–7036; VHF 73	Memorial Weekend to Columbus Day; Sat, Sun, & Holidays; 9 a.m–6 p.m..	10	Free.
11	Old Dock Bluff Park Replace.	Stony Brook Harbor, Smithtown.	631–360–7514; VHF 16	Apr–Oct; Mon–Sun; 24 Hrs.	4	Free.
12	Town of Smithtown—Long Beach Mooring Area.	Stony Brook Harbor, St. James.	631–360–7643; VHF 16	Apr–Oct; Mon–Sun; 24 hours.	4	Free.
13	Coecles Harbor Marina and Boatyard, Inc.	Coecles Harbor, Shelter Island.	631–749–0700; VHF 9	May 15–Oct 12; Mon–Sun; 8 a.m.–5 p.m.	6	$5.00.
14	Village of Northport-Pumpout Boat.	Northport Harbor, Northport.	631–261–7502; VHF 9	May 15–Oct 15; Mon–Sun; 9 a.m.–5 p.m.	N/A	Free.
15	Town of Huntington—Woodbine Marina.	Northport Harbor, Northport.	631–351–3192; VHF 9	May 1–Oct 31; Mon–Sun; 8 a.m.–8 p.m.	6	Free.
16	Town of Huntington—South Town Dock.	Huntington Harbor, Halesite.	631–351–3049; VHF 9	May 1–Oct 31; Mon–Sun; Boats 8 a.m.–8 p.m.; Stationery station 24 hours.	10	Free.
17	Town of Huntington-Mill Dam Marina Pumpout.	Huntington Harbor, Huntington.	631–351–3049; VHF 9	Apr 1–Sept 30; Mon–Sun; 24 hours.	6	Free.
18	Town of Huntington—Huntington Boat Pumpout.	Lloyd Harbor, Huntington.	631–351–3049; VHF 9	Apr 20–Nov 30; Sat, Sun, & Holidays; 10 a.m.–8 p.m.	8	Free.

LIST OF PUMPOUTS IN THE LIS NDZ PROPOSED AREA—Continued

No.	Name	Location	Contact information	Dates/days/hours of operation	Water depth (feet)	Fee
19	Town of Huntington—Halesite Marina Pumpout.	Huntington Harbor, Huntington.	631–351–3049; VHF 9 ..	Apr 1–Sept 30; Mon–Sun; 24 hours.	10	Free.
20	Town of Huntington—Halesite Marina Boat.	Huntington Harbor, Huntington.	631–351–3049; VHF 9 ..	Memorial Day to Labor Day; Sat & Sun; 10 a.m.–8 p.m.	N/A	Free.
21	Town of Huntington—Gold Star Battalion.	Huntington Harbor, Huntington.	631–351–3049; VHF 9 ..	May 1–Oct 31; Mon–Sun; 8 a.m.–8 p.m.	8	Free.
22	Huntington Yacht Club ..	Huntington Harbor, Huntington.	631–427–4949; VHF 68	Apr 15–Nov 15; Mon–Sun; 8 a.m.–8 p.m.	8	$5.00.
23	Town of Huntington-Mill Dam Marina Pumpout Upgrade.	Huntington Harbor, Huntington.	631–351–3049; VHF 9 ..	Apr 1–Dec 31; Mon–Sun; 24 hours.	10 low tide	Free.
24	Town of Brookhaven-Port Jefferson Boat-Replacement.	Port Jefferson and Setauket Harbors & Conscience Bay, Port Jefferson.	631–473–3052; VHF 73	May 15–Sept 15; Weekends & Holidays; 8 a.m.–4 p.m.	N/A	Free.
25	Town of Brookhaven—Mt. Sinai Boat-Replacement.	Mt. Sinai Harbor, Port Jefferson.	631–473–3052; VHF 73	Mid-May to Mid-Sept; Weekends & Holidays; 8 a.m.–4 p.m.	N/A	Free.
26	NYCDEP–World's Fair Marina.	East River, Flushing	631–595–4458; VHF 71	May 1–Oct 31; Mon–Sun; 8 a.m.–6 p.m.	8	Free.
27	NYCDEP–Bayside Marina.	Little Neck Bay, Flushing	718–595–4458; VHF 72	May 1–Oct 31; Mon–Sun; 24 hours.	4–12	Free.
28	Capri Marine & Yachting Center.	Manhasset Bay, Port Washington.	516–883–7800; VHF 9 & 71.	May 1–Oct 31; Mon–Sun; 8 a.m.–10 p.m.	1.5	Free.
29	Town of Oyster Bay—Theodore Roosevelt Beach & Marina Upgrade.	Oyster Bay	516–624–6180	N/A	N/A	Free.
30	Town of Oyster Bay—Tappen Beach & Marina.	Hempstead Harbor, Glenwood Landing.	516–624–6180; VHF 9 ..	Jan–Dec; Mon–Sun; 24 hours.	7–8	Free.
31	Sea Cliff Yacht Club	Hempstead Harbor, Sea Cliff.	516–671–7374; VHF 9 ..	May 15–Sept 15; Mon–Fri; 9 a.m.–5 p.m.	8	$5.00.
32	Town of North Hempstead—Port Washington Dock Pump Replacement.	Hempstead Harbor, Port Washington.	516–767–4622; VHF 9 & 16.	May 15–Nov 1; Mon–Sun; 24 hours.	7	Free.
33	Town of North Hempstead—Manorhaven Beach Park.	Manhasset Bay, Port Washington.	516–767–4622	May 15–Nov 1; Wed–Sun; 8 a.m.–4 p.m.	6	Free.
34	Town of North Hempstead-Bar Beach Park.	Hempstead Harbor, Port Washington.	516–767–4622; VHF 9 & 16.	Apr–Oct; Mon–Sun; 24 hours.	6	Free.
35	Manhasset Bay Marina (Port Washington)—1995 Project.	Manhasset Bay, Port Washington.	516–883–8411; VHF 9 & 71.	Apr 1–Oct 1; Mon–Sun; 24 hours.	15	Free.
36	InspirationWharf, c/o Ventura Management Corp.	Manhasset Bay, Port Washington.	516–883–7800; VHF 7 & 9.	May 1–Oct 31; Mon–Sun; 8 a.m.–10 p.m.	6	Free.
37	U.S Merchant Marine Academy.	Little Neck Bay, Kings Point.	516–773–5798	Jan–Dec; Mon–Sun; 9 a.m.–3 p.m.	6	Free.
38	Glen Cove Yacht Service & Repair, Inc..	Hempstead Harbor, Glen Cove.	516–676–0777	Apr–Oct; Mon–Sun; 24 hours.	6	$5.00.
39	City of Glen Cove—Glen Cove Yacht Club.	Hempstead Harbor, Glen Cove.	516–676–1625	N/A	7	Free.
40	Brewer Marina at Glen Cove.	Hempstead Harbor, Glen Cove.	800–331–3077; VHF 9 & 16.	May 1–Oct 31; Mon–Sun; 7:30 a.m.–4 p.m.	6	$5.00.
41	NYCDEP—Locust Point Marina.	Pelham Bay, Bronx	718–595–4458; VHF 68	May 1–Oct 31; Mon–Sun; Sunrise to Sunset.	4	Free.
42	City Island Yacht Sales—Pumpout Boat.	Pelham Bay, City Island	718–885–2300; VHF 9 ..	Apr 1–Dec 8; Mon–Sun; 8 a.m.–4:30 p.m.	N/A	$5.00.
43	City of New Rochelle—Municipal Marina.	New Rochelle Creek & Lower Harbor, New Rochelle.	914–235–7339; VHF 9 & 16.	Apr–Nov 30; Mon–Sun; 24 hours.	8	Free.
44	Town of Oyster Bay—Theodore Roosevelt Beach & Marina Boat Rep.	Oyster Bay Harbor and Mill Neck Bay, Oyster Bay.	516–624–6180; VHF 9 ..	Apr 1 to Mid-Nov; 7 days/week; 24 hours.	7–8	Free.

LIST OF PUMPOUTS IN THE LIS NDZ PROPOSED AREA—Continued

No.	Name	Location	Contact information	Dates/days/hours of operation	Water depth (feet)	Fee
45	Haven Marina	Manhasset Bay, Port Washington.	516–883–0937	May–Sept; Mon–Sun; Sunrise to Sunset.	8	Free.
46	Town of Smithtown—Long Beach Park East Replacement.	Stony Brook Harbor, St. James.	631–360–7620; VHF 16	Apr–Oct; Mon–Sun; 24 hours.	4	Free.
47	West Shore Marine	Esopus-Lloyd—Marlborough, Marlboro.	VHF 16 & 19	Mon–Sat, 8 a.m.–5 p.m.; Sun, 10 a.m.–5 p.m.	N/A	Free.
48	City of New Rochelle—Pumpout Boat.	Echo Bay, New Rochelle	914–235–7339; VHF 9	Memorial Day to Labor Day; Fri–Mon; 8 a.m.–4 p.m.	N/A	Free.
49	City of New Rochelle—Municipal Marina.	New Rochelle Creek & Lower Harbor, New Rochelle.	914–235–7339; VHF 9 & 16.	Apr–Nov 30; Mon–Sun; 24 hours.	8	Free.
50	Town of Huntington—Mill Dam Boat.	Huntington Harbor, Huntington.	631–351–3049; VHF 9	Apr 20–Sept 30; Sat, Sun & Holidays; 10 a.m.–8 p.m.	8	Free.
51	Manhasset Pumpout Boat.	Manhasset Bay, Syosset	516–677–5853	Fri–Sun & Holidays; 10 a.m.–6 p.m.	Varies	Free.
52	North Hempstead Pumpout Boat.	Manhasset Bay	516–767–4622; VHF 9 or 71.	Apr 1–Oct 30; Mon–Fri; 9 a.m.–3 p.m.	Varies	Free.
53	Tappen Marina Pumpout Boat.	Oyster Bay Harbor and Mill Neck Bay, Oyster Bay.	516–677–5853; VHF 9	June–Oct; Fri–Mon; 8 a.m.–6 p.m.	Varies	Free.
54	Western Waterfront Pier	Oyster Bay Harbor, Oyster Bay.	VHF 9	Memorial Day to Labor Day; 7 days/week; 24 hours.	N/A	Free.
55	Theodore Roosevelt Pumpout Boat.	Oyster Bay Harbor and Mill Neck Bay, Oyster Bay.	516–677–5853; VHF 9	Mid-Apr to Oct 31; Thu–Sun; 10 a.m.–6 p.m.	Varies	Free.
56	Soundview Boat Ramp	Northport Harbor, Northport.	631–351–3255; VHF 9	Memorial Day to Labor Day; Sat & Sun; 8 a.m.–8 p.m.	6′ at low tide; 12′ at high tide.	Free.
57	Island Boat Yard	West Neck Harbor, Shelter Island.	631–749–3333; VHF 9	Apr 15–Oct 15; Mon–Sun; 9 a.m.–5 p.m.	15	$5.00.
58	Port Jefferson Marina	Port Jefferson Harbor, Port Jefferson.	631–331–3567; VHF 9 for marina, VHF 73 for pumpout boats.	Boats: May to Mid-Sept; Fri, Sat, & Sun; 8 a.m.–6 p.m. Barge: May–Nov; 7 days/week; 24 hours.	11	Free.
59	Brewer Yacht Yard	Greenport Harbor, Greenport.	631–477–9594; VHF 9	Year-round however they do winterize. If requested, can run the pumpout in winter conditions. 7 days/week, 24 hours.	8	Free for self service; $5.00 for assistance from attendant.
60	Brewer Yacht Yard	Greenport Harbor, Greenport.	631–477–0828; VHF 9	5 days/week, year-round; Mon–Fri 7:30 a.m.–4 p.m.; Sat in off season 8–12; Sat in season 7:30 a.m.–7 p.m.	7–8	N/A
61	Brick Cove Marina	Southold Harbor, Southold.	631–477–0830	Mar–Dec; Mon–Fri, 7 a.m.–4 p.m.; Sat 9 a.m.–5 p.m.; Sun 1:30 p.m.–4 p.m.	6	Yes, for non-marina customers.
62	Goldsmith's Boat Shop	Southold Bay, Southold	631–765–1600	Year round; 7 days/week (closed Sun in Jan & Feb); 8:30 a.m.–4:30 p.m. (Sun 9 a.m.–4:30 p.m.).	6	N/A

LIST OF PUMPOUTS IN THE LIS NDZ PROPOSED AREA—Continued

No.	Name	Location	Contact information	Dates/days/hours of operation	Water depth (feet)	Fee
63	Mt. Sinai Yacht Club	Mt. Sinai Harbor, Mt. Sinai.	631–473–2993; VHF 16	May 15–Oct 1; May & June, open Fri, Sat, & Sun; June to Labor Day, open 7 days/ week; 9 a.m.–6 p.m.	20	None for members; $15 for outside boaters.
64	Mt. Sinai Marina	Mt. Sinai Harbor, Mt. Sinai.	631–928–0199; VHF 9 & 73.	Marina: Mother's Day to 1st weekend in Nov. Pumpout boats: May to Mid-Sept (8 a.m.–6 p.m.).	6	Free
65	Old Man's Boatyard	Mt. Sinai Harbor, St. James.	631–473–7330	Apr 15–Oct 15; Mon–Fri; 8 a.m.–4 p.m.	8	$50 for pumpout.
66	Danford's Marina	Port Jefferson Harbor, Port Jefferson.	631–928–5200; VHF 9 ..	May 1–Oct 31; 7 days/ week; 7 a.m.–9 p.m.	3–10	Free
67	Knutson West Marina	Huntington Harbor, Huntington.	631–549–7842	N/A	N/A	N/A
68	Seymour's Boatyard	Northport Harbor, Northport.	631–261–6574	Apr 15–Oct 31; 7 days/ week; hours vary.	7	N/A.

Based on the above, EPA hereby proposes to make an affirmative determination that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are available for the waters of the New York State Long Island Sound. A 30-day period for public comment has been opened on this matter, and EPA invites any comments relevant to its proposed determination.

Dated: March 31, 2011.

Judith A. Enck,

Regional Administrator, Region 2.

[FR Doc. 2011–8463 Filed 4–8–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notice

AGENCY: Federal Election Commission.

DATE AND TIME: Thursday, April 14, 2011 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting, open to the public, was canceled.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer; Telephone: (202) 694–1220.

Shawn Woodhead Werth,

Secretary and Clerk of the Commission.

[FR Doc. 2011–8710 Filed 4–7–11; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination—on the dates indicated—of the waiting period provided by law and the premerger notification rules. The listing for each transaction includes the transaction number and the parties to the transaction. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

Early Terminations Granted March 1, 2011 Thru March 31, 2011

03/01/2011

20110548 G Alcoa Inc.; TransDigm Group Incorporated; Alcoa Inc.

20110580 G James J. Parker; Caterpillar Inc.; James J. Parker

03/07/2011

20110574 G Summit Partners Private Equity Fund VII–A. L.P.; Answers Corporation; Summit Partners Private Equity Fund VII–A. L.P.

20110589 G GTCR Fund IX/A, L.P.; Sterigenics Holdings, Inc.; GTCR Fund IX/A. L.P.

20110591 G BHP Billiton Limited; Chesapeake Energy Corporation; BHP Billiton Limited

20110601 G First Reserve Fund XI, L.P.; Energy Spectrum Partners V, L.P.; First Reserve Fund XI, L.P.

20110602 G News Corporation; Shine Limited; News Corporation

20110614 G Clayton, Dubilier & Rice Fund VIII, L.P.; Emergency Medical Services Corporation; Clayton, Dubilier & Rice Fund VIII, L.P.

03/08/2011

20110592 G Danaher Corporation, Beckman Coulter, Inc.; Danaher Corporation

20110594 G Oglethorpe Power Corporation: KGen Power Corporation; Oglethorpe Power Corporation

20110604 G American Securities Partners V, L.P.; Integrated Solutions, LLC; American Securities Partners V, L.P.

20110608 G Station Holdco LLC; Station Casinos, Inc. (Debtor-in-Possession); Station Holdco LLC

03/09/2011

20110597 G JLL Partners Fund V, L.P.; Credit Suisse Group AG, JLL Partners Fund V, L.P.

20110615 G Waud Capital Partners QP II, L.P.; TA IX L.P.; Waud Capital Partners QP II, L.P.

03/10/2011

20110551 G Quanex Building Products Corporation; Lauren Holdco Inc. Quanex Building Products Corporation

03/11/2011

20110609 G Lindsay Goldberg III, L.P.; Lockheed Martin Corporation; Lindsay Goldberg III, L.P.

20110611 G Golden Gate Capital Opportunity Fund, L.P.; Conexant Systems, Inc.;, Golden Gate Capital Opportunity Fund, L.P.

20110625 G Golden Gate Capital Opportunity Fund, L.P. Tollgrade Communications, Inc. (PA); Golden Gate Capital Opportunity Fund. L.P.

20110630 G EQT V (No. 1) Limited Partnership; DHAB I S.A.; EQT V (No. 1) Limited Partnership

03/14/2011

20110460 G The Schreiber Foods, Inc., Employee Stock Ownership Plan; Dean Foods Company; The Schreiber Foods, Inc., Employee Stock Ownership Plan

20110571 G OIP Safway AIV, L.P.; Red Bear Holdings, Inc.; OIP Safway AIV, L.P.

20110632 G Reyes Holdings, L.L.C.; Schenck Company; Reyes Holdings, L.L.C.

03/15/2011

20110595 G Elliott International Limited; Iron Mountain Incorporated; Elliott International Limited

20110596 G Elliott Associates, L.P.; Iron Mountain Incorporated; Elliott Associates, L.P.

20110637 G Cerberus Institutional Partners, L.P.; Kevin J. Keane and Cindy M. Keane; Cerberus Institutional Partners, L.P.

20110638 G Cerberus Institutional Partners, L.P.; Shawn J. Keane and Jacquelyn M. Keane; Cerberus Institutional Partners, L.P.

03/16/2011

20110575 G Becton, Dickinson and Company; Accuri Cytometers, Inc.; Becton, Dickinson and Company

20110616 G Hewlett-Packard Company; Vertica Systems, Inc.; Hewlett-Packard Company

03/17/2011

20110581 G Atlantic Health System, Inc.; North Jersey Health Care Corporation; Atlantic Health System, Inc.

20110590 G Saptuo Inc.; GTCR Fund VIII, L.P.; Saptuo Inc.

20110641 G Watsco, Inc.; Carrier Enterprise II, LLC; Watsco, Inc.

03/18/2011

20110639 G Holly Corporation; Frontier Oil Corporation; Holly Corporation

20110640 G Algonquin Power and Utilities Corp.; National Grid plc; Algonquin Power and Utilities Corp.

20110644 G Nomura Holdings, Inc.; BATS Global Markets, Inc.; Nomura Holdings, Inc.

20110645 G Bank of America Corporation; BATS Global Markets, Inc.; Bank of America Corporation

20110648 G China National Chemical Corporation; Makhteshim Agan Industries Ltd.; China National Chemical Corporation

20110650 G Anne Ray Charitable Trust; Cargill, Incorporated; Anne Ray Charitable Trust

20110651 G Margaret A. Cargill Foundation; Cargill, Incorporated; Margaret A. Cargill Foundation

20110653 G Intertek Group plc; Moody International Limited: Intertek Group plc

20110656 G EPCOR Utilities Inc.; Brick Power Holdings LLC; EPCOR Utilities Inc.

20110660 G Exchange Income Corporation; Westower, LLC; Exchange Income Corporation

03/21/2011

20110538 G Meggitt PLC; Danaher Corporation; Meggitt PLC

20110579 G BAE Systems plc; Carlyle-FIS Acquisition Company, L.L.C.; BAE Systems plc

20110587 G Hercules Holding II, LLC; Catholic Health East; Hercules Holding II, LLC

20110619 G Gilead Sciences, Inc.; Calistoga Pharmaceuticals, Inc.; Gilead Sciences, Inc.

03/22/2011

20110635 G Daiichi Sankyo Company, Limited; Plexxikon Inc.; Daiichi Sankyo Company, Limited

03/23/2011

20110137 G Amazon.com, Inc.; Quidsi, Inc.; Amazon.com, Inc.

20110603 G Ares Corporate Opportunities Fund III, L.P.; Global Defense Technology & Systems, Inc.; Ares Corporate Opportunities Fund III, L.P.

20110631 G National Oilwell Varco, Inc.; Empeiria Conner LLC; National Oilwell Varco, Inc.

03/24/2011

20110251 G Brambles Limited; Island International Investment Limited Partnership; Brambles Limited

20110634 G Quest Diagnostics Incorporated; Thermo Fisher Scientific Inc.; Quest Diagnostics Incorporated

20110654 G Gibraltar Industries, Inc., Altus Capital Partners SBIC Parent, L.P.; Gibraltar Industries, Inc.

20110657 G CSR plc; Zoran Corporation, CSR plc

03/25/2011

20110636 G Giles Martin; Thermo Fisher Scientific Inc.; Giles Martin

20110661 G HOV Services Limited; SCH Services Inc.; HOV Services Limited

20110662 G Apollo Investment Fund V, L.P.; SCH Services Inc.; Apollo Investment Fund V, L.P.

20110665 G R. Marcelo Claure, eSecuritel Holdings. LLC; R. Marcelo Claure

20110667 G Catalyst Health Solutions, Inc.; Walgreen Co.; Catalyst Health Solutions, Inc.

03/28/2011

20110669 G Wellspring Capital Partners IV, L.P.; Mr. James R. Scheele; Wellspring Capital Partners IV, L.P.

20110670 G Berkshire Fund VII, L.P.; James E. Hoffman, Jr.; Berkshire Fund VII, L.P.

20110672 G EPCOR Utilities Inc.; LS Power Equity Partners II, L.P.; EPCOR Utilities Inc.

20110677 G Astellas Pharma Inc.; Maxygen, Inc.; Astellas Pharma Inc.

03/29/2011

20110606 G Verizon Communications Inc.; Terremark Worldwide, Inc.; Verizon Communications Inc.

20110668 G Blackstone Capital Partners V, L.P.; Rikco International, LLC; Blackstone Capital Partners V, L.P.

20110673 G New Mountain Partners III, L.P.,; Quad-C Partners VI, L.P.; New Mountain Partners III; L.P.

03/30/2011

20110610 G Ensco plc; Pride International, Inc., Ensco plc

20110627 G Hercules Offshore, Inc.; Seahawk Drilling, Inc.; Hercules Offshore, Inc.

20110649 G Teradata Corporation; Aster Data Systems, Inc.; Teradata Corporation

20110652 G Clariant AG; J.P. Morgan Chase & Co.; Clariant AG

03/31/2011

20110618 G General Electric Company; John Wood Group PLC; General Electric Company

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, Contact Representative, or Renee Chapman, Contact Representative, Federal Trade Commission, Premerger Notification Office, Bureau Of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2011–8331 Filed 4–8–11; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Statement of Organization, Functions, and Delegations of Authority

Part A, Office of the Secretary, Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Chapter AK, Office of Medicare Hearings and Appeals (OMHA), as last amended at 70 FR 36386–36387, dated June 23, 2005, is amended as follows:

I. Under Section AK.10 Organization, delete in its entirety and replace with the following:

Section AK.10 Organization. The Office of Medicare Hearings and Appeals (OMHA) is under the direction of the Chief Administrative Law Judge (CALJ), who reports directly to the Secretary. OMHA consists of the following components:

- Medicare Hearings and Appeals Chief Judge's Office (CJO) (Headquarters Office) (AKA)

—Office of Operations (AKA1)

—Office of Programs (AKA2)

- Medicare Hearings and Appeals Field Offices (AKB1–AKB4)

II. Under Section AK.20 Functions, Paragraph A, "The Office of Medicare Hearings and Appeals Immediate Office (AK)," delete the second paragraph, which begins with, "The Executive Director (ED) of OMHA/IO, reports to the CALJ, and is responsible for all operational matters * * *" in its entirety and replace with the following:

Within OMHA/CJO, the Director, Office of Operations and the Director, Office of Programs, both of whom report to the CALJ, are responsible for all operational matters and for executive and managerial oversight, respectively, in support of the mission of the office, with the exception of areas directly involving the conduct of adjudicatory hearings and the rendering of fair and impartial decisions ensuing from those hearings.

III. Under Section AK.20 Functions, Paragraph B, "Medicare Hearings and Appeals Field Offices (AKB1–4)," delete the first paragraph, which begins with, "The Field Offices are headed by a Managing Administrative Law Judge (MALJ) who reports directly to the CALJ. The Managing Administrative Law Judge (MALJ) acts on behalf of the CALJ at the respective field office location on all matters involving the hearing process, and is directly responsible for the effective execution of the hearings process within the field location * * *," in its entirety and replace with the following:

OMHA's Field Offices are headed by the Associate Chief Administrative Law Judges, all of whom report directly to OMHA's Chief Administrative Law Judge (CALJ). Each Field Office's Associate Chief Administrative Law Judge (ACALJ) acts on behalf of the OMHA CALJ at his or her respective field office location on all matters involving the hearing process and is directly responsible for the effective execution of the hearings process within the field location. Each Field Office's ACALJ is responsible for: (a) Providing direction, leadership, management and guidance to the field office staff, including Supervisory Administrative Law Judges (SALJs) and their staffs, (b) field office implementation of policies, goals, objectives, and procedures pertaining to the hearings process and formulating policies, goals, and objectives for the SALJs and support staff in their field office; (c) planning, organizing and administering field operations for scheduling and conducting independent and impartial hearings on appealed determinations involving adjudicatory hearings for authorities delegated to the SALJs by the Secretary; (d) developing and recommending OMHA action with respect to allegation of unfair hearings within the field operations; (e) upon request by SALJs, providing advice and guidance in matters related to adjudicating cases under the provisions of the Social Security Act; and (f) conducting adjudicatory hearings under authorities delegated to the SALJs by the Secretary.

IV. Under Section AK.20 Functions, Paragraph B, "Medicare Hearings and Appeals Field Offices (AKB1–4)," replace all reference to the "Hearing Office Manager" as the "Hearing Office Director" and all references to the "HOM" as the "HOD."

V. Delegation of Authority. Pending further delegation, directives or orders by the Secretary or by the Chief Administrative Law Judge, all delegations and re delegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further re delegations, provided they are consistent with this reorganization.

Dated: January 25, 2011.

E.J. Holland, Jr.,

Assistant Secretary for Administration.

[FR Doc. 2011–8356 Filed 4–8–11; 8:45 am]

BILLING CODE 4150–24–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Funding Opportunity Announcement (FOA), Initial Review

The meeting announced below concerns "National Spina Bifida Registry Longitudinal Data Collection and Evaluation," FOA DD11–005, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date:

1 p.m.–5 p.m., May 17, 2011 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to "National Spina Bifida Registry Longitudinal Data Collection and Evaluation," FOA DD11–005, initial review.

Contact Person for More Information: Brenda Colley Gilbert, Ph.D., M.P.H., Director, Extramural Research Program Office, National Center for Chronic Disease Prevention and Health Promotion, CDC, 1600 Clifton Road, NE., Mailstop K92, Atlanta, Georgia 30333, Telephone: (770) 488–6295.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: April 4, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–8507 Filed 4–8–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Funding Opportunity Announcement (FOA), Initial Review

The meeting announced below concerns "Longitudinal Study of a Population-based Cohort of People with Lupus," FOA DP11–004, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date:
11 a.m.–5 p.m., May 04, 2011 (Closed).

Place: Teleconference

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to "Longitudinal Study of a Population-based Cohort of People with Lupus," FOA DP11–004, initial review.

Contact Person for More Information: Brenda Colley Gilbert, Ph.D., M.P.H., Director, Extramural Research Program Office, National Center for Chronic Disease Prevention and Health Promotion, CDC, 1600 Clifton Road, NE., Mailstop K92, Atlanta, Georgia 30333, Telephone: (770) 488–6295.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: April 4, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–8508 Filed 4–8–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0012]

Cooperative Agreement With the University of Mississippi's National Center for Natural Products Research (U01) To Develop and Disseminate Botanical Natural Product Research With an Emphasis on Public Safety

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 a cooperative agreement with the University of Mississippi's National Center for Natural Products Research (UM–NCNPR). The goal of the cooperative agreement is to promote the efficient development and dissemination of natural products research and science and the programs developed under the agreement will complement the diverse activities of both the public and private sectors.

DATES: Important dates are as follows:

1. The application due date is May 1, 2011.
2. The anticipated start date is June 1, 2011.
3. The opening date is April 11, 2011.
4. The expiration date is May 2, 2011.

For Further Information and Additional Requirements Contact:

Scientific/Programmatic Contacts:

Jeanne I. Rader, Center for Food Safety and Applied Nutrition (HFS–715), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1786, FAX: 301–436–2622, e-mail: *Jeanne.Rader@fda.hhs.gov;* or

Steven L. Robbs, Center for Food Safety and Applied Nutrition (HFS–006), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2146, FAX: 301–436–2618, e-mail: *Steven.Robbs@fda.hhs.gov;* or

LaQuia S. Geathers, Center for Food Safety and Applied Nutrition (HFS–680), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2821, FAX: 301–436–2629, e-mail: *LaQuia.Geathers@fda.hhs.gov.*

Grants Management Contact:

Vieda Hubbard, Office of Acquisitions and Grants Services (HFA–500), 5630 Fishers Lane, Rm. 2141, Rockville, MD 20857, 301–827–7177, FAX: 301–827–7101, e-mail: *Vieda.Hubbard@fda.hhs.gov.*

For more information on this funding opportunity announcement (FOA) and to obtain detailed requirements, please refer to the full FOA located at *http://grants2.nih.gov/grants/guide* and *http://www.fda.gov/Food/NewsEvents/default.htm.*

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

RFA–FD–11–004

Catalog of Federal Domestic Assistance Number(s): 93.103 *https://www.cfda.gov.*

A. Background

The primary focus of the UM–NCNPR/FDA cooperative agreement is to develop and disseminate botanical natural product research with an emphasis on public safety according to the needs of FDA. The cooperative research, education, and outreach programs developed by UM–NCNPR will address scientific issues related to the safety of botanical dietary supplements (BDS) and botanical ingredients and will complement the diverse activities of both the public and private sectors.

B. Research Objectives

This cooperative agreement will define the research projects, workshops, conferences, partnerships with academia, industry, non-governmental organizations, and international organizations and other activities on which the FDA and UM–NCNPR will collaborate. Specifically, this cooperative agreement will provide continued support so that UM–NCNPR can:

- Assist in the identification and development of a list of BDS and botanical ingredients, based on safety concerns, trends, and knowledge of botanicals being marketed in the United States, to prioritize for further research.
- Acquire, validate, and characterize authenticated reference materials, including raw and processed plant materials and purified natural products of relevance to FDA, for evaluation of their safety.
- Exchange technical and scientific information, analytical methods, and reference material with FDA scientists and other stakeholders.
- Collaborate with FDA scientists in research areas of mutual interest.
- Coordinate scientific workshops and conferences on BDS-related topics of public health relevance to address high priority science and research needs.

C. Eligibility Information

NCNPR has the unique capability to bring together diverse scientific

expertise on BDS and botanical ingredients from: (1) The faculty in the UM School of Pharmacy, including researchers in the Departments of Pharmacognosy, Medicinal Chemistry, Pharmaceutics, Pharmacology, and the Research Institute of Pharmaceutical Sciences; (2) research scientists in the U.S. Department of Agriculture/Agricultural Research Service's (USDA/ARS) National Products Utilization Research unit who are physically co-located and programmatically integrated in the UM–NCNPR; (3) close academic links and historical collaborations with agriculture and botanical programs and facilities within the UM system; (4) successful research collaborations with the dietary supplement industry; and (5) established formal agreements with several international academic institutions.

These collaborations give UM–NCNPR the unique ability to provide essential scientific expertise and botanical and chemical resources that will continue to assist FDA in its mission to ensure the safety of BDS and botanical ingredients.

FDA believes that continued support of UM–NCNPR is appropriate because it is uniquely qualified to fulfill the objectives of the proposed cooperative agreement. FDA has determined that UM–NCNPR is the only institution with the unique capability of providing a broad range of highly relevant scientific expertise and facilities that are physically co-located and singularly dedicated to natural products research. UM is a comprehensive research institution with numerous academic programs relevant to natural products.

II. Award Information/Funds Available

A. Award Amount

The estimated amount of support in Fiscal Year (FY) 2011 will be for up to $2.1 million (direct plus indirect costs), with the possibility of 4 additional years of support for up to $2.5 million per year, subject to the availability of funds. Future year amounts will depend on annual appropriations and successful performance.

B. Length of Support

The award will provide 1 year of support, with the possibility of 4 additional years of support, contingent upon satisfactory performance in the achievement of project and program reporting objectives during the preceding year and the availability of Federal FY appropriations.

III. Electronic Application, Registration, and Submission

Only electronic applications will be accepted. To submit an electronic application in response to this FOA, applicants should first review the full announcement located at *http://www.fda.gov/Food/NewsEvents/default.htm* or *http://grants2.nih.gov/grants/guide.* (FDA has verified the Web site addresses throughout this document, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register.**) For all electronically submitted applications, the following steps are required.

- Step 1: Obtain a Dun and Bradstreet (DUNS) Number.
- Step 2: Register With Central Contractor Registration.
- Step 3: Obtain Username & Password.
- Step 4: Authorized Organization Representative (AOR) Authorization.
- Step 5: Track AOR Status.
- Step 6: Register With Electronic Research Administration (eRA) Commons.

Steps 1 through 5, in detail, can be found at *http://www07.grants.gov/applicants/organization_registration.jsp.* Step 6, in detail, can be found at *https://commons.era.nih.gov/commons/registration/registrationInstructions.jsp.* After you have followed these steps, submit electronic applications to: *http://www.grants.gov.*

Dated: April 1, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–8521 Filed 4–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–P–0593]

Determination That FENTORA (Fentanyl Citrate) Buccal Tablet, 300 Micrograms, Was Not 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 FENTORA (fentanyl citrate) buccal tablet, 300 micrograms (mcg), was not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for fentanyl citrate buccal tablet, 300 mcg, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Reena Raman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6238, Silver Spring, MD 20993–0002, 301–796–7577.

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 (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.

FENTORA (fentanyl citrate) buccal tablet, 300 mcg, is the subject of NDA 21–947, held by Cephalon, Inc., and initially approved on September 25, 2006. FENTORA is indicated for the management of breakthrough pain in

patients with cancer who are already receiving and who are tolerant to around-the-clock opioid therapy for their underlying persistent cancer pain.

FENTORA (fentanyl citrate) buccal tablet, 300 mcg, is currently listed in the "Discontinued Drug Product List" section of the Orange Book.

Watson Laboratories, Inc., submitted a citizen petition dated November 16, 2010 (Docket No. FDA–2010–P–0593), under 21 CFR 10.30, requesting that the Agency determine whether FENTORA (fentanyl citrate) buccal tablet, 300 mcg, 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 FENTORA (fentanyl citrate) buccal tablet, 300 mcg, was not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that FENTORA (fentanyl citrate) buccal tablet, 300 mcg, was withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of FENTORA (fentanyl citrate) buccal tablet, 300 mcg, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events and have found no information that would indicate that this product was withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list FENTORA (fentanyl citrate) buccal tablet, 300 mcg, in the "Discontinued Drug Product List" section of the Orange Book. The "Discontinued Drug Product List" delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to FENTORA (fentanyl citrate) buccal tablet, 300 mcg, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: April 6, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–8524 Filed 4–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0012]

Supplemental Funding Under the Food and Drug Administration Pediatric Device Consortia Grant Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of supplemental grant funds for the Pediatric Device Consortia Grant Program. The goal of this announcement is to allow an existing active grantee to compete for further funds listed under RFA–FD–11–002.

DATES: Important dates are as follows:

1. The supplemental application due date is May 2, 2011.
2. The anticipated start date is in September 2011.
3. The opening date is April 11, 2011.
4. The expiration date is May 3, 2011.

FOR FURTHER INFORMATION AND ADDITIONAL REQUIREMENTS CONTACT: Linda C. Ulrich, Office of Orphan Products Development, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 5271, Silver Spring, MD 20993–0002, 301–796–8686. e-mail: *Linda.Ulrich@fda.hhs.gov;* or Vieda Hubbard, Office of Acquisitions & Grants Service (HFA–500), Food and Drug Administration, 5630 Fishers Lane, rm.1079, Rockville, MD 20857, 301–827–7177, FAX: 301–827–7039, e-mail: *Vieda.Hubbard@fda.hhs.gov.*

For more information on this funding opportunity announcement (FOA) and to obtain detailed requirements, please refer to the full FOA located at: *http://grants.nih.gov/grants/guide/rfa-files/RFA–FD–11–002.html.*

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

RFA–FD–11–025; 93.103

The purpose of this **Federal Register** notice is to allow an existing grantee to compete to receive a competitive supplement under a previous funding opportunity announcement.

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) legislation, Congress passed the Pediatric Medical Device Safety and Improvement Act of 2007 (PMDSI Act). Section 305 of the PMDSI Act 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, postmarketing needs, and other activities.

C. Eligibility Information

This supplement is only available to a current, existing, ongoing grant recipient.

II. Award Information/Funds Available

A. Award Amount

The maximum amount of this supplement would be $1,000,000 in total cost (direct costs plus indirect costs) per year.

B. Length of Support

The supplement may 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, the applicant should first review the full

announcement located at *http://grants.nih.gov/grants/guide/rfa-files/RFA–FD–11–002.html.* (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/guide/rfa-files/RFA–FD–11–002.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. 1079, Rockville, MD 20857, 301–827–7177.

Dated: April 6, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–8513 Filed 4–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Cognitive Development.

Date: April 27, 2011.

Time: 2:30 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Carla Walls, PhD, Scientific Review Officer, Division of Scientific Review, National Institute of Child Health and Human Development, 6100 Executive Boulevard, Rockville, MD 20892–9304, (301) 435–6898, *wallsc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment program, National Institutes of Health, HHS)

Dated: April 5, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–8606 Filed 4–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Unified Application for the Community Mental Health Services Block Grant and Substance Abuse and Prevention Treatment Block Grant FY 2012–2013 Application Guidance and Instructions (OMB No. 0930–0168)—Revision

The Substance Abuse and Mental Health Services Administration (SAMHSA), is requesting approval from the Office of Management and Budget (OMB) for a revision of the 2012 and 2013 Community Mental Health Services Block Grant (MHSBG) and Substance Abuse Prevention and Treatment Block Grant (SAPTBG) Guidance and Instructions into one unified block grant application. To minimize the burden, the two separate clearances for the block grant applications will be merged into one.

Currently, the SAPTBG and the MHSBG differ on a number of their practices (e.g., data collection at individual or aggregate levels) and statutory authorities (e.g., method of calculating MOE, stakeholder input requirements for planning, set asides for specific populations or programs, etc.). Historically, the Centers within SAMHSA that administer these Block Grants have had different approaches to application requirements and reporting. To compound this variation, States have different structures for accepting, planning, and accounting for the Block Grants and the Prevention Set Aside within the SAPTBG. As a result, how these dollars are spent and what is known about the services and clients that receive these funds varies by Block Grant and by State.

In addition, between 2012 and 2015, 32 million individuals who are uninsured will have the opportunity to enroll in Medicaid or private health insurance. This expansion of health insurance coverage will have a significant impact on how State Mental Health Authorities (SMHAs) and State Substance Abuse Authorities (SSAs) use their limited resources. Many individuals served by these authorities are funded through Federal Block Grant funds. SAMHSA proposes that Block Grant funds be directed toward four purposes: (1) To fund priority treatment and support services for individuals without insurance or who cycle in and out of health insurance coverage; (2) to fund those priority treatment and support services not covered by Medicaid, Medicare or private insurance offered through the exchanges and that demonstrate success in improving outcomes and/or supporting recovery; (3) to fund universal, selective and targeted prevention activities and

services; and (4) to collect performance and outcome data to determine the ongoing effectiveness of behavioral health prevention, treatment and recovery support services and to plan the implementation of new services on a nationwide basis.

States should begin planning now for FY 2014 when more individuals are insured. To ensure sufficient and comprehensive preparation, SAMHSA will use FY 2012 and 2013 to work with States to plan for and transition the Block Grants to these four purposes. This transition includes fully exercising SAMHSA's existing authority regarding States' and Jurisdictions' (subsequently referred to as "States") use of Block Grant funds, and a shift in SAMHSA staff functions to support and provide technical assistance for States receiving Block Grant funds as they move through these changes.

The proposed Mental Health Block Grant and the Substance Abuse Prevention and Treatment Block Grant build on ongoing efforts to reform health care, ensure parity and provide States and Territories with new tools, new flexibility, and state/territory-specific plans for available resources to provide their residents the health care benefits they need. The revised planning section of the Block Grant application provides a process for States and Territories to identify priorities for individuals who need behavioral health services in their jurisdictions, develop strategies to address these needs, and decide how to expend Block Grant Funds. In addition, the Planning Section of the Block Grant requests additional information from States that could be used to assist them in their reform efforts. The plan submitted by each State and Territory will provide information for SAMHSA and other federal partners to use in working with States and Territories to improve their behavioral health systems over the next two years as health care and economic conditions evolve.

Currently, States and Territories are asked to provide strategies for seventeen areas that were developed almost twenty years ago. This new Block Grant application guides and prompts States and Territories to consider multiple populations and program areas that are likely to be priorities for States and Territories today, and to consider how changes in other funding streams that were not as relevant in prior years might fit with Block Grant funds today and in the future.

In addition, the new Block Grant application provides States and Territories the flexibility to submit one rather than two separate Block Grant applications if they choose. It also allows States and Territories to develop and submit a bi-annual rather than an annual plan, recognizing that the demographics and epidemiology do not often change on an annual basis. These options may decrease the number of applications submitted from four in two years to one.

Over the next several months, SAMHSA will assist States and Territories (individually and in smaller groups) as they develop their Block Grant applications. While there are some specific statutory requirements that SAMHSA will look for in each submitted application, SAMHSA intends to approach this process with the goal of assisting States and Territories in setting a clear direction for system improvements over time, rather than as a simple effort to seek compliance with minimal requirements.

Consistent with previous applications, the FY 2012–2013 application has sections that are required and other sections where additional information is requested, but not required. The FY 2012–2013 application requires States to submit a face sheet, a table of contents, a behavioral health assessment and plan, reports of expenditures and persons served, executive summary, and funding agreements and certifications. In addition, SAMHSA is requesting information on key areas that are critical to their success to address health reform and parity. States will continue to receive their annual grant funding if they only chose to submit the required section of their State Plans or choose to submit separate plans for the MHBG or SAPTBG. Therefore, as part of this Block Grant planning process, SAMHSA is asking States and Territories to identify their technical assistance needs to implement the strategies they identify in their plans for FY 2012 and 2013.

To facilitate an efficient application process for States in FY 2012–2013, SAMHSA convened an internal workgroup to develop the application for the Block Grant planning section. In addition, SAMHSA consulted with representatives from the state mental health and state substance abuse authorities to receive input regarding proposed changes to the Block Grant. Based on these discussions with States, SAMHSA is proposing several changes to the Block Grant programs, discussed in greater detail below.

Changes to Assessment and Planning Activities

Under the previous SAPTBG, States were requested to address seventeen national goals. Some of these seventeen goals were population specific (pregnant women), while others were service specific (substance abuse prevention strategies). The MHSBG required States to address a set of criterion for children with serious emotional disturbances and adults with serious mental illness. While both Block Grants required States to do an assessment and plan, they did not always allow the State or SAMHSA to obtain an overall picture of the State's behavioral health needs and to incorporate consistent priorities and planning activities, especially for individuals with a co-occurring mental and substance use disorder. States will be asked to follow a four-step planning process which consists of: (1) Assessing the strengths and needs of the service system; (2) identifying the unmet service needs and critical gaps within the current system; (3) prioritize the State planning activities, and; (4) develop goals, strategies and performance indicators.

The revised Block Grant application requires States to identify and analyze the strengths, needs, and priorities of their behavioral health systems. One important change is that States will be requested to take into account the priorities for the specific populations that are the current focus of the Block Grants in the context of the changing health care environment and SAMHSA's strategic initiatives. The focus of SAMHSA's Block Grant programs has not changed significantly over the past 20 years. While many of these populations originally targeted for the Block Grants are still a priority, additional populations have evolving needs that should be addressed. These include military families, youth who need substance use disorder services, individuals who experience trauma, increased numbers of individuals released from correctional facilities, and lesbian, gay, bi-sexual, transgender and questioning (LGBTQ) individuals. The uniform plan required in the Block Grant application must address the statutory populations (as appropriate for each Block Grant) and should address these other populations.

One population of particular note in 2014 will be the newly-insured. States should begin planning now for individuals with low-incomes who are currently uninsured but will gain health coverage in 2014 when additional coverage options are available. Many of these individuals will be covered by Medicaid or private insurance in FY 2014, and this will present new opportunities for behavioral health systems to expand access and capacity. In addition, States should identify who will not be covered after FY 2014, as well as whose coverage is insufficient

and how federal funds will be used to support these individuals who may need treatment and supports.

SAMHSA is also encouraging SMHAs and SSAs to develop and submit a combined plan to address a number of other common areas, including bi-directional integration of behavioral health and primary care services, provision of recovery support services and a combined plan for the provision of services for individuals with co-occurring mental and substance use disorders. These combined plans should be included in a State's application (for those states submitting one Block Grant application). For States that submit separate Block Grant applications, these combined plans for these activities should be included in both the State MHSBG and SAPTBG applications.

The new Block Grant application requires States to follow the following planning steps:

- Step One: Assess the strengths and needs of the service system to address the specific populations. This will include a description of the organization of the current public system, the roles of the state, county, and localities in the provision of service and the ability of the system to address diverse needs.
- Step Two: Identify the unmet service needs and critical gaps within the current system. Included in this step is the identification of data sources used to determine the needs and gaps for the populations identified as a priority.
- Step Three: Prioritize State planning activities. Given the information in Step 2, the States will prioritize the target populations as appropriate for each Block Grant as well as other priority populations as determined by the State.
- Step Four: Develop goals, strategies and performance indicators. For each of the priorities identified in Step 3, the state will identify at least one goal, strategies to reach that goal, and the performance indicators to be examined over the next two years.

In addition to the planning steps, States are requested to provide the following information:

- *Information on the Use of Block Grant Dollars for Block Grant Activities*—States should project how Block Grant funds will be used to provide services for the target populations or areas identified in their plans for States that have a combined MHSBG and SAPTBG application. SAMHSA encourages States to use MHSBG and SAPTBG funds to support their or other agencies' efforts to develop reimbursement strategies that support innovation. For example, States could use Block Grant funds to support various demonstration projects through other federal programs (Medicaid, HUD, Veterans Affairs). The new Block Grant application asks States to describe their overall reimbursement approach for services purchased with MHSBG and SAPTBG funds. States must identify the reimbursement methodology proposed for each service, prevention and emotional health development strategy, and system improvement. States are requested to project their expenditures under the MHSBG and the SAPTBG for treatment and support services.
- *Information on Activities that Support Individuals in Directing the Services*—In the new Block Grant application, States are asked to provide information regarding policies and programs that allow individuals with mental illness and/or substance use disorder to direct their own care.
- *Information on Data and Information Technology*—SAMHSA is requesting States to provide unique client-level encounter data for specific services that are purchased with Block Grant funds. States will be requested to complete the service utilization table in the Reporting Section of the Application. States should provide information on the number of unduplicated individuals by each service purchased with Block Grant Funds. If the State is currently unable to provide unique client level data for any part of its behavioral health system, the State is requested to describe in the Block Grant application their plan, process, resources needed and timeline for developing such capacity.
- *Description of State's Quality Improvement Reporting*—States have been reporting the program performance monitoring activities to include the use of independent peer review to improve the quality and appropriateness of treatment services delivered by providers receiving funds from the block grant (*See* 42 U.S.C. 300x–53(a) and 45 CFR 96.136), States are asked to attach their current quality improvement plan to their Block Grant application.
- *Description of State's Consultation with Tribes*—SAMHSA is required by the 2009 Memorandum on Tribal Consultation to submit plans on how it is to engage in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have Tribal implications. SAMHSA is requesting that States provide a description of how they consulted with Tribes in their State. This description should indicate how concerns of the Tribes were addressed in the State Block Grant plan(s). States shall not require any Tribe to waive its sovereign immunity in order to receive funds or in order for services to be provided for Tribal members on Tribal lands.
- *Description of State's Service Management Strategies*—SAMHSA, similar to other public and private payers of behavioral health services, seeks to ensure that services purchased under the Block Grant are provided to individuals in the right scope, amount and duration. The Block Grant application asks States to describe the processes that they will employ over the next planning period to identify trends in over/underutilization of SAPTBG or MHSBG funded services. They must also describe the strategies that they will deploy to address these utilization issues. SAMHSA is also requesting the States to describe the resources needed to implement utilization management strategies and the timeframes for implementing these strategies.
- *Development of State Dashboards*—An important change to the administration of the MHSBG and SAPTBG is the creation of State dashboards on key performance indicators. National dashboard indicators will be based on outcome and performance measures that will be developed by SAMHSA in FY 2011. For FY 2012, States will be requested to identify a set of state-specific performance measures for this incentive program. In addition, SAMHSA will identify several national indicators to supplement the state-specific measures for the incentive program. The State, in consultation with SAMHSA, will establish a baseline in the first year of the planning cycle and identify the thresholds for performance in the subsequent year. The State will also propose the instrument used to measure the change in performance for the subsequent year. The State dashboards will be used to determine if States receive an incentive based on performance. SAMHSA is considering a variety of incentive options for this dashboard program and will solicit input from the States on the options.
- *Information of State's Suicide Prevention Plan*—As an attachment to the Block Grant application(s), States are requested to provide the most recent copy of their suicide prevention plan. While this is not a required plan, SAMHSA is interested in knowing the strategies that State's are proposing to address suicide prevention. If a State does not have a suicide prevention plan or if it has not been updated in the past three years States are requested to describe when they will create or update their plan.

• *Identification of Technical Assistance Needs*—States are requested to describe the data and technical assistance needs identified by the State during the process of developing this plan that will be needed or helpful to implement the proposed plan.

• *Process for Comment on State Plan*—Current statute requires that, as a condition of the funding agreement for the grant, States will provide opportunity for the public to comment on the State plan. In the application, States are asked to describe their efforts and procedures to obtain public comment on the State plan.

• *Description of Processes to Involve Individuals and Families*—In the Block Grant application States are requested to describe their efforts to actively engage individuals and families in developing, implementing and monitoring the State mental health and substance abuse systems.

• *Description of the Use of Technology*—Interactive Communication Technologies (ICTs) are more frequently being used to deliver various health care services. In the Block Grant application, States are requested to provide information on their use or planned use of ICTs.

• *Process for Obtaining Support of State Partners*—The success of a State's MHSBG and SAPTBG will rely heavily on the strategic partnership that SMHAs and SSAs have or will develop with other health, social services, education and other State and local governmental entities. States are requested to identify these partners in their Block Grant application and describe the roles they will play in assisting the State to implement the priorities identified in the plan. SAMHSA is requesting States to provide a letter of support indicating agreement with the description of their role and collaboration with the SSA and/or SMHA and other State agencies (e.g. State education authorities, the State Medicaid agency, etc.)

• *Description of State Behavioral Health Advisory Council*—Each State is required to establish and maintain a State advisory council for services for individuals with a mental disorder. SAMHSA strongly encourages States to expand and use the same council to advise and consult regarding issues and services for persons with or at risk of substance abuse and substance use disorders as well.

Other Changes

States will be allowed to submit a joint plan for the Mental Health Services Block Grant and the Substance Abuse and Prevention and Treatment Block Grant.

States will no longer be required to submit an annual plan. The new application allows States to submit a two-year plan for FY 2012 and 2014.

Although the statutory dates for submitting the Block Grant application, plan and annual report remain unchanged, SAMHSA requests that the MHSBG and SAPTBG applications be submitted on the same date. In addition, the dates for submitting the plans have been changed to better comport with most States fiscal and planning years (July 1st through June 30th of the following year). More information can be found in the application overview.

Also, the dates States are requested to submit the annual reports have been changed for the SAPTBG. These annual reports will be due on the same date as the reports for the MHSBG, December 1st. Opting not to submit the block grant application, plan and annual report on the same date for the SAPTBG as the MHSBG will not affect State funding in any way (amount or timeliness of payment).

Various reporting requirements for narrative descriptions have been deleted and included as a table or as an assurance to confirm compliance. In addition SAMHSA is requesting States to provide more detailed information on block grant expenditures (Table 5 in the reporting section).

Estimates of Annualized Hour Burden

The estimated annualized burden for the unified application is 37,429 hours. Burden estimates are broken out in the following tables showing burden separately for Year 1 and Year 2. Year 1 includes the estimates of burden for the unified application and annual reporting. Year 2 includes the estimates of burden for the application update and annual reporting. The reporting burden remains constant for both years.

TABLE 1—ESTIMATES OF APPLICATION AND REPORTING BURDEN FOR YEAR 1

Application element	Number respondents	Responses/ respondents	Burden/ response (hours)	Total burden
Application Burden:				
Yr One Plan (separate submissions)	30 (CMHS); 30 (SAPT)	1	282	16,920
Yr One Plan (combined submission	30	1	282	8,460
Application Sub-total	60			25,380
Reporting Burden:				
MHBG Report	59	1	186	10,974
URS Tables	59	1	35	2,065
SAPTBG Report	60 [1]	1	186	11,160
Table 5	15 [2]	1	4	60
Reporting Subtotal	60			24,259
Total	119			49,639

[1] Redlake Band of the Chippewa Indians from MN receives a grant.
[2] Only 15 States have a management information system to complete Table 5.

TABLE 2—ESTIMATES OF APPLICATION AND REPORTING BURDEN FOR YEAR 2

Application element	Number respondents	Responses/ respondents	Burden/ response (hours)	Total burden
Application Burden:				

TABLE 2—ESTIMATES OF APPLICATION AND REPORTING BURDEN FOR YEAR 2—Continued

Application element	Number respondents	Responses/ respondents	Burden/ response (hours)	Total burden
Yr Two Plan	24	1	40	960
Application Sub-total	24			960
Reporting Burden:				
MHBG Report	59	1	186	10,974
URS Tables	59	1	35	2,065
SAPTBG Report	60	1	186	11,160
Table 5	15	1	4	60
Reporting Subtotal	60			24,259
Total	119			25,219

The total annualized burden for the application and reporting is 37,429 hours (49,639 + 25,219 = 74,858/2 years = 37,429).

The link to access the block grant application is *http://www.Samhsa.gov/grants/blockgrant.*

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 8–1099, One Choke Cherry Road, Rockville, MD 20857 or e-mail a copy to *summer.king@samhsa.hhs.gov.* Written comments should be received within 60 days of this notice.

Dated: April 5, 2011.

Elaine Parry,

Director, Office of Management, Technology and Operations.

[FR Doc. 2011–8520 Filed 4–8–11; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5478–N–02]

Privacy Act of 1974: Notice of New System of Records, Integrated Disbursement & Information System (IDIS) System

AGENCY: Department of Housing and Urban Development.

ACTION: Notice of a new System of Records, Integrated Disbursement & Information System (IDIS).

SUMMARY: IDIS is an existing grant management system used currently by grantees of seven formula grant programs managed by CPD. The first four are Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Emergency Shelter Grants (ESG), and Housing Opportunities for Persons with AIDS formula (HOPWA) programs. IDIS also supports three special grants established by the 2009 American Recovery and Reinvestment Act (ARRA) including Tax Credit Assistance Program (TCAP), Community Development Block Grant-Recovery (CDBG–R), and Homelessness Prevention & Rapid Re-housing Program (HPRP). All these grant programs have requirements that must be met. Collecting information to determine if each program's money was spent on eligible activities also verify that these grantees are complying with all the statutory regulations in using grant funds.

DATES: *Effective Date:* This proposal shall become effective May 11, 2011, unless comments are received on or before that date which would result in a contrary determination.

Comment Due Date: May 11, 2011.

ADDRESSES: Office of Community Planning and Development, 451 7th Street, SW., Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Donna Robinson-Staton, Departmental Privacy Officer, 451 Seventh Street, SW., Room 2256, Washington, DC 20410, Telephone Number (202) 402–8047. For more information: Robert T. Brever, Community Planning and Development, 451 7th Street, SW., Room 7224, Washington, DC 20410, Telephone Number (202) 402–8138. A telecommunications device for hearing- and speech-impaired persons (TTY) is available at 1–800–877–8339 (Federal Information Relay Services). (This is a toll-free number.)

SUPPLEMENTARY INFORMATION:

Title 5 U.S.C. section 552a(e)(4) and (11) provide that the public be given a 30-day period in which to comment on the proposed new system. The Office of Management and Budget (OMB), which has oversight responsibilities under the Act, requires a 30-day period in which to conclude its review of the system. Therefore, please submit any comments by March 31, 2011. In accordance with 5 U.S.C. 552a(r) and OMB Cir. A–130, the Department has provided a report to OMB and the Congress on the proposed modification.

Dated: March 31, 2011.

Jerry E. Williams,

Chief Information Officer.

HUD/H–8

SYSTEM NAME:

Integrated Disbursement & Information System (IDIS).

SYSTEM LOCATION:

Online at *http://www.hud.gov/offices/cpd/systems/idis/idis.cfm.*

Physically located at HUD Headquarters.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Beneficiaries under the HOME program's Homebuyers, Homeowner Rehab, and Rental activities.

CATEGORIES OF RECORDS IN THE SYSTEM:

The names of the owners of the buildings by address, the income category, and racial characteristics are collected for the Home program.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Statute: HOME Investment Partnerships Act—Title II Cranston Gonzalez National Affordable Housing Act Public Law 101–625; Home Regulations 24 CFR part 92; PRA OMB Control 2506–0171.

PURPOSES:

IDIS is an existing grants management system used currently by grantees of seven formula grant programs managed by CPD. The first four are Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Emergency Shelter Grants (ESG), and Housing Opportunities for Persons with AIDS formula (HOPWA) programs. IDIS also supports three

special grants established by the 2009 American Recovery and Reinvestment Act (ARRA) including Tax Credit Assistance Program (TCAP), Community Development Block Grant-Recovery (CDBG–R), and Homelessness Prevention & Rapid Re-housing Program (HPRP). All of these grants programs have review requirements that must be met. Collecting the information is necessary to determine if each program's money was spent on eligible activities as well as verify that grantees are complying with all the statutory and regulatory provisions in the use of the grants funds.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Grantees have access only to information for their own grant funded activities. They report to HUD on the activities on which grant funds are used, draw program funds, and report on activity accomplishments. HUD staff has access to information for all grantees for which they are responsible. HUD staff access the system for the purposes of monitoring grantee performance and to help determine what activities should be reviewed via on-site monitoring visits.

STORAGE:

Electronic files are stored on servers located at an offsite, contractor owned and operated data center (HITS Contract). Data is backed up to a secure off site disaster recovery facility (HITS Contract).

RETRIEVABILITY:

Information is retrieved by activity. The personal information is stored as accomplishment information for an activity.

SAFEGUARDS:

Electronic records are maintained in a secured computer network behind a firewall. Access to records is limited to authorized personnel. Personable Identifiable Information (PII) does not appear on any generated reports. CPD staff review all information before responding to FOIA request to verify that Personable Identifiable Information (PII) is not being released. If the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; or if the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system, then the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the HUD's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

RETENTION AND DISPOSAL:

Currently records are maintained indefinitely.

SYSTEM MANAGER(S) AND ADDRESS:

Robert T. Brever, Community Planning and Development, 451 7th Street, SW., Room 7224, Washington, DC 20410.

NOTIFICATION PROCEDURES:

For information, assistance, or inquiry about the existence of records, contact the Privacy Act Officer at the Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC. Written requests must include the full name, Social Security Number, date of birth, current address, and telephone number of the individual making the request.

CONTESTING RECORD PROCEDURES:

Procedures for the amendment or correction of records and for applicants wanting to appeal initial agency determination appear in 24 CFR part 16.

RECORD SOURCE CATEGORIES:

Information is collected only from Grantees.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 2011–8484 Filed 4–8–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2011–N070; 80221–1113–0000–F5]

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (Act) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing these permits.

DATES: Comments on these permit applications must be received on or before May 11, 2011.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Endangered Species Program Manager, Region 8, 2800 Cottage Way, Room W–2606, Sacramento, CA 95825 (telephone: 916–414–6464; fax: 916–414–6486). Please refer to the respective permit number for each application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Daniel Marquez, Fish and Wildlife Biologist; *see* **ADDRESSES** (telephone: 760–431–9440; fax: 760–431–9624).

SUPPLEMENTARY INFORMATION: The following applicants have applied for scientific research permits to conduct certain activities with endangered species under section 10(a)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*). We seek review and comment from local, State, and Federal agencies and the public on the following permit requests. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Permit No. TE–210235

Applicant: Matthew W. McDonald, Idyllwild, California.

The applicant requests an amendment to an existing permit (September 1, 2010, 75 FR 53708) to take (harass by survey) the southwestern willow flycatcher (*Empidonax traillii extimus*) in conjunction with surveys throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–36500A

Applicant: Western Foundation of Vertebrate Zoology, Camarillo, California.

The applicant requests a permit to take (survey, capture, band, locate and monitor nests, and population monitor) the least Bell's vireo (*Vireo bellii pusillus*) in conjunction with surveys and population monitoring activities in Ventura County, California, for the purpose of enhancing the species' survival.

Permit No. TE–820658

Applicant: AECOM, San Diego, California.

The applicant requests an amendment to an existing permit (February 3, 1997, 62 FR 5030) to take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*); take (harass by survey, capture, handle, relocate, and release) the unarmored threespine stickleback (*Gasterosteus aculeatus williamsoni*); take (harass by survey, capture, handle, release) the California tiger salamander (*Ambystoma californiense*), the Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*), giant kangaroo rat (*Dipodomys ingens*), and Pacific pocket mouse (*Perognathus longimembris pacificus*); and take (locate and monitor nests) the California least tern (*Sterna antillarum browni*), light-footed clapper rail (*Rallus longirostris levipes*), and Yuma clapper rail (*Rallus longirostris yumanensis*) in conjunction with surveys and population monitoring activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–062907

Applicant: Forde Biological Consultants, Camarillo, California.

The applicant requests an amendment to an existing permit (March 20, 2007, 72 FR 13121) to take (harass by survey, capture, handle, measure, and release) the arroyo toad (*Anaxyrus californicus*) and mountain yellow-legged frog (*Rana muscosa*) in conjunction with surveys and population monitoring activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–045994

Applicant: U.S. Geological Survey, Biological Resources Division, Western Ecological Research Center, San Diego Field Station, San Diego, California.

The applicant requests an amendment to an existing permit (June 14, 2010, 75 FR 33633) to take (trap, capture, handle, take biological samples, attach transmitters, and release) the arroyo toad (*Anaxyrus californicus*) and take (apply hormone treatments, conduct cryopreservation activities, augment populations, and remove infertile eggs) the mountain yellow-legged frog (*Rana muscosa*) in conjunction with surveys, population monitoring, reproductive analysis, and genetic activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–005535

Applicant: Gilbert O. Goodlit, Ridgecrest, California.

The applicant requests an amendment to an existing permit (May 1, 2009, 74 FR 202337) to take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with surveys throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–38413A

Applicant: U.S. Geological Survey, Western Ecological Research Center, Henderson Field Station, Henderson, Nevada, California.

The applicant requests a permit to remove/reduce to possession the Eureka Valley dune grass (*Swallenia alexandrae*) and Eureka Dunes evening primrose (*Oenothera californica*) in conjunction with population monitoring, germination, and growth studies from Eureka Valley within Death Valley National Park, Inyo County, California, for the purpose of enhancing the species' survival.

Permit No. TE–034293

Applicant: U.S. Bureau of Reclamation, Klamath Falls, Oregon.

The applicant requests an amendment to an existing permit (November 15, 2000, 65 FR 69043) to take (survey, electrofish, measure, collect biological samples, assess health, PIT tag, salvage, transport, hold in captivity, translocate, release, display, and kill) the Lost River sucker (*Deltistes luxatus*) and the shortnose sucker (*Chasmistes brevirostris*) in conjunction with research involving distribution and abundance, die off, entrainment and genetic studies in Klamath County, Oregon, for the purpose of enhancing the species' survival.

Permit No. TE–212445

Applicant: Robert A. Schell, San Rafael, California.

The applicant requests an amendment to an existing permit (May 1, 2009, 74 FR 202337) to take (survey, capture, handle, collect biological samples, and release) the California tiger salamander (*Ambystoma californiense*) in conjunction with genetic analysis throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–066455

Applicant: Scot A. Chandler, Murrieta, California.

The applicant requests an amendment to an existing permit (January 31, 2003, 68 FR 5037) to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–37418A

Applicant: William T. Bean, Berkeley, California.

The applicant requests a permit to take (capture, handle, mark, release, and recapture) the giant kangaroo rat (*Dipodomys ingens*) in conjunction with surveys and population monitoring studies at the Ciervo-Panoche Natural Area in eastern San Benito and western Fresno Counties, California, for the purpose of enhancing the species' survival.

Permit No. TE–807078

Applicant: Point Reyes Bird Observatory, Petaluma, California.

The applicant requests an amendment to an existing permit (May 1, 2009, 73 FR 20337) to take (locate and monitor nests) the California least tern (*Sterna antillarum browni*) in conjunction with population monitoring activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–38475A

Applicant: Jeffrey M. Lemm, Poway, California.

The applicant requests a permit to take (survey, trap, capture, handle, implant tags, collect, take biological samples, transport, release, captive rear, captive breed, augment populations, and release to unoccupied sites) the mountain yellow-legged frog (*Rana muscosa*) in conjunction with surveys, population monitoring, captive breeding, reproductive analysis, and genetic activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–166393

Applicant: Pete C. Trenham, Bellingham, Washington.

The applicant requests an amendment to an existing permit (November 6, 2007, 72 FR 62669) to take (survey, capture, handle, identify, measure, and release) the California tiger salamander (*Ambystoma californiense*) in

conjunction with conducting focused training seminars in occupied habitat throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–195305

Applicant: Andres Aguilar, Merced, California.

The applicant requests an amendment to an existing permit (October 29, 2008, 73 FR 64360) to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), in conjunction with surveys and genetic research Contra Costa, Glenn, Merced, San Luis Obispo, Solano, Stanislaus, and Ventura Counties, California, for the purpose of enhancing the species' survival.

We invite public review and comment on each of these recovery permit applications. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Michael Long,

Acting Regional Director, Region 8, Sacramento, California.

[FR Doc. 2011–8509 Filed 4–8–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–FHC–2011–N061; 94300–1122–0000–Z2]

Wind Turbine Guidelines Advisory Committee; Teleconference Line Available for Public Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of public meeting.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), will host a Wind Turbine Guidelines Advisory Committee (Committee) meeting on April 27, 2011. The meeting is open to the public. This meeting was announced in the **Federal Register** on April 1, 2011. In-person registration is now closed due to full room capacity. A listen-only teleconference line is now available. The meeting agenda will include a presentation and discussion of the Service's Draft Land-Based Wind Energy Guidelines.

DATES: The meeting will take place on April 27, 2011, from 9 a.m. to 5 p.m. Eastern Time. If you are a member of the public wishing to listen via the teleconference line, you must register online no later than April 20, 2011 (*see* "Meeting Participation Information" under **SUPPLEMENTARY INFORMATION**).

ADDRESSES: *Meeting Location:* U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 530, Arlington, VA 22203 (*see* "Meeting Location Information" under **SUPPLEMENTARY INFORMATION**).

FOR FURTHER INFORMATION CONTACT: Rachel London, Division of Habitat and Resource Conservation, U.S. Fish and Wildlife Service, U.S. Department of the Interior, (703) 358–2161.

SUPPLEMENTARY INFORMATION:

Background

On March 13, 2007, the Department of the Interior published a notice of establishment of the Committee in the **Federal Register** (72 FR 11373). The Committee's purpose is to provide advice and recommendations to the Secretary of the Interior (Secretary) on developing effective measures to avoid or minimize impacts to wildlife and their habitats related to land-based wind energy facilities. All Committee members serve without compensation. In accordance with the Federal Advisory Committee Act (5 U.S.C. App.), a copy of the Committee's charter is filed with the Committee Management Secretariat, General Services Administration; Committee on Environment and Public Works, U.S. Senate; Committee on Natural Resources, U.S. House of Representatives; and the Library of Congress. The Secretary appointed 22 individuals to the Committee on October 24, 2007, representing the varied interests associated with wind energy development and its potential impacts to wildlife species and their habitats. The Committee provided its recommendations to the Secretary on March 4, 2010.

Draft Land-Based Wind Energy Guidelines

The Draft Land-Based Wind Energy Guidelines were made available for public comment on February 18, 2011, with a comment-period ending date of May 19, 2011. The draft Guidelines are available for comment at *http://www.fws.gov/windenergy/docs/Wind_Energy_Guidelines_2_15_2011FINAL.pdf.* We will publish the final Guidelines for public use after consideration of any comments received. The purpose of the Guidelines, once finalized, will be to provide recommendations on measures to avoid, minimize, and compensate for effects to fish, wildlife, and their habitats. For more information, including how to comment on the draft Guidelines, see our **Federal Register** notice of February 18, 2011 (76 FR 9590).

Meeting Location Information

Please note that the in-person meeting location is full to capacity.

Meeting Participation Information

All Committee meetings are open to the public. The public has an opportunity to comment at all Committee meetings.

We require that all persons planning to listen to the meeting via teleconference register at *http://www.fws.gov/windenergy* no later than April 20, 2011. We will give preference to registrants based on date and time of registration. The in-person meeting registration is closed due to a filled room capacity.

Dated: April 6, 2011.

Rachel London,

Alternate Designated Federal Officer, Wind Turbine Guidelines Advisory Committee.

[FR Doc. 2011–8559 Filed 4–8–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L51010000.FX0000.LVRWA11A2990. LLAZP000000; AZA35079]

Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Sun Valley to Morgan 500/230kV Transmission Line Project (Formerly Called TS–5 to TS–9), Maricopa County, Arizona, and Possible Land Use Plan Amendment

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969 (NEPA), as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Hassayampa Field Office, Phoenix, Arizona, intends to prepare an Environmental Impact Statement (EIS) which may include discussion of an amendment to the Bradshaw-Harquahala Resource Management Plan (RMP), and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues.

DATES: This notice initiates the public scoping process for the EIS and possible plan amendment. Comments on issues may be submitted in writing until May 26, 2011. The date(s) and location(s) of any scoping meetings will be

announced at least 15 days in advance through local media and the BLM Web site at: *http://www.blm.gov/az/st/en.html*. In order to be included in the Draft EIS, all comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. We will provide additional opportunities for public participation upon publication of the Draft EIS.

ADDRESSES: You may submit comments on project issues and planning criteria related to the Bradshaw-Harquahala Resource Management Plan by any of the following methods:

- *Web site: http://www.blm.gov/az/st/en.html*.
- *E-mail: SunValley-Morgan@blm.gov*.
- *Fax:* 623–580–5580.
- *Mail:* BLM, Phoenix District Office, Hassayampa Field Office, Attention: Joe Incardine/Sun Valley-Morgan Project, 21605 North 7th Avenue, Phoenix, Arizona 85207–2929.

Documents pertinent to this proposal may be examined at the Hassayampa Field Office.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Joe Incardine, National Project Manager, telephone 801–524–3833; address BLM, Phoenix District Office, Hassayampa Field Office, 21605 North 7th Avenue, Phoenix, Arizona 85207–2929; e-mail *Joe_Incardine@blm.gov*.

SUPPLEMENTARY INFORMATION: The applicant, Arizona Public Service, has requested a right-of-way (ROW) authorization to construct, operate, and maintain a single-circuit 500-kilovolt (kV) and a single-circuit 230-kV overhead transmission line (constructed on the same structures or poles). The project area involves about 8 miles of public land along a route that is approximate 38 miles long. The proposed 500-kV portion of the project would strengthen the reliability of the regional 500-kV system and could facilitate delivery of renewable energy resources to load centers, such as the Phoenix metropolitan area. The proposed 230-kV portion of the project would provide a source to serve a future load anticipated to emerge within present undeveloped areas within the Town of Buckeye, the City of Surprise, the City of Peoria, and unincorporated Maricopa County. The transmission line would connect the Sun Valley (formerly TS–5) Substation located in the Town of Buckeye with the Morgan (formerly TS–9) Substation located in the City of Peoria.

An estimated 190 acres of public land would be necessary to accommodate the right-of-way for the transmission line, its associated construction areas, and access roads. To the extent possible, existing roads would be used for access for construction and maintenance. The public land that would be affected is in two separate areas: (1) Near the Sun Valley Substation, north of the Central Arizona Project canal in Buckeye, and (2) parallel to SR 74 in the City of Peoria and unincorporated Maricopa County. The transmission line would also cross State Trust land managed by the Arizona State Land Department, as well as privately owned lands. The transmission line may include steel monopole or lattice structures between 135- and 195-feet tall, with spans between structures ranging from 800- to 1,400-feet, depending on terrain. The right-of-way would be 200-feet wide. Structure locations cannot be determined until a specific right-of-way is identified and the final design completed.

The proposed right-of-way across public land is within a corridor for this transmission line certificated by the Arizona Corporation Commission in March 2009. However, the BLM's Bradshaw-Harquahala RMP (2010) does not have a utility or multi-use corridor designation where the proposed transmission line is to be located on the public land along SR 74. Generally, BLM land use plans contain corridor designations for major right-of-way projects such as electric transmission facilities accommodating lines of 115kV or greater voltage. The current BLM plan states that "all major utilities will be routed through designated corridors."

Authorization of this ROW project may require an amendment of the Bradshaw-Harquahala RMP. By this notice, the BLM is complying with requirements in 43 CFR 1610.2(c) to notify the public of potential amendments to land use plans, predicated on the findings of the EIS. If a land use plan amendment is necessary, the BLM will integrate the land use planning process with the NEPA process for this project. The BLM will comply with Secretarial Order 3310 concerning lands with wilderness characteristics. The BLM will also utilize and coordinate the NEPA commenting process to satisfy the public involvement process for section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470f) as provided for in 36 CFR 800.2(d)(3). Native American Tribal consultations will be conducted in accordance with policy, and Tribal concerns, including impacts on Indian trust assets, will be given due consideration. Federal, State, and local agencies, along with other stakeholders that may be interested or affected by the BLM's decision on this project, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency.

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the process for developing the EIS. At present, the BLM has identified the following preliminary issues: visual, desert tortoise and other desert wildlife.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 1610.2; 43 CFR 2800.

James G. Kenna,

Arizona State Director.

[FR Doc. 2011–8551 Filed 4–8–11; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CONC–0211–6680; 2410–OYC]

60-Day Notice of Intention To Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. Under the provisions of the Paperwork Reduction Act of 1995 and 5 CFR part 1320, Reporting and Record Keeping Requirements, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this new collection of information form (NPS #10–650). We 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.

DATES: To ensure that we are able to consider your comments on this information collection (IC), we must receive them by June 10, 2011.

ADDRESSES: Send your comments directly to Mr. Paul Chalfant, Commercial Services Program, National Park Service, 1849 C Street, NW., Mailstop 2410, Washington, DC 20240 (mail), by fax at 202–371–2090, or electronically to *Paul_Chalfant@nps.gov.* Send your comments also to Rob Gordon, Information Collection Clearance Officer, National Park Service, 1849 C Street, NW., Mailstop 2605, Washington, DC 20240 (mail); or *robert_gordon@nps.gov* (e-mail). All responses to the notice will be summarized and included in the request for the Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

For Further Information Contact and/or to Request a Draft of Proposed Collection of Information Contact: Paul Chalfant by mail or e-mail (*see* **ADDRESSES**), or by telephone at 202/513–7163 and/or Rob Gordon (*see* **ADDRESSES**), or by telephone at 202/354–1936.

SUPPLEMENTARY INFORMATION:

I. Abstract

The purpose of this information collection is to assist the National Park Service in managing the Commercial Use Authorization program. The NPS will use the information to manage the Commercial Use Authorizations in manner that is consistent with the highest level of protection of the natural and cultural resources. The information requested will allow the NPS to evaluate requests for a commercial use authorization and determine the suitability of the applicants to safely and effectively provide an appropriate service to the visiting public. It will also enable the NPS to manage the activity in a manner that protects the natural and cultural resources and the park visitor. Management includes, but is not limited to, managing the number of permits issued, determining the location and time that the activity occurs, and requiring the appropriate visitor protections including insurance, equipment, training and procedures.

II. Data

OMB Control Number: None.

Title: Commercial Use Authorizations.

Service Form Number: 10–650 Commercial Use Authorization Application; 10–660 Commercial Use Authorization Annual Survey (the annual survey will be completed only by individuals or businesses that successfully offered the service for the year).

Type of Request: New.

Description of Respondents: Respondents will be individuals or small businesses that wish to provide a commercial service to visitors in national park areas.

Respondent's Obligation: Responses to both of these information collections is mandatory.

Frequency of Collection: In most cases, each respondent will submit one application and one annual report per year.

Activity	Number of respondents	Number of responses	Completion time per response (hours)	Total annual burden hours
Commercial Use Authorization Application	4500	4500	.50	2250
Commercial Use Authorization Annual Survey	4000	4000	7.00	28000
Totals	8500	8500	7.50	30,250

Estimated Annual Nonhour Burden Cost: The total non-hour burden to the applicants is estimated at $32,500. It is estimated to cost about $10 for the estimated 3,250 CUA applicants. The costs include but are not limited to printing, mailing, postage and software costs. There are no other costs associated with preparing and submitting an application. Respondents do not have any recurring costs associated with the Commercial Use Authorization process.

Respondents that successfully operate their business under the Commercial Use Authorization are required to submit the Annual Report form. The non-hour burden to these businesses is estimated to be approximately $10. There are 2,850 active Commercial Use Authorizations. The total non-hour burden for the Annual Report form is $28,500.

The commercial use authorizations are issued annually or every 2 (two) years. The 2 (two)-year limit is set by the NPS Concessions Management Improvement Act of 1998, Section 418. These costs would be recurring on a 1 (one) or 2 (two) year cycle.

III. Comments

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and,
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. 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.

Dated: April 5, 2011.

Robert Gordon,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2011–8526 Filed 4–8–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CONC–0111–6544; 2410–OYC]

Notice of Temporary Concession Contract for Assateague Island National Seashore, MD

AGENCY: National Park Service, Interior.

ACTION: Notice of proposed award of temporary concession contract for Assateague Island National Seashore.

DATES: *Effective Date:* May 1, 2011.

SUMMARY: Pursuant to 36 CFR 51.24, public notice is hereby given that the National Park Service proposes to award a temporary concession contract for the conduct of certain visitor services within Assateague Island National Seashore, Maryland for a term not to exceed 3 (three) years. The visitor services include the sale of merchandise and limited pre-packaged food and beverage. This action is necessary to avoid interruption of visitor services.

SUPPLEMENTARY INFORMATION: The temporary concession contract is proposed to be awarded to Assateague Island Alliance, a qualified person (as defined in 36 CFR 51.3). The National Park Service has determined that a temporary concession contract is necessary in order to avoid interruption of visitor services and has taken all reasonable and appropriate steps to consider alternatives to avoid an interruption of visitor services. This action is issued pursuant to 36 CFR 51.24(a). This is not a request for proposals.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street, NW., 11th Floor, Washington, DC 20005, Telephone: 202/513–7156.

Dated: March 25, 2011.

Peggy O'Dell,

Deputy Director, Operations.

[FR Doc. 2011–8525 Filed 4–8–11; 8:45 am]

BILLING CODE 4312–53–P

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States Of America v. Bar-1 Ranch, Ltd.; Bar 1 Ranch, Llc; Bar-1 Ranch 2, Llc; Bar-One Ranch Management, Llc; and Alfred Barone,* Docket No. 9:09-cv-00130–DWM–JCL, was lodged with the United States District Court for the District of Montana on March 31, 2011.

This proposed Consent Decree concerns a complaint filed by the United States against Bar-1 Ranch, Ltd.; Bar 1 Ranch, Llc; Bar-1 Ranch 2, Llc; Bar-One Ranch Management, Llc; and Alfred Barone, pursuant to 28 U.S.C. 1331, 1345, and 1355, and Sections 301, 309(b), and 404 of the Clean Water Act, 33 U.S.C. 1311, 1319(b) and 1344, to obtain injunctive relief from and impose civil penalties against the Defendants for violating the Clean Water Act by discharging pollutants without a permit into waters of the United States. The proposed Consent Decree resolves these allegations by requiring the Defendants to restore the impacted areas and to pay a civil penalty.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to Daniel Pinkston, Environmental Defense Section, Environment and Natural Resources Division, U.S. Department of Justice, 999 18th Street, South Terrace, Suite 370, Denver, Colorado 80202, and refer to *United States v. Bar-1 Ranch, Ltd.,* DJ #90–5–1–1–18203.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of Montana, Russell Smith Courthouse, 201 East Broadway, Missoula, Montana 59801. In addition, the proposed Consent Decree may be viewed at *http://www.usdoj.gov/enrd/Consent_Decrees.html.*

Cherie L. Rogers,

Assistant Section Chief, Environmental Defense Section, Environment & Natural Resources Division.

[FR Doc. 2011–8501 Filed 4–8–11; 8:45 am]

BILLING CODE

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0058]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Investigator Integrity Questionnaire.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This notice requests comments from the public and affected agencies concerning the proposed information collection. Comments are encouraged and will be accepted for "sixty days" until June 10, 2011. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Renee Reid, *Renee.Reid@atf.gov,* Chief, Personnel Security Branch, Room 1.E–300, 99 New York Ave, NE., Washington, DC 20226.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please call Renee Reid at 202–648–9620 or the DOJ Desk Officer at 202–395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed information collection are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Investigator Integrity Questionnaire.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 8620.7. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: None.

Need for Collection:

ATF utilizes the services of contract investigators to conduct security/suitability investigations on prospective or current employees, as well as those contractors and consultants doing business with ATF. Persons interviewed by contract investigators will be randomly selected to voluntarily complete a questionnaire regarding the investigator's degree of professionalism.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 2,500 respondents will complete a 5 minute form.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 250 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street, NE., Room 2E–808, Washington, DC 20530.

Dated: April 5, 2011.

Lynn Murray,

Department Clearance Officer, PRA, Department of Justice.

[FR Doc. 2011–8486 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—DVD Copy Control Association

Notice is hereby given that, on March 9, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), DVD Copy Control Association ("DVD CCA") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Behavior Tech Computer Corp., Taipei, TAIWAN; Dongguan ChuDong Electronic Technology Co., Ltd., Dongguan City, Guangdong, PEOPLE'S REPUBLIC OF CHINA; and Wistron Corporation, Taipei Hsien, TAIWAN, have been added as parties to this venture.

Also, Dongguan Qisheng Electronic Industrial Co., Ltd., Dongguan City, Guangdong, PEOPLE'S REPUBLIC OF CHINA; Global Publishing Inc., Fremont, CA; Inventec Corporation, Taipei, TAIWAN; and Marvell International Ltd., Hamilton, BERMUDA, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DVD CCA intends to file additional written notifications disclosing all changes in membership.

On April 11, 2001, DVD CCA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on August 3, 2001 (66 FR 40727).

The last notification was filed with the Department on December 9, 2010. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act January 10, 2011 (76 FR 1460).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–8366 Filed 4–8–11; 8:45 am]

BILLING CODE M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Layfe Robert Anthony, M.D.; Denial of Application

On December 3, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Layfe Robert Anthony, M.D. (Respondent), of Salt Lake City, Utah. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BA8835449, and the denial of any pending applications to renew or modify the registration, on the ground that because of actions taken by the Utah Division of Occupational and Professional Licensing, he lacks "authority to practice medicine or handle controlled substances in the State of Utah," the State in which he is registered. Show Cause Order at 1 (citing 21 U.S.C. 824(a)(3)). The Show Cause Order also notified Respondent of his right to request a hearing or to submit a written statement in lieu of a hearing, the procedures for doing so, and the consequences for his failing to do so. *Id.* at 2 (citing 21 CFR 1301.43 & 1316.47).

On December 14, 2009, the Show Cause Order was served on Respondent by certified mail addressed to him at his registered location. Since that date, more than thirty days have passed and neither Respondent, nor anyone purporting to represent him, has requested a hearing or submitted a written statement. 21 CFR 1301.43(b) & (c). Accordingly, I conclude that Respondent has waived his right to a hearing and issue this Final Order based on the evidence contained in the investigative record. 21 CFR 1301.43(d) & (e).

Respondent held DEA registration, BA8835449, which authorized him to dispense controlled substances in schedules II through V as a practitioner. According to the Agency's registration records, Respondent's registration expired on June 30, 2007, and Respondent did not submit his renewal application until July 2, 2007. Moreover, the Agency did not automatically renew his registration.

Under 5 U.S.C. 558(c), "[w]hen the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." Based on this provision, the Government maintains that his registration has continued in effect.[1] It has not. However, an application remains pending before the Agency.

On January 28, 2009, the Utah Department of Commerce, Division of Occupational and Professional Licensing (DOPL), revoked his "licenses to practice as a physician/surgeon and to administer and prescribe controlled substances." Order, *In re Layfe Robert Anthony, M.D.,* No. DOPL–OSC–2001–70 (Utah Div. Occ. & Prof. Lic. Jan. 28, 2009).[2] Accordingly, Respondent lacks

[1] The Government did not explain the basis for its position that an application filed after a registration expires is nonetheless timely.

[2] The Order was based on a recommended decision of a three-member panel designated by the Director of the DOPL to act as the presiding officer in the proceeding. The panel's findings included, *inter alia,* that: 1) Respondent had "stored controlled substances [Versed and Provigil] * * * in his personal vehicle," as well as "41 prescription pads which contained multiple blank prescriptions that had been presigned by other physicians" at a clinic he was no longer affiliated with, *id.* at 9, 11–12, 16–17; that he had failed to comply with a previous state order that he "submit a triplicate copy" of a controlled substance prescription (for testosterone, a schedule III steroid) for review by the Division, *id.* at 21–22; that he had committed unprofessional conduct when he advised A.S. to administer to her son a controlled substance (Klonopin) which he had prescribed to her, *id.* at 21, 23–24; and that he had violated section 58–37–6(7)(o) of the Utah Controlled Substances Act by

authority to dispense controlled substances in Utah, the State in which he holds his DEA registration.

The Controlled Substances Act defines the "[t]he term 'practitioner' [to] mean[] a physician * * * licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practice * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice or research." 21 U.S.C. 802(21). Moreover, under 21 U.S.C. 823(f), "[t]he Attorney General shall register practitioners * * * to dispense * * * controlled substances * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices." DEA has therefore repeatedly held that holding state authority is an essential requirement for obtaining a registration and maintaining an existing one. *See David W. Wang,* 72 FR 54297, 54298 (2007); *Sheran Arden Yeates,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci,* 58 FR 51104, 51105 (1993); *Bobby Watts,* 53 FR 11919, 11920 (1988); *see also* 21 U.S.C. 824(a)(3) (authorizing revocation "upon a finding that the registrant * * * has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the * * * dispensing of controlled substances").

As the Final Order of the Utah DOPL makes clear, Respondent does not possess authority under Utah law to dispense controlled substances. Because he does not meet this requirement, his application will be denied. *See* 21 U.S.C. 823(f).

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b) & 0.104, I order that the application of Layfe Robert Anthony, M.D., for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This Order is effective May 11, 2011.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–8535 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–09–P

issuing controlled substance prescriptions "on forms which falsely identified his address." *Id.* at 21 & 24.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 07–20]

Mark De La Lama, P.A.; Denial of Application

On January 16, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Mark De La Lama (Respondent), of Phoenix, Arizona. The Show Cause Order proposed the denial of Respondent's application for a DEA Certificate of Registration as a mid-level practitioner (*i.e.,* physician assistant) on various grounds.

Specifically, the Show Cause Order made four major allegations against Respondent. First, the Order alleged that Respondent's former DEA registration had expired on June 30, 2003, but that Respondent had continued writing prescriptions for controlled substances after that date. ALJ Ex. 1, at 1 & 3. Next, noting that as a condition of his initial registration Respondent had entered into a Memorandum of Agreement (MOA) with the Agency, the Order alleged that Respondent had violated the MOA in two ways: First, by failing to produce the log of his controlled substance prescriptions which he was required to maintain when DEA Diversion Investigators (DIs) visited his practice premises on April 13, 2005, and; second, by failing to report two changes of his practice location. *Id.* at 1, 2–3. Finally, the Order alleged that on November 21, 2004, Respondent submitted a new application for a registration which he falsified by failing to disclose his April 1992 and October 1994 felony convictions for offenses related to controlled substances, as well as the existence of the MOA. *Id.* at 3.

Respondent, through his counsel, requested a hearing. The matter was assigned to a DEA Administrative Law Judge (ALJ), who conducted a hearing on January 16, 2008, in Phoenix, Arizona. ALJ at 2. Both parties called witnesses to testify and introduced documentary evidence into the record. Following the hearing, both parties filed briefs containing their proposed findings of fact, conclusions of law and argument. *Id.*

On April 2, 2009, the ALJ issued her Recommended Decision. Therein, the ALJ concluded that Respondent "knowingly issued prescriptions for controlled substances using an expired DEA registration number over a span of nearly two years" but that the "lack of evidence that Respondent issued prescriptions for other than a legitimate purpose * * * weigh[s] in favor of a finding that Respondent's registration would not be inconsistent with the public interest." *Id.* at 26.

The ALJ also found that Respondent's conviction record for two felonies under Arizona law involving controlled substances weighed "in favor of a finding that Respondent's registration would be inconsistent with the public interest." *Id.* at 27. Based on his failure to disclose these two felonies on his November 21, 2004 application, the ALJ further found that Respondent materially falsified his application but concluded that his conduct was only negligent because an office manager had completed the form for him. *Id.* at 28–29. The ALJ credited "Respondent's testimony and * * * his expressions of regret and recognition of his wrongdoing on this specific point, and * * * therefore conclude[d] that his material falsification in the 2004 application [did] not warrant denying his application." *Id.* at 30.

Next, the ALJ found "that Respondent failed to adhere to certain requirements contained" in a Memorandum of Agreement (MOA) which he was required to enter into with the Agency as a condition of obtaining a registration. *Id.* More specifically, Respondent "failed to maintain a log of all controlled substances that he prescribed as of the date of the April 2005 site visit" and he failed to notify the Agency of his changes in the location of his practice address. *Id.* 30–31. The ALJ also found, however, that Respondent "equally accepts responsibility for what went wrong[ ] and has demonstrated a commitment to cooperate with DEA in the future." *Id.* at 32. Moreover, while the ALJ noted that Respondent had been convicted (in 1985) in Thailand of possession and attempted smuggling of marijuana, as well as a more recent conviction for driving under the influence, the ALJ also noted that Respondent was then practicing "at a clinic that serves a primarily underserved and underinsured population" and that this is "an appropriate consideration in determining whether [his] application * * * should be granted." *Id.* at 33.

Based on his multiple convictions for controlled substances offenses and his "considerable difficulty [in] adhering to some of the requirements of the" MOA, the ALJ concluded that the Agency had "made out a prima facie case for denying [Respondent's] application." *Id.* The ALJ reasoned, however, that "[d]espite his criminal convictions involving controlled substances in the 1990s, Respondent appears to have put that period of his life behind him." *Id.* at 34.

In the ALJ's view, Respondent's "most recent conviction involving controlled substances occurred more than fifteen years ago [and] [s]ince that time, he has neither been implicated in nor been convicted of any other crime involving controlled substances [and] [t]he Government presented no evidence that the future would hold any differently." *Id.* Based on his "expression of remorse and his expressed willingness to comply with restrictions on his registration," the ALJ "conclude[d] that the public interest would best be served by granting Respondent a restricted registration" subject to four conditions. *Id.* These were that: (1) Respondent must comply with all Federal, State and local laws and regulations relating to controlled substances; (2) Respondent may not personally use controlled substances in any form or for any reason without a prescription issued by a duly licensed physician who possesses a valid DEA Certificate of Registration; (3) Respondent must permit DEA personnel to enter his practice location at any time during normal business hours, without prior notice, to verify compliance with all applicable laws and regulations relating to controlled substances, as well as with any or all restrictions imposed on Respondent as a condition of his registration with the DEA; and (4) Respondent must notify the DEA Phoenix Division, in writing, of any change of business address or employer. *Id.* at 34–35.

Neither party filed exceptions to the ALJ's decision. On May 7, 2009, the ALJ forwarded the record to me for a final agency action.

During the initial review of the record, it was noted that the Government had introduced into evidence—over Respondent's objection—a printout of a data compilation prepared by SearchPoint, a private entity, which purportedly listed the prescriptions Respondent issued between October 8, 2003 and May 23, 2005. The Government introduced this document, which is not a record required to be maintained under either federal or state law, to prove the allegations that Respondent had issued controlled substance prescriptions even after he knew his registration had expired and had done so even after being told to stop by DEA Investigators. Because Respondent's objection went to the foundation for admitting the compilation and the reliability of the information it contains, and the Government did not establish that the methods used to compile the data were sufficiently trustworthy, I remanded the case to the ALJ for further proceedings and specifically instructed the Government to address various questions as set forth in the remand order.[1] Following additional proceedings, the ALJ forwarded the record back to me for final agency action.

Having considered the entire record, I hereby issue this Decision and Final Order. I agree with the ALJ's conclusions that: (1) Respondent materially falsified his application, (2) that he has a significant history of convictions relating to controlled substances; (3) that he failed to meet the MOA's requirements with respect to both his proper keeping of a log and his obligation to notify the Agency of any changes in his practice location.[2] As the ALJ recognized, these findings establish a *prima facie* case for the denial of his application.

However, I reject the ALJ's conclusion that Respondent's employment at a clinic that serves an underserved population is "an appropriate consideration in determining whether [his] application * * * should be granted." ALJ at 33; *see also Gregory D. Owens,* 74 FR 36751, 36756–57 (2009) (rejecting consideration of socioeconomic status of practitioner's patients as appropriate consideration under the CSA). Moreover, while I do not reject the ALJ's findings that Respondent has accepted responsibility for his misconduct, I reject her proposed sanction because it clearly rests on a fundamental misunderstanding as to the scope of permissible sanctions under the CSA. Given the circumstances of this matter, I conclude that Respondent's application should be denied at this time.

The Reliability of the SearchPoint Data Compilation

Before proceeding to make factual findings, it is necessary to resolve the issue of whether the ALJ properly admitted—over Respondent's objection that the Government had not laid a proper foundation—Government Exhibit 8, which it represents to be a data compilation listing the prescriptions Respondent issued between October 8, 2003 and May 23, 2005.[3] The Government argues that this exhibit showed that Respondent had issued controlled substance prescriptions not only following the expiration of his registration, but also after he knew it had expired and even after he was told by DEA Investigators to stop doing so.[4] Gov. Proposed Findings at 7–8, 10–11. The ALJ relied on this evidence, in part, in her decision.

Under the Administrative Procedure Act (APA), an Order must be "supported by and in accordance with the reliable, probative and substantial evidence." 5 U.S.C. 556(d). While the Agency's decision may be based on hearsay evidence, *see Richardson* v. *Perales,* 402 U.S. 389, 410 (1971), such evidence must still be reliable.

The compilation is not, however, a record maintained by a government agency. Nor is it a record which is required to be maintained under either federal or state law. Moreover, on reviewing the compilation, there appeared to be various discrepancies which called into question the data's reliability. As I noted in the remand order, this Office is unaware of any judicial decisions either admitting or excluding similar data compilations prepared by SearchPoint.

At the hearing, a DI testified that prescription information is entered by a pharmacy into a computer which is then collected and sent to SearchPoint. Tr. 43. The DI did not, however, explain the basis of his knowledge. Moreover, the record did not establish the procedures or methods used by the pharmacies in entering the information, when the information is entered, whether either the pharmacies or SearchPoint have any procedures to verify the accuracy of the information, whether the data is properly secured, and whether there are procedures to protect the data from manipulation. *Cf. McCormick on Evidence* § 314, at 886 (3d ed. 1984).

[1] To make clear, I remanded the case because there was no prior Agency decision addressing the admissibility of data compilations prepared by private entities.

[2] Under the express terms of the MOA, Respondent agreed to surrender his registration without issuance of an Order to Show Cause in the event that he failed to comply with the MOA. GX 3, at 3. Also, a violation of the MOA's terms would "result in the initiation of proceedings to revoke" Respondent's registration. *Id.*

[3] The ALJ overruled the objection after determining that the Exhibit had been provided to Respondent in advance of the hearing even though Respondent's counsel had objected on grounds of lack of foundation and that "we have no way of determining the accuracy of the information as set forth herein." Tr. 66. While under the Agency's regulation, "[t]he authenticity of all documents submitted in advance [is] deemed admitted unless written objection thereto is filed with the presiding officer," 21 CFR 1316.59(c), there is no such rule applicable to objections based on a lack of foundation. The ALJ apparently confused these two independent grounds for objecting to the admission of evidence.

[4] Notably, the Government did not introduce into evidence either copies of any prescriptions Respondent wrote during this period, or pharmacy dispensing logs, even though such evidence should have been readily obtainable (as a pharmacy is required to keep such records for two years, *see* 21 CFR1304.04(a) and 1304.22(c)), and is what the Government customarily uses in these proceedings to establish that a practitioner wrote unlawful prescriptions.

The record also did not establish whether a prescription that was signed by both Respondent and a supervising physician (which was one of Respondent's defenses to the allegation that he continued to prescribe even after he realized his registration had expired) would be attributed to Respondent or the physician. Nor did the record establish why, where refills were authorized by a single prescription, the printout provided the same date for the date the prescription was written and the date it was dispensed.

Because the record did not adequately establish the procedures or methods used to compile this database and that the compilation is sufficiently trustworthy so as to satisfy the APA's requirement that the evidence be reliable, I remanded the case to the ALJ with instructions to address these various concerns. I also expressly ordered that the questions "must be addressed by a witness who has personal knowledge of the procedures and methods used by Searchpoint." Remand Order at 3.

On remand, the Government submitted an affidavit of the same Diversion Investigator whose testimony I previously found to be inadequate for establishing that the SearchPoint data is reliable. From his affidavit, it is clear that the DI lacks personal knowledge of the procedures and methods used by SearchPoint. *See* Affidavit of Miguel Rodriguez.

This, by itself, is reason to conclude that the Government has failed to comply with the remand order. However, even in his affidavit, the DI offered no evidence which establishes that the SearchPoint data is reliable. To the contrary, the DI explained that:

> [t]he accuracy and authenticity of the data was only as good as the accuracy of the pharmacy reporting. It was stipulated to all DEA investigators, that SearchPoint was only *a pointing tool* and the data provided by SearchPoint *was to be verified against actual records that the pharmacy,* distributor, [or] practitioner was required to maintain by current regulations and laws."

Id. at 4 (emphasis added).

The DI further acknowledged that he "did not verify the information found during the query of the SearchPoint database prior to meeting with [Respondent] on April 13, 2005." *Id.* at 4–5. (Indeed, it is apparent that the DIs did not verify the information even after meeting with Respondent as there are no "actual records" in evidence.) The DI's statement that the SearchPoint data was only to be used as a "pointing tool" begs the question of why the actual pharmacy (or Respondent's patient) records were never obtained.

Based on the DI's assertion that the SearchPoint database was "a valuable tool in DEA's investigative efforts," *id.* at 5, "the Government respectfully request[ed] an additional finding that the SearchPoint data proved useful in DEA's investigation of Respondent, and helped further the objectives of DEA's investigation." Gov't Memorandum on Remand at 2. Contrary to the Government's understanding, whether the SearchPoint data proved useful in its investigation is not material to the resolution of any issue in this proceeding.

As the Government's brief makes clear, determining the extent of Respondent's issuance of prescriptions after his registration expired and assessing his culpability in doing so is one of the central issues in this matter. Given that there was no clear agency precedent addressing the admissibility of similar data compilations, this proceeding was remanded to determine whether the SearchPoint data was sufficiently reliable to prove that Respondent had continued to issue controlled substance prescriptions not only after he became aware that his registration had expired, but also after he was told by a DI to stop doing so.

Notwithstanding that the remand order clearly stated what the Government was required to show to establish that this evidence is reliable, it failed to do so. Because the Government failed to comply with the remand order and offers no valid excuse for its failure to do so, I conclude that the SearchPoint compilation is not competent evidence and should have been excluded. *See* 21 CFR 1316.59(a) ("The presiding officer shall admit only evidence that is competent, relevant, material and not unduly repetitious."). Accordingly, as ultimate factfinder, I do not base any of my findings on it.

Findings

Respondent is a physician assistant, who is licensed by the Arizona Regulatory Board of Physicians Assistants (The Board). GXs 6 & 7. At the time of the hearing, Respondent was 49 years of age. Tr. 286.

Respondent obtained a Bachelor of Science degree in human biology in 1997 and a Master's degree in physician assistant studies in October 1999. *Id.* at 208. After obtaining his state license, Respondent commenced working as a physician assistant; his duties involve performing physical exams, making diagnoses, treating patients, interpreting test results, and ordering diagnostic tests and studies. *Id.*

On October 26, 2000, Respondent applied for a DEA registration to handle controlled substances in Schedules II through V as a mid-level practitioner. GX 2. On the application, Respondent was required to answer four "liability questions"; the questions included whether the applicant had ever been convicted of an offense related to controlled substances under either federal or state law. *Id.* at 2.

Respondent answered in the affirmative and provided an explanation of the circumstances surrounding a 1992 marijuana conviction. *Id.* Respondent wrote that in 1989 or 1990, a friend he met in karate class was involved in "selling dope" and that Respondent "made the horrible mistake of trying to make a 'fast buck.'" *Id.* Respondent also stated on the application that "I entered guilty pleas in 1992 and have never violated any of the terms of my probation." *Id.*

Respondent also stated on the application that his "criminal convictions were expunged by the Maricopa County Superior Court in 1999," based on the recommendation of his probation officer. *Id.* He also "regret[ted] this experience in [his] life" and that his "goal was to be the best P.A. and father I can be." *Id.*

On February 12, 2001, the Agency granted Respondent's application. GX 1. However, because of his prior conviction, the Agency issued him a restricted registration; as a condition of his registration, Respondent was required to enter into a Memorandum of Agreement (MOA), which imposed various conditions on his registration. Tr. 19; GX 3.

The MOA further detailed Respondent's drug-related offenses, which included two other drug convictions, one of which should clearly have been disclosed on his application, but was not. On May 3, 1985, Respondent was convicted in Bangkok, Thailand for "Possession and Attempted Smuggling" of approximately 145 grams of marijuana. GX 3, at 1. The court suspended the 21-month sentence, and Respondent paid a fine and completed two years of probation. *Id.*

On or about April 10, 1992, Respondent entered into a plea agreement in which he pled guilty to "Attempted[] Possession, Use, Production, Sale and Transportation" of approximately eight pounds of marijuana, a class 3 felony under Arizona law. *Id.* Respondent paid a fine, was jailed for two months, and was placed on five years' probation.[5] *Id.*

[5] On June 16, 1999, the Maricopa County Superior Court vacated the judgment of guilt and restored Respondent's civil rights. *Id.* at 2. This is the felony that he listed on his application in 2000.

With respect to this incident, Respondent maintained at the hearing that he "was approached by somebody" and ended up being "a fall guy." Tr. 284.

On October 24, 1994, Respondent was found guilty of "Conspiracy to Transfer, Sell or Possess" a narcotic drug, a class 2 felony under Arizona law, based on his involvement in a conspiracy to illegally import cocaine from Panama to the United States. GX 3, at 2. Respondent was fined and sentenced to seven years' probation, but the probation was subsequently reduced.[6] *Id.* With respect to this conviction, Respondent maintained at the hearing that he was not "directly involved" in the conspiracy because he only "had phone conversations with the particular individual," but he nevertheless pled guilty. *Id.* at 288–90.

Respondent did not disclose this conviction on his initial application. GX 2, at 2; Tr. 293. When questioned as to why, Respondent stated that he "suppose[d]" that it was because of "inadvertence" on his part and added that "[i]t was all at the same time," apparently referring to the marijuana distribution offense. Tr. 293.

As found above, as a condition of his registration, Respondent entered into an MOA, under which he agreed to comply with various conditions. The MOA was to remain in effect for five years from the date of signing, January 25, 2001, during which time the DEA would be able to monitor Respondent's handling of controlled substances. Tr. 115–16; GX 3, at 2.

As relevant to the allegations in this proceeding, Respondent agreed "to maintain a log for five years, which will list all controlled substances that he prescribes." GX 3, at 2. The log was "subject to inspection by DEA for five years from the date" the MOA was "fully executed," which was January 30, 2001. *Id.* at 2–3.

Second, Respondent agreed "that DEA personnel may enter his place of practice at any time during regular business hours, without prior notice, to verify compliance" with the MOA. *Id.* at 3. Finally, Respondent agreed "to notify the DEA Phoenix Division prior to transferring his DEA Certificate of Registration to another address within the state of Arizona or to another state." *Id.* In the MOA, Respondent indicated that he would be registered at the location of 3201 West Peoria Avenue, Suite A–202, Phoenix, Arizona. *Id.* at 1.

In October 2000, Respondent began working as a physician assistant under the supervision of a Dr. John Curtin, at the above address. Tr. 223. Sometime thereafter, Respondent contracted pneumonia and missed substantial time from work; upon his return, his hours were reduced. *Id.* at 224. Consequently, in 2001 or 2002, Respondent left this position and went to work for William Zachow, D.O., who owned 21st Century Family Medicine (21st Century), 6707 North 19th Ave., Suite 201, Phoenix, Arizona. *Id.* at 167–68, 224. Respondent did not notify DEA of this change of practice address, as required by the MOA.[7] Tr. 38–39.

As part of Respondent's employment agreement at 21st Century, the clinic was to handle matters related to his licensing fees, his malpractice coverage and his DEA registration. *Id.* at 224. Specifically, Sonia Zachow, Dr. Zachow's wife, "would take care of the fees and all the licensing and the DEA." *Id.* at 224–25. Respondent testified that this was a verbal agreement, as it had originally been with his first employer, Dr. John Curtin, and that he trusted Dr. Zachow to honor the agreement. *Id.* at 219. Respondent testified that "[f]rom my understanding, all my mail went to [Sonia Zachow] and through her. I didn't receive any." *Id.* at 225. In particular, Respondent testified that he never received a notification from DEA that his registration would expire after June 30, 2003. *Id.* Given that he had not notified the Agency of his new address, this is hardly surprising.

Shirley Reigle, a medical assistant at 21st Century, testified that she was employed at the clinic when Respondent was hired and that she worked with Respondent for four or five years. *Id.* at 168, 193. Ms. Reigle testified that she managed the "back office," coordinating the activities of the medical assistants, while Sonia Zachow managed the "front office," or business office. *Id.* at 169–71. Mrs. Zachow's responsibilities included the renewal of the licenses and DEA registrations held by the clinic's physicians and physician assistants, the renewal of insurance coverage and the billing of insurance claims. *Id.* at 171, 174, 176. According to Ms. Reigle, Mrs. Zachow's responsibilities further included notifying the DEA if a physician or physician assistant moved his or her location of practice. *Id.* at 188. However, in one instance prior to Respondent's employment at 21st Century, Ms. Reigle tried to induce Mrs. Zachow to give notice of a move but ended up having to provide the information to DEA herself. *Id.* at 204–05.

Respondent's DEA registration expired June 30, 2003. *Id.* at 42; GX 1. According to Ms. Reigle, sometime in late 2003, Mrs. Zachow entered the office that Ms. Reigle shared with Respondent and threw a bill from the DEA onto Respondent's desk, saying, "Why should I pay his DEA license when we're selling the practice." Tr. 176–77, 181. Ms. Reigle testified that she believed that Respondent "had gone for the day" and that, when she told Respondent about the incident later and he went to his desk to look, the bill was no longer on his desk. *Id.* at 177, 199. While Ms. Reigle testified that she told Respondent about the incident, he apparently took no action to determine whether he still held a valid registration.

Respondent testified that he did not receive notice that his registration required renewal and that, had he known, he would not have continued to practice without it. *Id.* at 225. Respondent admitted, however, that at the time he received his registration he knew it was subject to renewal in three years. *Id.* at 301. He further asserted that he did not keep track of the time or display his registration certificate and that he expected the office manager to handle matters pertaining to his licenses, as that was done for all incoming health care providers. *Id.* Respondent did, however, acknowledge that he was ultimately responsible for renewing his registration. *Id.* at 220.

Respondent left 21st Century sometime between July and October 2004, when Dr. Zachow sold the clinic.[8] *Id.* at 217. Respondent began practicing at the 51st Avenue Clinic (51st Avenue), which is located at 4700 North 51st Street, Suite 6, in Phoenix. *Id.;* GX 4, at 1.[9]

When the clinic did not offer him adequate hours, Respondent resumed

[6] The Superior Court also apparently vacated this conviction in 1999, when it restored Respondent's civil rights. Tr. 210.

[7] Respondent also testified that the year 2001 was a difficult year: In May his father fell from a roof and was hospitalized for 21 days with a brain hemorrhage before he finally died; Respondent took in three more dependents into his household as a result of his father's death; later that year, Respondent developed pneumonia, and when he returned to work his employer noticed he was depressed and referred him to counseling; then the national crisis of September 11, 2001 happened. Tr. 220–221. Respondent testified that "there was a lot of stuff that happened in 2001 that I think I was a little bit confused, just overwhelm[ed]." *Id.* at 221. While this sequence of events may have overwhelmed Respondent, and provide some basis for excusing his failure to notify the Agency of his having changed his location, it is not a credible explanation for his failure to renew his registration, which did not expire until June 30, 2003.

[8] As was much of his testimony regarding the dates of various events, Respondent's testimony as to the date when he left 21st Century and commenced working at the 51st Avenue clinic was vague.

[9] Respondent used the address of this clinic on his 2004 application. GX 4.

working on a part-time base at 21st Century and split his time between the two clinics. Tr. 217–18. Sometime in October 2004, Respondent received a letter from the Arizona Physician's Assistants Board notifying him that his "license had lapsed [on] October 1, 2004." GX 9, at 4.

Respondent testified that during the period in which he moved to the new practice, pharmacies were not honoring the prescriptions he wrote at his new employer, and that his "office was getting calls for the prescriptions that [he] had been writing, and they were talking about a DEA number." Tr. 226–27. Notwithstanding the phone calls, Respondent maintained that he did not know that the registration had "lapsed" until three or four months later when, in November 2004 or early 2005, he was "contacted by DEA." *Id.* at 226–27. In November 2004, Ms. Muniz, the office manager at 51st Avenue, told Respondent that he needed to reapply for a DEA registration.[10] *Id.* at 228.

According to Respondent, Ms. Muniz filled out the application for him and showed him only the signature page, which he signed without reviewing. *Id.* at 228–29, 262–63, 309–10. As with his previous application, the form asked Respondent whether he had "ever been convicted of a crime in connection with controlled substances under state or federal law?" GX 4, at 1; ALJ Ex. 3, at 3. The "no" answer was circled on the application. GX 4, at 1. Moreover, Respondent left blank the box which the form provided for explaining a "yes" answer to this question, and which is on the same page as the signature block. *Id.* at 2. The application was then submitted.

As to why he did not disclose his convictions, Respondent testified: "I was busy. I was probably seeing 50 patients a day. I was trying to make an impression." Tr. 228. According to Respondent, had Ms. Muniz given him the entire application, he would have given a detailed explanation and an answer of "yes" to the liability question, just as he had done on his October 2000 application. *Id.* at 229.

[10] In a letter he faxed to a DI on April 24, 2005, Respondent indicated that in October of 2004, he "received a letter stating that my P.A. license had expired" and that after "doing some investigation, it turn[ed] out [that] my fees had not been paid." GX 9, at 1. Sometime around the time that he got his state license reinstated, he "got a call from the former office manager stating that I had better check up on my malpractice fees. It turn[ed] out those had not been paid in over a year." *Id.* Moreover, in the same October time period, his new clinic "was getting calls back from the pharmacy saying that my DEA license was no longer valid" but that he did not think too much about it at first as "I didn't know that the license could expire." *Id.* at 2.

The ALJ specifically credited Respondent's testimony that he would not have provided a "no" answer "had he personally filled out the form" and that "he would have detailed the explanation of his past conduct as he had done in 2000." ALJ at 29. The ALJ further credited Respondent's "expressions of regret and recognition of his wrongdoing" in submitting the application. *Id.* at 30. The Government did not except to these findings.

It is undisputed that after filing his application, Respondent continued to write prescriptions for controlled substances under his expired registration even though he then clearly knew that it had expired and did so through at least March 2005. *See* GX 9, at 4; *see also* Resp. Prop. Findings at 6–7. Respondent offered two main (and somewhat inconsistent) explanations for why he continued to write prescriptions during this period.

First, in a written statement he provided to an Agency investigator in April 2005, Respondent claimed that "after reapplying" there was "some confusion * * * as to what was going on at that time, some months went by and [he] was informed by the clinic's office manager that she had taken care of everything and it was okay to write again." GX 9, at 4. Continuing, Respondent explained that Ms. Muniz had contacted someone "at DEA headquarters and he had informed her that we had filled out the incorrect application and our money had been posted to the wrong account, he said he would fax over the correct application to be filled out immediately and faxed back." *Id.* Respondent maintained that employees had said that "the money would be posted to the correct account and this would make the license active at this point." *Id.* Respondent faxed in the new application on February 17, 2005. *Id.*

Respondent further asserted that he "wrote very few prescriptions during this time [when he] was waiting for a copy of the new license." *Id.* According to Respondent, "[a]fter several weeks of not receiving [the] paperwork[,] we called again and were informed that there was a problem." *Id.* Respondent added that "[a]t this time I discontinued completely and left the controlled substances, the few we do write up to the responsibility of my supervising physicians." *Id.* at 5. Finally, Respondent claimed that while he could not "recall the very last prescription I wrote, it probably was over a month or two ago and was some cough syrup with codeine as I wrote very little in the first place." *Id.*

Second, in his testimony, Respondent further claimed that he "was getting co-signatures on the prescriptions if I did need to write or just having them written altogether by a supervising physician." Tr. 230. Respondent explained that the co-signed prescriptions would be "[o]ne prescription, my name and the doctor's name, usually above mine." *Id.* at 231. Respondent also asserted that the pharmacy "might have run it [the prescription] as my DEA, but actually the doctor, the supervising physician, it was under his DEA as well if his signature" was on the prescription. *Id.* Respondent further asserted that he had "some copies" available that would show that his prescriptions were being co-signed. *Id.*

Respondent submitted a letter (which is unsworn) dated April 22, 2005 written by Ms. Muniz, Director of Operations for the 51st Ave. Family Clinic. RX 8. According to the letter, Respondent submitted a renewal application sometime around December 3, 2004, when the payment for the application fee cleared. *Id.* However, after several months, Respondent had still not gotten his registration. *Id.* According to Ms. Muniz, she then called DEA Headquarters and was told that Respondent had submitted the wrong form. *Id.* The employee at DEA Headquarters then faxed over the correct form which Respondent then submitted. *Id.* According to Ms. Muniz, the employee told her that he would post the previous payment to the correct account and this would activate Respondent's registration. *Id.* However, according to an affidavit of a DEA Diversion Investigator, "there is no record of" Respondent's having submitted an application after November 21, 2004. Affidavit of Miguel Rodriguez, at 6.

Based on Respondent's "no" answer on his 2004 application to the liability question regarding whether he had any prior convictions for controlled substances offenses, a DI commenced an investigation. Tr. 93. The DI reviewed the records from the Agency's prior investigation, police reports and the MOA. *Id.* at 93–95. He also learned that, in September 2003, Respondent had been arrested in Florida for a hit-and-run incident while driving under the influence.[11] *Id.* at 103.

[11] There was no evidence presented that Respondent was under the influence of a controlled substance at the time of the incident. Tr. 256. Moreover, there is no evidence in this record that Respondent has recently abused controlled substances. I therefore conclude that the incident

Continued

Using Respondent's registration number, the DI also conducted a search of Respondent's controlled substance prescriptions using the SearchPoint database. *Id.* at 42–44, 76. The data indicated that Respondent had written controlled substance prescriptions after the expiration of his registration (June 30, 2003). *Id.* at 42–43. However, the DI testified that after reviewing the data, he did not have any concerns about Respondent's prescribing other than that he lacked a registration. Tr. 152.

On April 13, 2005, as part of his investigation of Respondent's application, the DI and his senior partner visited Respondent at the 51st Avenue clinic, which was the address Respondent had given on his application. Tr. 30–31. However, this address was different from Respondent's address of record on file with the Agency, as Respondent had not notified the Agency that he had changed his practice location and had therefore violated the MOA. *Id.* at 31.

According to the DI, Respondent was not authorized to handle controlled substances at the 51st Avenue clinic. *Id.* at 33. The DI testified that, although failing to notify DEA of a change of address is not typically the sole basis for revoking a DEA registration, Respondent's failure to comply with the address-change provision of the MOA gave cause for particular concern. *Id.* at 109. However, the Government produced no evidence that Respondent had done anything other than write prescriptions at this address.

During the visit, the DI did not observe Respondent working under the supervision of a physician, and Respondent did not inform him or his partner that he was working under physician supervision. *Id.* at 31–32. The DIs then asked to inspect the log which Respondent was required to maintain under the MOA. *Id.* at 33. Respondent left the room and returned with a box containing an assortment of papers and several folders in no particular order. *Id.* at 33–34. Respondent partially attributed the disorganization of his "log" to the fact that he was in the process of moving into a new practice while continuing to work part-time at the other such that each location had its own records. *Id.* at 327. Yet, at this point, he had been at 51st Avenue clinic for at least six months.

According to the DI, his partner examined the contents of the box and asked whether Respondent had records more recent than those for the year 2003. *Id.* at 35–36, 124–25, 160–61. Respondent answered that he could "put something together," thus indicating that he was not currently keeping a log. *Id.* at 36, 125. However, the DIs did not take the box to copy the contents and "never asked for a copy." *Id.* at 249, 251. Respondent later testified that "I had it together and I'd have produced—I even took a ledger and * * * copied them all down so I did have a log book of the individual entries."[12] *Id.* at 251.

In a subsequent conversation, Respondent offered the material to the DI to which the latter responded: "'No, I'll give [the letters] you have already provided to me to Washington and it will go from there.'" *Id.* The DI admitted that he and his partner did not ask for copies of the materials in the box and did not offer Respondent the option to submit later the materials that he would gather together. *Id.* at 128.

Respondent testified that he had photocopied his notes of "patient encounters," which contained "the patient's name, date of birth, everything that we're seeing about that patient on that day and the reasonable explanation of why you would write a controlled substance for that patient on that day" as well as the controlled substance prescriptions he had written and then placed the copies in a manila folder in a box. *Id.* at 216, 235, 239. Respondent testified that he thought this would be "even better than a logbook." *Id.* at 216, 235. As he explained:

> Now I thought that if there was ever a question about my writing abilities and what I was doing, that I could pull up the patient encounter and show my reasonable action on why I would write a prescription on that particular day for that particular patient. So I thought it was actually better than a logbook.

Id. at 236.[13]

The parties disputed whether what Respondent had presented to the DIs constituted a log. According to the DI, a log is "something that we could easily obtain and review to check and verify [Respondent's] prescription habits," which would normally be a "bound book with notations" or a "binder with prescriptions." Tr. 34–35. The DI testified that he did not consider the records in the box to be "easily reviewable." *Id.* at 36. However, he later conceded that the MOA did not specify what format the log was to be maintained in and that the information he sought could be obtained from the copies of the prescriptions. *Id.* at 36, 122.

Respondent testified that he "[p]robably" did not "completely" understand the MOA's requirement. *Id.* at 215. However, he also testified that "[a] log is actually a journal reading; it's a journal." *Id.* at 321. Respondent then testified that he thought "that a patient list was even better [and] was the same thing as a log book." *Id.* He also maintained that "there was nothing in the [MOA] that told me how * * * a patient log book should look," but then acknowledged that he never inquired of the Agency what the log should consist of "[b]ecause [he] thought that from what [he] had seen with other physicians, what they used was a photo-a three- or double—you know, the two-sided prescriptions where you just get a copy of it, that's what I'd seen." *Id.* at 322.

Respondent further testified that, while initially he kept the copies of prescriptions and patient encounters in a box in the office in chronological order, when he moved from 21st Century to 51st Avenue in October 2004, he placed the records from the new location in another box. *Id.* at 217, 237. Thus, at the meeting on April 13, 2005, he was only able to produce a portion of the prescriptions he had written as the remaining records were at 21st Century. *Id.* at 235–38.

The DIs discussed with Respondent the MOA's requirement that he notify the DEA before transferring his registration to another address. *Id.* at 37; GX 3, at 3. Respondent told them that he was not sure whether he had notified the Agency of his most recent move, and he acknowledged that he had moved to 51st Avenue approximately six months earlier. Tr. 38–39. He also told the DIs that he had worked at 21st Century for four years prior to the move to 51st Avenue and that this address was also different from the address at which he had originally been registered. *Id.* at 38–39, 154; RXs 6 & 8. Respondent provided the DIs with two changes of address: 4700 North 51st Avenue, Suite 6, Phoenix, Arizona, and 1526 West Glendale Avenue, Suite 109, Phoenix, Arizona. Tr. 38–39. Although he testified that it was ultimately his responsibility to advise the DEA that he had changed his practice address, Respondent maintained that it had been the responsibility of Mrs. Zachow to do so. *Id.* at 188 & 190.

The DIs also discussed with Respondent the fact that his DEA

has little relevance to the issues in this proceeding and deem it unnecessary to make further findings.

[12] Copies of this document were apparently offered as Respondent's Exhibit 2. However, the Government objected to the admission of the exhibit on the ground that it was not timely exchanged, and the ALJ sustained the objection.

[13] At the hearing, Respondent attempted to enter copies of this "log" into evidence as Respondent's Exhibit 1, but the Government objected on the ground that the documents had not been timely provided to the Government. *Id.* at 242–43, 248. The ALJ's sustained the objection and rejected the evidence. *Id.* at 248.

registration had expired. Tr. 59. Respondent told them that he had learned that the registration had expired several months before their meeting. *Id.* at 59, 113–14. Respondent further told the investigators that the office manager (Sonia Zachow) had been responsible for renewing the registration and had failed to do so. *Id.* at 112, 114–15.

During the April 13, 2005 meeting, the DI's senior partner instructed Respondent to desist from writing prescriptions for controlled substances; Respondent agreed that he would not write prescriptions for controlled substances. *Id.* at 62–63, 78.

At the hearing, Respondent testified that he had complied with the DI's instruction. *Id.* at 345. More specifically, Respondent testified that "I've been compliant from the day when I said—when they told me you can't write controlled substances I've been—not written one." *Id.*

A DI testified that sometime after May 23, 2005, he conducted a second search of Respondent's DEA registration number on SearchPoint and found that Respondent had written controlled substance prescriptions after the April 13, 2005, meeting. Tr. 77. However, for reasons explained above, because the Government did not comply with the instructions in the remand order for establishing that the SearchPoint data is reliable, I conclude that the Government has not proved that Respondent violated the DI's order to stop writing prescriptions. I further find that the Government has failed to produce any reliable evidence rebutting Respondent's contention that he had his prescriptions co-signed by a supervising physician after he became aware that his registration had expired.[14]

At the hearing, Respondent testified that he was compliant with the MOA; that his work as a physicians assistant was difficult and stressful; that he had no training in office administration; and that he had learned how to be a "better professional" from this experience with his DEA registration expiring. Tr. 257–59.

Respondent testified that, although he currently works as a physicians assistant without writing controlled substance prescriptions, his lack of authority to do so significantly diminishes his employer clinic's ability to treat patients: he is the only health care provider at the current clinic and cannot prescribe drugs necessary to treat such common ailments as excessive weight, Attention Deficit Disorder/Attention Deficit-Hyperactivity Disorder, acute pain, acute anxiety attacks, and testosterone deficiencies. *Id.* at 267 & 278. If he cannot substitute a non-controlled substance, he must refer a patient who requires a controlled substance to a physician or another facility. *Id.* at 273.

According to Respondent, in around July 2005, his boss at the 51st Avenue clinic gave him two weeks to resolve the issues surrounding his DEA registration and told him he would lose his job if he did not do so because insurance companies use the DEA registration number as a tracking number for reimbursement. *Id.* at 259–60. Respondent subsequently lost his job at this clinic but subsequently gained employment at his current clinic. *Id.* at 260.

Respondent further testified that he had "made a lot of mistakes" and that he did not "plan on this happening again." *Id.* at 267. Respondent added that he could not "afford to make any mistakes in [his] life anymore," that he had "made plenty" and was "sorry" to have "made them" and was "remorseful." *Id.* at 268. He further stated that while "I made countless errors here * * * I've learned from them and I don't think I'll ever see a courtroom again." *Id.*

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that an application for a practitioner's registration may be denied upon a determination "that the issuance of such registration would be inconsistent with the public interest." 21 U.S.C. 823(f). In making the public interest determination, the CSA requires that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

These factors may be considered in the disjunctive, and I "may rely on any one or a combination of factors and may give each factor the weight [I] deem[] appropriate" in determining whether an application for registration should be denied. *Robert A. Leslie,* 68 FR 15227, 15230 (2003). Moreover, I am "not required to make findings as to all the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005).

Under DEA precedent, the various grounds for revocation or suspension of an existing registration which Congress enumerated in section 304(a), 21 U.S.C. 824(a), are also properly considered when deciding whether to grant or deny an application under section 303(f) because "'the law would not require an agency to indulge in the useless act of granting a license on one day only to withdraw it on the next.'" *Anthony D. Funches,* 64 FR 14267, 14268 (1999) (quoting *Kuen H. Chen,* 58 FR 65401, 65402 (1993)); *see also Alan R. Schankman,* 63 FR 45260 (1998). These include section 304(a)(1), which provides for the suspension or revocation of a registration in the event that the registrant "has materially falsified any application filed pursuant to or required by this subchapter." 21 U.S.C. 824(a)(1). Thus, the allegation that Respondent materially falsified his application is properly considered in this proceeding.

The Government bears the burden of proof in showing that the issuance of a registration is inconsistent with the public interest. 21 CFR 1301.44(d). However, where the Government has made out a *prima facie* case, the burden shifts to the applicant to "present[] sufficient mitigating evidence" to show why he can be entrusted with a new registration. *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))). "Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir.1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct." *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Cuong Trong Tran,* 63 FR 64280, 62483 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995).

Factor One—The Recommendation of the State Licensing Board

The Arizona Regulatory Board of Physician Assistants has made no recommendation in this matter as to whether Respondent's application should be granted. However, it is undisputed that Respondent holds a current Arizona Physician Assistant's license and possesses authority under

[14] The Government does not address whether this practice is even permissible under Arizona law.

State law to dispense controlled substances. While Respondent therefore meets an essential prerequisite for obtaining a registration under the CSA, 21 U.S.C. 823(f), DEA has held repeatedly that a practitioner's possession of State authority is not dispositive of the public interest determination. *See Mortimer B. Levin,* 55 FR 8209, 8210 (1990).

Factors Two, Three, and Four—Respondent's Experience in Dispensing Controlled Substances, Conviction Record Under Federal and State Laws for Offenses Related to the Manufacture, Distribution, or Dispensing of Controlled Substances, and Compliance With Applicable Laws Related to Controlled Substances

As found above, on two prior occasions, Respondent was convicted of offenses under Arizona law related to the distribution of both marijuana (in 1992) and cocaine (in 1994).[15] Subsequently, in 1999, both of these convictions were vacated upon his having successfully completed probation.

Given the obvious concerns raised by his prior criminal conduct, *see* GX 3, at 2; following Respondent's obtaining of his PA license, the Agency granted his application for a registration on the condition that he enter into the MOA, under which he agreed to comply with several conditions beyond those imposed by the CSA and DEA regulations. Of relevance here, Respondent agreed to maintain, for a period of five years, a log "list[ing] all controlled substances that he prescribes" which was also to "be subject to inspection * * * for five years." GX 3, at 3. In addition, Respondent "agree[d] to notify the DEA Phoenix Division prior to transferring his * * * [r]egistration to another address within the state of Arizona or to another state." *Id.*

As the ALJ found, Respondent did not comply with either condition. ALJ at 30–32. When asked to present his log, he provided a box which contained an assortment of papers and folders in no particular order, with some papers hanging out from the sides of the box. Moreover, the most recent records were for the year 2003.

While the meaning of the MOA provision seems clear, and Respondent eventually acknowledged that a log is "a journal," Tr. 321, even accepting Respondent's explanation that he was in compliance by compiling his notes of patient encounters and the controlled substance prescriptions, it undisputed that he did not have a complete record of his prescribing activities as he lacked records after the year 2003.[16] I therefore hold that he violated the MOA's log-keeping provision.

Moreover, while the MOA clearly stated that Respondent was required to notify the local DEA office prior to transferring his registration to another address, Respondent twice changed his practice location without notifying the Agency. Here again, Respondent violated the terms of the MOA. However, standing alone, Respondent's violations of the MOA would not warrant the denial of his application given his expression of remorse.

Alleged Violations of 21 U.S.C. 843(a)(2)

Under the CSA, it is "unlawful for any person knowingly or intentionally * * * to use in the * * * dispensing of a controlled substance * * * a registration number which is fictitious, revoked, suspended, *expired,* or issued to another person[.]" 21 U.S.C. 843(a)(2) (emphasis added). Doing so is a felony offense which is punishable by "a term of imprisonment of not more than 4 years, a fine under Title 18, or both." *Id.* at § 843(d)(1).

The ALJ found that that "is undisputed that Respondent issued prescriptions for controlled substances after his DEA registration expired in June 2003, and that he continued to do so even after submitting an application for a new registration." ALJ at 24. While apparently crediting Respondent's testimony that he was not aware that his registration expired "until late 2004," the ALJ concluded that "there is no doubt that he was aware of its expiration after that time, and that he therefore knowingly used an expired registration in violation of the statute when he continued to write prescriptions after late 2004." *Id.* (citing 21 U.S.C. 843(a)(2)). However, the ALJ rejected the Government's contention that Respondent issued prescriptions even after the April 2005 meeting during which a DI told him to stop. *Id.*

The Government apparently accepts Respondent's contention that he did not know that his registration had expired until sometime in the fall of 2004 when he applied for a new registration. *See* Gov. Br. 6 (Proposed Finding 11) ("Respondent testified that he was unaware that his DEA registration had expired and wasn't notified in writing or otherwise of the expiration.").[17] The Government's contention that Respondent violated 21 U.S.C. 843(a)(2) is therefore based on his having issued prescriptions even after he submitted his application and clearly knew that his registration had expired. *Id.* at 10. The Government further argues that "exacerbat[ing] his unlawful conduct, Respondent continued issuing prescriptions under his expired * * * registration after DEA investigators advised him against doing so during the * * * April 2005 inspection." *Id.* at 10–11.

To prove these allegations, the Government relied on a data compilation of his purported prescriptions, the reliability of which it failed to establish. As the DI candidly explained, this data "was only a pointing tool" and "was to be verified against the actual records that" a pharmacy or practitioner is "required to maintain" under the CSA and DEA's regulations. Inexplicably, the Government did not produce any reliable evidence showing the controlled substances prescriptions he authorized such as patient medical records, copies of the actual prescriptions, or pharmacy dispensing logs. In sum, the Government did not produce reliable evidence establishing the extent to which Respondent continued to prescribe controlled substances following the expiration of his registration.

It acknowledged that in a letter to one of the DIs, Respondent stated that he had resumed prescribing at some point following the submission of his application. Moreover, there is a degree of inconsistency between Respondent's contentions that: (1) His office manager had contacted someone at DEA Headquarters and been told that he could write again; and (2) that he had a supervising physician co-sign the prescriptions. Nonetheless, because there is no reliable proof establishing the specific prescriptions which Respondent wrote following his becoming aware that his registration had expired, and the Government does not dispute either the factual basis of his contention that he had his prescriptions co-signed or the legality of this practice, there is insufficient evidence to show that Respondent violated 21 U.S.C. 843(a)(2). I therefore reject the

[15] It is also noted that in 1985, Respondent was convicted in Thailand of the offense of Possession and Attempted Smuggling" of marijuana. While this conviction is not encompassed within factor three, it is properly considered under factor five.

[16] Respondent did not dispute that he prescribed after 2003.

[17] While the Government established that Respondent's registration expired on June 30, 2003, GX 1, it did not introduce into evidence a copy of the Certificate of Registration which was issued to him. Such certificates typically include the expiration date. Nor does the Government argue that proof of actual knowledge is not required to sustain a violation of 21 U.S.C. 843(a)(2).

Government's contention (and the ALJ's conclusion) that Respondent violated 21 U.S.C. 843(a)(2).

Factor Five—Such Other Conduct Which May Threaten Public Health and Safety

Under this factor, the ALJ considered the allegations that Respondent materially falsified his 2004 application and that he had been convicted of driving under the influence. ALJ at 27–33. She also deemed it appropriate to consider Respondent's "employment at a clinic that serves a primarily underserved and underinsured population." *Id.* at 33.[18]

The Material Falsification Allegation

As found above, on his 2004 application, Respondent answered "no" to the question: "Has the applicant ever been convicted of a crime in connection with controlled substances under state or federal law?" GX 4, at 1. Moreover, Respondent left blank the box which the application provided for explaining a "yes" answer. *Id.* at 2. By signing the application, Respondent "certif[ied] that the forgoing information furnished on [the] application [wa]s true and correct." *Id.*

Respondent does not dispute that he should have disclosed the two Arizona convictions on his application. Resp. Br. at 13 ("It seems obvious that the 2004 application should have included the same information regarding felony convictions that [the] 2000 application had."). Indeed, it cannot be disputed that his answer was false and materially so given that under the public interest standard, the Agency is required to consider, *inter alia,* both an "applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances," 21 U.S.C. 823(f)(3), and his "[c]ompliance with applicable State, Federal, or local laws relating to controlled substances." *Id.* § 823(f)(4). Given the statutory factors, it is clear that Respondent's false answer was "capable of influencing" the decision as to whether his application should be granted. *See Jackson,* 72 FR at 23852 (" 'The most common formulation' of the concept of materiality is that 'a concealment or misrepresentation is material if it "has a natural tendency to influence, or was capable of influencing, the decision of" the decisionmaking body to which it was addressed.' " (quoting *Kungys* v. *United States,* 485 U.S. 759, 770 (1988) (quoting *Weinstock* v. *United States,* 231 F.2d 699, 701 (DC Cir. 1956))).

That the Agency did not rely on Respondent's false statement and grant his application does not make the statement immaterial. *The Lawsons, Inc.,* 72 FR 74334, 74339 (2007) (quoting *United States* v. *Alemany Rivera,* 781 F.2d 229, 234 (1st Cir. 1985) ("It makes no difference that a specific falsification did not exert influence so long as it had the *capacity* to do so."); *United States* v. *Norris,* 749 F.2d 1116, 1121 (4th Cir. 1984) ("There is no requirement that the false statement influence or effect the decision making process of a department of the United States Government."). Nor does it matter that some employees of the Agency were previously aware of Respondent's criminal history. *See The Lawsons,* 72 FR at 74339 n.7.

Respondent nonetheless contends that he did not intentionally falsify the application, Resp. Br. at 13–14, and the ALJ credited his testimony that the office manager at the clinic, where he was then working, filled out the application for him and that he signed it in haste without carefully reviewing it. ALJ at 8. The ALJ also credited his testimony that if he had "personally filled out the form * * * he would have detailed the explanation of his past conduct as he had done in 2000." *Id.* at 29.

While I accept the ALJ's credibility findings, I reject her conclusion that Respondent was merely "negligent." *Id.* Notably, between the form's blocks for signing and printing one's name, the form stated: "I hereby certify that the forgoing information furnished on this application is true and correct." GX 4, at 2. Given the certification's location on the application, Respondent cannot credibly claim that he did not read it. Respondent's testimony simply begs the question of what information he thought he was certifying as being "true."

Likewise, the form's block for explaining his answers to the liability questions was on the same side as the signature and certification blocks. In addition, Respondent had previously completed an application in which he disclosed his criminal convictions; he likewise knew, based on the detailed recitation of his various drug-related offenses in the MOA (although he apparently rarely, if ever, reviewed the MOA), that these offenses were of particular concern to DEA. Respondent clearly had reason to know that he was required to disclose his criminal convictions to the Agency.

Finally, the ALJ gave insufficient consideration to the circumstances surrounding the 2004 renewal. Notably, this was not a routine renewal. Rather, at the time it was submitted, Respondent clearly knew that his registration had long since expired. And, notwithstanding his claim that he was a harried practitioner who was trying to make an impression with his employer by seeing numerous patients, reviewing the form for completeness would have taken no more than a few minutes.

I therefore conclude that Respondent deliberately failed to read the front of the form. As several courts have noted, deliberate avoidance is generally not a defense to an allegation of material misrepresentation. *United States* v. *Puente,* 982 F.2d 156, 159 (5th Cir. 1993) ("[A] defendant who deliberately avoids reading the form he is signing cannot avoid criminal sanctions for any false statements contained therein."); *Hanna* v. *Gonzales,* 128 Fed. Appx. 478, 480 (6th Cir. 2005) (rejecting alien's claim that he did not willfully misrepresent material fact because friend filled out application for him; having signed the application under oath, his "failure to apprise himself of the contents of this important document constituted deliberate avoidance—an act the law generally does not recognize as a defense to misrepresentation").

The ALJ failed to acknowledge this line of authority. Instead, she relied on several Agency decisions and reasoned that the "lack of intent to deceive is a relevant consideration in determining whether a registrant or applicant should possess a DEA registration." ALJ at 30 (quoting *Rosalind A. Cropper,* 66 FR 41040, 41048 (2001)). However, the cases cited by the ALJ are readily distinguishable. *See id.* (citing *Samuel Arnold,* 63 FR 8687 (1998); *Martha Hernandez,* 62 FR 61145 (1997)).

For instance, in *Cropper,* the physician was completely unaware of the underlying agency action which she had failed to disclose on her application. 66 FR at 41048. That is a far cry from this case as Respondent clearly knew that he had been previously convicted of two felony drug offenses in the Arizona courts.

In *Samuel Arnold,* a physician failed to disclose on his application a prior suspension of his state medical license based on misconduct which was not related to controlled substances. 63 FR at 8687. However, the Deputy Administrator found credible the testimony of two witnesses that Respondent had called a DEA Office on

[18] She also considered Respondent's violations of the MOA under this factor. I conclude, however that these violations are properly considered in assessing his experience in dispensing controlled substances. Moreover, as noted above, Respondent's 1985 conviction in the Thai courts for possession and attempting to smuggle marijuana is properly considered under this factor. However, it is noted that this conviction is now twenty-five years old.

a speaker phone to inquire as to whether he was required to disclose the suspension and was told by an Agency employee that he did not have to because his "license was no longer suspended." *Id.* at 8687–88. Here, however, Respondent makes no claim that in filling out the application he relied on erroneous advice from an Agency employee as to what he was required to disclose.

Of the cases cited by the ALJ, only *Martha Hernandez,* 62 FR 61145 (1997), and *Theodore Neujahr,* 65 FR 5680 (2000), provide any comfort to Respondent. In *Hernandez,* while my predecessor concluded that the practitioner's material falsifications in failing to disclose the suspension by two States of her medical licenses (for failing to pay her student loans, which she believed was not within the intent of the liability question) "indicate a careless disregard for attention to detail," he imposed only a reprimand and conditions on her registration. *Id.* at 61148. While my predecessor agreed that "this lack of connection to controlled substances [wa]s not dispositive of the matter," he concluded that it was "relevant in determining the appropriate remedy." *Id.* Here, by contrast, Respondent's falsifications involve his failure to disclose his convictions for controlled substances offenses and are clearly relevant in determining the appropriate sanction.[19] *See* 21 U.S.C. 823(f)(3).

The ALJ also relied on *Neujahr,* a case in which the Agency granted the application of practitioner, notwithstanding that he had he had materially falsified it, because he "acknowledged that he falsified his applications, he apparently regretted that conduct, and [the ALJ] believe[d] that he will not repeat it." ALJ at 30 & n.86 (quoting 65 FR at 5682). Subsequently in her decision, the ALJ reasoned that while the Government had "made out a *prima face* case for denying his application, * * * it is important to note that the [Agency's] decision whether to grant or deny an application for registration is a prospective, rather than a retrospective, determination." *Id.* at 34.

It is true that proceedings under section 303 and 304 of the CSA are remedial and not punitive. *See, e. g., Jackson,* 72 FR at 23853. However, contrary to the ALJ's understanding, the remedial nature of this proceeding does not preclude the Agency from considering the deterrent value of a sanction with respect to both the Respondent and others in setting the remedy. *See Southwood Pharmaceuticals, Inc.,* 72 FR 36487, 36504 (2007). As *Southwood* makes clear, "even when a proceeding serves a remedial purpose, an administrative agency can properly consider the need to deter others from engaging in similar acts." *Id.* (citing *Butz* v. *Glover Livestock Commission Co., Inc.,* 411 U.S. 182, 187–188 (1973) (upholding Agency's authority "to employ that sanction as in [its] judgment best serves to deter violations and achieve the objectives of [the] statute")). The ALJ, however, did not even acknowledge *Southwood*.

Contrary to the ALJ's conclusion that Respondent will conduct himself henceforth in a responsible fashion, *see* ALJ at 34, Respondent made a similar promise in the MOA when he agreed to "abide by its contents in good faith." GX 3, at 3. *See also ALRA Laboratories, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995) ("An agency rationally may conclude that past performance is the best predictor of future performance."). Respondent, however, then proceeded to ignore his obligations under the MOA.

Under these circumstances, granting Respondent's application subject to the restrictions proposed by the ALJ, which do no more than replicate the conditions imposed by the MOA, amounts to no sanction at all. In short, adopting the ALJ's proposed sanction would send the wrong message to both Respondent, who has demonstrated a disturbing lack of attention to the requirements of being a registrant, as well as other applicants/registrants, especially those who would submit an application without carefully reviewing it for completeness and truthfulness.

Accordingly, I conclude that Respondent's application should be denied. However, given Respondent's expression of remorse, I conclude that Respondent can re-apply for a new registration six months from the effective date of this Order. Provided that his application is not materially false and that he has committed no other acts which would warrant the denial of his application, the Agency will expeditiously grant his renewal application and issue him a new registration subject to the conditions of the 2001 MOA.[20]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b) and 0.104, I order that the application of Mark De La Lama for a DEA Certificate of Registration as a mid-level practitioner be, and it hereby is, denied. This order is effective May 11, 2011.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

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[19] Having reviewed the Agency's decision in *Neujahr,* I conclude that the case was wrongly decided because the respondent there did not fully address his misconduct, which included not only his failure to disclose his having surrendered his authority under Federal law to write prescriptions for schedule II controlled substances, but also his failure to disclose a State proceeding which placed his veterinary license on probation; at his DEA hearing, the respondent offered no explanation as to this separate act of material falsification. 65 FR at 5681. In *Neujahr,* the ALJ concluded that the respondent "apparently regretted that conduct." *Id.* at 5682. To make clear, the Agency should not have to guess as to whether one has accepted responsibility for his misconduct. A registrant/applicant's acceptance of responsibility must be clear and manifest.

[20] I place no weight on Respondent's DUI/Hit and Run conviction there being no evidence that he was under the influence of a controlled substance at the time. *See David E. Trawick,* 53 FR 5326, 5327 (1988) (noting that factor five encompasses "wrongful acts relating to controlled substances committed by a registrant outside of his professional practice but which relate to controlled substances").

The ALJ also opined that it is appropriate to consider Respondent's employment at a clinic that serves an "underserved and underinsured populations." ALJ at 33. However, I have previously rejected this reasoning noting that "[t]he public interest standard of 21 U.S.C. 823(f) is not a freewheeling inquiry but is guided by the five specific factors which Congress directed the Attorney General to consider [and that] consideration of the socioeconomic status of a practitioner's patient population is not mandated by the text of either 21 U.S.C. 823(f) or 824(a)(4), which focus primarily on the acts committed by a practitioner." *Gregory D. Owens,* 74 FR 36751, 36757 (2009). I further noted that such a rule is "unworkable," and "would inject a new level of complexity into already complex proceedings and take the Agency far afield of the purpose of the CSA's registration provisions, which is to prevent diversion." *Id.* at n.22. I therefore do not consider the issue.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Glenn D. Krieger, M.D.; Denial of Application

On August 31, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Glenn D. Krieger, M.D. ("Applicant"), of West Bloomfield, Michigan. The Show Cause Order proposed the denial of Applicant's application for a DEA Certificate of Registration on the ground that his "registration would be inconsistent with the public interest as defined by 21 U.S.C. §§ 823(f) and 824(a)(4)." Show Cause Order, at 1.

More specifically, the Show Cause Order alleged that Applicant filed an

application for a DEA registration on October 9, 2008. *Id.* The Order further alleged that on "June 28, 2007, July 19, 2007, and August 1, 2007," Applicant was subjected to random urine drug tests and tested positive for fentanyl, a Schedule II controlled substance,[1] although the drug had never been prescribed to him. *Id.* Relatedly, the Order alleged that on November 7, 2008, Applicant told DEA Investigators that he "obtained the fentanyl from patients who returned unused fentanyl to [him], because [he] was collecting pain medication to give as a donation to the Oakpointe Church's missionary project in Zambia, Africa." *Id.* The Order further alleged that DEA Investigators were subsequently "informed by Oakpointe Church executives that the church did not conduct any Zambian missionary projects in 2007, that the Zambian missionary projects of previous years did not collect donated controlled substances, and that [Applicant] did not participate in any of the Zambian missionary projects." *Id.* at 1–2. The Order then alleged that Applicant's "false statements to DEA investigators constituted both conduct which may threaten the public health and safety pursuant to 21 U.S.C. § 823(f)(5) and criminal acts pursuant to 18 U.S.C. 1001. *Id.* at 2.

Next, the Show Cause Order alleged that Applicant had previously held a DEA Certificate of Registration, BK4918528, which he "surrendered for cause on March 7, 2008." *Id.* The Order then alleged that "[b]etween March 7, 2008 and November 1, 2008," Applicant "issued approximately 435 prescriptions for controlled substances despite not having a valid DEA Certificate of Registration, in violation of 21 U.S.C. § 841(a)." *Id.* Finally, the Order alleged that Applicant's "violation[s] of Federal laws and regulations are inconsistent with the public interest." *Id.* (citing 21 U.S.C. 823(f) and 824(a)(4)).

The Show Cause Order also explained that Respondent had the right to request a hearing on the allegations or to submit a written statement in lieu of a hearing, the procedures for doing either, and the consequences for failing do so. *Id.* (citing 21 CFR 1301.43(c), (d), & (e)). On or about September 2, 2009, the Government attempted to serve Applicant with the Order by certified mail addressed to him at the address he provided in his application for a new registration. However, on or about September 11, 2009, the Post Office returned the Order as "not deliverable as addressed."

[1] *See* 21 CFR 1308.12(c)(9).

On or about September 25, 2009, DEA made a second attempt to serve Applicant with the Order by certified mail addressed to him at the address given on his application. Again, however, the Post Office returned the mailing as "not deliverable as addressed."

On or about September 16, 2009, DEA mailed a copy of the Show Cause Order to Applicant's counsel.[2] As evidenced by a signed return receipt card, Applicant's counsel received the letter on September 18, 2009.

On February 2, 2010, the Office of Administrative Law Judges received a letter from Applicant (dated Jan. 28, 2010). Therein, Applicant stated that "[a]round mid-October 2009, I received a letter from my attorney * * * that was supposed to contain a complete copy of the letter he received only a few days earlier. Due to several different miscommunications and difficulty with traveling due to expenses, I did not appear for the scheduled show cause on December 1, 2009. In spite of my absence, I am very interested in scheduling a show cause."

Upon receipt of this letter, the ALJ ordered that the Government provide evidence of the date of service of the Show Cause Order upon Applicant by February 19, 2010 and to file any motion to terminate based on his failure to timely request a hearing by the same date. Order Granting the Government's Motion to Terminate Proceedings, at 1. The Order further directed Applicant to file a responsive pleading by February 26, 2010. *Id.*

Thereafter, the Government timely filed a Motion to Terminate. Therein, it asserted that it "effected service of the OSC on Respondent's counsel via certified mail on or around September 18, 2009," that the Show Cause Order clearly set forth the procedures for requesting a hearing and the consequences for failing to do so, and that he did not request a hearing within 30 days of receiving the Order as required by DEA regulations. *Id.* at 2. Applicant did not file a response to the Government's motion.

The ALJ granted the Government's motion noting that Applicant did not contest the Government's representation that the Show Cause Order had been served on his legal counsel/agent on or about September 18, 2009, and that, in his letter requesting a hearing, Applicant had acknowledged that in mid-October 2009, he had received a document from his attorney "related to this proceeding and 'did not appear for the scheduled show cause hearing on December 1, 2009,'" which information was contained on the front page of the Show Cause Order. *Id.* at 2–3. Because Applicant did not request a hearing until "several months after effective service of the" Order, and did not offer good cause for his failure to do so, the ALJ concluded that he had waived his right to a hearing and terminated the proceeding. *Id.* at 3 (citing 21 CFR 1301.43). I adopt this finding.[3]

Thereafter, the investigative record was forwarded to me for final agency action. Based on relevant evidence contained in the record, I conclude that granting Respondent's application would be "inconsistent with the public interest." 21 U.S.C. 823(f). Accordingly, his application will be denied. I make the following findings of fact.

Findings

On October 9, 2008, Applicant filed an application for a DEA Certificate of Registration through DEA's Web site. The application is the subject of this proceeding.

Applicant previously held DEA Certificate of Registration BK4918528. On March 7, 2008, Respondent voluntarily surrendered this registration and executed a DEA Form 104, Voluntary Surrender of Controlled Substances Privileges (which his counsel signed as a witness). The form clearly stated that it provided "authority for the Administrator * * * to terminate and revoke my registration without an order to show cause, a hearing, or any other proceedings." In addition, the form stated: "I understand that I will not be permitted to * * * prescribe, or engage in any other controlled substance activities whatsoever, until such time as I am again properly registered."

According to a report obtained by an Agency Investigator from the Michigan

[2] Applicant's counsel had represented him during an interview with DEA Investigators on November 7, 2008.

[3] Respondent did not challenge whether the Government's mailing of the Show Cause Order to the lawyer who previously represented him constituted sufficient service. *See* 21 U.S.C. 824(c) ("Before taking action pursuant * * * to a denial of registration under section 823 of this title, the Attorney General shall serve upon the applicant * * * an order to show cause. * * * ."); *see also United States* v. *Ziegler Boat and Parts Co.,* 111 F.3d 878, 881 (Fed. Cir. 1997) ("The mere relationship between a defendant and his attorney does not, in itself, convey authority to accept service. * * * Even where an attorney exercises broad powers to represent a client in litigation, these powers of representation alone do not create a specific authority to receive service.") (citing numerous authorities). However, a challenge to the sufficiency of service is deemed waived if it is not raised in a party's first responsive pleading. *See Hemisphere X Biopharma, Inc.,* v. *Johannesburg Consol. Investments,* 553 F.3d 1351, 1360 (11th Cir. 2008). Accordingly, I hold that Respondent has waived any challenge to the sufficiency of service.

Automated Prescription System (MAPS), within less than three weeks of the surrender, Applicant issued prescriptions to two patients for 60 and 90 tablets of OxyContin 80 mg. The report further showed that by the end of July, Applicant had resumed prescribing controlled substances full-bore.

The investigative record establishes that Applicant voluntarily surrendered his registration in connection with an Administrative Complaint ("Complaint") filed by the Michigan State Bureau of Health Professionals (BHP) on December 20, 2007. The Complaint alleged two counts. Administrative Complaint, *In re Glenn D. Krieger, M.D.,* No. 43–07–106420.

First, the Complaint alleged that Applicant had self-reported that he was abusing fentanyl, a schedule II controlled substance, to the Michigan Health Professional Recovery Program (HPRP) and had undergone a substance abuse evaluation and been diagnosed as abusing opioids. *Id.* at 5–6. The Complaint alleged that he had tested positive for fentanyl during urine drug screens conducted on June 28, July 19, and August 1, 2007, and that thereafter, HPRP advised him that "he was not safe to practice" medicine and recommended that he admit himself into an inpatient rehabilitation program. *Id.* at 6. The Complaint further alleged that he had failed to enter an inpatient drug rehabilitation program or enter into a monitoring agreement with HPRP. The BHP charged that his conduct "constitute[d] a mental or physical inability reasonably related to and adversely affecting Respondent's ability to practice in a safe and competent manner," "constitute[d] a conduct that impairs or may impair his ability to safely and skillfully practice medicine," and "constitute[d] substance abuse," all in violation of state law. *Id.* at 6–7.

Second, the Complaint alleged that, in treating S.S. for chronic back pain, TMJ,[4] fibromyalgia and depression, Applicant's "chart for S.S. [was] devoid of physical exams or clinical findings to support his long term prescribing of high doses of opioids, benzodiazepines, and stimulants" and that he had "failed to recognize that his prescribing of escalating doses of opioids was detrimental to S.S.'s overall functioning and quality of life." *Id.* at 10. The BHP charged that his conduct "constitute[d] negligence," "incompetence," and the "prescribing, giving away or administering [of] drugs for other than lawful diagnostic or therapeutic purposes," all in violation of Michigan law. *Id.*

The investigative file contains copies of the results from the urine drop assessments of June 28, July 19, and August 1, 2007. These documents establish that Applicant tested positive for fentanyl on each occasion.

On December 28, 2007, the BHP's Board of Medicine's Disciplinary Subcommittee (DS) summarily suspended Applicant's state medical license effective on service of the order. Order of Summary Suspension, at 1. On May 30, 2008, Applicant entered into a Consent Order with the State. Consent Order, at 6. The Consent Order provided that the DS found "that the allegations of fact contained in the complaint are true" and that Applicant had violated sections 16221(a),[5] (b)(i),[6] (b)(ii),[7] (b)(iii),[8] and (c)(iv)[9] of the Michigan Public Health Code. *Id.* at 2. The DS thus ordered that Applicant's license be "LIMITED for a minimum period of two years" such that he "shall not obtain, possess, dispense, administer, or have access to any drug designated as a controlled substance under the Public Health Code or its counterpart in federal law unless the controlled substance is prescribed or dispensed by a licensed physician for [Applicant] as a patient." *Id.* The Consent Order also placed him "on PROBATION for a period of two years." *Id.*

As one of the probationary conditions, the State ordered that Applicant "shall comply with the terms of the monitoring agreement" which he had entered into with the HPRP on May 15, 2008. *Id.* at 3. The Monitoring Agreement provided, *inter alia,* that he "will not obtain, possess, dispense, or administer controlled substances," that he "will practice total abstention from alcohol, controlled substances, and other mood-altering substances," and that he "will submit to drug screens as requested by HPRP." Monitoring Agreement, at 1–2. In the Consent Order, the parties stipulated that Applicant "does not contest the allegations of fact and law contained in the complaint" but that "by pleading no contest * * * does not admit the truth of the allegations [and] agrees that the Disciplinary Subcommittee may treat the allegations as true for the resolution of the complaint." Consent Order, at 4–5.[10]

On September 26, 2008, a Diversion Investigator (DI) with the DEA Detroit Division Office received information that Applicant was issuing prescriptions using the DEA registration number which he had previously surrendered. That day he contacted Applicant's attorney and left a phone message advising him that Applicant could not issue controlled substance prescriptions without a valid DEA registration.

On October 3, 2008, a pharmacist phoned the DI and told him that Applicant had issued a prescription for Vicotussin, a controlled substance. The pharmacist further stated that he had determined that Applicant did not have a valid registration, and therefore, did not fill the prescription. The DI again left a phone message with Applicant's attorney advising that Applicant could not issue controlled substance prescriptions without a valid registration. The DI also attempted to contact Applicant directly; the DI left a phone message advising him that he was not legally authorized to write controlled substance prescriptions unless and until he obtained a new registration.

The same day, Applicant's attorney contacted the DI and informed him that Applicant's Michigan medical license had been reinstated; the attorney further stated that he had advised Applicant that all of his licensure had been restored upon the reinstatement of his medical license such that Applicant had issued controlled substance

[4] Temporo-mandibular joint dysfunction.

[5] Section 16221(a) "provides the [DS] with the authority to take disciplinary action against [Applicant] for a violation of general duty, consisting of negligence or failure to exercise due care . . . or any conduct, practice, or condition which impairs or may impair, the ability to safely and skillfully practice medicine." Administrative Complaint, at 2.

[6] Section 16221(b)(i) provides the DS with authority to take disciplinary action against a licensee for "incompetence," defined as "[a] departure from, or failure to conform to, minimal standards of acceptable and prevailing practice for a health profession whether or not actual injury to an individual occurs." Administrative Complaint, at 2.

[7] Section 16221(b)(ii) provides the DS with authority to take disciplinary action against a licensee for "substance abuse," defined as "the taking of alcohol or other drugs at dosages that place an individual's social, economic, psychological, and physical welfare in potential hazard or to the extent that an individual loses the power of self-control as a result of the use of alcohol or drugs, or while habitually under the influence of alcohol or drugs, endangers public health, morals, safety, or welfare, or a combination thereof." Administrative Complaint, at 2.

[8] Section 16221(b)(iii) provides the DS with authority to take disciplinary action against a licensee "for a mental or physical inability reasonably related to and adversely affecting the licensee's ability to practice in a safe and competent manner." Administrative Complaint, at 2.

[9] Section 16221(c)(iv) provides the DS with authority to take disciplinary action against a licensee for "obtaining, possessing, or attempting to obtain or possess a controlled substance[] * * * without lawful authority; or selling, prescribing, giving away, or administering drugs for other than lawful diagnostic or therapeutic purposes." Administrative Complaint, at 3.

[10] On June 4, 2008, a State ALJ dissolved the summary suspension of his medical license. Order Dissolving Suspension, at 1.

prescriptions based on the attorney's erroneous advice. The DI informed the attorney that Applicant would have to apply for a new registration in order to prescribe controlled substances.

On October 5, 2008, the DI received a letter from Applicant's attorney, dated October 1, 2008. The letter requested the reinstatement of Applicant's controlled substances privileges, based on the reinstatement of his medical license.

The following day, on October 6, 2008, the DI received a telephone call from a second pharmacist regarding a controlled substance prescription (for 120 tablets of Oxycontin 80 mg.) issued by Applicant on September 10, 2008. The pharmacist had also checked Applicant's registration, found that he lacked a valid registration, and did not fill the prescription.

On October 9, 2008, Applicant filed an application for a new registration. Six days later, the DI received a telephone call from a third pharmacist. The pharmacist reported that the day before, a person had presented to him controlled substance prescriptions (for OxyContin, Roxicodone, Norco and Xanax) issued by Applicant on October 3, 2008. However, the pharmacy had experienced a delay in ordering the prescribed medications.[11]

On October 15, the pharmacist called the customer to advise her of the delay. Within fifteen minutes, he received a phone call from Applicant about the delay. Finding this suspicious, the pharmacist contacted the DI, who advised him that Applicant did not have a valid registration.

On November 7, 2008, the DI and his Group Supervisor interviewed Applicant in the presence of his attorney. During the interview, Applicant's attorney stated that he had "fumbled the ball" by advising Applicant that he could resume his customary practice, including prescribing controlled substances, upon the reinstatement of his medical license.[12] During the interview, Applicant stated that he had stopped issuing controlled substance prescriptions on October 3, 2008, when the DI had notified him that he could not do so without first obtaining a new registration. He further acknowledged that he had previously executed a Voluntary Surrender Form.

The DI also questioned Applicant about his abuse of fentanyl. Noting that he had obtained a report from the Michigan Automated Prescription System (MAPS)[13] showing the prescriptions Applicant had received as a patient and that no fentanyl prescriptions were listed, the DI asked Applicant how he had obtained the fentanyl. Applicant stated that he obtained the fentanyl by collecting unused pain medication from his patients, which he was collecting to give as a donation to his church's missionary project in Zambia. He further denied that he had issued fentanyl prescriptions to patients in order to have them fill the prescriptions and return the drugs to him for his personal use.

The DI subsequently interviewed several individuals associated with the church's missionary project. The church's senior pastor stated that while he knew Applicant through the church, he was not a member of it, and that while the church did conduct missionary projects in Zambia, Applicant had not participated in any of them. Subsequently, the DI interviewed a physician, who had run the project in 2003 and 2008, and a physician assistant, who had run the project in 2004 and 2005. Both individuals stated that there had been no missionary projects in 2006 and 2007, when Respondent tested positive for fentanyl. Moreover, the physician had never met Applicant and the physician assistant had not spoken to him since 2005. Finally, according to the church's Executive Pastor, the 2008 project did not use controlled substances and any drugs that were used had been bought and not donated.

On November 19, 2008, the DI ran another MAPS inquiry, this time for controlled substance prescriptions written by Applicant between March 1 and November 1, 2008. The report shows that between March 7, the date on which he surrendered his registration, and November 1, Applicant issued approximately 438 controlled substance prescriptions. The report also shows that he issued three controlled substance prescriptions prior to June 4, the date on which his Michigan medical license was reinstated,[14] and that he issued eight controlled substance prescriptions after October 3, 2008,[15] the date he received the DI's phone message to stop writing prescriptions and the date he claimed that he had ceased doing so.

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that the Attorney General "shall register practitioners * * * to dispense * * * controlled substances in schedule II, III, IV, or V, if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices." 21 U.S.C. 823(f). However, the statute also provides that the Attorney General "may deny an application for such registration if he determines that the issuance of such a registration is inconsistent with the public interest." *Id.* In determining the public interest, Congress directed that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. *Id.*

"[T]hese factors are * * * considered in the disjunctive." *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application. *Id.* Moreover, I am "not required to make findings as to all of the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

In this matter, I have considered all of the factors. While Applicant's state medical license has been re-instated (factor one) and there is no evidence

[11] The record contains copies of various controlled substance prescriptions issued by Applicant on which he used the DEA registration number he had previously surrendered.

[12] The attorney also stated that he was unaware that Applicant was required to apply for a new registration, despite his having witnessed the Voluntary Surrender Form previously executed by Applicant which had clearly stated that "I will not be permitted to * * * dispense, administer, prescribe, or engage in any other controlled substance activities * * * until such time as I am again properly registered." DEA Form 104.

[13] MAPS is part of a mandatory system in Michigan through which pharmacies and dispensing physicians report their controlled substance dispensings twice a month.

[14] Two of the prescriptions, dated March 19 and April 11, 2008, were issued to patient A.F. and were for first 60 tablets and then 90 tablets of OxyContin 80 mg. The third prescription, issued March 26, 2008, was for patient D.P. and was for 90 tablets of OxyContin 80 mg.

[15] On October 4, 2008, Applicant issued two prescriptions to patient L.V.: One for hydrocodone/APAP 10 mg./325 mg. (90 tablets) and one for OxyContin 40 mg. (180 tablets). On October 8, 2008, Applicant wrote five prescriptions for patient K.B.: For clonazepam 1 mg. (30 tablets), for Endocet 325 mg./10 mg. (90 tablets), for Methadone Hcl 10 mg. (90 tablets), for Methylin 20 mg. (90 tablets), and for OxyContin 80 mg. (75 tablets). On October 9, 2008, he issued a prescription to patient D.P. for alprazolam 1 mg. (75 tablets).

that he has been convicted of an offense related to the distribution or dispensing of controlled substances,[16] I conclude that the evidence relevant to Respondent's experience in dispensing controlled substances (factor two) and his compliance with applicable laws related to controlled substances (factor four), conclusively establishes that granting his application would be "inconsistent with the public interest." 21 U.S.C. 823(f).

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substance and Compliance With Applicable Laws Related to Controlled Substances

Under Federal law, it is unlawful "for any person [to] knowingly or intentionally * * * dispense a controlled substance" "except as authorized by" the CSA. 21 U.S.C. 841(a)(1). It is "unlawful for any person knowingly or intentionally * * * to use in the course of the * * * dispensing of a controlled substance * * * a registration number which is * * * revoked." *Id.* § 843(a)(3). Moreover, "[e]very person who dispenses, or propose to dispense, any controlled substance, shall obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him." *Id.* § 822(a)(2); *see also* 21 CFR 1301.11(a) (same). Also relevant here is 21 CFR 1301.13(a), which provides that "[n]o person required to be registered shall engage in any activity for which registration is required until the application for registration is granted and a Certificate of Registration is issued by the Administrator to such person."

As found above, Applicant issued more than 400 controlled substance prescriptions even after he had surrendered his registration and had no authority to lawfully do so. Moreover, upon surrendering his registration, Respondent acknowledged his understanding that his registration was being revoked and that he could not engage in any controlled substance activities including the dispensing of drugs "until such time as I am again properly registered." Yet within three weeks of surrendering his registration, Applicant issued two prescriptions for OxyContin 80 mg. Moreover, in late July, he escalated his prescribing activities.

During the November 7, 2008 interview, Applicant's lawyer stated that he had erroneously advised Applicant that upon the restoration of his state medical license, he could resume prescribing controlled substances. However, both the Voluntary Surrender Form and Federal law clearly stated that he could not issue controlled substances prescriptions until he obtained a new DEA registration. Moreover, the evidence shows that Applicant issued controlled substance prescriptions two months before his medical license was reinstated [17] and that he issued controlled substances prescriptions even after he was told to stop doing so by the DI. Thus, it is clear that Applicant knowingly and intentionally issued prescriptions in violation of Federal law. *See* 21 U.S.C. 822(a)(2), 841(a)(1), 843(a)(3). These violations were extensive and provide reason alone to deny his application.

In addition, on at least three occasions during the summer of 2007, Respondent tested positive for fentanyl, a schedule II controlled substance. *See* 21 CFR 13087.12(c). According to a MAPS report obtained by the DI which listed the prescriptions Applicant had obtained between September 20, 2004 and November 20, 2007, Respondent was never prescribed fentanyl by any physician. Moreover, as found above, Respondent told the DI that he obtained unused fentanyl from his patients to donate to his church's missionary project.

At a minimum, the evidence establishes a violation of 21 U.S.C. 844(a), which makes it "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner acting in the usual course of his professional practice, or except as otherwise authorized by" the CSA or the Controlled Substances Import and Export Act. Moreover, while Applicant still held a practitioner's registration during the period in which he tested positive for fentanyl, such a registration authorizes its holder only to dispense, i.e., "to deliver a controlled substance to an ultimate user." 21 U.S.C. 802(10). A practitioner's obtaining of a controlled substance from a patient is not dispensing and thus is not an authorized activity under a practitioner's registration. *See* 21 CFR 1301.13(e). Thus, even if Applicant had not engaged in the self-abuse of fentanyl, he was not lawfully authorized to obtain possession of the drug in this manner.[18] This conduct further supports the conclusion that granting Respondent's application would be "inconsistent with the public interest." 21 U.S.C. 823(f).

Factor Five—Such Other Conduct As May Threaten Public Health and Safety

The Government further alleged that Applicant made a false statement to an Agency Investigator when he stated that he had obtained the fentanyl he self-abused because he collected the drugs "to give as a donation to the Oakpointe Church's missionary project in Zambia." Show Cause Order at 1 (para.2) (citing 18 U.S.C. 1001). The evidence clearly shows that Applicant's statement to the DI was false in that he did not participate in the missionary project, let alone collect drugs for it.

That his statement was false does not, however, establish a violation by 18 U.S.C. 1001, because this provision requires that the statement be material to the matter being investigated by the Government. *See* 18 U.S.C. 1001(a) ("whoever, in any matter within the jurisdiction of the executive * * * branch of the Government of the United States, knowingly and willfully * * * (2) makes any materially false, fictitious, or fraudulent statement or representation * * * shall be fined under this title, imprisoned not more than five years * * * or both"). The Supreme Court has held that for a statement to be "material" for purposes of section 1001, it "must have a 'natural tendency to influence, or [be] capable of

[16] Putting aside that the State of Michigan has made no recommendation as to whether Respondent's application should be granted, this Agency has repeatedly held that the possession of a valid state license is not dispositive of the public interest inquiry. *See Patrick W. Stodola,* 74 FR 20727, 20730 n.16 (2009); *Robert A. Leslie,* 68 FR at 15230. As DEA has long recognized, "the Controlled Substances Act requires that the Administrator * * * make an independent determination as to whether the granting of controlled substances privileges would be in the public interest." *Mortimer Levin,* 57 FR 8680, 8681 (1992).

Nor is the lack of any criminal convictions related to the distribution or dispensing of controlled substances dispositive. *Edmund Chein,* 72 FR 6580, 6593 n.22 (2007), *aff'd, Chein* v. *DEA,* 533 F.3d 828 (D.C. Cir. 2008). Thus, the facts that Respondent holds a Michigan medical license (assuming that he is actually authorized to dispense controlled substances under the Consent Order) and has not been convicted of a relevant criminal offense are not dispositive.

[17] Given the terms of the Consent Order, which prohibited him from dispensing controlled substances, it also appears that his issuance of the prescriptions violated that order. However, the Government did not allege this in the Show Cause Order and thus I do not consider this conduct.

[18] The record does not conclusively establish whether he told this story to the persons from whom he obtained the fentanyl. Were this shown to be the case, Respondent would have violated 21 U.S.C. 843(a)(3), which renders it "unlawful for any person knowingly or intentionally * * * to acquire or obtain possession of a controlled substance by misrepresentation, fraud, * * * deception, or subterfuge[.]"

influencing, the decisionmaking body to which it is addressed.'" *United States* v. *Gaudin,* 515 U.S. 506, 509 (1995) (quoting *Kungys* v. *United States,* 485 U.S. 759, 770 (1988)). The Court has further explained:

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions: (a) "What statement was made?" and (b) "what decision was the agency trying to make?" The ultimate question: (c) "Whether the statement was material to the decision," requires applying the legal standard of materiality (quoted above) to these historical facts.

Gaudin, 515 U.S. at 512. The "evidence must be clear, unequivocal, and convincing." *Kungys,* 485 U.S. at 772.

While the DI's affidavit establishes the falsity of Applicant's statements, the Government does not explain what decision the statement had "the natural tendency" to influence or "was capable of influencing." *Gaudin,* 515 U.S. at 509 (quoting *Kungys,* 485 U.S. at 770). Among the possibilities are whether to grant or deny his application for registration, to pursue criminal charges against him, or to conduct further investigation to determine whether he had committed additional crimes or whether individuals (other than naïve patients [19]) were involved in supplying him with fentanyl. However, because the DI's affidavit does not offer any explanation as to why the false statement was "capable of influencing" any of the possible agency decisions, let alone identify which decision(s) the false statement was capable of influencing, I decline to address whether the statement was material.

In any event, given the extensive evidence under factors two and four establishing that Respondent knowingly wrote hundreds of controlled substance prescriptions even though he had surrendered his registration, that he wrote prescriptions within weeks of having surrendered his registration, that he wrote prescriptions even after being told to stop and that he could not do so until he obtained a new registration, as well as the evidence that he abused fentanyl, it is clear that issuing him a new registration would "be inconsistent with the public interest." 21 U.S.C. 823(f). Accordingly, Respondent's application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as by 28 CFR 0.100(b) & 0.104, I order that the application of Glenn D. Krieger for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This Order is effective immediately.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

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BILLING CODE 4410–09–P

[19] During the interview, Applicant also denied that he had ever issued prescriptions to patients to have them obtain drugs for himself. There is, however, no evidence that this statement was false.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 09–2]

Alan H. Olefsky, M.D.; Denial of Application

On August 22, 2008, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Alan H. Olefsky, M.D. (Respondent), of Chicago, Illinois. The Show Cause Order proposed the denial of Respondent's application for a DEA Certificate of Registration as a practitioner, "for reason that [Respondent's] registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f)." ALJ Ex. 1, at 1 (citing 21 U.S.C. 823(f) & 824(a)(4)).

The Show Cause Order specifically alleged that in 1989, Respondent issued "two false prescriptions for [the] controlled substances [Percocet and Halcion (triazolam), schedule II and schedule IV drugs, respectively] in the names of others and attempted to have them filled at a pharmacy in Florida." *Id.* The Show Cause Order alleged that on January 9, 1992, and after a hearing, the Administrator revoked Respondent's then-existing DEA registration having found the allegations proved and that Respondent had lied during the hearing regarding "the circumstances surrounding [his] misconduct." *Id.*

Next, the Show Cause Order alleged that "[f]rom at least December 2002, through October 2004," Respondent "again issued false prescriptions for various controlled substances in the names of [M.G., V.G., and T.C.]" and that "[t]hese prescriptions were for [Respondent's] personal use." *Id.* The Show Cause Order then alleged that on May 25, 2005, "DEA issued an Order proposing to revoke [Respondent's] DEA registration * * * based upon [his] issuing false prescriptions," and that on July 20, 2007, the Deputy Administrator issued a final order denying Respondent's application (his registration having expired), having found that he "had issued the prescriptions for [his] personal use and that such conduct violated federal law." *Id.* at 1–2 (citing 21 U.S.C. 843(a)(3)). Finally, the Order alleged that Respondent has "also exhibited a pattern of abusing alcohol" that includes a June 2004 arrest for driving under the influence and a January 2007 hospitalization "with a blood alcohol level of .327," and that his "history of abusing controlled substances and alcohol shows that granting [his] application for a DEA registration would be inconsistent with the public interest." *Id.* at 2.

By letter of October 6, 2008, counsel for Respondent requested a hearing on the allegations, ALJ Ex. 2, and the matter was placed on the docket of the Agency's Administrative Law Judges (ALJs). Following prehearing procedures, an ALJ conducted a hearing on June 2–3, 2009, in Chicago, Illinois. Both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law, and argument.

On February 22, 2010, the ALJ issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision (also ALJ or Recommended Decision). Therein, the ALJ considered the evidence pertinent to the five public interest factors and concluded that granting Respondent's application "would be inconsistent with the public interest." ALJ at 43.

As to the first factor—the recommendation of the appropriate State licensing board—the ALJ noted that Respondent's State licenses as a physician and as a handler of controlled substances "remain on indefinite probation and are subject to the restrictions stated in the May 22, 2007, consent order." ALJ at 35. Noting that Respondent is "currently authorized to handle controlled substances in Illinois," the ALJ concluded that "this factor weighs in favor of a finding that Respondent's registration would not be inconsistent with the public interest." *Id.* at 35–36. However, because "state licensure is a necessary but not sufficient condition for DEA registration," the ALJ concluded that "this factor is not dispositive." *Id.* at 36.

As to the second and fourth factors—Respondent's experience in handling controlled substances and his compliance with applicable Federal, State or local laws—the ALJ first noted that Respondent testified "in the instant proceeding that the explanation he offered in the 1991 hearing" about the Halcion and Percocet prescriptions "was true." *Id.* The ALJ did not, however, find his "explanation credible." *Id.*

Next, the ALJ found that "on numerous occasions between 2002 and 2004, Respondent issued prescriptions for alprazolam in other persons' names, had the prescriptions filled, and kept the drugs for his own use." *Id.* While the ALJ recognized that both Respondent and a psychiatrist who was involved in his treatment maintained that his "abuse of alprazolam was limited to the manner of acquiring it," she nonetheless concluded that his "fraudulent prescriptions for alprazolam indicate his willingness to misuse a DEA registration." *Id.*

The ALJ thus found that Respondent's conduct in both 1989 and from 2002 to 2004 violated 21 U.S.C. 843(a)(3), which prohibits acquiring a controlled substance by misrepresentation or fraud. *Id.* at 38. She also found that the 2002 to 2004 alprazolam prescriptions violated 21 U.S.C. 829 and 21 CFR 1306.04, because Respondent was not "acting in the usual course of professional practice" when he "appropriated to his own use the drugs he ostensibly prescribed to others." *Id.* Moreover, the ALJ found that Respondent violated 21 U.S.C. 841(a)(1) in that Respondent distributed controlled substances without a valid prescription. *Id.* Finally, the ALJ concluded that "[b]ecause Respondent issued controlled substance 'prescriptions' knowing that the person other than the one named on the prescription was the intended recipient of the controlled substances," he violated 21 CFR 1306.05, which requires that a prescription "bear the full name and address of the patient." *Id.* The ALJ thus concluded that "Respondent's handling of controlled substances and lack of compliance with law and regulations weigh[] in favor of a finding that his registration would not be consistent with the public interest." *Id.* at 39.

As to the third factor—Respondent's conviction record for offenses related to the distribution or dispensing of controlled substances—the ALJ noted that in 1989, Respondent had been charged with two state law counts of obtaining controlled substances by fraud but that "no conviction resulted from those proceedings." *Id.* The ALJ likewise noted that Respondent had not been convicted of a controlled substance offense based on his conduct during the 2002 to 2004 period. *Id.* The ALJ thus concluded that "this factor, although not dispositive, weighs against a finding that Respondent's registration would be inconsistent with the public interest." *Id.*

With respect to the fifth factor—other conduct which may threaten the public health and safety—the ALJ reviewed Respondent's history of arrests for various offenses, his history of alcohol abuse, as well as the evidence pertaining to his recovery and acceptance of responsibility. *Id.* at 39–41. The ALJ specifically found that "Respondent's criminal history advises against granting him a registration." *Id.* at 41. Based on his having misrepresented to a law firm that he held an unrestricted medical license when he did not and his testimony that he could not recall the circumstances surrounding various arrests which appeared on his criminal record, the ALJ also found that Respondent had "willing[ly] misrepresent[ed] the truth," and that this "extends beyond his handling of controlled substances." *Id.*

While the ALJ further noted that "Respondent has demonstrated that he is committed to his recovery from alcoholism [and] has taken steps to ensure that he remains sober," she nonetheless found that "his past behavior poses serious questions as to whether he is capable of handling controlled substances responsibly and is willing and able to adhere to all applicable laws and regulations by which DEA registrants must abide." *Id.* at 42. Also noting that Respondent "has [not] fully addressed other behavioral issues, nor does he seem fully to recognize the extent of his misconduct in falsifying prescriptions," *id.* at 43, the ALJ thus concluded that this factor supports "a finding that granting Respondent's application would not be consistent with the public interest" and recommended "that his pending application for registration be denied." *Id.*

Thereafter, Respondent filed Exceptions to the ALJ's Recommended Decision. On March 23, 2010, the ALJ forwarded the record to me for final agency action.

Having considered the record as a whole, I agree with the ALJ's ultimate conclusion that granting Respondent's application "would be inconsistent with the public interest" and her recommendation that his application be denied.[1] As the ultimate fact finder, 5 U.S.C. 557(b), I make the following findings.

Findings

Respondent is a physician licensed to practice medicine in Illinois and Indiana. RX 1, at 5 & 7. Respondent, however, has been no stranger to disciplinary proceedings brought by both this Agency and state licensing authorities. This matter is the third time he has been the subject of a DEA proceeding. *See* GX 3 (2007 Final Order denying Application), GX 4 (1992 Final Order revoking registration). Moreover, he has been subject to multiple proceedings brought by the Illinois Department of Financial and Professional Regulation including a 1995 proceeding (which was based on the first DEA proceeding), GX 1, at 7; a 2005 proceeding in which the State imposed a suspension because his "actions constitute[d] an immediate danger to the public," GX 10, at 1, a March 2007 suspension based on Respondent's having violated a November 2006 consent order which had restored his medical license, GX 12, at 1–2, GX 13; and a December 2007 consent order which, while restoring his Illinois Physician and Surgeon License and Controlled Substance License, placed him on probation for a minimum of five years.[2] GX 1, at 9–10, 13.

On February 24, 2005, Respondent submitted an untimely renewal application, his previous registration having expired on December 31, 2004. GX 3, at 3. Thereafter, based on Respondent's loss of his state authority and evidence that he had obtained controlled substances by calling in fraudulent prescriptions, the Deputy Assistant Administrator issued an Order to Show Cause to him which proposed the denial of any pending applications. *Id.* at 2. Respondent did not timely request a hearing. *Id.* at 2–3. While Respondent's application was treated as an application for a new registration, I found the allegations proved and issued a Final Order denying Respondent's application for a DEA registration. *Id.* at 9. On January 21, 2008, Respondent submitted a new application for registration; it is this application which is the subject of this proceeding. GX 1.

The 1989 Incident

On January 4, 1989, Respondent was arrested at Huntington Drug Depot, a pharmacy in Fort Lauderdale, Florida, after he presented two forged prescriptions for controlled substances: one for 60 dosage units of Percocet, a schedule II narcotic controlled substance which contains oxycodone, the other for 30 dosage units of Halcion .25 mg. (triazolam), a schedule IV controlled substance. GX 4, at 1. Both prescriptions were written on pre-printed forms of an HMO named

[1] For reasons explained throughout this decision, I reject the various arguments raised by Respondent in his exceptions.

[2] Based on the Illinois proceeding, Medical Licensing Board of Indiana brought a proceeding against Respondent; the Indiana Board placed Respondent's license on "indefinite probation." RX 6, at 1 & 5.

"Health America"; the prescriptions were dated January 3, 1989, listed the patient as "Chris Pulin," and bore the DEA registration number and purported signature of Evan K. Newman, M.D. *Id.; see also* GX 14, at 3–4. Respondent had previously worked at Health America but had resigned his position in November 1988. *Id.* at 3.

Upon reviewing the prescriptions, a pharmacist became suspicious because they were "too legible," and having been written on the HMO's forms, could have been filled for a fraction of the price at one of the HMO's participating pharmacies. GX 14, at 4–5. His suspicions aroused, the pharmacist called Dr. Newman, who told him that he did not have a patient named "Chris Pulin" and that he did not recall issuing the prescriptions. *Id.* at 5 n.6. The pharmacist then called the police; upon their arrival, both the owner of the store and his son, who was working as a pharmacy clerk, identified Respondent as the person who had presented the prescriptions and Respondent was arrested. *Id.* at 4–5. Moreover, a subsequent "search of Broward County and Fort Lauderdale records failed to disclose any record regarding a Chris Pulin." *Id.* at 9.

Respondent was then taken to the police station and interviewed. GX 4, at 1. There, he refused to give his name or date of birth, stated that the incident could jeopardize his life and career, and insisted that someone else had presented the prescriptions and that the police had arrested the wrong person.[3] *Id.* Respondent had no response when the officer told him that both pharmacists had identified him as the individual who had presented the prescriptions.[4] GX 15, at 20.

At his hearing, Respondent testified that he had received a phone call from a Ms. Schwartz, whom he did not know, and that she had asked him if he could help out an elderly friend of hers who had sustained a fall and lacked health insurance. GX 4, at 2; GX 15, at 100, 148. Respondent claimed that he told Ms. Schwartz to take her friend to Health America, where he could be examined. GX 4, at 2; GX 15, at 101.

According to Respondent, several days later, Ms. Schwartz called again stating that her friend had received a couple of prescriptions and asked Respondent if he could "have them filled at a reduced price." GX 15, at 102. In his testimony, Respondent claimed that later that day, an envelope was slipped under his door which contained a note with Chris Pulin's name and address and the two prescriptions. *Id.* at 103–04. In his testimony, Respondent maintained that he went to the pharmacy intending to have the prescriptions filled and handed the piece of paper and the prescriptions to the pharmacist who was working as the clerk. *Id.* at 108. Respondent testified that he did not intentionally or knowingly take the two prescriptions for Halcion and Percocet to the pharmacy knowing that they were forged. *Id.* at 113. In the instant matter, he also testified that he had never taken Halcion, Percocet, or generic oxycodone. Tr. 18.

In her 1991 Recommended Ruling, the ALJ found that Respondent was "a less than candid witness" and was not "generally credible." GX 14, at 12. She further explained that "Respondent's explanation of his conduct is most charitably described as inherently implausible," as a physician agreeing "to obtain a highly abused medication such as Percocet for a total stranger is * * * totally at odds with any rational notion of professional responsibility." *Id.*

On January 2, 1992, the Honorable Robert C. Bonner, DEA Administrator, himself no stranger to tall tales having previously served as a United States District Judge, adopted the ALJ's findings of fact and legal conclusions in their entirety and revoked Respondent's registration. GX 4, at 3 (57 FR 928 (1992)). The Administrator expressly found "that Respondent refuses to accept responsibility for his actions and does not even acknowledge the criminality of his behavior." *Id.* at 2. The Administrator further found that "Respondent's version of the incident is simply unworthy of belief." *Id.* He then noted that, although the state charges against Respondent had been dismissed, "Respondent's conduct demonstrates an absolute disregard for Federal and state law and nothing presented during Respondent's case persuades the Administrator that the Respondent is now willing to carefully abide by the laws and regulations relating to controlled substances."[5] *Id.* at 3.

On both his recent application for a new DEA registration and in his testimony in the instant proceeding, Respondent maintained that his 1991 story was true. For example, on his application, Respondent wrote: "From February 10, 1992 until February 10, 1993, my DEA registration was revoked *based on allegations* that in 1989, in Florida, I attempted to fill two prescriptions, *which were allegedly forged to try to help a person who did not have insurance*." GX 1, at 7 (emphasis added).

Moreover, in his testimony in the instant proceeding, Respondent told the exact same story of having been called "out of the blue" by Ms. Schwartz, whom he did not know and had never spoken to before, and was asked by her to help her elderly friend who had fallen down some stairs; how several days later, Ms. Schwartz had called him back and stated that her friend had obtained two prescriptions and asked if he would get them filled for her friend; how the prescriptions were slipped under his door; and how he had not forged the prescriptions and that the only thing he had done wrong was to "not look[] more into the authenticity of the prescriptions and doing what I did." Tr. 25–32. While the Administrator's (and ALJ's) findings that Respondent's story was not credible are *res judicata,* the ALJ explained that she did not find his story any more credible now than she had in 1991. ALJ at 36.

The 2002—2004 Incidents

In October 2004, an Investigator with the Illinois Department of Financial and Professional Regulation (IDFPR), Division of Professional Regulation (DPR), received an anonymous complaint, which alleged that Respondent was calling in to pharmacies false prescriptions for Xanax (alprazolam), Dilaudid (hydromorphone) and Viagra (a non-controlled prescription drug), under the names of M.G., V.G., and T.C., and that Respondent was going to the pharmacies and picking up the prescriptions for his personal use. GX 5, at 1. The informant further stated that Respondent paid cash for the drugs to avoid them being traced to him and identified three Chicago pharmacies where the prescriptions were being filled.[6] *Id.* The informant also reported

[3] At the time of his arrest, Respondent was wearing sunglasses and a hat which was "pulled down over his head." GX 14, at 4. When the police attempted to interview him at the station, Respondent refused to take off his sunglasses claiming he had glaucoma; he also initially refused to take off his hat claiming he was bald. *Id.* at 6. However, when Respondent eventually took off his hat for a brief moment, he was not bald. *Id.*

[4] Respondent was charged with attempting to obtain a controlled substance by fraud in violation of state statute, but the charges were dismissed because "the information was filed incorrectly as to the charge." GX 14, at 6–7.

[5] DEA granted Respondent a new registration in July 1993.

[6] The informant also reported that Respondent had been arrested for DUI on June 22, 2004 and was driving "on a suspended license while under the influence of alcohol." GX 5, at 6. At the hearing, Respondent admitted that he had been convicted of the DUI charge. Tr. 95. According to the report of a psychiatrist who evaluated him for the IDPFR, Respondent told her that the police officer thought he was drunk because he had difficulty walking due to a sprained ankle. Tr. 116–17. At the hearing,

Continued

that Respondent had been arrested for DUI on June 22, 2004 and was driving "on a suspended license while under the influence of alcohol." *Id.* at 6.

Upon receipt of this information, the DPR Investigator and a DEA Diversion Investigator (DI) went to the pharmacies and obtained at each of them, a profile which listed the prescriptions Respondent had written in the names of M.G., V.G. and T.C. GX 7. Subsequently, the DPR Investigator prepared a spreadsheet of the prescriptions. *Id.* The Investigators confirmed the informant's report that Respondent had issued prescriptions for alprazolam .5 mg. in the names of T.C., M.G., and V.G.

More specifically, Respondent issued alprazolam prescriptions in V.G.'s name for 60 tablets on April 4, May 17, and June 8, 2004. *Id.* 4. He issued prescriptions in T.C.'s name for 30 tablets on April 21 and May 7, 2004, as well as 60 tablets on September 8 and October 7, 2004. *Id.* at 3. Finally, he issued prescriptions in M.G.'s name for 60 tablets on July 8 and July 28, 2004. *Id.* at 4. Thus, between April 4 and October 7, 2004, Respondent called in prescriptions for a total of 480 tablets of alprazolam.

Moreover, in the order Respondent entered into with the Medical Licensing Board of Indiana, Respondent admitted that "from December 2002 to October 2004, [he] prescribed Xanax, Dilaudid, and Viagra using other individuals' names" and he "subsequently admitted that he consumed these drugs himself." RX 6, at 2.

Thereafter, the Chief of Medical Prosecutions for the IDFPR filed a complaint and a petition for temporary suspension of his medical license on the ground that Respondent's continued practice of medicine was "a danger to the public interest, safety and welfare." GX 9, at 1. The petition was supported by the affidavit of Larry G. McLain, M.D., Chief Medical Coordinator of the IDFPR, which stated that Respondent had "repeatedly issued false prescriptions for Xanax, Dilaudid and Viagra," that Respondent "call[ed] in these prescriptions in the names of [M.G., V.G., and T.C.]," and that he paid cash for the drugs which he was obtaining for "personal use." GX 9, at 5. Dr. McClain further noted Respondent's June 2004 DUI arrest and that he had an extensive criminal history.

On February 18, 2005, the DPR's Acting Director ordered that Respondent's medical license be suspended pending a hearing. GX 10. Thereafter, on May 25, 2005, the Deputy Assistant Administrator of the DEA Office of Diversion Control issued an Order to Show Cause to Respondent which proposed the revocation of his registration (and the denial of any renewal application) based on his having issued false controlled-substance prescriptions and his lack of authority under State law to dispense controlled substances, the latter being a requirement for holding a registration under Federal law. GX 3, at 2.

Regarding the events of this time period, Respondent testified that his drinking first became problematic around 2003 to 2004, when he switched from primarily drinking beer to drinking more wine and vodka. Tr. 10. Respondent stated that his drinking increased at this stage in conjunction with marital troubles, *id.* at 13, and that at the height of his abuse of alcohol, he consumed "[m]aybe a 750 ml bottle [of vodka] a [sic] week, maybe three-quarters of that." *Id.* at 12.

In the spring of 2006, Respondent underwent treatment at Lutheran General Hospital. Tr. 86. In June, Respondent completed inpatient treatment and signed an Aftercare Agreement with Illinois Professionals Health Program (IPHP).[7] *Id.* at 124, 137.

In September 2006, Respondent entered into a consent order with the IDFPR. The order, which became effective on November 21, 2006, restored Respondent's medical license and placed him on "Indefinite Probation." *Alan H. Olefsky, M.D.,* 72 FR 42127 (2007) (GX 3B, at 1). Among the conditions imposed by the order were that Respondent comply with the terms of an Aftercare Agreement and that he abstain from the use of alcohol and "mood altering and/or psychoactive drugs," except as prescribed by another physician. *Id.* at 42128. In the meantime, Respondent had been "discharged from Caduceus on [October 5, 2006] due to missing five consecutive group sessions," had "discontinued individual therapy with" a psychologist, and had missed five urine drug screens between September 20 and December 13, 2006. RX Group 11, at 1.

Within one month of the State's restoration of his license, Respondent resumed his drinking.[8] Tr. 14. In January 2007, Respondent was hospitalized with a blood alcohol content of .327. GX 12, at 2. On or about March 30, 2007, the IDFPR again petitioned for and obtained a temporary suspension of Respondent's medical license.[9] GXs 3A, at 3; 12 & 13.

Following his relapse, Respondent entered a treatment program for impaired professionals run by Resurrection Behavioral Health. GX 1, at 18. On April 10, 2007, Respondent "successfully completed treatment," *id.,* and the following day, Respondent entered into a second Aftercare Agreement. *Id.* at 25, 27. The Aftercare Agreement, which was in effect for a period of twenty-four months, required him to enroll in his "state Professional's Assistance Program," undergo random toxicology screens, attend Caduceus Aftercare meetings following completion of his long-term treatment program, attend AA meetings, and abstain from the "use of all mood-altering chemicals, except as prescribed by [his] primary or treating physicians." *Id.* at 25–26.

On April 10, 2007, Respondent also entered into a consent order with the IDFPR, which the latter approved on May 22, 2007. GX 1, at 16. The Consent Order "indefinitely suspended" Respondent's medical license "for a minimum of 6 months" from the March 30, 2007 suspension order but allowed him to regain his license by providing proof to an informal conference of the Medical Disciplinary Board that he had "successfully participated in a substance abuse treatment program for a minimum of 6 months." *Id.* at 13.

The Consent Order also provided that upon the restoration of his medical license, Respondent would be placed on probation for a minimum of five years subject to various conditions. *Id.* at 13–14. These conditions include that he

however, Respondent acknowledged that he had failed a breathalyzer test. *Id.* at 117.

[7] The IPHP is "a statewide program sponsored by Advocate Medical Group, the Illinois State Medical Inter-Insurance Exchange, and other health professional organizations." RX 1, part 3. It "provides support and advocacy for health care professionals who have difficulties with stress management, substance abuse, medical or psychiatric illness or other issues that may impact the professional's health, wellbeing, or ability to practice his or her profession." *Id.*

[8] Respondent testified that he relapsed because he didn't "have the sponsor set up" and did not attend Alcoholics Anonymous (AA) meetings regularly; the relapse occurred while he was nursing his terminally ill mother and experiencing "licensing issues" and "a sense of isolation living in Des Plaines." Tr. 86–87.

[9] Following the DPR's March 30, 2007 order which imposed a second suspension of Respondent's medical license, the second DEA proceeding, which had been held in abeyance (after the DPR's November 2006 order restoring Respondent's medical license) was forwarded to me for final agency action. GX 3A, at 3. While I found that Respondent did not have a current registration, I found that he had an application pending before the Agency. *Id.* I denied the application for two independent reasons: (1) That Respondent lacked authority under Illinois law to dispense controlled substances, which is an essential prerequisite for obtaining a DEA registration, and (2) that Respondent had violated Federal law by "repeatedly issu[ing] false prescriptions" for alprazolam and Dilaudid, which he then filled and "personally abused." *See* 72 FR at 42128 (citing 21 U.S.C. 802(21), 823(f), and 843(a)(3)).

comply with his Aftercare Agreement; that he abstain from use of alcohol and mind altering/psychoactive drugs unless prescribed to him by another physician; that he submit to random urine screens; that he not prescribe any controlled substances to himself, his family or friends; that his primary care physician file quarterly reports with the IDFPR regarding his "condition, prognosis, and any medication prescribed"; that he be "prohibited from ordering or maintain inventories of any controlled substance"; that he "be prohibited from administering or writing prescriptions for controlled substances outside of his worksite"; and that, if practicing as a physician, he do so where he was not "the only physician actively involved in the practice of medicine." *Id.* On December 5, 2007, the IDFPR restored Respondent's license to active status and placed it on probation subject to the conditions set forth in the May 2007 Consent Order.[10] GX 1, at 9–10.

Respondent's Evidence Regarding the Post-2002 Incidents

At the hearing, Respondent testified that while he was an alcoholic he had never been addicted to controlled substances and denied that he had ever taken a controlled substance for other than a legitimate medical purpose. Tr. 16. While Respondent acknowledged that he had written between 20 and 50 prescriptions in other persons' names in order to obtain alprazolam, *id.* at 18 & 21, and that he had not obtained the drug "correctly," *id.* at 36, he maintained that he was not abusing the drug but "was using it to sleep" as he "was not taking it in the amount over the recommended dose to use it for sleep purposes." *Id.* Respondent also claimed that he had never had a problem with the abuse of controlled substances. *Id.*

Subsequently, Respondent testified that he took the alprazolam only when he had "trouble sleeping" after having worked the night shift in the emergency room. *Id.* at 100. Respondent further explained that there "were just four or five shifts in the emergency room for a month. And it wasn't all the time, it was occasionally." *Id.* When further questioned as to how many tablets he took a day, Respondent testified that "I would take a half of one in the morning when I needed to fall asleep." *Id.* at 101.

Continuing, Respondent contended that "the amounts were common. A lot of the people * * * the person who evaluated me in terms of this case * * * found that the amount over the period of time was not a matter of abuse, in terms of the number of * * * Xanax." *Id.* Respondent then noted that a psychiatrist who had evaluated him for the IDFPR had "made a comment * * * that considering the amount of medications in my evaluation I did not suffer from any substance abuse problem. I'm just reflecting off of that report. They substantiated that, this psychiatrist in that department." *Id.* at 102. *See also id.* at 105 ("Her conclusion * * * was that I did not suffer from a drug problem, an addiction to drugs based on her interviewing me and the Xanax that was prescribed.").

As part of his case, Respondent submitted a copy of the psychiatric evaluation done on him for the IDPFR. RX 12. With respect to his use of substances, the report noted that Respondent "stated that over the last one and one half years, his consumption [of alcohol] increased to one or two ounces every few days. He reported occasional use of alprazolam 0.25 mg for sleep for the past two to three years. He denied use of any other medications or illicit substances." *Id.* at 3. While the psychiatrist also noted that she had reviewed pharmacy records (which showed that between April 4 and October 7, 2004, Respondent had issued alprazolam prescriptions totaling 180 tablets to T.C., 120 tablets to M.G., and 180 tablets to V.G.), she noted that the prescriptions "would have provided approximately 1 mg. daily of the substances during the time it was prescribed. Use of several milligrams at one time, especially if used with alcohol, could be dangerous and constitute abusive use. However, this examiner does not know who used the substance or how it was used." *Id.* at 6. Noting that no records had been submitted to her substantiating the claim that Respondent had also prescribed and used Dilaudid, the psychiatrist concluded that "[a]side from the allegations of [his] ex-wife, there is no clear evidence that [Respondent] demonstrated abuse of or dependence upon alcohol, prescription medications, or illicit substances." *Id.*

Respondent did not call the psychiatrist to testify and I decline to give weight to her report (which apparently was based largely on her interview of him) for several reasons. First, she concluded that Respondent was not even abusing alcohol, yet even Respondent acknowledges that he is an alcoholic and was so at the time in question. Tr. 111–16; RX Group 11, at 1.

Second, with respect to whether he was abusing alprazolam, while it is true that the total amount of alprazolam prescriptions noted above (480 tablets obtained between April 4 and October 7, 2004) would provide slightly more than 1 milligram per day, Respondent, during both his evaluation by the psychiatrist and in his testimony, claimed that he took only .25 mg. of alprazolam and that he did so only occasionally. RX 12, at 3; Tr. 100–01. Were Respondent's story true that he took half of a tablet five times a month to sleep following the night shift, over the approximately six to seven-month period in which he wrote the prescriptions,[11] he would have required no more than eighteen tablets in total, an amount 1/26th of the quantity he obtained. Notably, in her report, the psychiatrist did not even acknowledge the glaring inconsistency between the amount of alprazolam Respondent had obtained and his claimed rate of usage.[12]

As for his evidence of rehabilitation, Respondent introduced into evidence various letters written by Dr. Daniel H. Angres, Director, Resurrection Behavioral Health Addiction Services Division, Rush University Medical

[10] In addition to the 1989 Florida and 2004 DUI arrests, the Government also introduced records showing he had been arrested in May 1993 in Chicago for criminal damage to property; in March 1994 in Galena, Illinois for aggravated battery and criminal damage to property; in December 1995 for aggravated assault with a firearm; and in both December 1995 and November 2001 in Chicago for violation of a protective order. GX 6, at 1–2, 8–9; Tr. 45–46.

With the exception of the 1989 incident, the 2004 arrest for DUI, and one of the charges of having violated a protective order (which Respondent admitted having been convicted of, but then proceeded to minimize his culpability for, by claiming he had never been served with the protective order), the Government did not produce evidence apart from the arrest records and testimony based on the arrest records establishing that Respondent had committed any of these other offenses. As the Supreme Court has long noted, "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." *Schware* v. *Board of Bar Exam'rs,* 353 U.S. 232, 241 (1957). Accordingly, I do not consider any of the arrests, by themselves, to establish that Respondent committed the underlying conduct.

[11] While Respondent actually wrote the prescriptions during slightly more than a six month period, I assume that the October 7, 2004 prescription would have lasted for several weeks.

[12] As noted above, the psychiatrist's report noted that Respondent "denied use of any other medications." RX 12, at 3. Yet in the Indiana Consent Order, he stipulated that he had also obtained Dilaudid and that he had "consumed these drugs himself." RX 6, at 2.

The psychiatrist did, however, diagnose Respondent as having adult antisocial behavior. *Id.* at 6. While she concluded that Respondent's "behavior may be deemed inappropriate, illegal, or dangerous by the IDFPR," and that the IDFPR could "revoke his medical license or place restrictions upon it," she concluded that his behavior was not "due to a mental disorder." *Id.* Dr. Angres, a psychiatrist and addiction specialist who was involved in treating Respondent, explained that while he engaged in antisocial behavior, this happened "historically when [he was] under the influence" and that such behavior "often occur[s] with alcoholism." Tr. 202.

Center, and Russell Romano, Jr., Respondent's case manager at IPHP.[13] Respondent also called both Dr. Angres and Mr. Romano to testify.

At the time of the hearing, Dr. Angres, who is board-certified in Psychiatry Neurology and Addiction Medicine, served as Medical Director, Resurrection Behavioral Health, Addiction Services Division. Tr. 179, 181, 187. Respondent was Dr. Angres' patient in the "partial step-down outpatient program,"[14] and during this portion of Respondent's treatment would see him "several times a week" both in a group setting and individually.[15] *Id.* at 200.

Dr. Angres testified that while Respondent "would act in ways [that] might be described as an anti-social type of way * * * he doesn't present with any severe personality disorder." *Id.* at 202. Dr. Angres further testified that Respondent was in compliance with his Aftercare Agreement, that his urine screens were negative, and that his recovery was "[v]ery solid, it's very solid." *Id.* at 207–08.

According to Dr. Angres, Respondent's primary problem is alcohol dependence and that while Respondent was also diagnosed as having abused benzodiazepines (the class of drugs which includes alprazolam), the latter was based on the manner in which Respondent had obtained the drugs and not on the amount he was using. *Id.* at 199–200. Dr. Angres asserted that Respondent was using alprazolam "as [a] prescribed quantity for sleep," and benzodiazepine dependence was ruled out as a diagnosis because his "use was of the level of what's often prescribed." *Id.* In Dr. Angres' view, Respondent's issuance of fraudulent prescriptions "sounded like [it] was more a matter of convenience." *Id.* at 200. However, on cross-examination, Dr. Angres' admitted that his knowledge as to how much alprazolam Respondent was using was based on what the latter had told him. *Id.* at 220.

Mr. Romano testified that he has known Respondent since the spring of 2006, when after the latter's admission to Lutheran General Hospital, the Hospital contacted Dr. Doot, the IPHP's medical director, to do a substance abuse consultation. *Id.* at 137. Dr. Doot recommended that Respondent undergo some "treatment for alcohol and chemical dependency" at the Advocate Addiction Treatment Program"; Respondent completed treatment and signed an Aftercare Agreement with IPHP. *Id.;* RX Group 11, at 1.

Mr. Romano testified that he had known Respondent throughout the period which included his relapse and admission to the Resurrection Behavioral Health treatment program. *Id.* at 141. Mr. Romano testified that since April 2007, when Respondent signed his second Aftercare Agreement, he had seen Respondent on a monthly basis. *Id.* at 140; RX 1, parts 4 and 5. Mr. Romano testified that "since that January 2007 treatment * * * [t]here's been a remarkable turnaround as far as [Respondent's] acceptance and understanding of his addiction" and that Respondent has shown "commitment" to his recovery. *Id.* at 142–43. Mr. Romano reported that Respondent's urine tests had been reported as negative. *Id.* at 144.

Respondent also testified concerning his rehabilitation efforts. At the time of hearing, Respondent had been in his current job for a year and a half which involves "doing group therapy and group treatment with nursing home patients that have mental illness, and actually also substance abuse problems." Tr. 79–80. In addition, he was working as a "general physician" in a clinic with other physicians. *Id.* at 81. Respondent was also attending Alcoholics Anonymous (AA) meetings three to four times per week, *id.* at 81–82, talked with his AA sponsor between two and four times a week, *id.* at 83, and on Saturdays, attended his Caduceus group. *Id.* at 84.

Respondent testified that a DEA registration "[i]s a privilege" and that he had "done a lot of wrong things." Tr. 94. According to Respondent, he was "totally sorry for the things [he had] done." *Id.* Respondent stated that he "know[s]" "what [he has] done" so that he's "not sure on terms of what level * * * of * * * horrific punishment [he] need[s] to go through anymore." *Id.*

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that the Attorney General "may deny an application for such registration if he determines that the issuance of such a registration is inconsistent with the public interest." 21 U.S.C. 823(f). In making the public interest determination, the CSA directs that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

"[T]hese factors are * * * considered in the disjunctive." *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application for a registration. *Id.* Moreover, I am "not required to make findings as to all of the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

Where the Government has met its *prima facie* burden of showing that issuing a new registration to the applicant would be inconsistent with the public interest, the burden then shifts to the applicant to "present sufficient mitigating evidence" to show why he can be entrusted with a new registration. *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))). "Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir.1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he]

[13] Respondent submitted three letters written by Dr. Angres, all of which indicated that he had been in compliance with his after care program. RXs 1, part 6; 3 and 4. Respondent also submitted two letters from Mr. Romano, both of which stated that his "substance use disorder is in sustained, full remission which indicates to us that his petition to restore his DEA license is appropriate at this time." RX 2 (letter of April 8, 2008), RX 11, at 2 (letter of April 10, 2009).

Respondent also submitted letters supporting his application from an individual attesting to his work for Mobile Doctors, *see* RX 5, as well as from the social services directors at two nursing/rehabilitation centers. RXs 9 and 10.

[14] Dr. Angres testified that Resurrection Addiction Services Behavioral Health runs a day hospital program and that most patients live in an "independent living setting that [it] supervise[s]." *Id.* at 189. The day hospital program is a "form of intensive outpatient treatment" and is followed by an "intensive outpatient step-down program," which averages seven weeks in length and is then followed by a 20-month to 2-year period of "weekly aftercare monitoring." *Id.* The Caduceus Aftercare Program in which Respondent was participating typically lasts for two years, with facilitated weekly monitoring groups and random urine sampling by IPHP. *Id.* at 191. Aftercare in general usually lasts five years, during which time there is an expectation of continued 12-step/AA recovery and "appropriate sponsorship." *Id.* at 192.

[15] While Dr. Angres testified that he attended some of the Caduceus aftercare groups and would have patients come in at different intervals, he did not specify the frequency with which he was seeing Respondent. Tr. 200–01.

will not engage in future misconduct." *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Cuong Tron Tran,* 63 FR 64280, 64283 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995). Because of the authority conveyed by a registration and the extraordinary potential for harm caused by those who misuse their registrations, DEA places significant weight on an applicant/registrant's candor in the proceeding. *See also Hoxie* v. *DEA,* 419 F.3d at 483 ("admitting fault" is "properly consider[ed]" by DEA to be an "important factor[]" in the public interest determination).

Having considered all of the factors, I hold that the Government has met its *prima facie* burden of showing that Respondent has committed acts which render his registration inconsistent with the public interest. Indeed, the Government satisfied its *prima facie* burden simply by introducing the 1992 and 2007 Agency Orders. While I have carefully considered Respondent's evidence as to his rehabilitation, as explained below, I hold that Respondent has not rebutted the Government's *prima facie* case because he has failed to accept responsibility for his misconduct and gave false testimony in this proceeding.

Factor One—The Recommendation of the State Licensing Board

As an initial matter, while the IDFPR has restored Respondent's medical and controlled substances licenses and placed them on active but indefinite probation, it has made no recommendation as to whether Respondent's application should be granted. While under 21 U.S.C. 823(f), the possession of authority under state law to dispense controlled substances is an essential requirement for obtaining a registration, as the ALJ recognized, DEA has long held that a practitioner's possession of state authority is not dispositive under the public interest standard. ALJ at 36.

In his Exceptions, Respondent argues that the ALJ "failed to give proper consideration and weight to the circumstances" which led the IDFPR to restore his licenses as well as "the level of oversight and control" it has placed on his license. Resp. Exceptions at 3–4. DEA has long held, however, that it has " 'a separate oversight responsibility with respect to the handling of controlled substances and has a statutory obligation to make its independent determination as to whether the granting of [a registration] would be in the public interest.' " *Jeri Hassman, M.D.,* 75 FR 8194, 8227 (2010) (quoting *Mortimer B. Levin,* 55 FR 8209, 8210 (1990)). *See also Alvin Darby,* 75 FR 26993, 27000 n.32 (2010); *Edmund Chein,* 72 FR 6589, 6590 (2007), *aff'd Chein* v. *DEA,* 533 F.3d 828 (DC Cir. 2008) (The authority to determine whether the issuance of a registration is consistent with the public interest has been granted to the Attorney General and "delegated solely to the officials of this Agency.").

Contrary to Respondent's contention, this case is best decided based on the record compiled in this proceeding and not in the IDPFR matter. The record in this matter shows that Respondent has violated Federal criminal laws related to the dispensing of controlled substances (in multiple instances no less) and has now lied about it in two separate agency proceedings. ALJ at 36. Moreover, the record establishes a glaring inconsistency between Respondent's testimony as to his purported rate of alprazolam usage and the quantities of drugs he was obtaining. Whatever the IDPFR's reasons were for ignoring this, I decline to do so. I thus conclude that while the IDPFR's restoration of his state medical and controlled substances licenses renders him eligible to hold a DEA registration, it is not dispositive of whether his registration would be consistent with the public interest.[16]

Factors Two, Four, and Five—Respondent's Experience in Dispensing Controlled Substances, Compliance With Laws Related to Controlled Substances, and Such Other Conduct Which May Threaten Public Health and Safety

As found in two previous Agency Orders, Respondent has on multiple occasions either attempted to obtain, or successfully obtained, controlled substances "by misrepresentation, fraud, forgery, deception, or subterfuge," in violation of 21 U.S.C. 843(a)(3). *See also* 21 U.S.C. 846 (CSA's attempt provision). More specifically, on January 4, 1989, Respondent attempted to fill forged prescriptions for 60 tablets of Percocet, a schedule II narcotic, and 30 tablets of Halcion, a schedule IV benzodiazepine, at a Fort Lauderdale pharmacy but was arrested. *See* GX 4.

When questioned by the police, Respondent lied claiming that someone else had presented the prescriptions and that they had arrested the wrong person. At the 1991 hearing, however, Respondent changed his story claiming that he had been called out of the blue by a person he did not know who had asked him to fill the prescriptions for a friend and that several days later, the prescriptions were slid under his door. Then, as now, the ALJ found the story to be "inherently implausible" and the then-Administrator found that it was "simply unworthy of belief." Notwithstanding that in this proceeding, Respondent had a fresh opportunity to acknowledge his criminal behavior and accept responsibility for his misconduct, he repeated his lies.

Moreover, as I found in my 2007 Decision and Order, which denied his previous application, on multiple occasions during 2002 through 2004, Respondent called in fraudulent prescriptions in the names of three persons for alprazolam and Dilaudid (hydromorphone, a schedule II controlled substance) to obtain drugs for his personal abuse. While in this proceeding the Government primarily focused on Respondent's prescribing and use of alprazolam, my finding that Respondent issued fraudulent prescriptions for both alprazolam and Dilaudid is *res judicata. See University of Tennessee* v. *Elliot,* 478 U.S. 788, 797–98 (1986) ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata*[.]"). While Respondent waived his right to contest the allegations, *see* 72 FR 42127, he nonetheless had a full and fair opportunity to litigate these issues in that proceeding.[17]

While at the hearing Respondent acknowledged that he had issued at least twenty fraudulent prescriptions for alprazolam during the 2002 through 2004 period, his testimony regarding his rate of usage of the drug is glaringly inconsistent with the amount of the drug he obtained. As found above, between April 4 and October 7, 2004, Respondent obtained a total of 480 tablets of this drug. Yet in his testimony he maintained that he used the drug only four to five times a month (to help him sleep) and that he cut the tablets in half. Were this true, he would have used at most only eighteen tablets. Respondent offered no explanation to

[16] I concur with the ALJ's finding that there is no evidence that Respondent has been convicted of crimes related to the manufacture, distribution or dispensing of controlled substances. However, DEA has held that a finding that an applicant has not been convicted of such an offense is not dispositive. *See, e.g., Edmund Chein,* 72 FR 6580, 6593 n.22 (2007).

[17] In addition, in a proceeding brought by the Medical Licensing Board of Indiana, Respondent admitted that he had consumed Dilaudid (in addition to the Xanax). RX 6, at 2. In the instant matter, Respondent offered no explanation as to his use of Dilaudid.

account for the other 460 tablets he obtained during this period. The inconsistency between the amounts he obtained and his testimony supports the conclusion that Respondent lied about his rate of usage and likely did so to portray himself as being only an alcoholic and not a drug abuser.[18]

Thus, while Respondent produced extensive evidence of his rehabilitation from alcohol abuse, there is ample reason to be skeptical of his claim that he is not a drug abuser and that he has learned from his mistakes. Moreover, even assuming the good faith of those who have treated (and/or evaluated) him, and that the treatment he received for his alcoholism would be efficacious in treating prescription drug abuse notwithstanding his apparent unwillingness to acknowledge the extent of his alprazolam misuse, it is nonetheless clear that Respondent has a serious aversion to telling the truth. I therefore hold that Respondent has failed to accept responsibility for his misconduct and has failed to rebut the Government's *prima facie* case.

In his Exceptions, Respondent contends that he "cannot eradicate his past criminal history" and that the ALJ's recommendation that his application be denied "is tantamount to a permanent revocation * * * especially since the DEA considered most of the same information" in my 2007 order which denied his previous application. Exceptions, at 14. Respondent also contends that because the issues litigated in "the 1992 hearing before DEA are *res judicata* [they] should not be considered in any determination in this matter." *Id.* at 6. Finally, he contends that he has been adequately punished for his past misconduct and that the proper focus should have been "whether the circumstances in existence at the time of the prior denial in July 20, 2007 have sufficiently changed to warrant the issuance of Respondent's DEA registration." Exceptions, at 6–12.

Contrary to Respondent's view, Congress expressly directed the Agency to consider an "applicant's experience in dispensing * * * controlled substances." 21 U.S.C. 823(f). Respondent's previous incidents of presenting fraudulent prescriptions are thus properly considered in this proceeding. Moreover, while it is true that Respondent "cannot eradicate his past criminal history," he could have testified truthfully in this proceeding and accepted responsibility for his misconduct.[19] *See Robert Leslie,* 68 FR 15227 (2003) (denying application based on physician's continued unwillingness to accept responsibility for criminal conduct he engaged in seventeen years earlier). I am therefore wholly unpersuaded by Respondent's contention that the circumstances have sufficiently changed to warrant granting his application.

Respondent cites *Azen* v. *DEA,* 76 F.3d 384 (tablet) (9th Cir. 1996), an unpublished decision, as support for his contention that in light of his evidence of rehabilitation, it would be "unduly harsh" to deny his application. Putting aside that the Ninth Circuit upheld the Agency's decision to revoke Dr. Azen's registration, Respondent ignores that in 1993, the Agency previously gave him a second chance to demonstrate that he could be entrusted with a registration, yet he again breached this trust. Respondent also ignores under the Agency's rules, he had a way back to regaining his registration. That he could not testify truthfully about either the 1989 episode or his more recent criminal behavior and abuse of alprazolam makes clear that, notwithstanding his rehabilitation efforts, he cannot be entrusted with a new registration.[20] Accordingly, Respondent's application will be denied.

[18] To make clear, in light of the inconsistency between the amount of alprazolam Respondent obtained and his claimed rate of usage, I reject the ALJ's conclusion "that Respondent's abuse of alprazolam was limited to his manner of acquiring it." ALJ at 36.

[19] In arguing that he has been adequately punished for his past misconduct, Respondent misapprehends the nature of this proceeding. This is a remedial proceeding aimed at protecting the public interest. *See, e.g., Samuel S. Jackson,* 72 FR at 23853 (citing *Leo R. Miller,* 53 FR 21931, 21932 (1988)). My decision to deny Respondent's application is not based on a determination that he needs to be punished but on the fact that his unwillingness to accept responsibility and testify truthfully establishes that he cannot be entrusted with a registration notwithstanding his efforts at rehabilitation.

Respondent also argues that "it has been over three years since [he] engaged in any conduct that would suggest that it would be against the public interest to issue" him a new registration. Exceptions at 15. This argument ignores that Respondent's testimony at the proceeding is itself conduct which demonstrates that granting his application would be inconsistent with the public interest. In addition, that three years have passed without further incident is hardly impressive given that he has been without a registration during this period, thus denying him of the means to issue more fraudulent prescriptions.

[20] I find it unnecessary to give any weight to the 2005 incident in which Respondent represented to a Chicago law firm that he had an active and unrestricted medical license when his licensed had been suspended. *See* GX 8. Between his presentation of the two fraudulent prescriptions in 1989, his false statement to the police following his arrest, his false testimony in the 1991 proceeding, and the more recent incidents of his calling in numerous fraudulent prescriptions, there is more than ample evidence to question his credibility.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as by 28 CFR 0.100(b) and 0.104, I hereby order that the application of Alan H. Olefsky, M.D., be, and it hereby is, denied. This Order is effective May 11, 2011.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–8543 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–7]

Thomas E. Mitchell, M.D.; Dismissal of Proceeding

On September 11, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Thomas E. Mitchell, M.D. (Respondent), of Santa Ana, California. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration and the denial of any pending applications to renew or modify his registration on the ground that, because of an action brought by the Medical Board of California (MBC), he lacks authority to dispense controlled substances in the State in which he is registered. Show Cause Order at 1.

On October 13, 2009, Respondent's counsel filed a letter in which he requested an extension of time (of 60 days no less) to respond to the Show Cause Order. Letter from Robert H. McNeill, Jr., to Hearing Clerk (Oct. 9, 2009). Therein, Respondent's counsel stated that Respondent was currently awaiting trial on two felony counts of violating California's tax laws. *Id.* Respondent's counsel further stated that "[t]he resolution of the criminal case will significantly affect Dr. Mitchell's decision of whether to request a hearing on the Order to Show Cause." *Id.*

Deeming this letter to be a request for a hearing, on October 22, 2009, the ALJ issued an order directing that the Government file its pre-hearing statement on or before January 6, 2010, and that Respondent file his pre-hearing statement on February 8, 2010. Order for Prehearing Statements at 1–2. Thereafter, on November 2, 2009, the Government moved for summary disposition on the ground that, on December 18, 2008, the MBC had suspended Respondent's Physician's and Surgeon's Certificate for failing to

comply with a condition imposed by the Board's previous order. Mot. for Summ. Disp., at 1–2. Citing agency precedent, the Government argued that because Respondent lacks authority to dispense controlled substances in California, he is not authorized to hold a DEA registration in the State and his registration should be revoked. *Id.* As support for the motion, the Government attached the various MBC orders, as well as a printout of Respondent's registration status, which indicated that his registration was to expire on January 31, 2010. Mot. for Summ. Disp., at Exs. 1–4.

On November 16, 2009, Respondent filed an opposition to the motion. Respondent's Opposition at 4. Therein, Respondent argued that the MBC's order "is not reasonable and is fraught with procedural misconduct, misrepresentations and the subsequent illegitimate denial of due process." *Id.*

On November 25, 2009, following a further round of briefing by both parties on an issue of no material consequence,[1] the ALJ issued her Recommended Decision. Therein, she found that it was undisputed that Respondent lacks authority to dispense controlled substances in California and that under the Controlled Substances Act, DEA therefore lacks authority to continue his registration. ALJ Dec. at 5. The ALJ thus granted the Government's motion and recommended that Respondent's registration be revoked. *Id*

Neither party filed exceptions to the ALJ's Decision. On January 8, 2010, the ALJ forwarded the record to my Office for final agency action. Upon receipt of the record, it was determined that while Respondent's registration was to expire on January 31, 2010, he had yet to file a renewal application. A subsequent query of the Agency's registration records confirmed that Respondent allowed his registration to expire and did not file a renewal application.

Under DEA precedent, "if a registrant has not submitted a timely renewal application prior to the expiration date, then the registration expires and there is nothing to revoke." *Ronald J. Riegel,* 63 FR 67132, 67133 (1998). Moreover, in the absence of an application (whether timely filed or not), there is nothing to act upon. Accordingly, because Respondent has allowed his registration to expire and has not filed any application, this case is now moot and will be dismissed.[2]

[1] Specifically, that Respondent had previously held a West Virginia medical license.

[2] While the Show Cause Order will be dismissed, under 21 U.S.C. 823(f), Respondent is not entitled to be registered until he is again "authorized to dispense * * * controlled substances under the laws of the State in which he practices."

Order

Pursuant to the authority vested in me by 21 U.S.C. 824, as well as 21 CFR 0.100(b) and 0.104, I hereby order that the Order to Show Cause issued to Thomas E. Mitchell, M.D., be, and it hereby is, dismissed. This Order is effective immediately.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–8531 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–8]

Robert Charles Ley, D.O. ; Dismissal of Proceeding

On September 28, 2009, I, the then Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration ("Order") to Robert Charles Ley, D.O. (Respondent), of Kihei, Hawaii. Order to Show Cause at 1. The Order, which also sought the revocation of Respondent's registration and the denial of any pending applications to renew his registration, alleged, *inter alia,* that Respondent had issued numerous prescriptions for controlled substances to undercover police officers which lacked a legitimate medical purpose and therefore violated Federal law. *Id.* at 2.

On October 2, 2009, Respondent was served with the Order, and on October 7, 2009, he requested a hearing on the allegations. The matter was then assigned to an Agency Administrative Law Judge (ALJ), who proceeded to conduct pre-hearing procedures.

On November 4, 2009, the Government moved for summary disposition on the ground that the State of Hawaii had suspended Respondent's state controlled substances registration and that he was therefore no longer entitled to hold a registration under the Controlled Substances Act. *See* 21 U.S.C. 823(f) and 824(a)(3). Finding that there were no material facts in dispute, the ALJ granted the motion, recommended that I revoke Respondent's registration and deny any pending applications, and forwarded the record to me for final agency action. Order Granting Summary Disposition and Recommended Decision, at 6.

On January 12, 2010, the State of Hawaii re-instated Respondent's state registration. As a consequence, the Government was no longer entitled to a Final Order adopting the ALJ's Recommended Decision. Accordingly, on March 2, 2010, the Government moved to remand the case for further proceedings. Motion to Remand Case for Further Proceedings, at 1.

Respondent did not, however, file an application to renew his registration which was due to expire on March 31, 2010. Respondent's registration therefore expired on March 31, 2010.

Accordingly, on May 5, 2010, the Government moved to terminate the proceeding on the ground that this case is now moot. Motion to Terminate Administrative Proceedings, at 2. On May 26, 2010, I therefore ordered that Respondent file a response to the Government's motion; I further ordered that if Respondent contended that the matter was not moot, he should specifically address what collateral consequence attach as a result of the issuance of the immediate suspension, whether he intends to remain in professional practice, and why he failed to file a renewal application. *See* Order at 1–2 (May 26, 2010).

On June 25, 2010, Respondent filed his response. *See* Respondent's Memorandum In Response to Motion to Terminate Administrative Proceedings. Therein, Respondent "maintain[s] that the summary suspension of his DEA registration * * * was improper and unjustified, [but] due to physical conditions beyond his control, [he] is no longer in a position to pursue his administrative remedies." *Id.* at 1. Respondent therefore "does not object to the termination" of the proceeding. *Id.*

DEA has previously held that "if a registrant has not submitted a timely renewal application prior to the expiration date, then the registration expires and there is nothing to revoke." *Ronald J. Riegel,* 63 FR 67132 (1998). While DEA has recognized a limited exception to the mootness rule in cases which commence with the issuance of an immediate suspension order because of the collateral consequences which may attach with the issuance of an immediate suspension, *see William R. Lockridge,* 71 FR 77791, 77797 (2006), Respondent has not identified any collateral consequence caused by the order. Indeed, Respondent does not object to the termination of this proceeding. Accordingly, this proceeding is now moot and the Government's motion to terminate the proceeding will be granted.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824, as well as 28 CFR

0.100(b) and 0.104, I hereby grant the Government's motion to terminate the proceeding. I further order that the Order to Show Cause and Immediate Suspension of Registration issued to Robert Charles Ley, D.O, be, and it hereby is, dismissed.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–8544 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–28]

Louisiana All Snax, Inc.; Dismissal of Proceeding

On January 21, 2010, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order To Show Cause to Louisiana All Snax, Inc. (Respondent), of Baton Rouge, Louisiana. The Show Cause Order proposed the revocation of Respondent DEA's Certificate of Registration, which authorized it to distribute the list I chemicals ephedrine and pseudoephedrine, on the ground that, effective August 15, 2009, the State of Louisiana made both chemicals Schedule V controlled substances; that those persons who distribute these substances "must possess a license issued by the Louisiana Board of Pharmacy"; that Respondent "does not possess" the necessary license; and that DEA must therefore revoke its registration. Show Cause Order at 1 (citing 21 U.S.C. 824(a)(3), La. Rev. Stat. Ann. §§ 40:973 & 40:1049.1).

On February 18, 2010, Respondent requested a hearing on the allegations. In his letter, Respondent's owner stated that it had "stopped distributing ephedrine products prior to August 15, 2009 and do[es] not plan to distribute any as long as Act 314 * * * is in effect. My registration certificate will expire in March 2010 and we do not plan to renew it because we can not distribute legally." Letter of Robert Howerter to Hearing Clerk (Jan. 28, 2010). Mr. Howerter further wrote: "We do not understand why the DEA is revoking a certificate we can not use and will expire in a little over a month especially since we do not plan to renew it." *Id.* "As a token of [his] good faith," Mr. Howerter "attached [his] certificate to [his] letter." *Id.*

The matter was then placed on the docket of the DEA Office of Administrative Law Judges (ALJs), and on February 22, 2010, the ALJ ordered the Government to determine whether Respondent had filed a timely renewal application and to provide evidence supporting its allegation that Respondent lacked the requisite State authority. Order Directing the Government To Provide Proof That Respondent Lacks State Authority To Handle Controlled Substances and Briefing Schedule, at 1.

Two days later, the Government moved for summary disposition or to dismiss on the grounds of mootness. Therein, the Government noted that it had determined that Respondent's registration "expires on March 31, 2010" and that, "[a]s of the date of this filing, Respondent has not filed an application for renewal of its registration, and in its request for a hearing Respondent admitted that it does not plan to renew its DEA registration." Motion for Summ. Disp., at 2. While the Government also provided a copy of a letter from the Louisiana Board of Pharmacy to a Diversion Investigator stating that Respondent does not hold a Louisiana Controlled Dangerous Substances License and argued that "DEA must therefore revoke Respondent's DEA registration," the Government also observed that "[d]ismissal of this matter will also be appropriate * * * after March 31, 2010, on grounds of mootness, if Respondent does not apply for renewal of its registration." *Id.* at 3–4.

Respondent did not file a response to the Government's motion. ALJ Dec. at 2. On March 8, 2010, the ALJ granted the Government's motion for summary disposition based on Respondent's lack of authority under State law to handle listed chemicals. *Id.* at 5–6. However, the ALJ also noted that under Agency precedent, "'[i]f a registrant has not submitted a timely renewal application prior to the expiration date, then the registration expires and there is nothing to revoke.'" *Id.* at 2 (quoting *David L. Wood, M.D.,* 72 FR 54936, 54937 (2007) (quoting *Ronald J. Riegel, D.V.M.,* 63 FR 67132, 67133 (1998))). Noting that the Agency's regulation imposes a 25-day period to allow the parties to file exceptions prior to the ALJ's forwarding of the record to my Office for final agency action, the ALJ observed that by the time a decision is issued "on the proposed revocation * * * there will be nothing to revoke and the issue will be moot." *Id.* at n.2. The ALJ thus explained that "dismissal of this proceeding on mootness grounds * * * will be required when the matter is transmitted to" me. *Id.* at 2.

Having taken Official Notice of the registration records of the Agency, I find that Respondent's registration expired on March 31, 2010, and that Mr. Howerter was true to his word that Respondent did "not plan to renew it." Because Respondent's registration has now expired and there is no pending renewal application, there is neither a registration, nor an application, to act upon. Accordingly, the case is now moot. *See, e.g., Riegel,* 63 FR at 67133.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I order that the Order To Show Cause issued to Louisiana All Snax, Inc., be, and it hereby is, dismissed. This order is effective immediately.

Dated: April 1, 2011.

Michelle M. Leonhart,

Administrator.

[FR Doc. 2011–8541 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–25]

Calvin Ramsey, M.D.; Revocation of Registration

On December 18, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Calvin Ramsey, M.D. (Respondent), of Millington, Tennessee. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, AR7086689, as a practitioner, and the denial of any pending application to renew or modify the registration, on the ground that he does not "have authority to practice medicine or handle controlled substances in the State of Mississippi," the State in which he is registered with DEA.[1] Show Cause Order at 1 (citing 21 U.S.C. 823(f) and 824(a)(4)).

On January 8, 2010, Respondent, who is currently incarcerated at the Federal Correctional Institute Memphis Satellite Camp in Millington, Tennessee, requested a hearing on the allegations [2]

[1] The Order also alleged that Respondent's Registration does not expire until April 30, 2012. Show Cause Order at 1. Because Respondent does not dispute this, I find that he has a current registration.

[2] Therein, Respondent also requested that the Administrative Law Judge "issue a writ of Habeas Corpus to allow [him] to have a personal hearing in Springfield, Virginia in the interest of true [j]ustice." Response to Order to Show Cause, at 2.

and the matter was placed on the docket of the Agency's Administrative Law Judges (ALJs). Thereafter, on January 27, the ALJ ordered the Government "to provide evidence to support its allegation that Respondent lacks authority in the state in which he is registered with DEA" and set February 3, 2010 as the due date for any motion for summary disposition and a due date of February 17 for Respondent to file a reply. Order Directing Gov. to File Evidence Regarding Status of Resp.'s State Authority, at 1–2.

On January 29, 2010, the Government moved for summary disposition. Mot. for Summ. Disp. Therein, the Government noted that the State of Mississippi had suspended Respondent's state medical license effective May 4, 2009, *id.* at 2, and that Respondent did not dispute that the Mississippi State Board of Medical Licensure (Mississippi Board) had taken "adverse actions against" him. *Id.* at 5 (quoting Respondent's Resp. to Order to Show Cause, at 1). As support for its motion, the Government attached a copy of a Consent Order which Respondent entered into with the Mississippi Board.

The Consent Order noted that on or about October 16, 2008, Respondent had been convicted by the U.S. District Court for the Southern District of Mississippi of two counts of Filing a False Tax Return in violation of 26 U.S.C. 7201(1). Consent Order at 1. The Consent Order further noted that under Mississippi law, "conviction of a felony or misdemeanor involving moral turpitude" is ground for the suspension or revocation of a state medical license and that Respondent had "consent[ed] to the indefinite suspension of his license to begin on May 4, 2009, the date he was ordered by the District Court to surrender and commence serving his sentence. *Id.* at 1–2. Based on the Agency's longstanding rules that (1) a practitioner must be currently authorized to handle controlled substances in the State in which he practices in order to hold a DEA registration in that State, and (2) where a registrant loses his state authority, he is not entitled to maintain his DEA registration, the Government moved for summary disposition. Mot. for Summ. Disp., at 3.

On February 16, 2010, Respondent filed a motion which requested that the ALJ transfer his request for a writ of habeas corpus to an Article III judge. The motion was premised on Respondent's contention that he has a right to "a personal hearing at DEA headquarters" under the Due Process Clause and 21 U.S.C. 824(c). Resp. Motion Req. Transfer of Req. for Writ of Habeas Corpus, at 1–2.

The next day, Respondent filed his response to the Government's motion for summary disposition. Respondent's Resp., at 1. Therein, Respondent asserted that "[d]ue process dictates that this Court must ensure that legal representation is obtained for" him and that "[h]e had a right to be present at the formal hearing as indicated in [the] Show Cause Order." *Id.* at 2. Respondent further stated that he "cannot reply to the Government's response, [as] to do so, allows the assumption that he is acting Pro Se, without legal representation in this proceeding." *Id.* Continuing, Respondent contended that "it is incumbent that this Court secure the assistance of an Article III [j]udge" to issue a writ of habeas corpus. *Id.* Respondent thus requested that the proceeding be stayed pending resolution of the issue. *Id.*

On March 16, the ALJ issued an Amended Order granting the Government's Motion for summary disposition.[3] Amended Order Granting Summary Disposition, at 5. Therein, the ALJ noted that "no genuine dispute exists over the material fact that Respondent currently lacks state authority to handle controlled substances in Mississippi, his state of registration with the DEA, since his state license was indefinitely suspended on May 4, 2009." *Id.* at 4. The ALJ thus applied the Agency's settled rules that "a practitioner must be currently authorized to handle controlled substances in 'the jurisdiction in which he practices' in order to maintain a DEA registration," and "because 'possessing authority under state law to handle controlled substances is an essential condition for holding a DEA registration * * * the CSA requires the revocation of a registration issued to a practitioner who lacks [such authority].'" *Id.* at 3 (quoting *Roy Chi Lung,* 74 FR 20346, 20347 (2009) (other citations omitted)). The ALJ further noted that revocation is warranted even "'when a state license has been suspended, but with the possibility of future reinstatement,'" *id.* (quoting *Roger A. Rodriguez,* 70 FR 33206, 33207 (2005)), "and even where there is a judicial challenge to the state medical board action actively pending in the state courts." *Id.* at 4 (citing *Michael G. Dolin,* 65 FR 5661, 5662 (2000)). The ALJ thus granted the Government's motion for summary disposition and recommended that Respondent's registration be revoked and that any pending applications be denied.[4] *Id.* at 5.

On March 11, 2010, following the ALJ's initial order granting summary disposition, Respondent filed a pleading he entitled as "Inter-Agency Appeal For Reconsideration of Administrative Law Judge's Decision and Request For Stay of ALJ's Final Judgement [sic]." For the purpose of this decision, this pleading will be deemed to be Respondent's Exceptions to the ALJ's recommended decision.

On April 12, 2010, the ALJ forward the record to me for final agency action. Having considered the entire record, I reject each of the arguments raised in Respondent's Exceptions and adopt the ALJ's decision in its entirety.

In his Exceptions, Respondent raises three primary arguments. First, he contends that the ALJ erred by failing to either appoint counsel to represent him or alternatively, by failing to refer his request for a writ of habeas corpus to an Article III judge, who would presumably order the Government to allow him to personally attend the hearing. As for the first part of his contention, there is no constitutional right to appointed counsel in a proceeding under 21 U.S.C. 824(a). *See Goldberg* v. *Kelly,* 397 U.S. 254, 270 (1970). Nor does Respondent cite any authority for his contention that the ALJ was required to transfer his request for a writ of habeas corpus to an Article III judge, which Respondent could have filed in the appropriate federal district court.[5]

Next, Respondent contends that the ALJ's grant of summary disposition was "arbitrary and capricious" because there were disputed issues of material fact. According to Respondent, he did not

In his Order Directing the Government to File Evidence, the ALJ noted that Respondent's "request is beyond the jurisdiction of this tribunal." Order Directing Gov. to File Evidence Regarding Status of Resp.'s State Authority, at 1 n.1.

[3] Apparently, the ALJ initially mistook Respondent's February 16 motion requesting that his request for a writ of habeas corpus be transferred to an Article III judge as his pleading responding to the Government's summary judgment motion and issued a recommended decision on February 17. At some point thereafter, the ALJ concluded that the pleading Respondent filed on February 17 was, in fact, intended to be his response to the Government's summary disposition motion although he maintained that he "cannot reply to the Government's response, [because] to do so, allows the assumption that he is acting Pro Se, without legal representation in this proceeding." Respondent's Resp. to ALJ's Order, at 2. The ALJ therefore considered the arguments contained therein and issued an amended decision.

[3] In his Amended Order, the ALJ did not address any of the contentions raised by Respondent in his March 11, 2010 "Inter-Agency Appeal for Reconsideration of Administrative Law Judge's Decision and Request for Stay of ALJ's Final Judgement [sic]." Amended Order Granting Summary Disposition, at 3 n.4.

[5] The ALJ explained that had a hearing been necessary, he would have taken "all reasonable steps" to provide a hearing, "notwithstanding his incarcerated status." ALJ Amended Order at 5 n.5.

"knowingly and intelligently" waive his right to a hearing before the Mississippi Board, *id.* at 12; his "waiver [was] obtained through misrepresentation and under extreme duress," *id.* at 8; and he is currently challenging the validity of his waiver in the Mississippi State Courts. *Id.* at 12.

This argument, however, takes Respondent nowhere because "DEA has repeatedly held 'that a registrant cannot collaterally attack the results of a state criminal or administrative proceeding in a proceeding under section 304 [21 U.S.C. § 824] of the CSA.'" *Hicham K. Riba,* 73 FR 75773, 75774 (2008) (quoting *Brenton D. Glisson,* 72 FR 54296, 54297 (2007) (other citation omitted)). *See also Shahid Musud Siddiqui,* 61 FR 14818 (1996); *Robert A. Leslie,* 60 FR 14004 (1995). Respondent's various contentions regarding the validity of the Consent Order are therefore not material to this Agency's resolution of whether he is entitled to maintain his DEA registration.

Because 21 U.S.C. 824(a)(3) authorizes the revocation of a registration "upon a finding that the registrant * * * has had his State license suspended [or] revoked * * * and is no longer authorized by State law to engage in the * * * distribution [or] dispensing of controlled substance," the only fact material to resolving this dispute is whether Respondent holds a State license. There being no dispute that Respondent lacks the requisite state authority, there was no need for an evidentiary hearing, as summary judgment has been used for more than 100 years to resolve legal "actions in which there is no genuine issue as to any material fact" and has never been deemed to violate Due Process. *See* Fed. R. Civ. P. 56 (Advisory Committee Notes—1937 Adoption). *Cf. Codd* v. *Velger,* 429 U.S. 624, 627 (1977).

Nor was Respondent entitled to an in-person hearing to challenge the sanction which the ALJ recommended. *Cf. Anderson* v. *Recore,* 446 F.3d 324, 330–31 (2d Cir. 2006). Under DEA's longstanding interpretation of the CSA, revocation is warranted whenever a practitioner's state authority has been revoked because, under the plain terms of the statute, possessing such authority is an essential condition for holding a DEA registration. *See* 21 U.S.C. 802(21) ("[t]he term 'practitioner' means a physician * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice"). *See also id.* § 823(f) ("The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.").

Accordingly, DEA has repeatedly held that the CSA requires the revocation of a registration issued to a practitioner whose state license has been suspended or revoked. *David W. Wang,* 72 FR 54297, 54298 (2007); *Sheran Arden Yeates,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci,* 58 FR 51104, 51105 (1993); *Bobby Watts,* 53 FR 11919, 11920 (1988).[6] This is so even where a state board has suspended (as opposed to revoked) a practitioner's authority with the possibility that the authority may be restored at some point in the future, *Rodriguez,* 70 FR at 33207, as well as where, as here, a practitioner has sought judicial review of the state board proceeding. *Dolin,* 65 FR at 5662. Because Respondent currently lacks authority to dispense controlled substances in Mississippi, the State in which he holds his DEA registration, his registration will be revoked and any pending applications will be denied.[7]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) and 0.104, I order that DEA Certificate of Registration, AR7086689, issued to Calvin Ramsey, M.D., be, and it hereby is, revoked. I further order that any pending application of Calvin Ramsey, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective May 11, 2011.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

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BILLING CODE 4410–09–P

[6] In his Exceptions, Respondent cites two cases which he contends the ALJ "failed to consider" as cases where physicians had lost their state licenses and yet "no revocation of [the] physician's DEA license occurred. Exceptions at 8 (citing *Barry H. Brooks, M.D.,* 66 FR 18305 (2001); *Vincent J. Scolaro,* 67 FR 42060 (2002)). Neither of these case support Respondent because in both of them, the physician's state authority had been restored at the time of the proceeding. *See Brooks,* 66 FR at 18308; *Scolaro,* 67 FR at 42065.

[7] In the event the State Board restores Respondent's medical license at some point in the future, he can then apply for a new registration.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Clifton D. Burt, M.D.; Revocation of Registration

On April 6, 2010, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Clifton D. Burt (Registrant) of Richmond, Virginia and Union, New Jersey. The Show Cause Order proposed the revocation of Registrant's DEA Certificates of Registration, FB0575499 and FB1499587, on the ground that his "continued registrations are inconsistent with the public interest as that term is defined in 21 U.S.C. 823(f)." Show Cause Order, at 1.

The Show Cause Order alleged that from "May 2008 to October 2008," Registrant "prescribed controlled substances to individuals via the Internet based on online questionnaires, submissions of unverifiable medical records, and telephone consultations" such that the prescriptions "were for other than a legitimate medical purpose or outside the usual course of professional practice in contravention of 21 CFR 1306.04(a)." *Id.* at 2. The Order further alleged that Registrant "failed to establish a valid physician-patient relationship as required by the laws of Virginia." *Id.* (citing, *inter alia,* Va. Code Ann. §§ 54.1–2915.A(3), (13), (16) & (17)). The Order next alleged that "[f]rom October 2008 to March 2009," Registrant "directly dispensed control substances to patients in Schedules IV and V without possessing a controlled substance certificate in violation of the laws of the Commonwealth of Virginia." *Id.* (citing, *inter alia,* Va. Code Ann. §§ 54.1–2914.A., 54.1–2915.A(17) & (18), 54–1–111.A(4),[1] and 54.1–3303(A)). The Order also informed Registrant of his right to request a hearing or to submit a written statement in lieu of a hearing, the applicable procedures for doing so, and the consequence if he failed to do either. *Id.* at 2–3.

On April 9, 2010, the Show Cause Order was served on Registrant by registered mail addressed to him at both of his registered locations. Since that time, thirty days have now passed, and neither Registrant, nor anyone purporting to representing him, has either requested a hearing or submitted a written statement. I therefore find that Registrant has waived his rights under 21 CFR 1301.43(b) and (c) and therefore

[1] The correct citation is Va. Code Ann. § 54.1–111.A(4).

issue this Decision and Final Order based on relevant evidence contained in the record submitted by the Government. 21 CFR 1301.43(e).

Findings

Registrant is the holder of two DEA registrations, both of which authorize him to dispense controlled substances in schedules II through V as a practitioner: (1) Certificate of Registration FB1499587, issued for the registered location of 1505 Stuyvesant Avenue, Union, New Jersey, and which expires on July 31, 2012; and (2) Certificate of Registration FB0575499, issued for the registered location of 9211 Burge Avenue, Richmond, Virginia, which expires on July 31, 2010. The record, however, contains no evidence as to whether Respondent has filed an application to renew the latter registration.

On September 17, 2008 a DEA Diversion Investigator (DI) and a DEA Special Agent (SA) interviewed patient T.M. at the Richmond District Office. T.M. indicated that since 2006, he had obtained hydrocodone through the Web site Fortune Telemed on ten to fifteen occasions. T.M. stated that he acquired the drugs by visiting the Web site, filling out an online questionnaire, and requesting the drug; T.M. also faxed his medical records to the Web site. Thereafter, T.M. spoke on the phone with individuals who identified themselves as physicians and who, after a brief consultation, wrote prescriptions for him for hydrocodone/acetaminophen(apap) (10/325 mgs.), the drug he had requested. T.M. was never physically examined by, let alone met, any of the physicians who issued the prescriptions he obtained through Fortune Telemed.

During his interview, T.M. did not recall the names of the Fortune Telemed physicians. However, the record contains copies of two controlled substance prescriptions (dated June 7 and July 20, 2008) issued by Registrant for T.M., both of which were for 45 tablets of hydrocodone/apap (10/325 mgs.), a schedule III controlled substance. *See* 21 CFR 1308.13(e).

On September 18, 2008, two DIs interviewed patient N.N. N.N. stated that he had received hydrocodone/apap (10/325 mgs.) ten to fifteen times in the last year and a half from the Web site Topline.com. N.N. stated that to acquire the drugs, he had completed an online questionnaire, requested the drug and faxed his medical records to Topline; thereafter, N.N. was called by individuals who identified themselves as physicians and who wrote the prescriptions after consultations which typically lasted less than five minutes. N.N. was never physically examined by, nor saw, any of these physicians.

N.N. did not remember the names of any of the Topline physicians. The record, however, contains a copy of a prescription written by Registrant for N.N. on June 10, 2008 for 90 tablets of hydrocodone/apap (10/325 mgs.).

On September 24, 2008, a DI and SA interviewed patient R.D. in Alexandria, Virginia. R.D. stated that during the previous two and a half to three years, he had obtained hydrocodone/apap (10/500 mgs.) approximately 30 times from the Web site Telemed. R.D. stated that he had filled out an online questionnaire, requested the drug, and faxed his medical records to Telemed. Thereafter, R.D. was called by individuals who identified themselves as doctors from Telemed, who then did a two to three minute-long consultation with him. R.D. stated that he never was physically examined by the Telemed doctors and never saw them.

Although R.D. stated that he had obtained hydrocodone 10 mg. from Telemed, the only prescriptions written by Registrant for him which are in the record were for 30 tablets of Ambien (zolpidem), a schedule IV controlled substance.[2] *See* 21 CFR 1308.14(c). The prescriptions were dated July 1, October 14, November 26, and December 26, 2008.

On September 26, 2008, a DI and an SA interviewed patient K.H. at his residence in Manassas, Virginia. K.H. indicated that he first visited the Topline Web site to obtain drugs in "[e]arly 2008." He completed an online questionnaire and faxed his medical records to the site. He was then contacted by individuals identifying themselves as physicians who, after "[n]o more than five (5) minutes" of conversation, wrote prescriptions for hydrocodone/apap (10/500 mgs.). The Topline doctors issued the prescriptions without ever physically examining or meeting him.

The investigative file contains three controlled substance prescriptions written by Registrant for K.H. All were for 90 tablets of hydrocodone/apap (10/500 mgs.) and are dated October 30, November 28, and December 23, 2008.

On Wednesday, March 4, 2009, an Intelligence Research Specialist (IRS), a DI, and an Investigator from the Virginia Department of Health Professionals interviewed Registrant at his place of employment, Concentra Medical Center ("Concentra") in Richmond, Virginia. Registrant stated that he first learned about Telemed Ventures, L.L.C. ("Telemed") through advertising in May 2008 and that he contacted the company on his own initiative. After speaking with a woman named Ana Goris and providing his curriculum vitae and licensing information, he then spoke with the Medical Director, Dr. John Maye.

During the interview, Registrant stated that he was still working for Telemed. In the interview, he indicated that he would review any medical records submitted by the customer and talk with him, discuss the side effects of the drug being sought, and then authorize the prescription, which he would fax to Telemed Ventures, L.L.C. He further claimed that he could deny the prescription if he chose to.

According to Registrant, customers were required to submit updated records approximately every four to six months, but he did not state what records were required. Registrant stated that he never ordered any medical tests for any of Telemed's customers and that he never independently verified customer records. He further asserted that he would speak with approximately three to nine customers per week and admitted that he never saw the customers in person or evaluated them face-to-face. He also stated that he was paid $25.00 for new patients and $20.00 for returning patients and that he received a check every Friday in payment for the consultations he had done the previous week. Finally, he stated that the majority of the Telemed customers requested hydrocodone.

On November 7, 2009, Registrant entered into a Consent Order with the Virginia Board of Medicine ("the Board"). In its Findings of Fact, the Board determined that Registrant "violated Sections 54.1–2915.A(3),[3] (13),[4] (16)[5] and (17),[6] and Section 54.1–

[2] Ambien is the name brand of generic zolpidem.

[3] Under Virginia law, the Board may discipline a physician, suspend his license or revoke his license for the "unprofessional conduct" of "[i]ntentional or negligent conduct in the practice of any branch of the healing arts that causes or is likely to cause injury to a patient or patients." Va. Code Ann. § 54.1–2915.A(3).

[4] This paragraph makes it unprofessional conduct for a physician to "[c]onduct[] his practice in a manner as to be a danger to the health and welfare of his patients or to the public." Va. Code Ann. § 54.1–2915.A(13).

[5] This paragraph makes it unprofessional conduct for a physician to "[p]erform[] any act likely to deceive, defraud, or harm the public." Va. Code Ann. § 54.1–2915.A(16).

[6] This paragraph makes it unprofessional conduct for a physician to "[v]iolat[e] any provision of statute or regulation, state or federal, relating to the manufacture, distribution, dispensing, or administration of drugs." Va. Code Ann. § 54.1–2915.A(17).

3303.A [7] of the Code, in that from May 2008 to October 2008, he prescribed controlled substances, including hydrocodone * * * and zolpidem * * * to individuals outside of a bona fide practitioner-patient relationship." Consent Order, at 1. According to the Consent Order, "during that time period [Registrant] was employed by Secure Telemedicine, LLC ("Telemed"), a company offering medical services and prescriptions to patients via its Web site, *TopLineRx.com*." *Id.* The Consent Order further indicated that Registrant "stated that he would review medical records and speak with patients by phone prior to issuing a prescription" and that he "prescribed controlled substances to these individuals without seeing these patients in person and without performing any physical examinations on these patients." *Id.* at 1–2.

In its findings, the Board also determined that Registrant "violated Sections 54.1–2915.A(17) and (18),[8] and Section 54.1–111.A(4) [9] of the Code, in that, from approximately October 2008 to March 4, 2009, he dispensed controlled substances in Schedules IV, V, and VI to patients without being licensed by the Board of Pharmacy, as required by Section 54.1–3302 of the Code." *Id.* at 2. The Board further found that "since October 1, 2008, [Registrant] has been employed by Concentra Medical Center * * * in Richmond, Virginia, providing medical care to workers' compensation patients," that he "admits that he has dispensed controlled substances during the course of his employment with Concentra, and states that he was unaware that he was required to have an additional license to do so." [10] *Id.* By the terms of the Consent Order, Registrant received a reprimand, was fined fifteen hundred dollars ($1,500.00), and was required to complete "at least twelve (12) hours of continuing medical education * * * in the subject of proper prescribing." *Id.*

Discussion

Section 304(a) of the Controlled Substances Act ("CSA") provides that a "registration pursuant to section 823 of this title to * * * dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would make his registration under section 823 of this title inconsistent with the public interest as determined under such section." 21 U.S.C. 824(a)(4). In the case of a practitioner, Congress directed that the following factors be considered in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. 21 U.S.C. 823(f).

"[T]hese factors are * * * considered in the disjunctive." *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application. *Id.* Moreover, I am "not required to make findings as to all of the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005).

While I have considered all five factors, I conclude that it is not necessary to make findings as to factors one, three, and five. As explained below, I conclude that the evidence relevant to Registrant's experience in dispensing controlled substances (factor two) and his compliance with applicable laws related to controlled substance (factor four) establishes that he has committed acts which render his registration "inconsistent with the public interest." 21 U.S.C. 824(a)(4). I will therefore order that his registration be revoked and that any pending application be denied.

Factors Two and Four: Registrant's Experience in Dispensing Controlled Substances and Record of Compliance With Applicable Controlled Substance Laws

Under a longstanding DEA regulation, a prescription for a controlled substance is not effective unless it is issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. 21 CFR 1306.04(a). This regulation further provides that an "order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of * * * 21 U.S.C. 829 * * * and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." *Id. See also* 21 U.S.C. 802(10) (Defining the term "dispense" as meaning "to deliver a controlled substance to an ultimate user * * * by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance.")

As the Supreme Court recently explained, "the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses." *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)).

Under the CSA it is fundamental that a practitioner must establish and maintain a bona fide doctor-patient relationship in order to act "in the usual course of * * * professional practice" and to issue a prescription for a "legitimate medical purpose." *Laurence T. McKinney,* 73 FR 43260, 43265 n.22 (2008); *see also Moore,* 423 U.S. at 142–43 (noting that evidence established that physician exceeded the bounds of professional practice "when he gave inadequate physical examinations or none at all," "ignored the results of the tests he did make," and "took no precautions against * * * misuse and diversion."). At the time of the events at issue here, the CSA generally looked to state law to determine whether a doctor and patient have established a bona fide doctor-patient relationship. *See Christopher Henry Lister,* 75 FR 28068,

[7] Similar to the CSA, Virginia law provides that a "prescription for a controlled substance may be issued only by a practitioner of medicine * * * who is authorized to prescribe controlled substances" and that the "prescription shall be issued for a medicinal or therapeutic purpose and may be issued only to persons * * * with whom the practitioner has a bona fide practitioner-patient relationship." Va. Code Ann. § 54.1–3303.A. The section also provides, in pertinent part, that "a bona fide practitioner-patient relationship means that the practitioner shall * * * (iii) perform or have performed an appropriate examination of the patient, either physically or by means of instrumentation and diagnostic equipment through which images and medical records may be transmitted electronically." *Id.*

[8] This paragraph makes it unprofessional conduct to "[v]iolat[e] or cooperat[e] with others in violating any of the provisions of Chapters 1, 24, and this chapter or regulations of the Board." Va. Code Ann. § 54.1–2915.A(18).

[9] This section makes illegal "[p]erforming any act of function which is restricted by statute or regulation to persons holding a professional or occupational license or certification, without being duly certified or licensed." Va. Code Ann. § 54.1–111.A(4).

[10] In the Consent Order, Registrant "neither admit[ted] nor den[ied] the truth of the * * * Findings of Fact, but agree[d] not to contest them in any future proceedings before" the Board. *Id.* at 3. This, however, does not foreclose the Agency from giving weight to these findings.

28069 (2010); *Kamir Garces-Mejia,* 72 FR 54931, 54935 (2007); *United Prescription Services, Inc.,* 72 FR 50397, 50407 (2007).

Under Virginia law, a controlled substance prescription "shall be issued for a medicinal or therapeutic purpose and may be issued only to persons * * * with whom the practitioner has a bona fide practitioner-patient relationship." Va. Code Ann. § 54.1–3303.A. Furthermore, under the statute, "a bona fide practitioner-patient relationship means that the practitioner shall * * * (iii) perform or have performed an appropriate examination of the patient, either physically or by the use of instrumentation and diagnostic equipment through which images and medical records may be transmitted electronically." *Id.*

As found above, Registrant admitted in an interview with agency Investigators that he prescribed controlled substances for Telemed without conducting physical examinations of its customers. Moreover, the record shows that each of the four persons who were interviewed by DEA Investigators, obtained controlled substances from Telemed through prescriptions issued by him, without being physically examined by him, let alone seeing him. The Virginia Board's findings corroborate the various admissions Registrant made in his interview as well as the statements made by T.M., N.N., R.D., and K.H. in their respective interviews. I therefore find that Registrant issued controlled substances to internet patients without physically examining them and that he failed to establish a bona fide doctor-patient relationship with the Telemed customers. I further hold that in prescribing controlled substances to these persons, Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice. 21 CFR 1306.04(a). Respondent thus violated both the CSA and Virginia law.

I further find—as did the Virginia Board—that Registrant violated Virginia Code §§ 54.1–2915.A(17) & (18) in that between October 2008 and March 2009, he prescribed controlled substances in Virginia's schedules IV through VI in the State of Virginia without possessing the required license. Consent Order, at 2; *see also Christopher Henry Lister,* 75 FR 28068, 28069 (2010) (citing *University of Tennessee* v. *Elliot,* 478 U.S. 788, 797–98 (1986)). This conduct also violated a DEA regulation. *See* 21 CFR 1306.03(a)(1). I therefore find that Registrant violated both DEA regulation and Virginia law in this regard as well.[11]

In sum, the evidence shows that Registrant has repeatedly violated both Federal and State laws related to the dispensing of controlled substances and has therefore committed acts which render his registration "inconsistent with the public interest." 21 U.S.C. 824(a)(4). Accordingly, Respondent's registrations will be revoked and any pending application to renew or modify either registration will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. §§ 823(f) & 824(a)(4), as well as 28 CFR 0.100(b) & 0.104, I order that DEA Certificate of Registration FB1499587, issued to Clifton D. Burt, M.D., be, and it hereby is, revoked. I also order the Office of Diversion Control to determine whether Clifton D. Burt, M.D., filed a timely renewal application for DEA Certificate of Registration FB0575499, and if so, order that this registration be, and it hereby is, revoked. I further order that any pending application of Clifton D. Burt, M.D., to renew or modify his registrations, be, and it hereby is, denied. This Order is effective May 11, 2011.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

The Medicine Dropper; Revocation of Registration

On January 29, 2010, I, the then Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration (Order) to The Medicine Dropper (Respondent), of Greenwood, South Carolina. The Order proposed the revocation of Respondent's DEA Certificate of Registration, BT2981214, as a retail pharmacy, and the denial of any pending applications to renew or modify its registration, on the ground that its "continued registration is inconsistent with the public interest." Order, at 1.

More specifically, the Order alleged that, on March 18, 2009, Respondent's owner had entered into a Settlement Agreement with the United States Attorney for the District of South Carolina under which he agreed to a policy "to prevent the use of [his] pharmacy for 'doctor shopping' and [to] provide quarterly reports of all Schedule II controlled substances [it] dispensed." *Id.* at 1–2. The Order also alleged that in the settlement, Respondent's owner "agreed to 'fill prescriptions using the correct DEA number for the physician and [to] ensure that all required elements of the prescriptions are present prior to dispensing,'" as well as to comply with Federal and State laws related to the dispensing of controlled substances. *Id.*

The Order alleged that, after executing the Settlement Agreement, Respondent's owner continued to dispense prescriptions for schedule III controlled substances containing hydrocodone to L.P, even though she submitted similar prescriptions from three different physicians between June and November of 2009. *Id.* With respect to L.P., the Order further alleged that Respondent had "dispensed an excessive amount of hydrocodone," and that "[b]ased on Respondent's own calculations for what constitutes a 'day's supply' of hydrocodone for L.P., Respondent dispensed the equivalent of 709 'day's supplies' during the period between September 22, 2008 and September 1, 2009," and that "[t]his resulted in dispensing more than twice the recommended amount of hydrocodone that L.P. should have received." *Id.*

Next, the Order alleged that in January and February 2009, Respondent distributed Lyrica, a schedule V controlled substance, "to T.M. without a valid prescription in violation of 21 U.S.C. § 841(a)," and that it "also furnished false or fraudulent material information regarding T.M.'s Lyrica prescriptions in violation of 21 U.S.C. § 843(a)(4)(A) and mislabeled T.M.'s Lyrica prescription in violation of 21 CFR 1306.24(a)." *Id.* The Order further alleged that on September 14, 2009, Respondent completed filling a prescription for Dilaudid (hydromorphone), a schedule II controlled substance, which T.M. had presented to it in August 2009, thereby

[11] Under Federal law, because Respondent did not hold a Virginia license to dispense controlled substances, he was not even entitled to hold a DEA registration in the State because he did not meet a statutory prerequisite for obtaining a registration. *See* 21 U.S.C. 802(21) (defining "[t]he term 'practitioner' [as] a physician * * * licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices * * * to dispense * * * a controlled substance in the course of professional practice"); *id.*§ 823(f) ("The Attorney General shall register practitioners * * * to dispense * * * controlled substances * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices."). *See also Jovencio L. Raneses,* 75 FR 11563, 11564 (2010); *Nasim F. Khan,* 73 FR 4630, 4632 (2008).

violating 21 CFR 1306.13(a), which requires that a partially-filled prescription for a schedule II controlled substance be completely filled within 72 hours of the partial filling. *Id.* With respect to T.M., the Order also alleged that in September 2009, Respondent provided false information regarding his prescriptions to an inspector from the South Carolina Department of Health and Environmental Control. *Id.*

The Order further alleged that in September 2009, Respondent violated 21 CFR 1306.11(d)(4), when it "filled an 'emergency' oral call-in prescription for" MS Contin, a schedule II controlled substance, "for patient D.S. without notifying DEA that no written order was ever received." *Id.* The Order also alleged that Respondent violated South Carolina law by filling two prescriptions for schedule II controlled substances "that were more than 90 days old." *Id.* at 3.

Finally, the Order alleged that "[s]ince March 2009, Respondent has repeatedly violated the terms of the Settlement Agreement" by "permitt[ing] doctor shopping, fill[ing] prescriptions for controlled substances without a legitimate medical purpose," and violating other Federal and State laws in filling various prescriptions. *Id.* The Order further alleged that Respondent had violated the Settlement Agreement because it had "failed to provide DEA with quarterly reports of all schedule II controlled substances [it] dispensed." *Id.*

Based on the above, I concluded that Respondent's continued registration during the pendency of the proceeding "constitutes an imminent danger to the public health and safety." *Id.* Pursuant to my authority under 21 U.S.C. 824(d), I therefore immediately suspended Respondent's registration and ordered that the suspension "remain in effect until a final determination is reached in these proceedings." *Id.*

On February 3, 2010, the Order, which also notified Respondent of its right to a hearing to contest the allegations (as well as its right to submit a written statement in lieu of a hearing), the procedure for requesting a hearing, and the consequence if it failed to do so, was served on Respondent. *See id.* at 3 (citing 21 CFR 1301.43(a), (c), (d) & (e)). Since the date of service of the Order, neither Respondent, nor anyone purporting to represent it, has requested a hearing or submitted a written statement in lieu of a hearing. Thirty days now having passed since the Order was served on Respondent, I find that it has waived its right to a hearing. *See* 21 CFR 1301.43(b) & (d). I therefore issue this Decision and Final Order based on the evidence contained in the investigative record submitted by the Government. *Id.* 1301.43(e). I make the following findings.

Findings

Respondent is a corporation organized under the laws of South Carolina, which is owned by John Frank Weeks and Derrelyn B. Weeks. Respondent operates a retail pharmacy located at 420 Epting Avenue, Greenwood, South Carolina, and is the holder of DEA Certificate of Registration, BT2981214, which authorizes it to dispense controlled substances in schedules II through V as a retail pharmacy. Respondent's registration was to expire on November 30, 2009; however, on October 16, 2009, Respondent submitted a renewal application. Accordingly, Respondent's registration remains in effect (albeit in suspended status) pending the issuance of this Final Order. *See* 5 U.S.C. 558(c).

On March 23, 2009, Respondent and its owners entered into a Settlement Agreement with the United States of America, which was intended to resolve the latter's civil and administrative claims based on its contentions that, between June 14, 2002 and January 16, 2008, Respondent violated the Controlled Substances Act and DEA regulations "by filling prescriptions for other than legitimate medical purposes; ignoring evidence of diversion; and dispensing excessive doses of controlled substances." [1] Settlement Agreement at 2. As part of the Settlement Agreement, Respondent and its owners agreed that "as a registrant with the DEA, they have a duty to comply with all federal regulations governing the dispensing and distribution of controlled substances." *Id.* at 8.

Respondent and its owners further agreed that "[t]hey will adopt a reasonable and customary policy suitable to the DEA to prevent the use of their pharmacy for 'doctor shopping' and will provide quarterly reports of all schedule II controlled substances dispensed in such a form as reasonably required by the DEA." *Id.* at 9. In addition, Respondent and its owners agreed that "[t]hey will fill prescriptions using the correct DEA number for the physician and ensure that all required elements of the prescription are present prior to dispensing" and that "[t]hey will comply with State and Federal law pertaining to the dispensing of controlled substances." *Id.*

According to the affidavit of a DEA Diversion Investigator, notwithstanding Respondent's (and its owner's) promise to adopt a policy to prevent doctor shopping, between June 2009 and November 2009, Respondent dispensed ten prescriptions for schedule III controlled substances containing hydrocodone to L.P., which were issued by three different doctors. Affidavit at 3–4. Moreover, according to Respondent's records, in most instances, the quantity dispensed was intended to be a thirty-day supply, yet in several instances Respondent dispensed an additional thirty-day supply well before the prescription it had previously dispensed would have run out and frequently did so weeks early, and in one instance, nearly four weeks early. More specifically, Respondent's records show that, based on prescriptions issued by a Dr. B., Respondent dispensed a thirty-day supply to L.P. on April 9 and 24, May 2, 5, and 22, June 1 and 20, and July 1, 2009.

In his affidavit, the DI further stated that Respondent had dispensed prescriptions for Lyrica, a schedule V controlled substance to T.M., which were purportedly called in by a Dr. M. Affidavit at 5–6. However, in a letter, Dr. M. stated that he had discharged T.M. from his clinic on October 29, 2008, and that the last prescription he had authorized was on October 22, 2008. Included in the record are five "TELEPHONE PRESCRIPTION" forms, attached to which are the stickers indicating the actual dispensing of 90 tablets of Lyrica 150 mg. and listing Dr. M. as the prescriber. According to these documents, Respondent dispensed Lyrica to T.M. on November 28, 2008, January 6, May 1, June 2 and July 8, 2009, well after Dr. M. had discharged her.

Subsequently, Mr. Weeks (Respondent's owner) wrote a letter to Lauren Patton, an Inspector with the South Carolina Department of Health and Environmental Control. Affidavit at 5. Therein, Mr. Weeks asserted that he had reviewed the actual prescription-fill information, and that subsequent to November 28, 2008, Respondent did not dispense any more Lyrica to T.M. because she was placed on hold while the pharmacy waited for her to bring in an actual prescription. *Id.* However, other records of Respondent show that it billed T.M.'s insurance company for Lyrica prescriptions attributed to Dr. M. which were dispensed on January 6, February 6, March 5, April 3, May 1, June 2, July 8, and August 7, 2009. In addition, the record includes a photograph of a drug vial; the vial bears the label of Respondent's pharmacy and indicates that on May 1, 2009, it dispensed 60 tablets of Lyrica to T.M.,

[1] The Agreement was also intended to resolve the Government's contentions that Respondent had submitted various false claims to the South Carolina Medicaid Program.

that T.M. was owed 30 tablets of the authorized quantity and lists Dr. M. as the prescriber. According to the DI's affidavit, during an interview, T.M. showed them two vials for Lyrica which listed Dr. M. as the prescriber and which were dispensed to her by Respondent on January 6 and May 1, 2009.[2]

Other evidence shows that while Respondent repeatedly dispensed prescriptions for hydromorphone (a schedule II controlled substance), which were purportedly authorized by Dr. M., a pain management specialist, and did so through May 1, 2009, on multiple occasions during this period it also dispensed hydrocodone to T.M. based on prescriptions issued by other practitioners. Indeed, on May 1, 2009, Respondent dispensed to T.M. 240 tablets of hydromorphone purportedly authorized by Dr. M. and 90 tablets of hydrocodone authorized by J.B., a Family Nurse Practitioner. Moreover, other documents establish that Dr. M. and J.B. did not work in the same practice.

The record also includes a copy of a "Telephoned Prescription" dated "09/03/09" for 28 tablets of "MSCOTIN [sic] 30 mg." for patient D.S. According to the DI's affidavit, "no subsequent written order was ever received and Respondent did not notify DEA" as required under 21 CFR 1306.11(d)(4). Affidavit at 6. However, there is no evidence such as prescription labels or a dispensing log establishing that the prescription was ever actually dispensed.

The record also contains two prescriptions which were issued on March 6, 2009, by Dr. S. to J.W. for 60 tablets of MS Contin (morphine sulfate) 100 mg. and 180 tablets Roxicodone (oxycodone) 30 mg., both of which are schedule II controlled substances under the CSA and South Carolina law. The record further establishes that the prescriptions were dispensed on August 7, 2009, approximately five months after they were issued.

Finally, while the Settlement Agreement requires that Respondent submit to DEA each quarter a report of the schedule II controlled substances it dispensed, according to the DI, it has never done so. *Id.* at 7.

Discussion

Section 304(a) of the Controlled Substance Act provides that "[a] registration * * * to * * * dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section." 21 U.S.C. 824(a). In determining the public interest, the Act directs that the Attorney General consider the following factors:

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
>
> (2) The applicant's experience in dispensing * * * controlled substances.
>
> (3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
>
> (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
>
> (5) Such other conduct which may threaten the public health and safety.

Id. § 823(f).

"[T]hese factors are * * * considered in the disjunctive." *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors, and may give each factor the weight I deem appropriate in determining whether a registration should be revoked and/or an application should be denied. *Id.* Moreover, it is well settled that I am "not required to make findings as to all of the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005). However, the Government has the burden of proof. 21 CFR 1301.44(d) & (e).

Having considered all of the factors, I conclude that the evidence pertinent to factors two and four makes out a *prima facie* showing that Respondent "has committed such acts as would render [its] registration * * * inconsistent with the public interest." 21 U.S.C. 824(a)(4). Accordingly, Respondent's registration will be revoked and its pending application to renew its registration will be denied.

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Relating to Controlled Substances

Under a longstanding DEA regulation, a prescription for a controlled substance is unlawful unless it has been "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 CFR 1306.04(a). The regulation further provides that while "[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, * * * a *corresponding responsibility rests with the pharmacist who fills the prescription*." *Id.* (emphasis added). Continuing, the regulation states that "the person knowingly filling such a purported prescription, as well as the person issuing it, [is] subject to the penalties provided for violations of the provisions of law relating to controlled substances." *Id.*

DEA has consistently interpreted this provision as prohibiting a pharmacist from filling a prescription for a controlled substance when he either "knows or has reason to know that the prescription was not written for a legitimate medical purpose." *Medic-Aid Pharmacy,* 55 FR 30043, 30044 (1990); *see also Frank's Corner Pharmacy,* 60 FR 17574, 17576 (1995); *Ralph J. Bertolino,* 55 FR 4729, 4730 (1990); *United States* v. *Seelig,* 622 F.2d 207, 213 (6th Cir. 1980). This Agency has further held that "[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription." *Bertolino,* 55 FR at 4730 (citations omitted).[3]

As the evidence shows, Respondent violated this regulation on multiple occasions when it dispensed prescriptions for schedule III controlled substances containing hydrocodone to L.P., notwithstanding that L.P. was filling the prescriptions weeks before a previously filled prescription would have run out. More specifically, pursuant to prescriptions issued by a Dr. B., Respondent dispensed 90 tablets of hydrocodone to L.P. on April 9 and 24, May 2, 5, and 22, June 1 and 20, and July 1, 2009. According to Respondent's records, each of these prescriptions provided a thirty-day supply to L.P. Yet Respondent repeatedly filled subsequent prescriptions weeks early. Indeed, even ignoring the April prescriptions, the May 5 prescription, which followed a prescription filled three days earlier, was filled nearly four weeks early. Given the dates on when L.P. presented the prescriptions, I conclude that Respondent and its employees clearly had reason to know

[2] The Government also alleged that Respondent violated 21 CFR 1306.13(a) because it did not fill the remainder of a prescription for Dilaudid (hydromorphone, a schedule II drug) until well after 72 hours of its having partially filled the prescriptions. The Government's evidence does not, however, establish this violation.

[3] As the Supreme Court recently explained, "the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses." *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135 (1975)).

that the prescriptions were unlawful. I thus hold that Respondent violated its corresponding responsibility under Federal law and DEA's regulation by filling prescriptions which it had reason to know were not legitimate. 21 CFR 1306.04(a); *Bertolino,* 55 FR at 4730. It is also clear that Respondent has breached the Settlement Agreement by failing to comply with Federal law and DEA regulations and by failing to institute a policy to prevent the filling of unlawful prescriptions.

The evidence also supports the conclusion that Respondent violated Federal law when it dispensed numerous prescriptions for Lyrica to T.M. which were purportedly authorized by Dr. M. by telephone. The evidence shows that the prescriptions were fraudulent because Dr. M. had previously discharged T.M. from his practice and ceased writing prescriptions for her. The evidence also shows that Mr. Weeks falsely represented to a State inspector that Respondent had not dispensed Lyrica after November 28, 2008, when, in fact, it had dispensed the drug multiple times to her. At a minimum, Mr. Weeks' willingness to lie about this issue (coupled with his failure to submit any evidence rebutting the allegation) supports the inference that he and Respondent had reason to know that the prescriptions were fraudulent and yet dispensed them anyway. *See* 21 U.S.C. 841(a)(1) and 843(a)(3); 21 CFR 1306.04(a).

In addition, the evidence shows that Respondent repeatedly dispensed narcotic drugs such as hydromorphone (also purportedly authorized by Dr. M) to T.M. for more than six months after she had been discharged by him, and that during this time period, it also repeatedly dispensed hydrocodone based on prescriptions which were issued by J.B. (a nurse practitioner). Dr. M. and J.B. did not, however, practice together. Yet Respondent repeatedly dispensed both drugs to T.M. and even dispensed both drugs to her on the same day (May 1, 2009). Once again, it is clear that Respondent violated its corresponding responsibility under 21 CFR 1306.04(a) and the Settlement Agreement on numerous occasions.

The record further establishes that Respondent violated South Carolina law when, on August 7, 2009, it dispensed 180 tablets of Roxicodone (oxycodone) 30 mg. and 60 tablets of MS Contin (morphine sulfate) 100 mg. to J.W. based on prescriptions which were dated March 6, 2009. Both drugs are schedule II controlled substances under South Carolina law (as they are under the CSA). *See* S.C. Code § 44–53–210(a). Under South Carolina law, "[p]rescriptions for Schedule II substances must be dispensed within ninety days of the date of issue, after which time they are void." *Id.* § 44–53–360(e). However, on the date Respondent dispensed these two prescriptions, they were more than five months old and were void. I thus conclude that Respondent violated South Carolina law by dispensing these prescriptions.

Finally, the Settlement Agreement clearly required that Respondent submit "quarterly reports of all schedule II controlled substances [it] dispensed." As found above, the DI's affidavit establishes that Respondent has never submitted such a report. Respondent is therefore in violation of the Settlement Agreement for this reason as well.

I therefore find that Respondent has committed acts which render its registration "inconsistent with the public interest." 21 U.S.C. 824(a)(4). Accordingly, Respondent's registration will be revoked and its pending application to renew its registration will be denied. For the same reasons which led me to order the immediate suspension of Respondent's registration, I conclude that this Order shall be effective immediately.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that DEA Certificate of Registration, BT2981214, issued to The Medicine Dropper, be, and it hereby is, revoked. I further order that any pending application of The Medicine Dropper for renewal or modification of its registration be, and it hereby is, denied. This Order is effective immediately.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–8542 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 08–16]

Four Seasons Distributors, Inc.; Order Accepting Settlement Agreement and Terminating Proceeding

On October 31, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Four Seasons Distributors, Inc. (Respondent), of Belleville, Illinois. The Show Cause Order proposed the revocation of Respondent's Certificate of Registration, which authorizes it to distribute listed chemicals, and the denial of any pending applications to renew or modify the registration, on the ground that Respondent's registration is "inconsistent with the public interest." ALJ Ex. 1 (citing 21 U.S.C. 823(h) & 824(d)).

Respondent, through its counsel, requested a hearing on the allegations and the matter was assigned to an agency Administrative Law Judge (ALJ), who conducted a hearing on April 21, 2008. Thereafter, on October 30, 2009, the ALJ issued her recommended decision. Therein, the ALJ found that the Government "ha[d] not met its burden of proof in showing that the Respondent's continued registration would be against the public interest" and recommended that its registration be continued. ALJ at 37. The Government apparently agreed as it did not file exceptions to the ALJ's decision. The ALJ then forwarded the record to me for final agency action.

Thereafter, the parties "reached a settlement of all administrative matters pending before" me and filed a joint motion which requests that I terminate the proceedings. Motion to Terminate Administrative Proceedings. The parties also included a copy of the Memorandum of Agreement, setting forth the terms of their settlement.

Having reviewed the ALJ's decision and the terms of the settlement agreement, I find that the settlement is appropriate and consistent with the public interest. Accordingly, the parties' motion to terminate the proceeding is hereby granted and the Order to Show Cause is dismissed.

It is so ordered.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–8537 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–0002]

Agency Information Collection Activities: Proposed Collection, Comments Requested

ACTION: 30-day Notice of Information Collection Under Review: Revision of a currently approved collection; Supplementary Homicide Report.

The Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with established review procedures of the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 76, Number 21, page 5611, on February 1, 2011, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until May 11, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Mr. Gregory E. Scarbro, Unit Chief, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, Module E–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306; facsimile (304) 625–3566 or sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please fax Mr. Gregory E. Scarbro at 304–625–3566 or call the DOJ Desk Officer at 202–395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, 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 of other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of information collection:* Revision of a currently approved collection.

(2) *The title of the form/collection:* Supplementary Homicide Report.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Form Number: 1–704; Sponsor: Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: City, county, state, federal and tribal law enforcement agencies. Brief Abstract: This collection is needed to collect information on law enforcement officers killed or assaulted in the line of duty throughout the U.S.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 17,985 law enforcement agency respondents that submit monthly for a total of 215,820 responses with an estimated response time of 9 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 32,373 hours, annual burden, associated with this information collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street, Room 2E–808, Washington, DC 20530.

Dated: April 4, 2011.

Lynn Murray,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 2011–8489 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–NEW]

Agency Information Collection Activities: New Collection, Comments Requested

ACTION: 30-day Notice of information collection for renewal: Final Disposition Report (R–84).

The Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Criminal Justice Information Services (CJIS) Division will be submitting the following information collection renewal to the Office of Management and Budget (OMB) for review in accordance with established review procedures of the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. The information collection was previously published in the **Federal Register** Volume 26, Page 6827, on February 8, 2011, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until May 11, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please call Rachel K. Hurst at 1–304–625–2000 or the DOJ Desk Officer at 202–395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have a 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 of other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of information collection:* Approval of existing collection in use without an OMB control number.

(2) *The title of the form/collection:* Final Disposition Report.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* R–84 (Final Disposition Report); CJIS Division, FBI, DOJ.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: City, county, state, federal and tribal law enforcement agencies. This collection is needed to report completion of an arrest record. Acceptable data is stored as part of the Integrated Automated Fingerprint Identification System (IAFIS) of the FBI.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 71,757 agencies as respondents at five minutes per Final Disposition Report completed.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 54,167 annual burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street, NE., Room 808, Washington, DC 20530.

Dated: April 5, 2011.

Lynn Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2011–8488 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Meeting of the Compact Council for the National Crime Prevention and Privacy Compact

AGENCY: Federal Bureau of Investigation.

ACTION: Meeting Notice.

SUMMARY: The purpose of this notice is to announce a meeting of the National Crime Prevention and Privacy Compact Council (Council) created by the National Crime Prevention and Privacy Compact Act of 1998 (Compact). Thus far, the Federal Government and 29 States are parties to the Compact which governs the exchange of criminal history records for licensing, employment, and similar purposes. The Compact also provides a legal framework for the establishment of a cooperative Federal-State system to exchange such records.

The United States Attorney General appointed 15 persons from State and Federal agencies to serve on the Council. The Council will prescribe system rules and procedures for the effective and proper operation of the Interstate Identification Index system for noncriminal justice purposes.

Matters for discussion are expected to include:

(1) The Compact Council's Strategic Plan Update
(2) Outreach to Compact Memorandum of Understanding (MOU), Non-MOU, and Non-Compact States
(3) Compact Language Review, Article IV

The meeting will be open to the public on a first-come, first-seated basis. Any member of the public wishing to file a written statement with the Council or wishing to address this session of the Council should notify the Federal Bureau of Investigation (FBI) Compact Officer, Mr. Gary S. Barron at (304) 625–2803, at least 24 hours prior to the start of the session. The notification should contain the requestor's name and corporate designation, consumer affiliation, or government designation, along with a short statement describing the topic to be addressed and the time needed for the presentation. Requestors will ordinarily be allowed up to 15 minutes to present a topic.

Dates and Times: The Council will meet in open session from 9 a.m. until 5 p.m., on May 18–19, 2011.

ADDRESSES: The meeting will take place at the Rosen Centre Hotel, 9840 International Drive, Orlando, Florida, telephone (407) 996–9840.

FOR FURTHER INFORMATION CONTACT: Inquiries may be addressed to Mr. Gary S. Barron, FBI Compact Officer, Compact Council Office, Module D3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306, telephone (304) 625–2803, facsimile (304) 625–2868.

Dated: March 24, 2011.

Kimberly J. Del Greco,

Section Chief, Biometric Services Section, Criminal Justice Information Services Division, Federal Bureau of Investigation.

[FR Doc. 2011–8394 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–02–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0197]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review—Extension of currently approved collection; Bureau of Justice Assistance Application Form: *State Criminal Alien Assistance Program.*

The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Assistance, will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. This proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until June 10, 2011.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact M. Berry at 202–353–8643 or 1–866–859–2687, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, 810 7th Street, NW., Washington, DC 20531.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please call M. Berry at 202–353–8463, or the DOJ Desk Officer at 202–395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four 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 through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information

(1) *Type of information collection:* Extension of currently approved collection.

(2) *The title of the form/collection: State Criminal Alien Assistance Program.*

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Bureau of Justice Assistance, Office of Justice Programs, United States Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract.* Primary: States and local units of general government including the 50 state governments, the District of Columbia, Guam, Puerto Rico, the U.S. Virgin Islands, and the more than 3,000 counties and cities with correctional facilities.

Other: None.

Abstract: In response to the Violent Crime Control and Law Enforcement Act of 1994 Section 130002(b) as amended in 1996, BJA administers the State Criminal Alien Assistance Program (SCAAP) with the Bureau of Immigration and Customs Enforcement (ICE), and the Department of Homeland Security (DHS). SCAAP provides Federal payments to States and localities that incurred correctional officer salary costs for incarcerating undocumented criminal aliens with at least one felony or two misdemeanor convictions for violations of state or local law, and who are incarcerated for at least 4 consecutive days during the designated reporting period and for the following correctional purposes;

Salaries for corrections officers;

Overtime costs;

Performance based bonuses;

Corrections work force recruitment and retention;

Construction of corrections facilities;

Training/education for offenders;

Training for corrections officers related to offender population management;

Consultants involved with offender population;

Medical and mental health services;

Vehicle rental/purchase for transport of offenders;

Prison Industries;

Pre-release/reentry programs;

Technology involving offender management/inter agency information sharing;

Disaster preparedness continuity of operations for corrections facilities.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that no more than 865 respondents will apply. Each application takes approximately 90 minutes to complete and is submitted once per year (annually).

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total hour burden to complete the applications is 1,297 hours. 865 × 90 minutes = 77,850/60 minutes per hour = 1,297 burden hours

If additional information is required contact: Lynn Murray, Department Clearance Officer, U.S. Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, 145 N Street, NE., Room 2E–808, Washington, DC 20530.

Lynn Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2011–8487 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,009A]

The Ubs Group, a Division Of Ubs Ag, Also Known as Ubs Financial Services, Inc. and/or Ubs-Glb (Americas), Inc., Formerly Known as Brinson Partners, Inc., Corporate Center Division; Group Technology Infrastructure Services, Distributed Systems and Storage Group; Chicago, Illinois; Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on February 8, 2010, applicable to workers of The UBS Group, a division of UBS AG, also known as UBS Financial Services, Inc., and/or UBS–GLB (Americas), Inc., Corporate Center Division, Group Technology Infrastructure Services, Distributed Systems and Storage Group, Chicago, Illinois. The workers provide information technology services. The notice was published in the **Federal Register** on December 8, 2010 (75 FR 76488).

At the request of the company, the Department reviewed the certification for workers of the subject firm.

New information shows that UBS–GLB (Americas), Inc. is formerly known as Brinson Partners. Some workers separated from employment at the Chicago, Illinois location of The UBS Group, a division of UBS AG, also known as UBS Financial Services, Inc., and/or UBS–GLB (Americas), Inc., formerly known as Brinson Partners, Corporate Center Division, Group Technology Infrastructure Services, Distributed Systems and Storage Group have their wages reported under a separate unemployment insurance (UI) tax account under the name Brinson Partners.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by a shift in information technology services to Singapore.

The amended notice applicable to TA–W–75,009 is hereby issued as follows:

"All workers of UBS Group, a division of UBS AG, also known as UBS Financial Services, Inc., and/or UBS–GLB (Americas),

Inc., Corporate Center Division, Group Technology Infrastructure Services, Distributed Systems and Storage Group, Stamford, Connecticut (TA–W–75,009); and UBS Group, a division of UBS AG, also known as UBS Financial Services, Inc., and/or UBS–GLB (Americas), Inc., formerly known as Brinson Partners, Inc., Corporate Center Division, Group Technology Infrastructure Services, Distributed Systems and Storage Group, Chicago, Illinois (TA–W–75,009A); and UBS Group, a division of UBS AG, also known as UBS Financial Services, Inc., and/or UBS–GLB (Americas), Inc., Corporate Center Division, Group Technology Infrastructure Services, Distributed Systems and Storage Group, New York, New York (TA–W–75,009B), who became totally or partially separated from employment on or after December 15, 2009, through February 8, 2013, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

Signed in Washington, DC, this 31st day of March, 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8494 Filed 4–8–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273), the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of March 21, 2011 through March 25, 2011.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the

International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the Federal Register; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
74,748	Anderson Hardwood Floors, LLC, Shaw Industries Group, Inc., 07, Hard Surfaces Division.	Patten, ME	September 29, 2009.
74,796	Eagle Cap Campers, Inc	La Grande, OR	October 29, 2009.
75,008	Weyerhaeuser NR, Choicewood Division	Titusville, PA	December 8, 2009.
75,014	Fairchild Semiconductor, Leased Workers from Manpower Professional	South Portland, ME	November 9, 2010.
75,049	The Buckstaff Company, Oshkosh Industries, Inc	Oshkosh, WI	December 28, 2009.
75,082	Simmons Manufacturing Company, LLC, Juvenile Division	Neenah, WI	January 7, 2010.
75,097	Fraser Timber Limited, Fraser Papers, Inc	Ashland, ME	December 14, 2009.
75,130	FTCA, Inc., Also Known As Fleetwood Folding Trailers, Inc	Somerset, PA	January 21, 2010.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
74,961	Pfizer, Wyeth Pharmaceuticals, Pfizer Global, Leased Workers Westaff, Kelly Service.	Rouses Point, NY	December 2, 2010.
74,961A	Pfizer, Wyeth Pharmaceuticals, Pfizer Research Division	Chazy, NY	December 2, 2010.
74,993	Baxter Healthcare Corporation, Baxter International, Inc.; Leased Workers Aerotek and Kelly Services.	Beltsville, MD	December 13, 2009.
75,069	Reliance Globalcom Services, Inc., Yipes Holding, Inc.	Denver, CO	December 28, 2009.
75,145	Volvo Group North America, LLC, Volvo Information Technology, AB Volvo, Leased Workers Ajilon, Andreas, etc.	Greensboro, NC	January 27, 2010.
75,146	Berkley Surgical Company	Uniontown, PA	January 26, 2010.
75,163	Capgemini America, Inc., Capgemini NA; MIS Div.; Leased Workers Advanced Programming Group, etc.	Chicago, IL	January 31, 2010.
75,163A	Capgemini America, Inc., Capgemini NA; MIS Div.; Leased Workers Advanced Programming Group, etc.	New York, NY	January 31, 2010.
75,182	Union Apparel, Inc	Norvelt, PA	November 27, 2010.
75,186	Stanley Black & Decker, Customer DIY Div.; North Campus; Leased Workers Personnel Placements LLC, etc.	Jackson, TN	February 7, 2010.
75,188	Dell Services, CHPW Account, Workers Wages Reported Under Transaction Applications Group.	Tulsa, OK	February 7, 2010.
75,232	The Travelers Indemnity Company, Travelers Companies, Inc.; Personal Insurance Div.; Customer Sales and Service.	Knoxville, TN	February 10, 2010.
75,234	Stanley Black & Decker, Inc., CDIY Division, Leased Worker from Personnel Placements.	Jackson, TN	February 8, 2010.
75,293	Caraustar Industries, Inc., Corporate Division, Information Technology, etc., Leased Workers Manpower.	Austell, GA	February 14, 2010.
75,299	Thomson Reuters, Business Compliance & Knowledge Solutions Div., Leased Workers Adecco USA.	Forth Worth, TX	February 14, 2010.

The following certifications have been issued. The requirements of Section 222(c) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
75,001	Means Industries, Inc., Amsted Industries, Leased Workers of Kelly Services, Inc.	Saginaw, MI	December 15, 2009.
75,083	Chrysler LLC, Powertrain Division	Detroit, MI	January 13, 2011.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
74,819	Analog Devices, Inc., Corporate Headquarters	Norwood, MA	
74,935	Husqvarna Turf Care, Husqvarna A.B.	Beatrice, NE	
74,966	Jerr-Dan Corporation, An Oshkosh Corporation, Fire and Emergency Division	Greencastle, PA	
75,011	AJW Merchants, Inc. (AJW), TJX Companies, Leased Workers from Advanced Career Services.	Fall River, MA	
75,159	BAE Systems, Land and Armaments, U.S. Combat Systems, Leased Workers of Spherion.	Lemont Furnace, PA	
75,248	All Clad Metalcrafters, LLC, Groupe SEB, Warehouse Division	Canonsburg, PA	
75,273	Harsco Rail	Fairmont, MN	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the Federal Register and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
75,088	Rieck Mechanical	Dayton, OH	

I hereby certify that the aforementioned determinations were issued during the period of March 21, 2011 through March 25, 2011. Copies of these determinations may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or *tofoiarequest@dol.gov*. These determinations also are available on the Department's Web site at *http://www.doleta.gov/tradeact* under the searchable listing of determinations.

Dated: April 1, 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8495 Filed 4–8–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Revised Determination on Reconsideration

In the matter of: TA–W–74,347; NCR Corporation, United States Postal Service Help Desk, Customer Care Center, Including On-Site Leased Workers of Volt Consulting; West Columbia, South Carolina and TA–W–74,347A; NCR Corporation Call Center, Including On-Site Leased Workers of Volt Consulting; West Columbia, South Carolina; Notice of Revised Determination on Reconsideration.

On October 7, 2010, the Department issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of NCR Corporation, Customer Care Center, United States Postal Service Help Desk, West Columbia, South Carolina. The Department's Notice was published in the **Federal Register** on October 25, 2010 (75 FR 65515).

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The initial negative determination was based on the findings that the worker separations, or threat of separation, were not due to either a shift in the supply of support service abroad by NCR Corporation, Customer Care Center, United States Postal Service Help Desk, or increased imports of services like or directly competitive with those supplied at NCR Corporation, Customer Care Center, United States Postal Service Help Desk, West Columbia, South Carolina. The initial investigation also revealed that NCR Corporation, Customer Care Center, United States Postal Service Help Desk, West Columbia, South Carolina, did not supply a service to a firm that employed a worker group eligible to apply for Trade Adjustment Assistance (TAA).

A careful review of previously-submitted information confirmed that workers at NCR Corporation are separately identifiable by service supplied. As such, the Department determines that there are two worker groups at the West Columbia, South Carolina facility: the United States Postal Service (USPS) Help Desk within the Customer Care Center (TA–W–74,347) and the NCR Corporation's Call Center (TA–W–74,347A).

Therefore, for purposes of the Trade Act of 1974, as amended, the subject worker group of TA–W–74,347 consists of workers and former workers of USPS Help Desk who are engaged in employment related to the supply of technical support services for the USPS. This worker group excludes workers not assigned to the Customer Care Center and workers within the Customer Care Center who are assigned to other Help Desks. This worker group includes on-site leased workers of Volt Consulting.

Moreover, the subject worker group of TA–W–74,347A consists of workers and former workers of the Call Center who

are engaged in employment related to the supply of technical support services. This worker group excludes workers not assigned to the Call Center located in West Columbia, South Carolina. This worker group includes on-site leased workers of Volt Consulting.

Information obtained during the reconsideration investigation confirmed that, during the relevant period, NCR Corporation did not shift to a foreign country the supply of services like or directly competitive with the services supplied by the USPS Help Desk, nor has there has been an acquisition from a foreign country by NCR Corporation of services like or directly competitive with those supplied by the USPS Help Desk. Rather, the services which were supplied by the workers at USPS Help Desk in West Columbia, South Carolina are being performed at other NCR Corporation facilities within the United States, per the client. Therefore, the Department determines that workers and former workers of NCR Corporation, Customer Care Center, United States Postal Service Help Desk, West Columbia, South Carolina have not met the eligibility criteria for TAA.

Information obtained during the initial investigation revealed that a significant number of workers at NCR Corporation, Call Center, West Columbia, South Carolina have been totally or partially separated, or are threatened with such separation; that NCR Corporation has shifted to a foreign country the supply of services like or directly competitive with the services supplied by the Call Center; and that the shift to India has contributed importantly to worker separations (total or partial), or threat of such separations, at NCR Corporation, Call Center, West Columbia, South Carolina. Therefore, the Department determines that workers and former workers of NCR Corporation, Call Center, West Columbia, South Carolina have met the eligibility criteria for TAA.

Conclusion

After careful review of the additional facts obtained during the reconsideration investigation, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of NCR Corporation, Customer Care Center, United States Postal Service Help Desk, West Columbia, South Carolina (TA–W–74,347) and determine that workers and former workers of NCR Corporation, Call Center, West Columbia, South Carolina (TA–W–74,347A), meet the worker group certification criteria under Section 222(a) of the Act, 19 U.S.C. 2272(a). In accordance with Section 223 of the Act, 19 U.S.C. 2273, I make the following certification:

"All workers of NCR Corporation, Call Center, including on-site leased workers of Volt Consulting, West Columbia, South Carolina (TA–W–74,347A), who became totally or partially separated from employment on or after June 18, 2009, through two years from the date of this revised certification, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

Signed in Washington, DC, this 1st day of April, 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8496 Filed 4–8–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Revised Determination on Reconsideration

TA–W–74,551
Vaughan Furniture Company, Inc., Vaughan Administrative Building, 816 Glendale Road, Galax, Virginia
TA–W–74,551A
Vaughan Furniture Company, Inc., B.C. Vaughan Factory/Chestnut Creek Veneer Building, 255 Creekview Drive, Galax, Virginia
TA–W–74,551B
Vaughan Furniture Company, Inc., T.G. Vaughan Distribution Center, 100 T.G. Vaughan, Jr. Road, Galax, Virginia

On December 3, 2010, the Department of Labor issued an Affirmative Determination Regarding Application for Reconsideration for workers of Vaughn Furniture Company, Inc., 816 Glendale Road, Galax, Virginia. The Department's Notice was published in the **Federal Register** on December 13, 2010 (75 FR 77664). The subject workers supplied services in support of furniture production.

The workers at Vaughan Administrative Building (TA–W–74,551) supply support services to B.C. Vaughan Factory/Chestnut Creek Veneer Building (TA–W–74,551A) and T.G. Vaughan Distribution Center (TA–W–74,551B). The workers at all three locations are engaged in employment related to the production of furniture.

Workers at the 255 Creekview Drive facility who were separated on/after October 3, 2006 through October 12, 2009 are eligible to apply for Trade Adjustment Assistance and Alternative Trade Adjustment Assistance under TA–W–62,250 (Vaughan Furniture Company, Inc., 255 Creekview Drive, Galax, Virginia).

The investigation revealed that the three aforementioned worker groups of Vaughan Furniture Company, Inc., Galax, Virginia, have met the criteria for certification.

More than five percent of workers at each of the Galax, Virginia facilities have been totally or partially separated, or threatened with such separation.

Vaughan Furniture Company, Inc. had shifted to a foreign country the production of articles like or directly competitive with furniture produced by the subject firm in Galax, Virginia.

The shift of production contributed importantly to the separations within the three aforementioned worker groups of Vaughan Furniture Company, Inc., Galax, Virginia.

Conclusion

After careful review of the facts obtained in the reconsideration investigation, I determine that the three aforementioned worker groups of Vaughan Furniture Company, Inc., Galax, Virginia, meet the worker group certification criteria under Section 222(a) of the Act, 19 U.S.C. 2272(a). In accordance with Section 223 of the Act, 19 U.S.C. 2273, I make the following certification:

"All workers of Vaughn Furniture Company, Inc., Vaughan Administrative Building, 816 Glendale Road, Galax, Virginia (TA–W–74,551) and Vaughn Furniture Company, Inc., T.G. Vaughan Distribution Center, 100 T.G. Vaughan, Jr. Road, Galax, Virginia (TA–W–74,551B) who became totally or partially separated from employment on or after August 17, 2009, through two years from the date of certification, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended; and all workers of Vaughn Furniture Company, Inc., B.C. Vaughan Factory/Chestnut Creek Veneer Building, Galax, Virginia (TA–W–74,551A), who became totally or partially separated from employment on or after October 13, 2009, through two years from the date of certification, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

Signed in Washington, DC this 30th day of March, 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8497 Filed 4–8–11; 8:45 am]

BILLING CODE 4510–FN–P

LEGAL SERVICES CORPORATION

Sunshine Act Meetings

Notice

DATE AND TIME: The Legal Services Corporation Board of Directors and its committees will meet on April 15–16, 2011. On Friday, April 15th, the first meeting will commence at 9 a.m., Eastern Daylight Time. On Saturday, April 16th, the first meeting will commence at 9 a.m., Eastern Daylight Time. On each of these two days, each meeting other than the first meeting of the day will commence promptly upon adjournment of the immediately preceding meeting. Please note that on Friday, April 15th, meetings of the Audit Committee and Development Committee will run concurrently after the meeting of the Finance Committee.

LOCATION: The Westin Hotel, 6631 Broad Street, Richmond, VA 23230.

PUBLIC OBSERVATION: Unless otherwise noticed, all meetings of the LSC Board of Directors are open to public observation. Members of the public who are unable to attend but wish to listen to a public proceeding may do so by following the telephone call-in directions provided below and are asked to keep their telephones muted to eliminate background noises. From time to time the presiding Chair may solicit comments from the public.

CALL-IN DIRECTIONS FOR OPEN SESSIONS:

• Call toll-free number: 1–866–451–4981;

• When prompted, enter the following numeric pass code: 5907707348 (or 2755431953 to access the concurrent Development Committee meeting on April 15, 2011);

• When connected to the call, please "MUTE" your telephone immediately.

MEETING SCHEDULE:

	Time [1]
Friday, April 15, 2011 1. Promotion & Provision for the Delivery of Legal Services Committee. 2. Operations & Regulations Committee. 3. Finance Committee. 4. Audit Committee*. 5. Development Committee*.	9 a.m.

MEETING SCHEDULE:—Continued

	Time [1]
Saturday, April 16, 2011 1. Governance & Performance Review Committee. 2. Board of Directors.	9 a.m.

STATUS OF MEETING: Open, except as noted below.

• Board of Directors—Open, except that a portion of the meeting of the Board of Directors may be closed to the public pursuant to a vote of the Board of Directors to consider and act on a personnel benefits matter, to hear briefings from management and LSC's Inspector General, and to consider and act on the General Counsel's report on potential and pending litigation involving LSC.[2]

A verbatim written transcript will be made of the closed session of the Board meeting. However, the transcript of any portions of the closed session falling within the relevant provisions of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and (c)(10), and the corresponding provisions of the Legal Services Corporation's implementing regulation, 45 CFR 1622.5(a) and (h), will not be available for public inspection. A copy of the General Counsel's Certification that in his opinion the closing is authorized by law will be available upon request.

MATTERS TO BE CONSIDERED:

Friday, April 15, 2011

Promotion and Provision for the Delivery of Legal Services Committee

Agenda

Open Session

1. Approval of agenda.
2. Approval of minutes of the Committee's meeting of January 28, 2010.
3. Presentation by panel on domestic violence practice and issues.
4. Presentation by Virginia programs.
5. Consider and act on possible revisions to the Committee's charter.
6. Public comment.
7. Consider and act on other business.
8. Consider and act on adjournment of meeting.

Operations and Regulations Committee

Agenda

Open Session

1. Approval of agenda.
2. Approval of minutes of the Committee's meeting of January 28, 2011.
3. Consider and act on Draft Final Rule on 45 CFR Part 1609 to clarify scope of fee-generating case restrictions to non-LSC fund supported cases.
   a. Presentation by Mattie Cohan, Senior Assistant General Counsel.
   b. Public comment.
4. Consider and act on 2010 census and formula distribution issues.
   • Presentation by Bristow Hardin, Program Analyst III, Office of Program Performance (OPP); and by John Constance, Director, Office of Government Relations and Public Affairs (GRPA).
5. Consider and act on strategic planning.
   • Presentation by Mattie Cohan, Senior Assistant General Counsel.
6. Public comment.
7. Consider and act on other business.
8. Consider and act on adjournment of meeting.

Finance Committee

Agenda

Open Session

1. Approval of agenda.
2. Approval of the minutes of the Committee's meeting of January 28, 2011.
3. Consider and act on the Revised Operating Budget for FY 2011 and recommend Resolution 2011–XXX to the full Board.
   • Presentation by David Richardson, Treasurer/Comptroller.
4. Presentation on LSC's Financial Reports for the first five months of FY 2011.
   • Presentation by David Richardson, Treasurer/Comptroller.
5. Report on FY 2011 appropriations process.
   • Report by John Constance, Director, Office of Government Relations and Public Affairs.
6. Report on FY 2012 appropriations process.
   • Report by John Constance, Director, Office of Government Relations and Public Affairs.
7. Report on FY 2013 appropriations process.
   a. Report by David Richardson, Treasurer/Comptroller.
   b. Comments by John Constance, Director, Office of Government Relations and Public Affairs.
8. Public comment.

[1] Please note that all times in this notice are in the Eastern Daylight Time.

* The Audit Committee meeting will run concurrently with the meeting of the Development Committee upon conclusion of the meeting of the Finance Committee.

[2] Any portion of the closed session consisting solely of staff briefings does not fall within the Sunshine Act's definition of the term "meeting" and, therefore, the requirements of the Sunshine Act do not apply to such portion of the closed session. 5 U.S.C. 552b(a)(2) and (b). *See also* 45 CFR 1622.2 & 1622.3.

9. Consider and act on other business.
10. Consider and act on adjournment of meeting.

Audit Committee

Agenda

Open Session

1. Approval of agenda.
2. Approval of minutes of the Committee's January 28, 2011 meeting.
3. Review of Audit Committee charter and consider and act on possible changes thereto.
4. Quarterly review of 403(b) plan performance.
• Alice Dickerson, Director, Office of Human Resources.
5. Audit follow-up questions.
• Ronald Merryman, Assistant Inspector General for Audits.
6. Briefing by Inspector General.
7. Briefing on technology security.
• Jeff Morningstar, Director, Office of Information Technology.
8. Public comment.
9. Consider and act on other business.
10. Consider and act on adjournment of meeting.

Development Committee

Agenda

Open Session

1. Approval of agenda.
2. Approval of minutes of the Committee's January 28, 2011 meeting.
3. Consider and act on Development Officer job description or RFP for a Development Consultant.
4. Public comment.
5. Consider and act on other business.
6. Consider and act on adjournment of meeting.

Saturday, April 16, 2011

Governance and Performance Review Committee

Agenda

Open Session

1. Approval of agenda.
2. Approval of minutes of the Committee's meeting of January 28, 2011.
3. Staff report on progress on implementation of GAO recommendations.
• Report by John Constance, Director, Office of Government Relations and Public Affairs.
4. Consider and act on Inspector General's evaluation for 2010.
5. Discussion of research agenda and next step(s).
6. Consider and act on other business.
7. Public comment.
8. Consider other business and act on motion to adjourn meeting.

Board of Directors

Agenda

Open Session

1. Pledge of Allegiance
2. Approval of agenda.
3. Approval of Minutes of the Board's Open Session Annual meeting of January 29, 2011.
4. Approval of Minutes of the Board's Open Session meeting of March 31, 2011.
5. Chairman's Report.
6. Members' Reports.
7. President's Report.
8. Inspector General's Report.
9. Consider and act on the report of the Promotion & Provision for the Delivery of Legal Services Committee.
10. Consider and act on the report of the Finance Committee.
11. Consider and act on the report of the Audit Committee.
12. Consider and act on the report of the Operations & Regulations Committee.
13. Consider and act on the report of the Governance & Performance Review Committee.
14. Consider and act on the report of the Development Committee.
15. Consider and act on status report on the work of the Special Task Force on Fiscal Oversight.
16. Public comment.
17. Consider and act on other business.
18. Consider and act on whether to authorize an executive session of the Board to address items listed below under Closed Session.

Closed Session

19. Approval of Minutes of the Board's Closed Session Annual meeting of January 29, 2011.
20. Briefing by Management.
21. Consider and act on personnel benefits matter.
22. Briefing by the Inspector General.
23. Consider and act on General Counsel's report on potential and pending litigation involving LSC.
24. Consider and act on motion to adjourn meeting.

CONTACT PERSON FOR INFORMATION: Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Katherine Ward, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov.*

Dated: April 6, 2011.

Victor M. Fortuno,

Vice President, General Counsel & Corporate Secretary.

[FR Doc. 2011–8652 Filed 4–7–11; 11:15 am]

BILLING CODE 7050–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for International Science & Engineering; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for International Science and Engineering (#25104).

Date/Time: April 25, 2011; 8:30 a.m. to 5 p.m. April 26, 2011; 8:30 a.m. to 12 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Stafford II, Room 555, Arlington, VA.

Type of Meeting: OPEN.

Contact Person: Robert Webber, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230 (703) 292–7569.

If you are attending the meeting and need access to the NSF, please contact the individual listed above so your name may be added to the building access list.

Purpose of Meeting: To provide advice on the international programs and activities of the National Science Foundation.

Agenda

April 25, 2011

AM: Meet with NSF Director and Committee discussion.
PM: Update on Office of International Science and Engineering, Reports from Advisory Committee Working Groups.

April 26, 2011

AM: Globalization of Universities, Member Remarks.

Dated: April 5, 2011.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2011–8465 Filed 4–8–11; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Computer and Information; Science and Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

NAME: Advisory Committee for Computer and Information Science and Engineering—(1115).

DATE AND TIME: May 6, 2011 8:30 a.m.–5 p.m.

PLACE: National Science Foundation, 4201 Wilson Blvd., Room 1235, Arlington, VA.

TYPE OF MEETING: Open.

CONTACT PERSON: Carmen Whitson, Directorate for Computer and Information, Science and Engineering, National Science Foundation, 4201 Wilson Blvd., Suite 1105, Arlington, VA 22230. Telephone: (703) 292–8900.

MINUTES: May be obtained from the contact person listed above.

PURPOSE OF MEETING: To advise NSF on the impact of its policies, programs and activities on the CISE community. To provide advice to the Assistant Director for CISE on issues related to long-range planning, and to form ad hoc subcommittees to carry out needed studies and tasks.

AGENDA: Report from the Assistant Director. Discussion of research, education, diversity, workforce issues in IT and long-range funding outlook.

Dated: April 6, 2011.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2011–8500 Filed 4–8–11; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0187]

Notice of Issuance of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Issuance and Availability of Revision 4 of Regulatory Guide 1.149, "Nuclear Power Plant Simulation Facilities for Use in Operator Training, License Examinations, and Applicant Experience Requirements."

FOR FURTHER INFORMATION CONTACT: Robert G. Carpenter, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–251–7483 or e-mail *Robert.Carpenter@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or Commission) is issuing a revision to an existing guide in the agency's "Regulatory Guide" series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 4 of Regulatory Guide 1.149, "Nuclear Power Plant Simulation Facilities for Use in Operator Training, License Examinations, and Applicant Experience Requirements," was issued with a temporary identification as Draft Regulatory Guide, DG–1248.

This guide describes methods acceptable to the NRC's staff for complying with those portions of the Commission's regulations associated with approval or acceptance of a nuclear power plant simulation facility for use in operator and senior operator training, license examination operating tests, and meeting applicant experience requirements.

II. Further Information

In May 2010, DG–1248 was published with a public comment period of 60 days from the issuance of the guide. The public comment period closed on August 27, 2010. Electronic copies of Regulatory Guide 1.149, Revision 4 are available through the NRC's public Web site under "Regulatory Guides" at *http://www.nrc.gov/reading-rm/doc-collections/* and through the NRC's Agencywide Documents Access and Management System (ADAMS) at *http://www.nrc.gov/reading-rm/adams.html,* under Accession No. ML110420119. The regulatory analysis may be found in ADAMS under Accession No. ML110420133. Public comments and the NRC responses may be found in ADAMS under Accession No. ML110420139.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4209, by fax at (301) 415–3548, and by e-mail to *pdr.resources@nrc.gov.*

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 4th day of April, 2011.

For the Nuclear Regulatory Commission.

Harriet Karagiannis,

Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2011–8530 Filed 4–8–11; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. A2011–13; Order No. 709]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Rogers Avenue Station in Fort Smith, Arkansas has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioner, and others to take appropriate action.

DATES: *Administrative record due (from Postal Service):* April 12, 2011; *deadline for notices to intervene:* May 2, 2011. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the "Filing Online" link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on March 28, 2011, the Commission received a petition for review of the closing of the Rogers Avenue Station in Fort Smith, Arkansas. The petition, which was filed by Kelly A. Procter-Pierce (Petitioner), is postmarked March 22, 2011, and was posted on the Commission's Web site March 29, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and designates the case as Docket No. A2011–13 to consider Petitioner's appeal. If Petitioner would like to further explain her position with supplemental information or facts,

Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than May 2, 2011.

Categories of issues apparently raised. Petitioner appears to raise the issue of failure to consider the effect on the community. *See* 39 U.S.C. 404(d)(2)(A)(i).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than the one set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the administrative record with the Commission is April 12, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this Notice is April 12, 2011.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participants' submissions will also be posted on the Commission's Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's Webmaster via telephone at 202–789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Monday through Friday, except on Federal Government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

The Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Those, other than the Petitioner and respondent, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before May 2, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by the Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

It is ordered:

1. The Postal Service shall file the administrative record regarding this appeal no later than April 12, 2011.

2. Any responsive pleading by the Postal Service to this Notice is due no later than April 12, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Christopher J. Laver is designated officer of the Commission (Public Representative) to represent the interests of the general public.

5. The Secretary shall arrange for publication of this Notice and Order in the **Federal Register**.

PROCEDURAL SCHEDULE

March 28, 2011	Filing of Appeal.
April 12, 2011 ...	Deadline for the Postal Service to file the administrative record in this appeal.
April 12, 2011 ...	Deadline for the Postal Service to file any responsive pleading.
May 2, 2011	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
May 2, 2011	Deadline for Petitioner's Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
May 23, 2011 ...	Deadline for answering brief in support of Postal Service (*see* 39 CFR 3001.115(c)).
June 7, 2011	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
June 14, 2011 ..	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116).
July 20, 2011	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)) the expiration date is 120 days from March 22, 2011, the postmark date of the appeal).

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–8478 Filed 4–8–11; 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 a Closed Meeting on Thursday, April 14, 2011 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, April 14, 2011 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings; and

Other matters relating to enforcement proceedings.

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: April 7, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–8670 Filed 4–7–11; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64188; File No. SR–NASDAQ–2011–044]

Self-Regulatory Organizations; the NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Fee Pilot Program for NASDAQ Last Sale

April 5, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 31, 2011, The NASDAQ Stock Market LLC ("NASDAQ" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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

NASDAQ is proposing to extend for three months the fee pilot pursuant to which NASDAQ distributes the NASDAQ Last Sale ("NLS") market data products. NLS allows data distributors to have access to real-time market data for a capped fee, enabling those distributors to provide free access to the data to millions of individual investors via the internet and television. Specifically, NASDAQ offers the "NASDAQ Last Sale for NASDAQ" and "NASDAQ Last Sale for NYSE/Amex" data feeds containing last sale activity in U.S. equities within the NASDAQ Market Center and reported to the jointly-operated FINRA/NASDAQ Trade Reporting Facility ("FINRA/NASDAQ TRF"), which is jointly operated by NASDAQ and the Financial Industry Regulatory Authority ("FINRA"). The purpose of this proposal is to extend the existing pilot program for three months, from April 1, 2011 through June 30, 2011.

This pilot program supports the aspiration of Regulation NMS to increase the availability of proprietary data by allowing market forces to determine the amount of proprietary market data information that is made available to the public and at what price. During the pilot period, the program has vastly increased the availability of NASDAQ proprietary market data to individual investors. Based upon data from NLS distributors, NASDAQ believes that since its launch in July 2008, the NLS data has been viewed by over 50,000,000 investors on Web sites operated by Google, Interactive Data, and Dow Jones, among others.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.

* * * * *

7039. NASDAQ Last Sale Data Feeds

(a) For a three month pilot period commencing on [January] *April* 1, 2011, NASDAQ shall offer two proprietary data feeds containing real-time last sale information for trades executed on NASDAQ or reported to the NASDAQ/FINRA Trade Reporting Facility.

(1)–(2) No change.

(b)–(c) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Prior to the launch of NLS, public investors that wished to view market data to monitor their portfolios generally had two choices: (1) Pay for real-time market data or (2) use free data that is 15 to 20 minutes delayed. To increase consumer choice, NASDAQ proposed a pilot to offer access to real-time market data to data distributors for a capped fee, enabling those distributors to disseminate the data at no cost to millions of internet users and television viewers. NASDAQ now proposes a three-month extension of that pilot program, subject to the same fee structure as is applicable today.[3]

NLS consists of two separate "Level 1" products containing last sale activity within the NASDAQ market and reported to the jointly-operated FINRA/NASDAQ TRF. First, the "NASDAQ Last Sale for NASDAQ" data product is a real-time data feed that provides real-time last sale information including execution price, volume, and time for executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. Second, the "NASDAQ Last Sale for NYSE/Amex" data product provides real-time last sale information including execution price, volume, and time for NYSE- and NYSE Amex-securities executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF.

NASDAQ established two different pricing models, one for clients that are able to maintain username/password entitlement systems and/or quote counting mechanisms to account for usage, and a second for those that are not. Firms with the ability to maintain username/password entitlement systems and/or quote counting mechanisms are eligible for a specified fee schedule for the NASDAQ Last Sale for NASDAQ Product and a separate fee schedule for the NASDAQ Last Sale for NYSE/Amex Product. Firms that are unable to maintain username/password entitlement systems and/or quote counting mechanisms also have multiple options for purchasing the NASDAQ Last Sale data. These firms choose between a "Unique Visitor" model for internet delivery or a "Household" model for television delivery. Unique Visitor and Household populations must be reported monthly and must be validated by a third-party vendor or ratings agency approved by NASDAQ at NASDAQ's sole discretion. In addition, to reflect the growing confluence between these media outlets, NASDAQ offered a reduction in fees when a single distributor distributes

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NASDAQ previously stated that it would file a proposed rule change to make the NLS pilot fees permanent. NASDAQ has also informed Commission staff that it is consulting with FINRA to develop a proposed rule change by FINRA to allow inclusion of FINRA/NASDAQ TRF data in NLS on a permanent basis. However, FINRA and NASDAQ have not completed their consultations regarding such a proposed rule change. Accordingly, NASDAQ is filing to seek a three-month extension of the existing pilot.

NASDAQ Last Sale Data Products via multiple distribution mechanisms.

Second, NASDAQ established a cap on the monthly fee, currently set at $50,000 per month for all NASDAQ Last Sale products. The fee cap enables NASDAQ to compete effectively against other exchanges that also offer last sale data for purchase or at no charge.

As with the distribution of other NASDAQ proprietary products, all distributors of the NASDAQ Last Sale for NASDAQ and/or NASDAQ Last Sale for NYSE/Amex products pay a single $1,500/month NASDAQ Last Sale Distributor Fee in addition to any applicable usage fees. The $1,500 monthly fee applies to all distributors and does not vary based on whether the distributor distributes the data internally or externally or distributes the data via both the internet and television.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(4) of the Act,[5] in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

NASDAQ believes that its NASDAQ Last Sale market data products are precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by lessening regulation of the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[6]

By removing "unnecessary regulatory restrictions" on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoaliton* v. *SEC* [sic], No. 09–1042 (D.C. Cir. 2010) upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. "In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' *NetCoaltion* [sic], at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323).

The court agreed with the Commission's conclusion that "Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.'"[7]

The Court in *NetCoalition,* while upholding the Commission's conclusion that competitive forces may be relied upon to establish the fairness of prices, nevertheless concluded that the record in that case did not adequately support the Commission's conclusions as to the competitive nature of the market for NYSEArca's data product at issue in that case. As explained below in NASDAQ's Statement on Burden on Competition, however, NASDAQ believes that there is substantial evidence of competition in the marketplace for data that was not in the record in the *NetCoalition* case, and that the Commission is entitled to rely upon such evidence in concluding that the fees established in this filing are the product of competition, and therefore in accordance with the relevant statutory standards.[8]

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. NASDAQ's ability to price its Last Sale Data Products is constrained by (1) Competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and free delayed consolidated data; and (3) the inherent contestability of the market for proprietary last sale data.

The market for proprietary last sale data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[6] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[7] *NetCoaliton* v. *SEC* [sic] at p. 16.

[8] It should also be noted that Section 916 of Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") has amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3) to make it clear that all exchange fees, including fees for market data, may be filed by exchanges on an immediately effective basis. Although this change in the law does not alter the Commission's authority to evaluate and ultimately disapprove exchange rules if it concludes that they are not consistent with the Act, it unambiguously reflects a conclusion that market data fee changes do not require prior Commission review before taking effect, and that a formal proceeding with regard to a particular fee change is required only if the Commission determines that it is necessary or appropriate to suspend the fee and institute such a proceeding.

trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's broker-dealer customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it. Moreover, as a broker-dealer chooses to direct fewer orders to a particular exchange, the value of the product to that broker-dealer decreases, for two reasons. First, the product will contain less information, because executions of the broker-dealer's orders will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing orders will become correspondingly more valuable.

Similarly, in the case of products such as NLS that are distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: They can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, NASDAQ believes that products such as NLS can enhance order flow to NASDAQ by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by investors with access to the internet or television. Conversely, the value of such products to distributors and investors decreases if order flow falls, because the products contain less content.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market information (or provide information free of charge) and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market information, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. This would be akin to strictly regulating the price that an automobile manufacturer can charge for car sound systems despite the existence of a highly competitive market for cars and the availability of after-market alternatives to the manufacturer-supplied system.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including ten self-regulatory organization ("SRO") markets, as well as internalizing broker-dealers ("BDs") and various forms of alternative trading systems ("ATSs"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities ("TRFs") compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSE Amex, NYSEArca, and BATS.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple BDs' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the Internet. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers:

Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and Direct Edge. Today, BATS publishes its data at no charge on its Web site in order to attract order flow, and it uses market data revenue rebates from the resulting executions to maintain low execution charges for its users. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, Reuters and Thomson.

The competitive nature of the market for products such as NLS is borne out by the performance of the market. In May 2008, the internet portal Yahoo! began offering its website viewers real-time last sale data provided by BATS Trading. NLS competes directly with the BATS product that is still disseminated via Yahoo! The New York Stock Exchange also distributes competing last sale data products at a price comparable to the price of NLS. Under the regime of Regulation NMS, there is no limit to the number of competing products that can be developed quickly and at low cost.

Moreover, consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at $1 per month for non-professional users. Second, consolidated data is also available at no cost with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data (such as last sale data) that is simply a subset of the consolidated data. The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data, by highlighting the optional nature of proprietary products.

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. "No one disputes that competition for order flow is 'fierce'." *NetCoalition* at 24. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of broker-dealers with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A broker-dealer that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected broker-dealers will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data. Similarly, increases in the cost of NLS would impair the willingness of distributors to take a product for which there are numerous alternatives, impacting NLS data revenues, the value of NLS as a tool for attracting order flow, and ultimately, the volume of orders routed to NASDAQ and the value of its other data products.

In establishing the price for the NASDAQ Last Sale Products, NASDAQ considered the competitiveness of the market for last sale data and all of the implications of that competition. NASDAQ believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish a fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to NLS, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources ensures that NASDAQ cannot set unreasonable fees, or fees that are unreasonably discriminatory, without losing business to these alternatives. Accordingly, NASDAQ believes that the acceptance of the NLS product in the marketplace demonstrates the consistency of these fees with applicable statutory standards.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Three comment letters were filed regarding the proposed rule change as originally published for comment NASDAQ responded to these comments in a letter dated December 13, 2007. Both the comment letters and NASDAQ's response are available on the SEC Web site at *http://www.sec.gov/comments/sr-nasdaq-2006-060/nasdaq2006060.shtml.*

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.[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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–044 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–2011–044. 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

[9] 15 U.S.C. 78s(b)(3)(a)(ii) [sic].

provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–044 and should be submitted on or before May 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8475 Filed 4–8–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64186; File No. SR–EDGX–2011–07]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Adopt Rule 3.22 (Proxy Voting), in Accordance With the Provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

April 5, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act" or "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 24, 2011, EDGX Exchange, Inc. (the "Exchange" or "EDGX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt Rule 3.22 (Proxy Voting), in accordance with the provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The text of the proposed rule change is attached as Exhibit 5 and is available on the Exchange's Web site at *http://www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

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 III below. The self-regulatory organization 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

Purpose

The Exchange is proposing to adopt EDGX Rule 3.22 (Proxy Voting), in accordance with the provisions of Section 957 of the Dodd-Frank Act, to prohibit Members from voting uninstructed shares if the matter voted on relates to (i) The election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act of 1940 (the "Investment Company Act")), (ii) executive compensation, or (iii) any other significant matter, as determined by the Securities and Exchange Commission (the "Commission"), by rule.

Section 957 of the Dodd-Frank Act amends Section 6(b)[3] of the Securities Exchange Act of 1934 (the "Exchange Act") [sic] to require the rules of each national securities exchange to prohibit any member organization that is not the beneficial owner of a security registered under Section 12[4] of the Exchange Act from granting a proxy to vote the security in connection with certain stockholder votes, unless the beneficial owner of the security has instructed the member organization to vote the proxy in accordance with the voting instructions of the beneficial owner. The stockholder votes covered by Section 957 include any vote with respect to (i) The election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act), (ii) executive compensation, or (iii) any other significant matter, as determined by the Commission, by rule.

Accordingly, in order to carry out the requirements of Section 957 of the Dodd-Frank Act, the Exchange proposes to adopt proposed EDGX Rule 3.22 to prohibit any Member from giving a proxy to vote stock that is registered in its name, unless: (i) Such Member is the beneficial owner of such stock; (ii) pursuant to the written instructions of the beneficial owner; or (iii) pursuant to the rules of any national securities exchange or association of which it is a member provided that the records of the Member clearly indicate the procedure it is following. The Exchange is proposing to adopt these rules because other national securities exchanges and associations do allow proxy voting under certain limited circumstances while the current Exchange Rules are silent on such matters. Therefore, a Member that is also a member of another national securities exchange or association may vote the shares held for a customer when allowed under its membership at another national securities exchange or association, provided that the records of the Member clearly indicate the procedure it is following.

Notwithstanding the foregoing, a Member that is not the beneficial owner of a security registered under Section 12 of the Exchange Act is prohibited from granting a proxy to vote the security in connection with a shareholder vote with respect to the election of a member of the board of directors of an issuer (except for a vote with respect to uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission, by rule, unless the beneficial owner of the security has instructed the Member to vote the proxy in accordance with the voting instructions of the beneficial owner.

Because Section 957 of the Dodd-Frank Act does not provide for a transition phase, the Exchange is

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 781.

proposing to adopt the proposed rule change pursuant to Section 19(b) of the Exchange Act to comply with Section 957 of the Dodd-Frank Act and is requesting that the Commission approve the proposal on an accelerated basis. Additionally, proposed EDGX Rule 3.22(a) is based on NYSE Arca, Inc. ("NYSE Arca") rule 9.4 and Financial Industry Regulatory Authority ("FINRA") rule 2251, International Securities Exchange, LLC ("ISE") rule 421(a) and proposed EDGX Rule 3.22(b) is based on Nasdaq rule 2251(d) and ISE rule 421(b).

Basis

The Exchange believes the proposed rule change is consistent with the Act [5] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(10) [7] requirements that all national securities exchanges adopt rules prohibiting members from voting, without receiving instructions from the beneficial owner of shares, on the election of a member of a board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission, by rule. The Exchange also believes that the proposed rule change is consistent with the requirements under Section 6(b)(5) [8] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange is adopting this proposed rule change to comply with the requirements of Section 957 of the Dodd-Frank Act, and therefore believes the proposed rule change to be consistent with the Act, particularly with respect to the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[5] 15 U.S.C. 78a et seq.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(10).

[8] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–EDGX–2011–07 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–EDGX–2011–07. 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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2011–07 and should be submitted on or before May 2, 2011.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

In its filing, the Exchange requested that the Commission approve the proposal on an accelerated basis so that the Exchange could immediately comply with the requirements imposed by the Dodd-Frank Act, and because the proposed rule text is based upon ISE Rule 421, FINRA Rule 2251, Nasdaq Rule 2251(d), and NYSE Arca Rule 9.4.[9] After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[10]

The Commission believes that proposed Rule 3.22(a) is consistent with Section 6(b)(5) [11] of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Under proposed Rule 3.22(a), a Member shall be prohibited from voting uninstructed shares unless (1) That Member is the beneficial owner of the stock; (2) pursuant to the written instructions of the beneficial owner; or (3) pursuant to the rules of any national securities exchange or association of which it is also a member, provided that the Member's records clearly indicate the procedure it is following. This provision is based on ISE Rule 421, FINRA Rule 2251 and NYSE Arca Rule 9.4, which were previously approved by

[9] *See* Securities Exchange Act Release 63139 (October 20, 2010), 75 FR 65680 (October 26, 2010) (SR–ISE–2010–99); 61052 (November 23, 2009), 74 FR 62857 (December 1, 2009) (SR–FINRA–2009–066) (finding that the proposed rule change was consistent with the Act because the Rule "will continue to provide FINRA members with guidance on the forwarding of proxy and other issuer-related materials."); 62992 (September 24, 2010), 75 FR 60844 (October 1, 2010) (SR–NASDAQ–2010–114); and 48735 (October 31, 2003), 68 FR 63173 (November 7, 2003) (SR–PCX–2003–50).

[10] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(5).

the Commission.[12] The Commission notes that the proposed change will provide clarity to Exchange Members going forward on whether broker discretionary voting is permitted by Exchange Members under limited circumstances when the Member is also a member of another national securities exchange that permits broker discretionary voting. In approving this portion of the proposal, the Commission notes that Rule 3.22(a) is consistent with the approach taken under the rules of other national securities exchanges or national securities association, and for Exchange Members who are not also members of another national securities exchange prohibits broker discretionary voting on any matter, consistent with investor protection and the public interest.

The Commission believes that proposed Rule 3.22(b) is consistent with Section 6(b)(10)[13] of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission by rule.

The Commission believes that proposed Rule 3.22(b) is consistent with Section 6(b)(10) of the Act because it adopts revisions that comply with that section. As noted in the accompanying Senate Report, Section 957, which enacted Section 6(b)(10), reflects the principle that "final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares."[14] The proposed rule change will make the Exchange compliant with the new requirements of Section 6(b)(10) by specifically prohibiting broker-dealers, who are not beneficial owners of a security, from voting uninstructed shares in connection with a shareholder vote on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule, unless the member receives voting instructions from the beneficial owner of the shares.[15]

The Commission also believes that proposed Rule 3.22(b) is consistent with Section 6(b)(5)[16] of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the rule assures that shareholder votes on the election of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940) and on executive compensation matters are made by those with an economic interest in the company, rather than by a broker that has no such economic interest, which should enhance corporate governance and accountability to shareholders.[17]

Based on the above, the Commission finds that the Exchange's proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act because it should enhance corporate accountability to shareholders while also serving to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,[18] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission believes that good cause exists to grant accelerated approval to proposed Rule 3.22(a), because this proposed rule will conform the Exchange rule to ISE Rule 421, NYSE Arca Rule 9.4 and FINRA Rule 2251, which were published for public comment in the **Federal Register** and approved by the Commission, and for which no comments were received.[19] Because proposed Rule 3.22(a) is substantially similar to the ISE, NYSE Arca and FINRA rules, it raises no new regulatory issues.

The Commission also believes that good cause exists to grant accelerated approval to proposed Rule 3.22(b), which conforms the Exchange's rules to the requirements of Section 6(b)(10) of the Act. Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit broker voting on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule. The Commission believes that good cause exists to grant accelerated approval to proposed Rule 3.22(b), because it will conform the Exchange rule to the requirements of Section 6(b)(10) of the Act. Moreover, proposed Rule 3.22(b) is substantially similar to ISE Rule 421 and Nasdaq Rule 2251.[20]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[21] that the proposed rule change (SR–EDGX–2011–07) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8476 Filed 4–8–11; 8:45 am]

BILLING CODE 8011–01–P

[12] *See supra* note 9.

[13] 15 U.S.C. 78f(b)(10).

[14] *See* S. Rep. No. 111–176, at 136 (2010).

[15] The Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future. Should the Commission adopt such rules, we would expect the Exchange to adopt coordinating rules promptly to comply with the statute.

[16] 15 U.S.C. 78f(b)(5).

[17] As the Commission stated in approving NYSE rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers the goal of enfranchising shareholders. *See* Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR–NYSE–2006–92).

[18] 15 U.S.C. 78s(b)(2).

[19] *See supra* note 9.

[20] *See supra* note 9.

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64191; File No. SR–DTC–2010–15]

Self-Regulatory Organizations; The Depository Trust Company; Order Granting Approval of a Proposed Rule Change To Amend Rules Relating to the Requirement To Maintain a Balance Certificate in the Fast Automated Securities Transfer Program

April 5, 2011.

I. Introduction

On November 5, 2010, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR–DTC–2010–15 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposal was published in the **Federal Register** on November 23, 2010.[2] The Commission received two comment letters.[3] For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

Under DTC's FAST program, transfer agents participating in FAST ("FAST transfer agents") hold DTC securities in the form of balance certificates.[4] The balance certificates are registered in the name of DTC's nominee, Cede & Co., and evidence the record ownership by Cede & Co. of each issue for which the FAST transfer agent acts as transfer agent. The Balance Certificate Agreement is executed by each FAST transfer agent and DTC and sets forth the rights and obligations of FAST transfer agents and DTC. As additional securities are deposited or withdrawn from DTC, the appropriate FAST transfer agent adjusts the denomination of the balance certificate and electronically confirms theses changes with DTC.

Because transfer agents electronically confirm with DTC the adjustments to the denomination of the balance certificates and balances with DTC on a daily basis the number of shares represented by the balance certificate, some FAST transfer agents requested that DTC remove the requirement that they custody a balance certificate. As a result, DTC has proposed to remove the requirement that FAST transfer agents maintain a balance certificate for only those securities whose issuers are "participating" in the direct registration system ("DRS").[5]

Accordingly, pursuant to the rule change being approved by this Order, DTC will remove the requirement that FAST transfer agents maintain a balance certificate for those exchange listed issues that are DRS eligible and that are participating in DRS. However, DTC will continue to reserve its rights to draw down from the FAST balance and to receive in lieu of a DRS position a certificate registered in DTC's nominee name of Cede & Co. and reflecting any number of shares up to and including the total amount of shares due DTC from the FAST transfer agents.

III. Comment Letters

The Commission received two comment letters, one from the Securities Transfer Association ("STA") raising several concerns about the filing and the other from DTC responding to the STA's comments.[6] While the STA strongly supports DTC's proposed rule to eliminate the requirement for FAST agents to maintain a balance certificate for issues participating in DRS, the STA believes the requirement to maintain a balance certificate should also be eliminated for those issues eligible for DRS but not participating. The STA reasons that DRS eligible issues can be electronically reflected on the transfer agent's records and can still be moved electronically through a Deposit Withdrawal at Custodian transaction ("DWAC").[7] The STA also noted that the proposed requirement that reserves the right for DTC to request a certificate may be problematic for those issuers that do not issue certificates.

DTC's comment letter responded to both concerns raised by the STA. First, DTC contended that companies that have issued securities that are fully eligible and participating in DRS have authorized the use of a statement to evidence ownership. Without this authorization by the issuer, DTC argues, there is no ability to get an electronic statement from the issuer's transfer agent and therefore no inherent approval of statement form as a valid evidence of ownership.[8]

Second, with regards to the provision of DTC's proposal reserving the right for DTC to request a certificate, DTC maintained that currently all issuers eligible and participating in DRS are required to maintain and provide DTC upon request a FAST balance certificate. DTC stated that it cannot anticipate every situation that may arise where it is in DTC's best interest to certificate the FAST balance but there are times when obtaining a certificate is necessary, such as when the issuer's transfer agent or the issuer itself no longer meets the criteria to be in the FAST program.

IV. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[9] The Commission finds that DTC's proposed rule change is consistent with its obligations under the Exchange Act because it should allow DTC to reduce the costs and risks associated with the creation, storage, transfer, and

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[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 63320 (November 16, 2010), 75 FR 71473 (November 23, 2010).

[3] Letters from Charles V. Rossi, President, Securities Transfer Association (December 14, 2010) and Candice Fordin, Associate Counsel, The Depository Trust & Clearing Corporation (February 22, 2011).

[4] FAST reduces the movement of certificates between DTC and transfer agents, thereby reducing the costs and risks associated with the creation, movement, and storing of certificates. For a description of DTC's current rules relating to FAST, see Securities Exchange Act Release Nos. 34–13342 (March 8, 1977) (File No. SR–DTC–76–3); 34–14997 (July 26, 1978) (File No. Sr–DTC–78–11); 34–21401 (October 16, 1984) (File No. SR DTC–84–8); 34–31941 (March 3, 1993) (SR–DTC–92–15); and 34–46956 (December 2, 2002) (File No. SR–DTC 2002–15). In addition, see Securities Exchange Act Release No. 34–60196 (June 30, 2009) 74 FR 33496 (File No. SR–DTC–2006–16).

[5] DRS allows registered owners to hold their assets on the records of the transfer agent in book-entry form rather than in certificated form and provides investors with an alternate approach to holding their securities either in certificated form or in "street" name. Securities on deposit at DTC are considered "DRS eligible" if the issuer's by-laws permit the issuance of book entry shares and the CUSIP number has been designated as FAST eligible by DTC. "Participating in DRS" means that the issuer and its transfer agent have complied with DTC's requirements to participate in the DRS program and actually allow investors to hold shares in DRS. Issuers that participate in DRS have acknowledged that the use of electronic registration of securities is a valid method to evidence ownership of their issued securities.

[6] *Supra* note 3.

[7] Through DTC's DWAC service, participants are permitted to make deposits and withdrawals directly with a transfer agent for an issue evidenced by a balance certificate registered in the name of Cede & Co. and held for DTC by a transfer agent. Issues eligible under DTC's Fast Automated Securities Transfer ("FAST") are eligible for DTC's DWAC service. For more information about the DWAC service, see Securities Exchange Act Release No. 30283 (January 23, 1992), 57 FR 3658 (January 30, 1992) (SR–DTC–91–16).

[8] In addition to the requirement that an issue be eligible and participating in DRS, DTC's proposed rule change also requires that issue be exchange traded. The STA did not raise any concerns in its comment letter regarding this aspect of the proposal. Nonetheless, DTC stated in its comment letter that by waiving the requirement to maintain a balance certificate for only those issues that are listed on an exchange, DTC is able to rely on the due diligence of the exchange to provide a level of issuer transparency that DTC might not otherwise be able to attain.

[9] 15 U.S.C. 78q–1(b)(3)(F).

replacement of physical certificates, specifically in this case the balance certificates, which should in turn allow DTC to better safeguard the securities which are in its custody or control or for which it is responsible.

While the Commission understands the STA would like to further promote dematerialization by eliminating the need for FAST agents acting for issues that are eligible but not participating in DRS to maintain a balance certificate, we agree with DTC that at this time allowing only those issues where the issuer has expressly provided that statements are evidence of ownership to eliminate maintaining the balance certificate better safeguards the securities being custodied by the FAST agent on DTC's behalf. Furthermore, the proposed rule change may encourage those issuers that have made their securities eligible but are not participating in DRS to participate in DRS, which would further facilitate the STA's goal of reducing the use of physical certificates.

With regards to the STA's concern that requiring issuers or their transfer agents to provide a balance certificate upon request, the proposed rule change does not change DTC's current requirements relating to certificating FAST balance positions and therefore should not present any new issues for issuers or FAST transfer agents. DTC was simply making clear in the proposed rule change that it is continuing to reserve the right to request such a certificate.

Accordingly, for the reasons stated above the Commission believes that the proposed rule change is consistent with DTC's obligation under Section 17A of the Exchange Act, as amended, and the rules and regulations thereunder.[10]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–DTC–2010–15) be and hereby is approved.

[10] In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[11]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8553 Filed 4–8–11; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64193; File No. SR–ISE–2011–17]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE Rule 2102 To Extend the Pilot Program

April 5, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 31, 2011, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 2102 (Hours of Business) to extend the expiration of the pilot rule.

The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend ISE Rule 2102 to extend the expiration of the pilot rule. Initial amendments to ISE Rule 2102 to allow the Exchange to pause trading in an individual stock when the primary listing market for such stock issues a trading pause were approved by the Commission on June 10, 2010 on a pilot basis to end on December 10, 2010.[3] The pilot was then extended to expire on April 11, 2011.[4] On September 10, 2010, ISE Rule 2102 was amended again to expand the pilot rule to apply to the Russell 1000® Index and other specified exchange traded products.[5] The Exchange now proposes to extend the date by which this pilot rule will expire to the earlier of August 11, 2011 or the date on which a limit up/limit down mechanism to address extraordinary market volatility, if adopted, applies. Extending this pilot program will provide the exchanges with a continued opportunity to assess the effect of this rule proposal on the markets.

2. Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[6] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[7] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes uniformity across markets concerning decisions to pause trading in a security when there are significant price movements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (SR–ISE–2010–48).

[4] *See* Securities Exchange Act Release No. 63506 (December 9, 2010), 75 FR 78301 (December 15, 2010) (SR–ISE–2010–117).

[5] *See* Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (SR–ISE–2010–66).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78k–1(a)(1).

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[10] However, Rule 19b–4(f)(6)[11] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[12] For this reason, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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–ISE–2011–17 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–ISE–2011–17. 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 offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2011–17, and should be submitted on or before May 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8527 Filed 4–8–11; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] *Id.*

[12] For the purposes only of waiving the operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64181; File No. SR–OCC–2010–19]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving a Proposed Rule Change Relating to Stock Loan Programs

April 5, 2011.

I. Introduction

On December 16, 2010, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] The proposed rule change clarifies the regulatory treatment under Rule 15c3–1[2] of collateral and margin posted by clearing members participating in stock loan transactions through OCC's Stock Loan/Hedge Program or Market Loan Program. The proposed rule change was published for comment in the **Federal Register** on January 5, 2011.[3] No comment letters were received. This order approves the proposed rule change.

II. Description of the Proposal

A. Background

OCC's Stock Loan/Hedge Program, provided for in Article XXI of OCC's By-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.15c3–1.

[3] Securities Exchange Act Release No. 63623 (Dec. 30, 2010), 76 FR 0602.

Laws and Chapter XXII of OCC's Rules, provides a means for OCC clearing members to submit broker-to-broker stock loan transactions to OCC for clearance. Broker-to-broker transactions are independently-executed stock loan transactions that are negotiated directly between two OCC clearing members. OCC's Market Loan Program, provided for in Article XXIA of OCC's By-Laws and Chapter XXIIA of OCC's Rules, accommodates securities loan transactions executed through electronic trading platforms that match lenders and borrowers on an anonymous basis. Anonymous stock loan transactions are initiated when a lender or borrower, which is either an OCC clearing member participating in the Market Loan Program or a non-clearing member that has a clearing relationship with an OCC clearing member participating in the Market Loan Program, accepts a bid/offer displayed on a trading platform.[4]

When a stock loan transaction is submitted to and accepted by OCC for clearance, OCC substitutes itself as the lender to the borrower and as the borrower to the lender thus serving a function for the stock loan market similar to the one it serves for the listed options market. OCC guarantees the future daily mark-to-market payments, which are effected through OCC's cash settlement system, between the lending clearing member and borrowing clearing member and guarantees the return of the loaned stock to the lending clearing member and the return of the collateral to the borrowing clearing member upon close-out of the stock loan transaction.[5] One advantage of submitting stock loan transactions to OCC is that the stock loan and stock borrow positions then reside in the clearing member's options account at OCC and, to the extent that they offset the risk of options positions carried in the same account, may reduce the clearing member's margin requirement in the account. OCC's risk is, in turn, reduced by having the benefit of the hedge.

One of the tools that OCC uses to manage its exposure to stock loan transactions is the margin that OCC calculates and collects with respect to each account of a clearing member.[6] Such margin consists of a mark-to-market component that is based on the net asset value of the account (*i.e.,* the cost to liquidate the account at current prices). A second component of such margin is the risk component ("Risk Margin") determined by OCC's proprietary margin system based on the net risk of all open positions carried in the account, including stock loan positions as well as options positions.[7] An additional margin requirement ("Additional Margin"), which is solely applicable to stock loan transactions, arises where the collateral provided by the borrowing clearing member is greater than the current market value of the loaned stock. For example, in a stock loan transaction where the borrowing clearing member is required to provide collateral equal to 102% of the current market value of the loaned stock, OCC will charge the corresponding lending clearing member an Additional Margin amount equal to the 2% excess collateral and will credit the borrowing clearing member an equal amount. The Additional Margin charge/credit is designed to provide OCC with resources so it can fully compensate a party to a stock loan transaction in the event of a counterparty default where the loaned stock or collateral held by the non-defaulting party is worth less than the value of the collateral or loaned stock exchanged.

B. Description of Rule Change

In December 2008, the Commission approved an OCC proposed rule change that memorialized OCC's understanding that where stock loan transactions are submitted to OCC for clearance through the Stock Loan/Hedge Program, any Additional Margin that a clearing member is required to deposit with OCC will be treated the same as any other portion of the OCC margin deposit requirement and therefore will not constitute an unsecured receivable that would otherwise be required to be deducted from such clearing member's net capital for purposes of Rule 15c3–1.[8]

Pursuant to this rule change, OCC is expanding the prior interpretive relief to make clear that: (i) clearing members are not required to take a net capital deduction with respect to any excess of the collateral over the market value of the loaned stock and (ii) the interpretive relief also applies to stock loan transactions submitted to OCC for clearance through the Market Loan Program. As explained above, any over-collateralization of the loaned stock will be secured and offset by Additional Margin charges/credits applied by OCC. Therefore, any such excess collateral on loaned stock also would not be deemed to constitute an unsecured receivable for purposes of Rule 15c3–1.

In connection with the above-referenced initiatives, OCC will amend Interpretation .05 to OCC Rule 601 to reflect the regulatory treatment under Rule 15c3–1 of collateral and margin posted by clearing members participating in stock loan transactions through the Stock Loan/Hedge Program and/or Market Loan Program.[9]

III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[10] OCC's rule change to provide additional interpretive relief with respect to the net capital treatment of stock loan transactions extends OCC's previous changes to its Stock Loan/Hedge Program [11] and is similarly designed to enhance OCC's ability to assure that it has collected sufficient margin from its members in relation to such members' activity. The new interpretive relief should continue to provide OCC with the ability to manage the risk of a clearing member's stock loan activity and should continue to enable OCC to protect itself and its members from potential losses associated with the stock loan program. Accordingly, the Commission finds that the proposed rule change is designed to assure the safeguarding of securities and funds which are in OCC's custody or control or for which OCC is responsible.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act [12] and the rules and regulations thereunder.

[4] A clearing member participating in the Market Loan Program is obligated to OCC as principal with respect to transactions effected by its customers that are non-clearing members of a trading platform.

[5] With respect to both the Stock Loan/Hedge Program and the Market Loan Program, the loaned securities are moved to the account of the borrower against cash collateral (normally 102%) through the facilities of The Depository Trust Company ("DTC"). DTC notifies OCC that the movement has occurred at the time the transaction is submitted for clearance. The securities are returned to the lender against return of the cash collateral through the same mechanism.

[6] This OCC margin requirement is in addition to the cash collateral that is transferred to the stock lender and may be deposited in any form constituting acceptable margin collateral under OCC Rule 604.

[7] OCC does not calculate risk margin on stock loan positions and stock borrow positions separately from risk margin on options positions carried in the same account.

[8] Securities Exchange Act Release No. 59036 (Dec. 1, 2008), 73 FR 74554 (Dec. 8, 2008).

[9] The text of the proposed amendment to Interpretation .05 can be found at *http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_10_19.pdf.*

[10] 15 U.S.C. 78q–1(b)(3)(F).

[11] *Supra* note 8.

[12] 15 U.S.C. 78q–1.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (File No. SR–OCC–2010–19) be and hereby is approved.[14]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[15]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8473 Filed 4–8–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64192; File No. SR–FINRA–2011–015]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Effective Date of the Trading Pause Pilot

April 5, 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 March 30, 2011, 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. 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 6121 (Trading Halts Due to Extraordinary Market Volatility) to extend the effective date of the single stock circuit breaker pilot program until the earlier of August 11, 2011 or the date on which a limit up/down mechanism to address extraordinary market volatility, if adopted, applies to the pilot securities.

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.

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

FINRA proposes to amend FINRA Rule 6121.01 to extend the effective date of the pilot by which such rule operates, which is currently scheduled to expire on April 11, 2011, until the earlier of August 11, 2011 or the date on which a limit up/down mechanism to address extraordinary market volatility, if adopted, applies to the pilot securities.

FINRA Rule 6121.01 provides that if a primary listing market has issued an individual stock trading pause under its rules, FINRA will halt trading otherwise than on an exchange in that security until trading has resumed on the primary listing market. The pilot was developed and implemented as a market-wide initiative by FINRA and other self-regulatory organizations ("SROs") in consultation with Commission staff, and is currently applicable to the S&P 500® Index,[3] the Russell 1000® Index and a pilot list of Exchange Traded Products,[4] together, the "pilot securities."

The extension proposed herein would allow the pilot to continue to operate without interruption while FINRA and the other SROs further assess the effect of the pilot on the marketplace and whether other initiatives should be adopted in lieu of the current pilot.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, such that the pilot can continue to operate without interruption for the benefit of the marketplace and the investing public.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[5] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change meets these requirements in that it promotes uniformity across markets concerning decisions to pause trading in a security when there are significant price movements.

Additionally, extension of the pilot until the earlier of August 11, 2011 or the date on which a limit up/down mechanism to address extraordinary market volatility, if adopted, applies to the pilot securities, would allow the pilot to continue to operate without interruption while FINRA and the other SROs further assess the effect of the pilot on the marketplace and whether other initiatives should be adopted in lieu of the current pilot.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [6] and Rule 19b–4(f)(6) thereunder.[7]

[13] 15 U.S.C. 78s(b)(2).

[14] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62251 (June 10, 2010), 75 FR 34183 (June 16, 2010) (Order Approving File No. SR–FINRA–2010–025).

[4] *See* Securities Exchange Act Release No. 62883 (September 10, 2010), 75 FR 56608 (September 16, 2010) (Order Approving File No. SR–FINRA–2010–033).

[5] 15 U.S.C. 78*o*–3(b)(6).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the

Continued

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[8] However, Rule 19b–4(f)(6)[9] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[10] For this reason, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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–2011–015 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–FINRA–2011–015. 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 website (*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 website 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 offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–FINRA–2011–015, and should be submitted on or before May 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8504 Filed 4–8–11; 8:45 am]

BILLING CODE 8011–01–P

Act, an exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[8] 17 CFR 240.19b–4(f)(6)(iii).

[9] *Id.*

[10] For the purposes only of waiving the operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64189; File No. SR–CBOE–2011–008]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of Proposed Rule Change To Permit the Listing of Series With $0.50 and $1 Strike Price Increments on Certain Options Used To Calculate Volatility Indexes

April 5, 2011.

I. Introduction

On February 4, 2011, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to expand the $2.50 Strike Price Program. The proposed rule change was published for comment in the **Federal Register** on February 24, 2011.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

CBOE has proposed to amend Rules 5.5 and 24.9 to permit the listing of strike prices in $0.50 intervals where the strike price is less than $75, and strike prices in $1.00 intervals where the strike price is between $75 and $150 for option classes used to calculate volatility indexes. The Exchange also proposed to amend Interpretation and Policy .08 to Rule 5.5 to permit $0.50 strike price intervals where the strike price is less than $75 for options on exchange-traded funds ("ETFs") that are used to calculate a volatility index.

In its proposal, CBOE seeks to apply its VIX methodology[4] to options on certain ETFs and individual equity

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 63927 (February 17, 2011), 76 FR 10412 ("Notice").

[4] The VIX methodology is derived from a body of research showing that it is possible to create pure exposure to volatility by assembling a special portfolio of options. While the price of a single option depends on both the underlying price and volatility, this special portfolio is constructed, in the aggregate, to eliminate the stock price dependence. In theory, this option portfolio would be comprised of an infinite number of options with continuous strike prices. In practice, however, the options that are used to calculate VIX—as well as other volatility indexes—are finite in number and are subject to a minimum interval between strike prices. The narrower this minimum interval, the more accurate the expression of volatility should be.

securities, and believes that it is appropriate to designate strike price intervals and ranges for series in such options that are comparable to those strike price intervals and ranges in effect for the SPX option series. The Exchange hopes that this will permit calculation of volatility index values that are recognized to be as accurate and reliable as the VIX values. The Exchange stated that allowing smaller strike price intervals for options overlying single stocks, ETFs, and indexes with prices of $150 or less will allow the Exchange to calculate volatility indexes that are better estimates of the expected volatility of option classes with underlying prices that are low relative to the level of the S&P 500.

The Exchange also stated its belief that the expansion of strike prices resulting from the proposal is limited because the proposal will apply only to options that are used to calculate a volatility index. CBOE further stated that it has analyzed its capacity and represented that it believes that the Exchange and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing series with strike prices in $0.50 intervals where the strike price is less than $75, and series with strike prices in $1.00 intervals where the strike price is between $75 and $150 for option classes used to calculate volatility indexes that would result from the Exchange's proposal.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[5] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[6] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The proposal appears to strike a reasonable balance between the Exchange's desire to offer a wider array of investment opportunities and the need to avoid unnecessary proliferation of options series and the corresponding increase in quotes and market fragmentation. The Commission expects the Exchange to monitor the trading volume associated with the additional options series listed as a result of this proposal and the effect of these additional series on market fragmentation and on the capacity of the Exchange's, OPRA's, and vendors' automated systems. The Commission notes that CBOE has represented that it believes the Exchange and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the newly permitted listings.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (SR–CBOE–2011–008) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8498 Filed 4–8–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64187; File No. SR–EDGA–2011–08]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Adopt Rule 3.22 (Proxy Voting), in Accordance With the Provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

April 5, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act" or "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 24, 2011, EDGA Exchange, Inc. (the "Exchange" or "EDGA") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt Rule 3.22 (Proxy Voting), in accordance with the provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The text of the proposed rule change is attached as Exhibit 5 and is available on the Exchange's Web site at *http://www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

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 III below. The self-regulatory organization 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

Purpose

The Exchange is proposing to adopt EDGA Rule 3.22 (Proxy Voting), in accordance with the provisions of Section 957 of the Dodd-Frank Act, to prohibit Members from voting uninstructed shares if the matter voted on relates to (i) the election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act of 1940 (the "Investment Company Act")), (ii) executive compensation, or (iii) any other significant matter, as determined by the Securities and Exchange Commission (the "Commission"), by rule.

Section 957 of the Dodd-Frank Act amends Section 6(b)[3] of the Securities Exchange Act of 1934 (the "Exchange Act") [sic] to require the rules of each national securities exchange to prohibit any member organization that is not the beneficial owner of a security registered

[5] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

under Section 12[4] of the Exchange Act from granting a proxy to vote the security in connection with certain stockholder votes, unless the beneficial owner of the security has instructed the member organization to vote the proxy in accordance with the voting instructions of the beneficial owner. The stockholder votes covered by Section 957 include any vote with respect to (i) the election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act), (ii) executive compensation, or (iii) any other significant matter, as determined by the Commission, by rule.

Accordingly, in order to carry out the requirements of Section 957 of the Dodd-Frank Act, the Exchange proposes to adopt proposed EDGA Rule 3.22 to prohibit any Member from giving a proxy to vote stock that is registered in its name, unless: (i) Such Member is the beneficial owner of such stock; (ii) pursuant to the written instructions of the beneficial owner; or (iii) pursuant to the rules of any national securities exchange or association of which it is a member provided that the records of the Member clearly indicate the procedure it is following. The Exchange is proposing to adopt these rules because other national securities exchanges and associations do allow proxy voting under certain limited circumstances while the current Exchange Rules are silent on such matters. Therefore, a Member that is also a member of another national securities exchange or association may vote the shares held for a customer when allowed under its membership at another national securities exchange or association, provided that the records of the Member clearly indicate the procedure it is following.

Notwithstanding the foregoing, a Member that is not the beneficial owner of a security registered under Section 12 of the Exchange Act is prohibited from granting a proxy to vote the security in connection with a shareholder vote with respect to the election of a member of the board of directors of an issuer (except for a vote with respect to uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission, by rule, unless the beneficial owner of the security has instructed the Member to vote the proxy in accordance with the voting instructions of the beneficial owner.

Because Section 957 of the Dodd-Frank Act does not provide for a transition phase, the Exchange is proposing to adopt the proposed rule change pursuant to Section 19(b) of the Exchange Act to comply with Section 957 of the Dodd-Frank Act and is requesting that the Commission approve the proposal on an accelerated basis. Additionally, proposed EDGA Rule 3.22(a) is based on NYSE Arca, Inc. ("NYSE Arca") rule 9.4 and Financial Industry Regulatory Authority ("FINRA") rule 2251, International Securities Exchange, LLC ("ISE") rule 421(a) and proposed EDGA Rule 3.22(b) is based on Nasdaq rule 2251(d) and ISE rule 421(b).

Basis

The Exchange believes the proposed rule change is consistent with the Act[5] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(10)[7] requirements that all national securities exchanges adopt rules prohibiting members from voting, without receiving instructions from the beneficial owner of shares, on the election of a member of a board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission, by rule. The Exchange also believes that the proposed rule change is consistent with the requirements under Section 6(b)(5)[8] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange is adopting this proposed rule change to comply with the requirements of Section 957 of the Dodd-Frank Act, and therefore believes the proposed rule change to be consistent with the Act, particularly with respect to the protection of investors and the public interest.

[4] 15 U.S.C. 781.

[5] 15 U.S.C. 78a et seq.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(10).

[8] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–EDGA–2011–08 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–EDGA–2011–08. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of

10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGA–2011–08 and should be submitted on or before May 2, 2011.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

In its filing, the Exchange requested that the Commission approve the proposal on an accelerated basis so that the Exchange could immediately comply with the requirements imposed by the Dodd-Frank Act, and because the proposed rule text is based upon ISE Rule 421, FINRA Rule 2251, Nasdaq Rule 2251(d), and NYSE Arca Rule 9.4.[9] After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[10]

The Commission believes that proposed Rule 3.22(a) is consistent with Section 6(b)(5)[11] of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Under proposed Rule 3.22(a), a Member shall be prohibited from voting uninstructed shares unless (1) That Member is the beneficial owner of the stock; (2) pursuant to the written instructions of the beneficial owner; or (3) pursuant to the rules of any national securities exchange or association of which it is also a member, provided that the Member's records clearly indicate the procedure it is following. This provision is based on ISE Rule 421, FINRA Rule 2251 and NYSE Arca Rule 9.4, which were previously approved by the Commission.[12] The Commission notes that the proposed change will provide clarity to Exchange Members going forward on whether broker discretionary voting is permitted by Exchange Members under limited circumstances when the Member is also a member of another national securities exchange that permits broker discretionary voting. In approving this portion of the proposal, the Commission notes that Rule 3.22(a) is consistent with the approach taken under the rules of other national securities exchanges or national securities association, and for Exchange Members who are not also members of another national securities exchange prohibits broker discretionary voting on any matter, consistent with investor protection and the public interest.

The Commission believes that proposed Rule 3.22(b) is consistent with Section 6(b)(10)[13] of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission by rule.

The Commission believes that proposed Rule 3.22(b) is consistent with Section 6(b)(10) of the Act because it adopts revisions that comply with that section. As noted in the accompanying Senate Report, Section 957, which enacted Section 6(b)(10), reflects the principle that "final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares."[14] The proposed rule change will make the Exchange compliant with the new requirements of Section 6(b)(10) by specifically prohibiting broker-dealers, who are not beneficial owners of a security, from voting uninstructed shares in connection with a shareholder vote on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule, unless the member receives voting instructions from the beneficial owner of the shares.[15]

The Commission also believes that proposed Rule 3.22(b) is consistent with Section 6(b)(5)[16] of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the rule assures that shareholder votes on the election of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940) and on executive compensation matters are made by those with an economic interest in the company, rather than by a broker that has no such economic interest, which should enhance corporate governance and accountability to shareholders.[17]

Based on the above, the Commission finds that the Exchange's proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act because it should enhance corporate accountability to shareholders while also serving to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,[18] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission believes that good cause exists to grant accelerated approval to proposed Rule 3.22(a), because this proposed rule will conform the Exchange rule to ISE Rule

[9] *See* Securities Exchange Act Release 63139 (October 20, 2010), 75 FR 65680 (October 26, 2010) (SR–ISE–2010–99); 61052 (November 23, 2009), 74 FR 62857 (December 1, 2009) (SR–FINRA–2009–066) (finding that the proposed rule change was consistent with the Act because the Rule "will continue to provide FINRA members with guidance on the forwarding of proxy and other issuer-related materials."); 62992 (September 24, 2010), 75 FR 60844 (October 1, 2010) (SR–NASDAQ–2010–114); and 48735 (October 31, 2003), 68 FR 63173 (November 7, 2003) (SR–PCX–2003–50).

[10] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(5).

[12] *See supra* note 9.

[13] 15 U.S.C. 78f(b)(10).

[14] *See* S. Rep. No. 111–176, at 136 (2010).

[15] The Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future. Should the Commission adopt such rules, we would expect the Exchange to adopt coordinating rules promptly to comply with the statute.

[16] 15 U.S.C. 78f(b)(5).

[17] As the Commission stated in approving NYSE rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers the goal of enfranchising shareholders. *See* Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR–NYSE–2006–92).

[18] 15 U.S.C. 78s(b)(2).

421, NYSE Arca Rule 9.4 and FINRA Rule 2251, which were published for public comment in the **Federal Register** and approved by the Commission, and for which no comments were received.[19] Because proposed Rule 3.22(a) is substantially similar to the ISE, NYSE Arca and FINRA rules, it raises no new regulatory issues.

The Commission also believes that good cause exists to grant accelerated approval to proposed Rule 3.22(b), which conforms the Exchange's rules to the requirements of Section 6(b)(10) of the Act. Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit broker voting on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule. The Commission believes that good cause exists to grant accelerated approval to proposed Rule 3.22(b), because it will conform the Exchange rule to the requirements of Section 6(b)(10) of the Act. Moreover, proposed Rule 3.22(b) is substantially similar to ISE Rule 421 and Nasdaq Rule 2251.[20]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[21] that the proposed rule change (SR–EDGA–2011–08) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8477 Filed 4–8–11; 8:45 am]

BILLING CODE 8011–01–P

[19] *See supra* notes 9.

[20] *See supra* note 9.

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 7411]

30-Day Notice of Proposed Information Collection: DS–156, Nonimmigrant Visa Application, OMB Control Number 1405–0018

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Nonimmigrant Visa Application.
- *OMB Control Number:* 1405–0018.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs (CA/VO).
- *Form Number:* DS–156.
- *Respondents:* Nonimmigrant visa applicants.
- *Estimated Number of Respondents:* 800,000.
- *Estimated Number of Responses:* 800,000.
- *Average Hours per Response:* 1 hour.
- *Total Estimated Burden:* 800,000 hours per year.
- *Frequency:* Once per respondent.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from April 11, 2011.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *E-mail: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Stefanie Claus of the Office of Visa Services, U.S. Department of State, 2401 E. Street, NW., L–603, Washington, DC 20522, who may be reached at (202) 663–2910.

SUPPLEMENTARY INFORMATION:

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond.

Abstract of proposed collection:

Form DS–156 is required by regulation of all nonimmigrant visa applicants who do not use the Online Application for Nonimmigrant Visa (Form DS–160). Posts will use the DS–156 to elicit information necessary to determine an applicant's visa eligibility.

Methodology:

The DS–156 is completed by applicants online or, in exceptional circumstances, applicants may submit a paper application to posts abroad. The applicant prints the application and a 2–D barcode. When the applicant appears at the interview the barcode is scanned and the information electronically received.

Dated: March 31, 2011.

David T. Donahue,

Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2011–8539 Filed 4–8–11; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Safety Approval Performance Criteria

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notification of criteria used to evaluate the National Aerospace Training and Research (NASTAR) Center safety approval application.

SUMMARY: NASTAR was issued a safety approval, subject to the provisions of Title 51 U.S.C. subtitle V, chapter 509, and the orders, rules and regulations issued under it. Pursuant to 14 CFR 414.35, this Notice publishes the criteria that were used to evaluate the safety approval application.

Background: NASTAR applied for, and received, a safety approval for the ability of its Space Training System: Model 400 (STS–400) to replicate G levels. The performance criteria for this safety approval are applicant developed per 14 CFR 414.19 (a)(4). NASTAR's

STS–400 suborbital space flight simulator (a multi-axis centrifuge) is capable of replicating the G forces associated with suborbital space flight within the following parameters:

—Manned flight profiles up to 12 Gz and 8 Gx, with an onset rate up to +/- 8 G/Sec and an accuracy in Gz and Gx axis of +/- 0.1 G.

Criteria Used to Evaluate Safety Approval Application: The STS–400 was evaluated by the FAA as a component of a flight crew training process. The evaluation included the FAA's assessment of the STS–400's ability to accurately replicate the specified G levels.

NASTAR submitted the following data to show that the STS–400 complies with the criteria:

—Acceptance Test Plan.

—Launch and reentry profiles demonstrations, and

—G level accelerometer and tachometer test results.

FOR FURTHER INFORMATION CONTACT: For questions about the performance criteria, you may contact Sherman Council, Licensing and Evaluation Division (AST–200), FAA Office of Commercial Space Transportation (AST), 800 Independence Avenue SW., Room 331, Washington, DC 20591, telephone (202) 267–8308; e-mail *sherman.council@faa.gov.*

Issued in Washington, DC, April 4, 2011.

George C. Nield,

Associate Administrator for Commercial Space Transportation.

[FR Doc. 2011–8534 Filed 4–8–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at the Burnet Municipal Airport, Burnet, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Request To Release Airport Property.

SUMMARY: The FAA proposes to rule and invite public comment on the release of land at the Burnet Municipal Airport under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

DATES: Comments must be received on or before May 11, 2011.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Mr. Mike Nicely, Manager, Federal Aviation Administration, Southwest Region, Airports Division, Texas Airports Development Office, ASW–650, Fort Worth, Texas 76137.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. David Vaughn, Asst. City Manager, at the following address: P.O. Box 1369, 1001 Buchanan Drive, Suite 4, Burnet, Texas 78611.

FOR FURTHER INFORMATION CONTACT: Mr. Steven Cooks, Program Manager, Federal Aviation Administration, Texas Airports Development Office, ASW–650, 2601 Meacham Boulevard, Fort Worth, Texas 76137. Telephone: (817) 222–5608. E-mail: *Steven.Cooks@faa.gov.* Fax: (817) 222–5989.

The request to release property may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release property at the Burnet Municipal Airport under the provisions of the AIR 21.

The following is a brief overview of the request:

The City of Burnet requests the release of 4.407 acres of non-aeronautical airport property. A portion of the land was acquired by imminent domain in 1959 as part of the original 79.31 acres and the remaining portion was acquired in 1982. The property to be released will be sold to allow for a new public safety facility. The proposed facility will include police, fire, and EMS services which will benefit general aviation by establishing immediate security and safety services to all areas of the airport and greatly improve the quality and availability of these services to the entire community. Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents relevant to the application in person at the Burnet Municipal Airport, telephone number (512) 756–6655.

Issued in Fort Worth, Texas on February 29, 2011.

Kelvin Solco,

Manager, Airports Division.

[FR Doc. 2011–8297 Filed 4–8–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Oakland and Genesee Counties, MI

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Availability of the Final Environmental Impact Statement (FEIS) and Section 4(f) Evaluation for the M–15 Corridor from I–75 to I–69.

SUMMARY: This notice announces the availability of a Final Environmental Impact Statement (FEIS) and Section 4(f) Evaluation for the M–15 Corridor from I–75 to I–69. This action is pursuant to the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq,* as amended and the Council on Environmental Quality Regulations (40 CFR parts 1500–1508). The FEIS documents the identification of the Technically and Environmentally Preferred Alternative for M–15 from I–75 to I–69 in Oakland and Genesee Counties, Michigan, and the selection of the No-Build Alternative with Transportation Systems Management.

DATES: The FEIS and Section 4(f) Evaluation was made available to the public on April 11, 2011. EPA published the Notice of Availability on April 15, 2011. The Record of Decision cannot be issued any sooner than May 16, 2011. The FEIS is available for a 30-day public review period. Comments must be received on or before May 16, 2011. All submissions from organizations or businesses and from individuals identifying themselves as representatives or officials of organizations or businesses will be made available for public disclosures in their entirety.

ADDRESSES: 1. *Document Availability:* The document was made available to the public on April 11, 2011. Copies of the FEIS are available for public inspection and review on the project Web site: *http://www.michigan.gov/mdotstudies* and at the following locations:

Independence Township, 6482 Waldon Center Drive, Clarkston

Groveland Township, 4695 Grange Hall Road, Holly

Atlas Township, 7386 South Gale Road, Goodrich

Brandon Township Public Library, 304 South Street, Ortonville

Davison Township, 1280 North Irish Road, Davison

Village of Goodrich, 7338 South State Street, Goodrich

MDOT Bay Region, 55 East Morley Drive, Saginaw

MDOT Metro Region, 18101 W. Nine Mile Road, Southfield
MDOT Oakland Transportation Service Center, 800 Vanguard Drive, Pontiac
MDOT Davison Transportation Service Center, 9495 East Potter Road, Davison

Additional Information about the project is available on the project website, *http://www.michigan.gov/mdotstudies.*

Copies of the FEIS and Section 4(f) Evaluation may be requested from Bob Parsons (Public Involvement and Hearings Officer) at the Michigan Department of Transportation, 425 W. Ottawa Street, P.O. Box 30050, Lansing, MI 48909 or by calling (517) 373–9534.

This document has been published by authorization of the Director of the State of Michigan's Department of Transportation in keeping with the intent of the National Environmental Policy Act of 1969 and subsequent implementing regulations and policies, including *Title VI of the Civil Rights Act of 1964,* that direct agencies to provide the public and other agencies an opportunity to review and comment on proposed projects and alternatives so that potential impacts of the project can be considered and taken into account during the decision-making process. Requests for alternative formats of this document under Title II of the Americans with Disabilities Act may be made by calling 517.373.9534 or TTD 800.649.3777.

2. *Comments:* Send comments on the FEIS to the Michigan Department of Transportation, c/o Bob Parsons (Public Involvement and Hearings Officer), 425 W. Ottawa Street, P.O. Box 30050, Lansing, MI 48909; Fax: (517) 373–9255; or e-mail: *parsonsb@michigan.gov.* Information regarding this proposed action is available in alternative formats upon request.

FOR FURTHER INFORMATION CONTACT: Robert Fijol, Area Engineer, at FHWA Michigan Division, 315 W. Allegan Street, Room 201; Lansing, MI 48933; by phone at (517) 702–1841, or e-mail at *Robert.Fijol@dot.gov.*

David T. Williams, Environmental Program Manager, FHWA Michigan Division, 315 W. Allegan Street, Room 201; Lansing, MI 48933; by phone at (517) 702–1820; or e-mail at *David.Williams@dot.gov*

SUPPLEMENTARY INFORMATION: The Michigan Department of Transportation intends to close out the Final Environmental Impact Statement (FEIS) for M–15 between I–75 and I–69 in Oakland and Genesee Counties with the selection of the "No-Build" Alternative with Transportation System Management (TSM) operational improvements. While the FEIS does identify a Technically and Environmentally Preferred Alternative (TEPA), the decision to move forward with the No-Build Alternative is being made due to a lack of available funding to fiscally constrain the TEPA in Southeast Michigan Council of Governments (SEMCOG) Long Range Plan. MDOT will implement TSM improvements such as pavement rehabilitation projects, safety improvement projects, intersection operation projects, and signalization upgrades along the corridor as funds become available. These future TSM improvements will be cleared environmentally as separate actions.

The local jurisdictions along the M–15 corridor plan to use the FEIS and the TEPA as a planning tool, to help them make future transportation and land use decisions in a manner which would not preclude future capacity improvements along the M–15 corridor. Since the TEPA was broken into logical termini or usable sections, each section could be cleared with a Categorical Exclusion (CE) or an Environmental Assessment (EA) if money for improvements is identified in the future. Since these proposed future actions will require new analysis when environmental clearance is sought, most sections of this document have not been updated with current information. All information will be reviewed and updated when individual project clearance is sought.

Purpose and Need for the Project: The purpose of the M–15 Study is to provide increase capacity and safety on M–15 between 1–75 and I–69.

Alternatives Contained in the DEIS Eliminated from Further Study: The Mass Transit and Low-Cost/TSM alternatives were eliminated because they could not reduce or divert travel demand to the point that two lanes for through travel in each direction were not needed.

The bypass alternatives and the Irish Road option did not divert sufficient travel from M–15 to reduce the need for four through travel lanes. Therefore, they were eliminated because they are not practical options.

Super-2 and three-lane alternatives could not meet the project purpose and need of four through travel lanes and therefore eliminated. The full-width or "wide" boulevard was more intrusive and caused more impacts than the "narrow" boulevard, so the latter was favored and the former eliminated because it is not a practical option.

Alternatives Evaluated in the FEIS: Several improvement alternatives were analyzed for this project, as were the No-Build Alternative Alternative. The three "build alternatives" were: (1) Low Cost Improvements/Transportation Systems Management; (2) New Alignments; and, (3) M–15 Reconstruction. These alternatives were developed from the public involvement process. Documentation of the alternatives analysis process is found in three technical memoranda prepared for the study. The Technically and Environmentally Preferred Alternative is M–15 reconstruction to a combination of five-lane and boulevard cross sections.

No-Build Alternative (Recommended Alternative: The No–Build Alternative, has been chosen as the Recommended Alternative, would consist of continued regular maintenance of M–15. Additionally, it will also include some of the improvements mentioned below in the Low Cost Improvements/Transportation Systems Management Section. The four-lane section of M–15 through Goodrich was re-striped in 1999 as a safety project from four lanes to three (center turn-lane configuration) with some curb added. M–15 was repaved in Genesee County in 1999 and in Oakland County in 2000. Minor improvements to shoulders and guard rails occurred at these times. Traffic signals have also been added as congestion has increased. The Recommended Alternative would continue this pattern of maintenance and minor adjustments. It would not require the acquisition of additional right-of-way. Unacceptable levels of traffic service would result if traffic volumes continue to increase.

Low-Cost Improvements/Transportation Systems Management: This alternative called for paving of gravel roads to provide alternative routes to M–15, upgrading intersections along M–15, improving incident management, improving access control, and encouraging reduced trips.

New Alignments: These options considered improving Irish Road (west of and parallel to M–15 in the north section of the corridor) and constructing bypasses of the Village of Goodrich or the Glass Road/Seymour Lake area.

M–15 Reconstruction and Widening: The current cross-section is a two-lane highway throughout a majority of the corridor. Therefore reconstruction and widening options were analyzed. Because traffic forecasts show four through travel lanes are required to meet travel demand, the "super-2" and three-lane options were discarded. Given the need for turning movements through the length of the corridor, little application of a four-lane road was found, compared to a five-lane section, which allows for

turn movements at all required locations. A narrow boulevard with a typical cross section of 172 feet was found to have merit from traffic and safety standpoints, while still allowing turns as required. A wide boulevard, by comparison, was found to have substantially more impacts than the narrow boulevard, as its proposed right-of-way was about 30 feet wider. The wide boulevard was dropped from further consideration when the narrow boulevard was found to be equal from a traffic standpoint and acceptable from a design standpoint.

Authority: 23 CFR 771.117.

Issued on: April 5, 2011.

Russell L. Jorgenson,

Division Administrator, Lansing, Michigan.

[FR Doc. 2011–8512 Filed 4–8–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2011–0080]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemption from the diabetes mellitus standard; request for comments.

SUMMARY: FMCSA announces receipt of applications from 23 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before May 11, 2011.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2011–0080 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 23 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b) (3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Donovan A. Bloomfield

Mr. Bloomfield, age 48, has had ITDM since 2006. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bloomfield understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bloomfield meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Massachusetts.

Kyle T. Brewer

Mr. Brewer, 28, has had ITDM since 2001. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Brewer understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Brewer meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B Commerical Driver's License (CDL) from Nebraska.

Rastus A. Bryant, Jr.

Mr. Bryant, 56, has had ITDM since 2010. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function

that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bryant understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bryant meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from South Carolina.

Daniel J. Cahalan

Mr. Cahalan, 55, has had ITDM since 1998. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Cahalan understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Cahalan meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from North Carolina.

Bill R. Dubson

Mr. Dubson, 36, has had ITDM since 1985. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dubson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dubson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class D operator's license from Illinois.

Paul C. Farley

Mr. Farley, 50, has had ITDM since 1987. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Farley understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Farley meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Connecticut.

Daniel E. Farmer

Mr. Farmer, 53, has had ITDM since 1992. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Farmer understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Farmer meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class E operator's license from Missouri.

C. Shawn Fox

Mr. Fox, 44, has had ITDM since 2007. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Fox understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Fox meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

Brad S. Gray

Mr. Gray, 54, has had ITDM since 2006. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Gray understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Gray meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Maryland.

Ken M. Jorgenson

Mr. Jorgenson, 58, has had ITDM since 2010. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Jorgenson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Jorgenson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

Troy M. Keller

Mr. Keller, 21, has had ITDM since 1994. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Keller understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Keller meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy.

He holds a Class A CDL from Pennsylvania.

Edmund D. Kilmartin, III

Mr. Kilmartin, 57, has had ITDM since 2009. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Kilmartin understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kilmartin meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Michigan.

Lonnie L. Little

Mr. Little, 45, has had ITDM since 2009. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Little understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Little meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

Michael G. Moseley

Mr. Moseley, 45, has had ITDM since 2009. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Moseley understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Moseley meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Carolina.

William M. Munn

Mr. Munn, 67, has had ITDM since 2001. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Munn understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Munn meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Washington DC.

Jeffrey M. Sandler

Mr. Sandler, 50, has had ITDM for the past 15 years. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Sandler understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sandler meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from California.

Donald R. Sine, Jr.

Mr. Sine, 56, has had ITDM since 2002. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Sine understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sine meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from West Virginia.

Edward C. Sinkhorn, Jr.

Mr. Sinkhorn, 72, has had ITDM since 2010. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Sinkhorn understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sinkhorn meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Indiana.

Wanda S. Sloan

Ms. Sloan, 61, has had ITDM since 2010. Her endocrinologist examined her in 2011 and certified that she has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. Her endocrinologist certifies that Ms. Sloan understands diabetes management and monitoring, has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Sloan meets the requirements of the vision standard at 49 CFR 391.41(b)(10). Her optometrist examined her in 2011 and certified that she does not have diabetic retinopathy. She holds a Class D operator's license from Tennessee.

John C. Stephens

Mr. Stephens, 66, has had ITDM since 1980. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Stpehens understands diabetes management and monitoring,

has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Stephens meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Minnesota.

Francisco M. Torres

Mr. Torres, 34, has had ITDM since 1998. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Torres understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Torres meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from New Mexico.

Dale R. Walton

Mr. Walton, 53, has had ITDM since 2010. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Walton understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Walton meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Pennsylvania

Mark H. Wilcox

Mr. Wilcox, 52, has had ITDM since 2007. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Wilcox understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Wilcox meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Minnesota.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 USC. 31136(e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary. The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: March 31, 2011.

Pamela M. Pelcovits,

Director, Office of Policy, Plans and Regulations.

[FR Doc. 2011–8561 Filed 4–8–11; 8:45 am]

BILLING CODE P

[1] Section 4129(a) refers to the 2003 notice as a "final rule." However, the 2003 notice did not issue a "final rule" but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2011–0010]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 23 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision standard. The Agency has concluded that granting these exemptions will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these CMV drivers.

DATES: The exemptions are effective April 11, 2011. The exemptions expire on April 11, 2013.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://*

www.regulations.gov at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

Background

On February 22, 2011, FMCSA published a notice of receipt of exemption applications from certain individuals, and requested comments from the public (76 FR 9856). That notice listed 23 applicants' case histories. The 23 individuals applied for exemptions from the vision requirement in 49 CFR 391.41(b)(10), for drivers who operate CMVs in interstate commerce.

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. Accordingly, FMCSA has evaluated the 23 applications on their merits and made a determination to grant exemptions to each of them.

Vision and Driving Experience of the Applicants

The vision requirement in the FMCSRs provides:

A person is physically qualified to drive a commercial motor vehicle if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber (49 CFR 391.41(b)(10)).

FMCSA recognizes that some drivers do not meet the vision standard, but have adapted their driving to accommodate their vision limitation and demonstrated their ability to drive safely. The 23 exemption applicants listed in this notice are in this category. They are unable to meet the vision standard in one eye for various reasons, including amblyopia, complete loss of vision, optic nerve hypoplasia, aphakia, macular edema, macular degeneration, cataract, retinal detachment and prosthesis. In most cases, their eye conditions were not recently developed. 15 of the applicants were either born with their vision impairments or have had them since childhood. The 8 individuals who sustained their vision conditions as adults have had them for periods ranging from 4 to 50 years.

Although each applicant has one eye which does not meet the vision standard in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV. Doctors' opinions are supported by the applicants' possession of valid commercial driver's licenses (CDLs) or non-CDLs to operate CMVs. Before issuing CDLs, States subject drivers to knowledge and skills tests designed to evaluate their qualifications to operate a CMV.

All of these applicants satisfied the testing standards for their State of residence. By meeting State licensing requirements, the applicants demonstrated their ability to operate a commercial vehicle, with their limited vision, to the satisfaction of the State. While possessing a valid CDL or non-CDL, these 23 drivers have been authorized to drive a CMV in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. They have driven CMVs with their limited vision for careers ranging from 2 to 58 years. In the past 3 years, four of the drivers were involved in crashes or convicted of moving violations in a CMV.

The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the Februay 22, 2011 notice (76 FR 9856).

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the vision standard in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. Without the exemption, applicants will continue to be restricted to intrastate driving. With the exemption, applicants can drive in interstate commerce. Thus, our analysis focuses on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting him or her to driving in intrastate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered not only the medical reports about the applicants' vision, but also their driving records and experience with the vision deficiency.

To qualify for an exemption from the vision standard, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at Docket Number FMCSA–1998–3637.

We believe we can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrate the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively (*See* 61 FR 13338, 13345, March 26, 1996). The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly (See Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex,

geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (See Weber, Donald C., "Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process," Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

Applying principles from these studies to the past 3-year record of the 23 applicants, two of the applicants were convicted for moving violations and two of the applicants were involved in crashes. All the applicants achieved a record of safety while driving with their vision impairment, demonstrating the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions. The veteran drivers in this proceeding have operated CMVs safely under those conditions for at least 3 years, most for much longer. Their experience and driving records lead us to believe that each applicant is capable of operating in interstate commerce as safely as he/she has been performing in intrastate commerce. Consequently, FMCSA finds that exempting these applicants from the vision standard in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption. For this reason, the Agency is granting the exemptions for the 2-year period allowed by 49 U.S.C. 31136(e) and 31315 to the 23 applicants listed in the notice of February 22, 2011 (76 FR 9856).

We recognize that the vision of an applicant may change and affect his/her ability to operate a CMV as safely as in the past. As a condition of the exemption, therefore, FMCSA will impose requirements on the 23 individuals consistent with the grandfathering provisions applied to drivers who participated in the Agency's vision waiver program.

Those requirements are found at 49 CFR 391.64(b) and include the following: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Discussion of Comments

FMCSA received one comment in this proceeding. The comment was considered and discussed below.

The Pennsylvania Department of Transportation is in favor of granting a Federal vision exemption to James H. Corby, Thomas E. Moore, and John F. Murphy. They indicated that they have reviewed the driving histories of these three applicants and have no objections to FMCSA granting them vision exemptions.

Conclusion

Based upon its evaluation of the 23 exemption applications, FMCSA exempts, Jody L. Baker, Gary W. Balcom, Jimmie L. Blue, Ronald Cook, James H. Corby, Bobby D. Cox, Wesley M. Creamer, Gerald S. Dennis, Cleveland E. Edwards, Thomas Grandfield, Bruce J. Greil, Johnnie L. Hall, Jerry L. Hofer, Charles R. Hoeppner, Lester H. Killingsworth, Joseph F. Lopez, III, Thomas E. Moore, John F. Murphy, Michael O. Regentik, Larry D. Robinson, David Serrano, Bill J. Thierolf and Edward Timpson from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above (49 CFR 391.64(b)).

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: March 31, 2011.

Pamela M. Pelcovits,

Director, Office of Policy, Plans and Regulations.

[FR Doc. 2011–8565 Filed 4–8–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0372]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 19 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision standard. The Agency has concluded that granting these exemptions will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these CMV drivers.

DATES: The exemptions are effective April 11, 2011. The exemptions expire on April 11, 2013.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202)–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m.

Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf.*

Background

On February 11, 2011, FMCSA published a notice of receipt of exemption applications from certain individuals, and requested comments from the public (76 FR 7894). That notice listed 19 applicants' case histories. The 19 individuals applied for exemptions from the vision requirement in 49 CFR 391.41(b)(10), for drivers who operate CMVs in interstate commerce.

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. Accordingly, FMCSA has evaluated the 19 applications on their merits and made a determination to grant exemptions to each of them.

Vision and Driving Experience of the Applicants

The vision requirement in the FMCSRs provides:

A person is physically qualified to drive a commercial motor vehicle if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber (49 CFR 391.41(b)(10)).

FMCSA recognizes that some drivers do not meet the vision standard, but have adapted their driving to accommodate their vision limitation and demonstrated their ability to drive safely. The 19 exemption applicants listed in this notice are in this category. They are unable to meet the vision standard in one eye for various reasons, including amblyopia, complete loss of vision, corneal scar, glaucoma, ocular melanoma, aphakia, retinal vein occlusion, macular degeneration, cataract, retinal damage and prosthesis. In most cases, their eye conditions were not recently developed. 14 of the applicants were either born with their vision impairments or have had them since childhood. The 5 individuals who sustained their vision conditions as adults have had them for periods ranging from 5 to 24 years.

Although each applicant has one eye which does not meet the vision standard in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV. Doctors' opinions are supported by the applicants' possession of valid commercial driver's licenses (CDLs) or non-CDLs to operate CMVs. Before issuing CDLs, States subject drivers to knowledge and skills tests designed to evaluate their qualifications to operate a CMV.

All of these applicants satisfied the testing standards for their State of residence. By meeting State licensing requirements, the applicants demonstrated their ability to operate a commercial vehicle, with their limited vision, to the satisfaction of the State. While possessing a valid CDL or non-CDL, these 19 drivers have been authorized to drive a CMV in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. They have driven CMVs with their limited vision for careers ranging from 3 to 54 years. In the past 3 years, none of the drivers were involved in crashes or convicted of moving violations in a CMV.

The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the February 11, 2011 notice (76 FR 7894).

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the vision standard in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. Without the exemption, applicants will continue to be restricted to intrastate driving. With the exemption, applicants can drive in interstate commerce. Thus, our analysis focuses on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting him or her to driving in intrastate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered not only the medical reports about the applicants' vision, but also their driving records and experience with the vision deficiency.

To qualify for an exemption from the vision standard, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at Docket Number FMCSA–1998–3637.

We believe we can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrate the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively (*See* 61 FR 13338, 13345, March 26, 1996). The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly (*See* Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (*See* Weber, Donald C., "Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process," Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

Applying principles from these studies to the past 3-year record of the 19 applicants, two of the applicants were convicted for a moving violation and none of the applicants were involved in a crash. All the applicants achieved a record of safety while driving with their vision impairment, demonstrating the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions. The veteran drivers in this proceeding have operated CMVs safely under those conditions for at least 3 years, most for much longer. Their experience and driving records lead us to believe that each applicant is capable of operating in interstate commerce as safely as he/she has been performing in intrastate commerce. Consequently, FMCSA finds that exempting these applicants from the vision standard in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption. For this reason, the Agency is granting the exemptions for the 2-year period allowed by 49 U.S.C. 31136(e) and 31315 to the 19 applicants listed in the notice of February 11, 2011 (76 FR 7894).

We recognize that the vision of an applicant may change and affect his/her ability to operate a CMV as safely as in the past. As a condition of the exemption, therefore, FMCSA will impose requirements on the 19 individuals consistent with the grandfathering provisions applied to drivers who participated in the Agency's vision waiver program.

Those requirements are found at 49 CFR 391.64(b) and include the following: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Discussion of Comments

FMCSA received one comment in this proceeding. The comment was considered and discussed below.

The Pennsylvania Department of Transportation is in favor of granting a Federal vision exemption to James W. Hoover, George D. Ruth, and Ronald C. Wolfe. The Department indicated that they have reviewed the driving histories of these three applicants and have no objections to FMCSA granting them vision exemptions.

Conclusion

Based upon its evaluation of the 19 exemption applications, FMCSA exempts, James L. Acree, Tracey M. Baucom, David L. Botkins, Richard D. Flaherty, Michael R. Holmes, James W. Hoover, Mark C. Jeffrey, Paul J. Jones, Pedro G. Limon, William G. Marshall, Timothy S. Moore, Kenneth H. Morris, Shelby V. Nicholson, Tracy J. Omeara, Gary W. Pope, George D. Ruth, Benjamin Stone, James H. Wallace, Sr., and Ronald C. Wolfe from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above (49 CFR 391.64(b)).

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: March 31, 2011.

Pamela M. Pelcovits,

Director, Office of Policy, Plans and Regulations.

[FR Doc. 2011–8562 Filed 4–8–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD 2011 0030]

Inventory of U.S.-Flag Launch Barges

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Inventory of U.S.-Flag Launch Barges.

SUMMARY: The Maritime Administration is updating its inventory of U.S.-flag launch barges. Additions, changes and comments to the list are requested. Launch barge information may be found at *http://www.marad.dot.gov/ships_shipping_landing_page/domestic_shipping/launch_barge_program/Launch_Barge_Program.htm.*

DATES: Any comments on this inventory should be submitted in writing to the contact person by May 11, 2011.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, Office of Cargo Preference and Domestic Trade, Maritime

Administration, MAR–730, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone 202–366–5979; e-mail: *Joann.Spittle@dot.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to 46 CFR part 389 (Docket No. MARAD–2008–0045) Determination of Availability of Coastwise-Qualified Vessels for the Transportation of Platform Jackets, the Final Rule requires that the Maritime Administration publish a notice in the Federal Register requesting that owners or operators (or potential owners or operators) of coastwise qualified launch barges notify us of:

(1) Their interest in participating in the transportation and, if needed, the launching or installation of offshore platform jackets; (2) the contact information for their company; and (3) the specifications of any currently owned or operated coastwise qualified launch barges or plans to construct same.

In addition, we are also seeking information on non-coastwise qualified (U.S.-flag) launch barges as well.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: April 5, 2011.

By Order of the Maritime Administrator.

Murray Bloom,

Acting Secretary, Maritime Administration.

REPORTED U.S.-FLAG LAUNCH BARGES

[September 2010]

Vessel name	Owner	Built	Length (ft.)	Beam (ft.)	DWT (L.T.)	Approx launch capacity (L.T.)	Coastwise qualified
Julie B	Crowley Marine Services	2008	400	130	23,600	23,100	X
Marty J	Crowley Marine Services	2008	400	105	19,226	18,766	X
Barge 455–3	Crowley Marine Services	2008	400	105	19,226	18,766	X
Barge 400L	Crowley Marine Services	1997	400	100	19,646	19,146	X
Barge 500–1	Crowley Marine Services	1982	400	105	16,397	15,897	X
Barge 410	Crowley Marine Services	1974	400	99.5	12,035	11,535	X
455 4	Crowley Marine Services	2009	400	105	19,226	18,766	X
455 5	Crowley Marine Services	2009	400	105	19,226	18,766	X
455 6	Crowley Marine Services	2009	400	105	19,226	18,766	X
455 7	Crowley Marine Services	2009	400	105	19,226	18,766	X
455 8	Crowley Marine Services	2010	400	105	19,226	18,766	X
455 9	Crowley Marine Services	2010	400	105	19,226	18,766	X
MWB 403	HMC Leasing, Inc.	1979	400	105	16,322	6,800	X
H–851	Heerema Shipping	1987	853	206.7	128,452	60,000	
H–114	Heerema Shipping	1982	525	137.8	39,226	25,000	
H–122	Heerema Shipping	1978	400	100	16,788	5,500	
H–541	Heerema Shipping	2000	540	138	41,067	20,500	
H–627	Heerema Shipping	1978	580	160	51,829	26,000	
McDermott Tidelands 021	J. Ray McDermott, Inc.	1980	240	72	4,700	2,200	X
McDermott Tidelands No. 012.	J. Ray McDermott, Inc.	1973	240	72.2	4,217	4,000	X
McDermott Tidelands No. 014.	J. Ray McDermott, Inc.	1973	240	72.2	4,217	4,000	X
McDermott Tidelands 020	J. Ray McDermott, Inc.	1980	240	72	5,186	5,000	X
McDermott Tidelands 021	J. Ray McDermott, Inc.	1981	240	72	5,186	5,000	X
INTERMAC 600	J. Ray McDermott, Inc.	1973	500	120	32,290	15,600	
MARMAC 400	McDonough Marine Service	2001	400	99′-9″	10,861	4,400	X
MARMAC 300	McDonough Marine Service	1998	300	100	10,267	4,200	X
MARMAC 22	McDonough Marine Service	2003	260	72	5,198	2,400	X
MARMAC 21	McDonough Marine Service	2002	260	72	5,120	2,400	X
MARMAC 20	McDonough Marine Service	1999	250	72	4,943	2,200	X
MARMAC 19	McDonough Marine Service	1999	250	72	4,765	2,200	X
MARMAC 18	McDonough Marine Service	1998	250	72	4,765	2,200	X
MARMAC 17	McDonough Marine Service	1997	250	72	4,765	2,200	X
MARMAC 16	McDonough Marine Service	1995	250	72	4,765	2,200	X
MARMAC 15	McDonough Marine Service	1995	250	72	4,765	2,200	X
MARMAC 12	McDonough Marine Service	1994	250	72	4,765	2,200	X
MARMAC 11	McDonough Marine Service	1994	250	72	4,765	2,200	X
MARMAC 9	McDonough Marine Service	1993	250	72	4,765	2,200	X
COLUMBIA NORFOLK	Moran Towing	1982	329′ 3½″	78	8,036	8,000	X
FAITHFUL SERVANT	Puglia Engineering, Inc.	1979	492	131	23,174	23,000	
ATLANTA BRIDGE	Trailer Bridge, Inc.	1998	402	100	6,017	6,017	X
BROOKLYN BRIDGE	Trailer Bridge, Inc.	1998	402	100	6,017	6,017	X
CHARLOTTE BRIDGE	Trailer Bridge, Inc.	1998	402	100	6,017	6,017	X
CHICAGO BRIDGE	Trailer Bridge, Inc.	1998	402	100	6,017	6,017	X
MEMPHIS BRIDGE	Trailer Bridge, Inc.	1998	402	100	6,017	6,017	X

[FR Doc. 2011–8532 Filed 4–8–11; 8:45 am]
BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2011–0006]

Koenigsegg Automotive AB; Morgan Motor Company Limited; Receipt of Applications for Renewals of Temporary Exemptions From the Advanced Air Bag Requirements of FMVSS No. 208

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of receipt of applications for renewals of temporary exemptions and request for comments.

SUMMARY: In accordance with the procedures in 49 CFR Part 555, Koenigsegg Automotive AB Koenigsegg") and Morgan Motor Company Limited ("Morgan") have petitioned the agency for renewals of temporary exemption from advanced air bag requirements of FMVSS No. 208, "Occupant crash protection."The basis for each application is that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard.

This notice of receipt of applications for renewal of temporary exemptions is published in accordance with the statutory provisions of 49 U.S.C. 30113(b)(2). Please note that we are publishing together the notice of receipt of the two applications for renewal to ensure efficient use of agency resources and to facilitate processing of the applications. NHTSA has made no judgments on the merits of each application. NHTSA will consider each application separately. We ask that commenters also consider each application separately and submit comments specific to individual applications.

DATES: Comments must be received on or before May 11, 2011.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

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

Regardless of how you submit your comments, you should mention the docket number of this document.

You may call the Docket at 202–366–9324.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act discussion below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

We shall consider all comments received before the close of business on the comment closing date indicated below. To the extent possible, we shall also consider comments filed after the closing date.

FOR FURTHER INFORMATION CONTACT: Ms. Dorothy Nakama, Office of the Chief Counsel, NCC–112, National Highway Traffic Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590. Telephone: (202) 366–2992; Fax: (202) 366–3820.

I. Advanced Air Bag Requirements and Small Volume Manufacturers

In 2000, NHTSA upgraded the requirements for air bags in passenger cars and light trucks, requiring what are commonly known as "advanced air bags." [1] The upgrade was designed to meet the goals of improving protection for occupants of all sizes, belted and unbelted, in moderate-to-high-speed crashes, and of minimizing the risks posed by air bags to infants, children, and other occupants, especially in low-speed crashes. The rule accomplished this by establishing new test requirements and injury criteria and specifying the use of an entire family of test dummies: the then-existing dummy representing 50th percentile adult males, and new dummies representing 5th percentile adult females, 6-year-old children, 3-year-old children, and 1-year-old infants.

The advanced air bag requirements were a culmination of a comprehensive plan that the agency announced in 1996 to address the adverse effects of air bags. This plan also included an extensive consumer education program to encourage the placement of children in rear seats.

The new requirements were phased in beginning with the 2004 model year. Small volume manufacturers (*i.e.,* original vehicle manufacturers producing or assembling fewer than 5,000 vehicles annually for sale in the United States) were not subject to the advanced air bag requirements until September 1, 2006.

In recent years, NHTSA has addressed a number of petitions for exemption from the advanced air bag requirements of FMVSS No. 208. The majority of these requests have come from small manufacturers which have petitioned on the basis of substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard.

Although NHTSA has granted a number of these petitions in situations where the manufacturer is supplying standard air bags in lieu of advanced air bags,[2] NHTSA is considering (1) whether it is in the public interest to continue to grant such petitions, particularly in the same manner as in the past, given the number of years these requirements have now been in effect and the benefits of advanced air bags, and (2) to the extent such petitions are granted, what plans and countermeasures to protect child and infant occupants, short of compliance with the advanced air bags, should be expected.

Given the passage of time since the advanced air bag requirements were established and have been implemented, and in light of the benefits of advanced air bags, NHTSA is considering whether it is in the public interest to continue to grant exemptions from these requirements, particularly in the same manner as in the past. The costs of compliance with the advanced air bag requirements of FMVSS No. 208 are costs that all entrants to the U.S. automobile marketplace should expect to bear. Furthermore, NHTSA understands that, in contrast to the

[1] *See* 65 FR 30680 (May 12, 2000) (Docket No. NHTSA–2000–7013).

[2] *See, e.g.,* grant of petition to Panoz, 72 FR 28759 (May 22, 2007), or grant of petition to Koenigsegg, 72 FR 17608 (April 9, 2007).

initial years after the advanced air bag requirements went into effect, low volume manufacturers now have access to advanced air bag technology. Accordingly, NHTSA tentatively concludes that the expense of advanced air bag technology may not now be sufficient, in and of itself, to justify the grant of a petition for a hardship exemption from the advanced air bag requirements.

NHTSA further notes that exemptions from motor vehicle safety standards are to be granted on a "temporary basis."[3] In prior petitions NHTSA has granted temporary exemptions from the advanced air bag requirements as a means of affording eligible manufacturers a transition period to comply with the exempted standard. Accordingly, in deciding whether to grant an exemption based on substantial economic hardship, NHTSA ordinarily considers the steps that the manufacturer has already taken to achieve compliance, as well as the future steps the manufacturer plans to take during the exemption period and the estimated date by which full compliance will be achieved.[4]

NHTSA invites comment on whether and in what circumstances (e.g., nature of vehicles, number of vehicles, level of efforts to comply with the requirements, timing as to number of years since the requirements were implemented, etc.) it should continue to grant petitions for exemptions from the advanced air bag requirements of FMVSS No. 208. We note that any policy statements we may make in this area would not have the effect of precluding manufacturers from submitting subsequent petitions for exemption. However, we believe it could be helpful for manufacturers to know our general views in advance of submitting a petition.

We also request comment on the issue of, to the extent such petitions are granted, what plans and countermeasures to protect child and infant occupants, short of compliance with the advanced air bags, should be expected. We note that in responding to some recent petitions for exemption from the advanced air bag requirements of FMVSS No. 208, NHTSA has considered the fact that the petitioner planned to install some countermeasures for the protection of child passengers.[5]

NHTSA also invites comment on the likelihood that a child or infant will be a passenger in either a Morgan or Koenigsegg vehicle sold in the U.S.

As always, we are concerned about the potential safety implication of any temporary exemption granted by this agency. In the present case, we are addressing two petitions that seek renewals of temporary exemptions from the advanced air bag requirements. Each petitioner is a manufacturer of low volume, specialty sports cars.

II. Overview of Petitions for Economic Hardship Exemption

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR Part 555, Koenigsegg Automotive AB ("Koenigsegg") and Morgan Motor Company ("Morgan") have petitioned the agency for renewals of temporary exemptions from certain advanced air bag requirements of FMVSS No. 208 (S14).

The basis for Koenigsegg's application and for Morgan's application is that compliance would cause substantial economic hardship[6] to a manufacturer that has tried in good faith to comply with that standard. A copy of each petition[7] is available for review and has been placed in the docket for this notice. The agency closely examines and considers the information provided by manufacturers in support of these factors, and, in addition, pursuant to 49 U.S.C. 30113(b)(3)(A), determines whether exemption is in the public interest and consistent with the Safety Act.[8]

A manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator (49 U.S.C. 30113).

Finally, while 49 U.S.C. 30113(b) states that exemptions from a Safety Act standard are to be granted on a "temporary basis,"[9] the statute also expressly provides for renewal of an exemption on reapplication. Manufacturers are nevertheless cautioned that the agency's decision to grant an initial petition in no way predetermines that the agency will repeatedly grant renewal petitions, thereby imparting semi-permanent exemption from a safety standard. Exempted manufacturers seeking renewal must bear in mind that the agency is directed to consider financial hardship as but one factor, along with the manufacturer's on-going good faith efforts to comply with the regulation, the public interest, consistency with the Safety Act, generally, as well as other such matters provided in the statute.

We note that under 49 CFR 555.8(e), "If an application for renewal of temporary exemption that meets the requirements of § 555.5 has been filed not later than 60 days before the termination date of an exemption, the exemption does not terminate until the Administrator grants or denies the application for renewal." In the case of the petitions for renewal from both Koenigsegg and Morgan, each manufacturer submitted its petition for renewal by the deadline stated in 49 CFR 555.8(e).

III. Petition of Koenigsegg

Background—Koenigsegg Automotive is a Swedish corporation formed in 1999 to produce high-performance sports cars, which are not intended for daily commuting purposes. Koenigsegg is a privately owned company with fewer than 100 shareholders, and manufactures fewer than 50 cars per year. At the time Koenigsegg applied for its initial exemption, the Koenigsegg product line for U.S. sale consisted of the CC model. The Koenigsegg CCX was developed as the next generation of Koenigsegg vehicles after production of the CCR model ended on December 30, 2005. The CCX model (the subject of Koenigsegg's petitions for temporary exemption) was scheduled to go into production in 2006 and to continue at least through the end of 2009. Originally, planning to sell vehicles only in the European, Mid-East, and Far-East markets, Koenigsegg decided in late 2005 to seek entry to the U.S. market for reasons related to ongoing financial viability. The retail price of the CCX is reported to be over $700,000 per vehicle.

In a **Federal Register** document of April 9, 2007 (72 FR 17608), Koenigsegg was granted a temporary exemption from the advanced air bag requirements of FMVSS No. 208, *Occupant Crash Protection,* and from certain provisions of FMVSS No. 108, *Lamps, Reflective Devices, and Associated Equipment* for

[3] 49 U.S.C. 30113(b)(1).

[4] 49 CFR 555.6(a)(2).

[5] *See, e.g.,* grant of petition of Think Technology AS, 74 FR 40634–01 (Aug. 12, 2009); grant of petition of Ferrari S.p.A., 74 FR 36303–02 (July 22, 2009).

[6] When considering financial matters involving companies based in the European Union (EU), it is important to recognize that EU and U.S. accounting principles have certain differences in their treatment of revenue, expenses, and profits. Public statements by EU manufacturers relating to financial results should be understood in this context. This agency analyzes claims of financial hardship carefully and in accordance with U.S. accounting principles.

[7] Morgan has requested confidential treatment under 49 CFR Part 512 for certain business and financial information submitted as part of its petition for temporary exemption. Accordingly, the information placed in the docket does not contain such information that the agency has determined to be confidential.

[8] The Safety Act is codified as Title 49, United States Code, Chapter 301.

[9] 49 U.S.C 30113(b)(1).

the CCX. The exemption was granted for the period from April 9, 2007 (the date of **Federal Register** publication of the grant of Koenigsegg's petition) through December 31, 2009. In accordance with 49 CFR part 555, the basis for the grant was that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard, and the exemption would have a negligible impact on motor vehicle safety.

In a submission dated October 29, 2009, Koenigsegg petitioned for a partial renewal of its temporary exemption, seeking a temporary exemption from the advanced air bag requirements only for the CCX. Koenigsegg did not seek renewal of the exemption from FMVSS No. 108 requirements. Koenigsegg sought a renewal of temporary exemption from the advanced air bag requirements for the CCX for an additional three years, from January 1, 2010 through December 31, 2012.

As discussed in further detail below, the petitioner argued that it tried in good faith, but could not bring the vehicle into compliance with the advanced air bag requirements, and would incur substantial economic hardship if it cannot sell continue to sell vehicles in the U.S.

Eligibility. Koenigsegg is a small, privately-owned company with at present, 40 full-time staff members and several part-time employees. Koenigsegg advises NHTSA that it is not affiliated with any other automobile manufacturer. At the time Koenigsegg submitted its petition to NHTSA, Koenigsegg was negotiating to purchase SAAB Automobile, but SAAB was not sold to Koenigsegg.

The company is a small volume manufacturer whose total production has been between four and eight vehicles per year for the past four years. According to profit and loss accounts provided by Koenigsegg, the company has experienced losses in calendar year (CY) 2006 of $3,771,571,[10] losses in CY 2007 of $3,673,124, and losses in CY 2008 of $274,255. In CY 2009, Koenigsegg reported a profit of $178,281.

Since it was granted the exemption from advanced air bags in 2007, Koenigsegg stated that worldwide economic conditions required a re-evaluation of its business and sales projections. Koenigsegg's earlier plan to manufacture as many as 50 vehicles per year has been adjusted to approximately 20 vehicles per year. Recently, Koenigsegg has initiated a "Custom Vision" program that allows customers a measure of customization (within vehicle specification boundaries) of their vehicles. This initiative has increased the costs of building the vehicles and resulted in an increase in the retail sales price of each vehicle.[11]

As an additional source of income, Koenigsegg has been able to sell its engineering services to third parties and cites the "Quant concept car"[12] as one project.

According to forecasts presented in its petition, Koenigsegg anticipates the following number of CCX vehicles would be imported into the United States, if its requested renewal of exemption were to be granted: 10 CCXs in CY 2010; 12 CCXs in CY 2011, and 17 CCXs in CY 2012.

Requested Exemptions. Koenigsegg stated that it intends to certify the CCX as complying with the rigid barrier belted test requirement using the 50th percentile adult male test dummy set forth in S14.5.1 of FMVSS No. 208. The petitioner stated that it previously determined the CCX's compliance with rigid barrier unbelted test requirements using the 50th percentile adult male test dummy through the S13 sled test using a generic pulse rather than a full vehicle test. Koenigsegg stated that it, therefore, cannot at present say with certainty that the CCX will comply with the unbelted test requirement under S14.5.2, which is a 20–25 mph rigid barrier test. As for the CCX's compliance with the other advanced air bag requirements, Koenigsegg stated that it does not know whether the CCX will be compliant because to date it has not had the financial ability to conduct the necessary testing. As such, Koenigsegg is requesting an exemption for the CCX from the rigid barrier unbelted test requirement with the 50th percentile adult male test dummy (S14.5.2), the rigid barrier test requirement using the 5th percentile adult female test dummy (belted and unbelted, S15), the offset deformable barrier test requirement using the 5th percentile adult female test dummy (S17), the requirements to provide protection for infants and children (S19, S21, and S23) and the requirement using an out-of-position 5th percentile adult female test dummy at the driver position (S25).

Koenigsegg's Statement of Economic Hardship—Publicly available information and financial documents submitted to NHTSA by the petitioner indicate that sales of the CCX will result in greater financial losses unless Koenigsegg obtains renewal of the temporary exemption from the advanced air bag requirements.

Koenigsegg states that the U.S. accounts for approximately 35 to 40 percent of the worldwide market for the CCX. Koenigsegg states that for CY 2006 through 2008, its financial statements have shown losses of over $7.7 million dollars.[13]

Koenigsegg states that if the renewal of the temporary exemption from advanced air bag requirements is not granted, there will be losses over CYs 2009–2011 of more than $3.3 million.[14]

With a renewal of the temporary exemption from advanced air bag requirements, Koenigsegg forecasts profits of $3.6 million for CYs 2010 through 2012.[15]

Koenigsegg states that without the renewal of the temporary exemption, the CCX cannot be sold in the U.S. from CY 2010 through 2012, and it needs the income from U.S. sales until the next version of the CCX is produced in 2013 with advanced air bags. Koenigsegg asserts that the financial impact of a denial of renewal of the temporary exemption would be more than lost sales. Koenigsegg's view is that with no U.S. sales for a three year period, it will "surrender" its small, but, in Koenigsegg's view, "significant" market share to competitors, and expressed concern that it will not be able to regain that lost market share. Furthermore, because the CYs 2010 through 2012 U.S. sales of the CCX are expected to make up half of worldwide sales of the CCX, Koenigsegg stated it is "likely" that it would no longer be viable for Koenigsegg to continue to produce the CCX for any market.

[10] All dollar amounts cited are based on an exchange rate of 6.8 krona to the U.S. dollar.

[11] Koenigsegg did not specify the amount of the increase in price.

[12] In footnote 1 in its petition, Koenigsegg describes the "Quant concept car" as follows: "The Quant project was a commission from NLG, a Swiss high tech company specializing in the development of new patented solar cell and rechargeable battery technologies, who wanted a high profile concept car to showcase their technologies. Koenigsegg was responsible for the vehicle concept, styling and showcar manufacturing and painting, show ready * * *"

[13] All dollar amounts cited are based on an exchange rate of 6.8 krona to the U.S. dollar.

[14] Koenigsegg states it will make a profit of $178,281 in CY 2009 (the last year of the temporary exemption from advanced air bag and FMVSS No. 108 requirements), and without a renewal of the temporary exemption from advanced air bag requirements, forecasts that it will incur a loss of $2,607,200 in CY 2010, and that it will incur a loss of $704,785 in CY 2011.

[15] With a renewal of the temporary exemption from advanced air bag requirements, Koenigsegg forecasts that it will make a profit of $6,636 (assuming U.S. sales of 10 CCX vehicles) in CY 2010, make a profit of $1,131,449 (assuming U.S. sales of 12 CCX vehicles) in CY 2011, and will make a profit of $2,493,698 (assuming U.S. sales of 17 CCX vehicles) in CY 2012.

Koenigsegg's Statement of Good Faith Efforts to Comply With Advanced Air Bag Requirements—Koenigsegg provided the following information in support of its statement that it has made the requisite good faith efforts to meet advanced air bag requirements. In its initial petition for temporary exemption from advanced air bag requirements, Koenigsegg anticipated "that two years would be needed to install an advanced air bag system on the CCX."[16] At that time, Koenigsegg planned to produce a second generation of the CCX model by late 2009, which would be certified as complying with all applicable U.S. standards, including those for advanced air bags.

However, Koenigsegg is facing unanticipated financial challenges. Since it was granted the temporary exemption from advanced air bag requirements in April 2007, Koenigsegg cited "unexpected events" that have necessitated the product cycle of the CCX to be extended from December 2009 to December 2012. The introduction of the successor vehicle to the CCX has been delayed for three years because Koenigsegg has used available funds to comply with the California Air Resources Board (CARB) requirements for the U.S. market. The world economic situation has hindered Koenigsegg's search for outside financing to develop the new model. Koenigsegg stated that: "The limited funds available are felt to be better utilized on improving the CCX with regards to 35 mph occupant protection."

Koenigsegg stated that expenditures also went to meeting U.S. and European carbon dioxide emissions requirements and FMVSS No. 108 headlamp requirements.

In 2009, when it realized the successor vehicle to the CCX was going to be delayed, Koenigsegg once again looked into the possibility of fitting advanced air bags into the current CCX. Koenigsegg had hoped that technological and supplier availability had changed since it made its last review in 2005. After its 2009 review, Koenigsegg concluded that advanced air bags for the current CCX were not available.

Nevertheless, there has been some progress in developing advanced air bags for the CCX. Koenigsegg states that it has undertaken significant work and through many iterations of crash analysis simulation, now understands the extent of redesign. Koenigsegg states that complete compliance with FMVSS No. 208 is hindered by the number of crash test vehicles needed to validate all the test cases. Koenigsegg states that in adopting the new development plan, it would take three vehicles and 10 full front end assemblies, at a cost to Koenigsegg of $4.5 million. Koenigsegg states that at present, this amount of money is neither financially or commercially feasible.

Koenigsegg explained how it has focused on developing advanced air bags for the CCX successor vehicle. Koenigsegg has started working with a consortium consisting of IDIADA, Bosch, and Key Safety Systems, to develop a "low risk" advanced air bag development program that would be feasible for a small volume manufacturer to complete. This effort is primarily based on a drastic reduction in the number of test vehicles, and is based on continued rebuild and repair of frontal structures that are bolted on to the vehicle. Koenigsegg stated that this was possible because of the "advanced monococque chassis concept" upon which the CCX successor will be based. Koenigsegg further stated that the successor to the CCX will comply with the FMVSS No. 214 *Side Impact Protection* pole test criteria.

Koenigsegg described how the work initiated for the advanced air bag program will be shared: Koenigsegg will take overall vehicle engineering responsibility; IDIADA will perform all CAE (computer aided engineering) and manage the crash test program; Bosch will be responsible for the air bag ECU (electronic control unit) hardware/software development; and Key Safety Systems (KSS) will be responsible for the DAB (driver side air bag)/PAB (passenger side air bag) and restraint system hardware adaptation and calibration, including all sled tests.

Koenigsegg's plan is to spend over $1.3 million in outside development costs plus $2.8 million for the cost of development vehicles. Because of the worldwide economic situation, which has affected automotive sales, Koenigsegg states that it needs more time to be able to raise the capital to meet the advanced air bag development expenditures.

Koenigsegg Argues an Exemption Would Be in the Public Interest. The petitioner put forth several arguments in favor of a finding that the requested renewal of an exemption from advanced air bag requirements would be consistent with the public interest. Specifically, Koenigsegg argued that the vehicle would be equipped with a fully-compliant standard U.S. air bag system. Other than the lack of an advanced air bag, Koenigsegg emphasized that the CCX will comply with applicable FMVSSs and with Part 581, *Bumper Standard.*

As additional bases for showing that its requested renewal of an exemption would be in the public interest, Koenigsegg offered the following. The company asserted that there is consumer demand in the U.S. for the CCX, and granting this application will allow the demand to be met, thereby expanding consumer choice. The company also suggested another reason why granting the renewal of the exemption would not be expected to have a significant impact on safety, specifically because the vehicle is unlikely to be used extensively by owners, due to its "sporty (second car) nature." Finally, Koenigsegg indicated that the CCX incorporates advanced engineering and certain advanced safety features that are not required by the FMVSSs, including racing brakes with anti-lock capability and traction control. In addition, the company argued that the CCX has enhanced fuel efficiency due to its highly aerodynamic design.

IV. Petition of Morgan

Background—Founded in 1909, Morgan is a small, privately-owned vehicle manufacturer producing approximately 650 specialty sports cars per year.[17] Morgan manufactures several models, but at present, only sells the Aero 8 in the U.S. Morgan intended to produce a vehicle line specific to the U.S. market, with Ford supplying the engine and transmission. However, for technical reasons, the project did not come to fruition, and Morgan temporarily stopped selling vehicles in the U.S. in 2004. In May 2005, Morgan obtained a temporary exemption from this agency's bumper standard and began selling the Aero 8 in the U.S.

On July 12, 2006 (71 FR 39386), NHTSA published a notice of receipt of five applications for temporary exemptions from the advanced air bag requirements of FMVSS No. 208. Among these petitions was one from Morgan, for the Aero 8, which is discussed at pages 39390–39391. Morgan's petition is included in the docket for that notice, i.e., Docket NHTSA–2006–25324.

We granted Morgan's petition for temporary exemption in a **Federal Register** notice of September 7, 2006 (71 FR 52851). The discussion of Morgan's grant is on pages 52862 though 52865. The grant of temporary exemption is for the Morgan Aero 8 "From S15.2, S17,

[16] 72 FR 17608, at 17611, April 9, 2007.

[17] A manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production does not exceed 10,000, as determined by the NHTSA Administrator (15 U.S.C. 1410(d)(1)).

S19, S21, S23, and S25 of 49 CFR 571.208." The exemption was granted for the period from September 1, 2006 to August 31, 2009.

In a petition dated June 11, 2009, Morgan asked for a renewal of the temporary exemption for a two year period, from September 1, 2009 to August 31, 2011. NHTSA's statute at 49 U.S.C. 30113(b) states that exemptions from a Federal motor vehicle safety standard are to be granted on a "temporary basis." [18] However, the statute also expressly provides for renewal of an exemption on reapplication.

Morgan's petition would apply to the Aero 8 and the Aero Super Sport, an interim vehicle also based on the Aero platform. The Aero Super Sport will be available on an interim basis until a successor vehicle (code named the AP8), is complete and ready for sale.

Morgan's Statement of Economic Hardship—In its petition for temporary exemption for the Aero 8 for September 1, 2006 through August 31, 2009, Morgan estimated that U.S. sales of the Aero 8 would be several hundred vehicles a year. In the June 11, 2009 petition, Morgan reports that it has sold 19 Aero 8s in the U.S. from September 2006 to the present. The 19 vehicles represent "less than 3% of what had been expected."

Morgan stated it has been focusing over the last two years on the Aero model range successor, (code named the AP8) which will be a completely new design. However, since the original petition was granted in 2006, it was decided to extend the availability of the present Aero model from September 2009 to the fall of 2011, in large part due to world economic conditions.

Because, over the past few years, Morgan did not sell as many vehicles in the U.S. as it had hoped, and because of other economic considerations, Morgan decided to delay development of the new AP8. In order to "improve available funds," Morgan decided to concentrate on the Aero Super Sport, an interim project based on the Aero platform, which Morgan hopes will be able to generate enough revenue so that Morgan can continue to develop the AP8. The Aero Super Sport was slated to be available in the U.S. in January 2010.

Morgan seeks an extension of the temporary exemption from the advanced air bag requirements for the Aero Super Sport. Morgan intends to use the exemption to cover a "limited production run of 50 U.S. Aero Super Sport cars." Morgan states the Aero Super Sport will be the last model that is based on the Aero chassis and that uses the standard air bag system.

Morgan states that the Aero "must" come to an end in 2011 because the production of the steering wheel has ended, and no further stock, other than that already owned by Morgan, is available. Morgan stated that this essentially forced end to production is important because "it essentially precludes further requests by Morgan to NHTSA to prolong the Aero platform in the U.S."

Morgan estimates that, assuming 50 Aero Super Sports are sold in the U.S., the total number of exempted vehicles that Morgan manufactures and sells in the U.S. will be 69 (50 Aero Super Sports plus the 19 Aero 8s already sold). If Morgan can sell 69 vehicles, that will be 656 fewer vehicles than the projected sales in Morgan's first petition for temporary exemption in 2005.

Morgan's Statement of Good Faith Efforts to Comply—In its previous submission, Morgan stated that it has been working with the air bag supplier Siemens to develop an advanced air bag system for the Aero 8. However, a lack of funds and technical problems precluded the implementation of an advanced air bag system for the Aero 8. It said that the minimum time needed to develop an advanced air bag system (provided that there is a source of revenue) is two years. Specific technical challenges include the following. Morgan does not have access to the necessary sensor technology to pursue the "full suppression" passenger air bag option. Due to the design of the Aero 8 platform dashboard, an entirely new interior solution and design must be developed. Chassis modifications are anticipated due to the originally stiff chassis design.

In its February 2006 petition, Morgan stated that for vehicles to be built between September 2006–September 2009, the Aero 8 vehicles will have (and in fact, did have) standard air bags. Back then, Morgan stated its belief that when its advanced air bag system is ready in 2009, the air bag system will simultaneously be installed in both the Aero and other models.

Morgan's Statement of Public Interest—In its original petition concerning the Aero, Morgan put forth several arguments supporting its view that the requested exemption is consistent with the public interest. According to Morgan, if the exemption was denied and Morgan stops U.S. sales, Morgan's U.S. dealers would unavoidably have numerous lay-offs, resulting in U.S. unemployment. Denial of an exemption would reduce consumer choice in the specialty sports car market sector in which Morgan cars compete. That company argued that the Morgan vehicles will not be used extensively by owners, and are unlikely to carry small children. Finally, according to Morgan, granting an exemption would assure the continued availability of proper parts and service support for existing Morgan owners. Without an exemption, Morgan would be forced from the U.S. market, and Morgan dealers would find it difficult to support existing customers.

In its petition asking for a renewal of the temporary exemption from FMVSS No. 208, Morgan reiterated these points.

V. Public Comment Period

We are providing a 30-day comment period on Koenigsegg's and Morgan's petitions for an extension of a temporary exemption from the advanced air bag requirement of FMVSS No. 208. After considering public comments and other available information, we will publish a notice of final action addressing each application in the **Federal Register**.

VI. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit two copies of your comments, including the attachments, to the Docket at the address given above under **ADDRESSES**.

Comments may also be submitted to the docket electronically by logging into *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *http://www.whitehouse.gov/omb/fedreg/reproducible.html.*

[18] 49 U.S.C. 30113(b)(1).

How can I be sure that my comments were received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512.)

Will the agency consider late comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date. If Docket Management receives a comment too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the comments received by Docket Management at the address given above under **ADDRESSES**. The hours of the Docket are indicated above in the same location. You may also see the comments on the Internet. To read the comments on the Internet, go to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

Authority: 49 U.S.C. 30113; delegations of authority at 49 CFR 1.50. and 501.8.

Issued on: April 5, 2011.

Joseph S. Carra,

Acting Associate Administrator for Rulemaking.

[FR Doc. 2011–8468 Filed 4–8–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 55 (Sub-No. 705X)]

CSX Transportation, Inc.—Discontinuance of Service Exemption—in Pinellas County, Fla.

CSX Transportation, Inc. (CSXT) filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over approximately a 0.45-mile rail line on CSXT's Southern Region, Jacksonville Division, Clearwater Subdivision, extending between milepost ARE 897.55 near 16th Street North and milepost ARE 898.00 at the junction of 1st Avenue South and Dr. Martin Luther King Street in St. Petersburg, Pinellas County, Fla. The line traverses United States Postal Service Zip Code 33707.

CSXT has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic to be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. § 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on May 11, 2011, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA for continued rail service under 49 CFR 1152.27(c)(2) [1] must be filed by April 21, 2011.[2] Petitions to reopen must be filed by May 2, 2011, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative: Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: April 1, 2011.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–8439 Filed 4–8–11; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Proposed Collection; Comment Request; State Small Business Credit Initiative Allocation Agreement

AGENCY: Departmental Offices, Small Business Lending Funds, Treasury.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)), this notice invites the general public and other public agencies to comment on a proposed information collection for which approval from the Office of Management and Budget (OMB) will be requested. The proposed collection would be an extension of a currently approved collection under OMB No. 1505–0227 which is due to expire June 30, 2011.

DATES: Written comments must be received on or before June 10, 2011 to be assured of consideration.

[1] Each OFA must be accompanied by the filing fee, which is currently set at $1,500. *See* 49 CFR 1002.2(f)(25).

[2] Because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use conditions are not appropriate. Likewise, no environmental or historic documentation is required here under 49 CFR 1105.6(c) and 49 CFR 1105.8(b), respectively.

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 used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information

Comments may be sent to Dawn Wolfgang, Department of the Treasury, Departmental Offices, 1750 Pennsylvania Ave., NW., Suite 11010, Washington, DC 20220.

Responses to this notice will be summarized and included in the request for OMB approval and will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Daniel Ballard, (202) 622–5142.

SUPPLEMENTARY INFORMATION:

Title: State Small Business Credit Initiative Allocation Agreement.

OMB Number: 1505–0227.

Expiration Date: June 30, 2011.

Type of Request: Extension without change of a currently approved information collection.

Abstract: Under the Small Business Jobs Act of 2010 (the "Act"), the Department of the Treasury is responsible for implementing several components of the Act. Among these components is a program under title III of the Act which requires Treasury to make payments to participating States. Participating States will use the Federal funds for programs that leverage private lending to help finance small businesses and manufacturers that are creditworthy, but are not getting the loans they need to expand and create jobs. The collection of information is necessary to ensure that the allocation agreement constitutes a legal binding obligation of the participating State and to monitor participating State compliance and performance. The recordkeeping requirements ensure both the effective and efficient use of the funds consistent with the agreement.

Affected Public: State and Local Governments.

Estimated Number of Respondents: 56.

Estimated total annual responses: 112.

Hours per response: 11.

Total annual burden hours: 1,232.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2011–8560 Filed 4–8–11; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

Amendment To Extend the Term of the Existing Enhanced-Use Lease (EUL) at the Department of Veterans Affairs (VA) Michael E. DeBakey VA Medical Center (VAMC) in Houston, TX

AGENCY: Department of Veterans Affairs.

ACTION: Notice of Intent to Enter into an Amendment to Extend the Term of a Current Enhanced-Use Lease.

SUMMARY: The Secretary of VA intends to enter into an amendment to extend the term of the existing EUL with Amelang Partners, LLC (lessee) at the Michael E. DeBakey VAMC in Houston, Texas. VA proposes to extend the term of the existing lease from 35 years to 75 years. The lessee will continue to lease approximately 8.18 acres of land at the VAMC, and finance, design, develop, construct, operate, manage, and maintain a mixed-use facility on the VAMC campus. In return for VA granting the EUL extension, the lessee will (a) convey to VA an approximately 7.64 acre parking lot currently serving VA, and (b) at commencement of the 40-year extension, pay VA fair market value of the aforementioned 8.18 acres of land, based on an appraisal of the underlying land and improvements. The lessee shall bear full financial and legal responsibility to redevelop and maintain the property as a mixed-use property at no cost to VA. VA plans to use the additional lease consideration from the anticipated 40-year lease extension to serve Veterans at the Michael E. DeBakey VAMC.

FOR FURTHER INFORMATION CONTACT: Edward L. Bradley, Office of Asset Enterprise Management (044), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7778.

SUPPLEMENTARY INFORMATION: 38 U.S.C. 8161 *et seq.,* specifically provides that the Secretary may enter into an enhanced-use lease if he determines that the implementation of a business plan proposed by the Under Secretary for Health for applying the consideration under such a lease to the provision of medical care and services would result in a demonstrable improvement of services to eligible Veterans in the geographic service-delivery area within which the property is located. This project meets this requirement.

Approved: March 17, 2011.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2011–8583 Filed 4–8–11; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Department of Energy

10 CFR Part 430
Energy Conservation Program: Energy Conservation Standards for Fluorescent Lamp Ballasts; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket Number EE–2007–BT–STD–0016]

RIN 1904–AB50

Energy Conservation Program: Energy Conservation Standards for Fluorescent Lamp Ballasts

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking (NOPR) and public meeting.

SUMMARY: The Energy Policy and Conservation Act (EPCA) prescribes energy conservation standards for various consumer products and commercial and industrial equipment, including fluorescent lamp ballasts (ballasts). EPCA also requires the U.S. Department of Energy (DOE) to determine if amended standards for ballasts are technologically feasible and economically justified, and would save a significant amount of energy, and to determine whether to adopt standards for additional ballasts not already covered by Federal standards. In this NOPR, DOE proposes amended energy conservation standards for those ballasts currently subject to standards, and new standards for certain ballasts not currently covered by standards. This NOPR also announces a public meeting to receive comment on these proposed standards and associated analyses and results.

DATES: DOE will hold a public meeting on May 10, 2011, from 9 a.m. to 4 p.m., in Washington, DC. The meeting will also be broadcast as a webinar. See section 0, "Public Participation," for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) before and after the public meeting, but no later than June 10, 2011. *See* section 0, "Public Participation," of this NOPR for details.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room GE–086, 1000 Independence Avenue, SW., Washington, DC 20585. To attend, please notify Ms. Brenda Edwards at (202) 586–2945. Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. Any foreign national wishing to participate in the meeting should advise DOE as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 to initiate the necessary procedures.

Any comments submitted must identify the NOPR for Energy Conservation Standards for Fluorescent Lamp Ballasts and provide docket number EE–2007–BT–STD–0016 and/or regulatory information number (RIN) number 1904–AB50. Comments may be submitted using any of the following methods:

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

2. *E-mail: ballasts.rulemaking@ee.doe.gov.* Include the docket number and/or RIN in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD. It is not necessary to include printed copies.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Office of Energy Efficiency and Renewable Energy through the methods listed above and by e-mail to *Christine_J._Kymn@omb.eop.gov.*

For detailed instructions on submitting comments and additional information on the rulemaking process, *see* section 0 of this document (Public Participation).

Docket: The docket is available for review at *http://www.regulations.gov,* including **Federal Register** notices, framework documents, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *http://www.regulations.gov* index. Not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket web page can be found at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/fluorescent_lamp_ballasts.html.* This web page will contain a link to the docket for this notice on regulations.gov. The regulations.gov web page contains simple instructions on how to access all documents, including public comments, in the docket. *See* section 0 for further information on how to submit comments through *http://www.regulations.gov.*

For further information on how to submit or review public comments or participate in the public meeting, contact Ms. Brenda Edwards at (202) 586–2945 or e-mail: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT:

Dr. Tina Kaarsberg, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 287–1393. E-mail: *Tina.Kaarsberg@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–7796. E-mail: *Elizabeth.Kohl@hq.doe.gov.*

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I. Summary of the Proposed Rule

The Energy Policy and Conservation Act (42 U.S.C. 6291 *et seq.;* EPCA or the Act), as amended, requires that any new or amended energy conservation standard DOE prescribes for certain products, such as fluorescent lamp ballasts (ballasts), be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in a significant conservation of energy. (42 U.S.C. 6295(o)(3)(B)) In accordance with these and other statutory provisions discussed in this notice, DOE proposes new and amended energy conservation standards for ballasts. The proposed standards are shown in Table I.1. These proposed standards, if adopted, would apply to all products listed in Table I.1 and manufactured in, or imported into, the United States on or after June 30, 2014.

TABLE I.1—PROPOSED STANDARDS

Product class *	Proposed standard **	Percent improvement over current standard or baseline +
IS and RS ballasts that operate: 4-foot MBP lamps ..... 8-foot slimline lamps	1.32 * Ln (total lamp arc power) + 86.11	1.9 to 13.4.
PS ballasts that operate: 4-foot MBP lamps ..... 4-foot MiniBP SO lamps ..... 4-foot MiniBP HO lamps	1.79 * ln (total lamp arc power) + 83.33	9.3 to 12.6.
IS and RS ballasts that operate 8-foot HO lamps.	1.49 * ln (total lamp arc power) + 84.32	34.7.
PS ballasts that operate 8-foot HO lamps.	1.46 * ln (total lamp arc power) + 82.63	32.0.
Ballasts that operate 8-foot HO lamps in cold temperature outdoor signs.	1.49 * ln (total lamp arc power) + 81.34	31.7.

* IS = instant start; RS = rapid start; MBP = medium bipin; PS = programmed start; SO = standard output; HO = high output.
** The proposed standards are based on an equation that is a function of the natural logarithm (ln) of the total lamp arc power operated by the ballast.
+ Range is applicable to the representative ballasts analyzed.

DOE's analyses indicate that the proposed standards would save a significant amount of energy—an estimated 3.7–6.3 quads of cumulative energy over 30 years (2014 through 2043). This amount is equivalent to the annual energy use of approximately 18.5 million to 31.5 million U.S. homes.

The cumulative national net present value (NPV) of total consumer costs and savings of the proposed standards for products shipped in 2014–2043, in 2009$, ranges from $8.1 billion (at a 7-percent discount rate) to $24.7 billion (at a 3-percent discount rate).[1] The NPV

[1] DOE uses discount rates of 7 and 3 percent based on guidance from the Office of Management and Budget (OMB Circular A–4, section E,

Continued

is the estimated total value of future operating-cost savings during the analysis period, minus the estimated increased product costs, discounted to 2011. The industry net present value (INPV) is the sum of the discounted cash flows to the industry from the base year through the end of the analysis period (2014 to 2043). Using a real discount rate of 7.4 percent, DOE estimates that INPV for manufacturers of all fluorescent lamp ballasts in the base case ranges from $853 million to $1.24 billion in 2009$. If DOE adopts the proposed standards, it expects that manufacturer INPV may change from a loss of 7.7 percent to a loss of 34.7 percent, or approximately a loss of $95.3 million to a loss of $296.2 million. Using a 7-percent discount rate, the NPV of consumer costs and savings from today's proposed standards would amount to 27–119 times the total estimated industry losses. Using a 3-percent discount rate, the NPV would amount to 53–246 times the total estimated industry losses.

The projected economic impacts of the proposed standards on individual consumers are generally positive. For example, the estimated average life-cycle cost (LCC) savings are approximately $11–$25 for 2-lamp IS and RS ballasts that operate common 4-foot T8 lamps in the commercial sector.[2] When more than one baseline existed for a representative ballast type, DOE performed separate LCC analyses comparing replacement lamp-and-ballast systems to each baseline. Because T8 systems are generally more efficient than T12 systems, the incremental energy savings in a T8 baseline case are considerably lower than when comparing the same efficiency levels to a T12 baseline. It was only in these dual-baseline (*i.e.,* T12 and T8) cases that DOE observed negative economic impacts at the proposed standard levels, as the incremental energy and operating cost savings in the T8 baseline cases were not sufficient to offset the increased prices of more efficient replacements.

In addition, the proposed standards would have significant environmental benefits. The energy saved is in the form of electricity, and DOE expects the energy savings from the proposed standards to eliminate the need for approximately 4.37–7.22 gigawatts (GW) of generating capacity by 2043. The savings would result in cumulative (undiscounted) greenhouse gas emission reductions of approximately 40–121 million metric tons (MMt) [3] of carbon dioxide (CO_2) between 2014 and 2043. During this period, the proposed standards would result in undiscounted emissions reductions of approximately 32–44 thousand tons of nitrogen oxides (NO_X) and 0.59–1.67 tons of mercury (Hg).[4] DOE estimates the net present monetary value of the CO_2 emissions reduction is between $0.18 and $6.67 billion, expressed in 2009$ and discounted to 2011, based on a range of discount rates discussed in section 0. DOE also estimates the net present monetary value of the NO_X emissions reduction, expressed in 2009$ and discounted to 2011, is between $19 and $35 million at a 7-percent discount rate, and between $42 and $65 million at a 3-percent discount rate.[5]

The benefits and costs of today's proposed standards, for products sold in 2014–2043, can also be expressed in terms of annualized values. The annualized monetary values shown in Table I.2 are the sum of (1) the annualized national economic value, expressed in 2009$, of the benefits from consumer operation of products that meet the proposed standards (consisting primarily of operating cost savings from using less energy, minus increases in equipment purchase and installation costs, which is another way of representing consumer NPV), and (2) the annualized monetary value of the benefits of emission reductions, including CO_2 emission reductions.[6] The value of the CO_2 reductions, otherwise known as the Social Cost of Carbon (SCC), is calculated using a range of values per metric ton of CO_2 developed by a recent interagency process. The monetary costs and benefits of emissions reductions are reported in 2009$ to permit comparisons with the other costs and benefits in the same dollar units. The derivation of the SCC values is discussed in section 0.

Although combining the values of operating savings and CO_2 emission reductions provides a useful perspective, two issues should be considered. First, the national operating savings are domestic U.S. consumer monetary savings that occur as a result of market transactions while the value of CO_2 reductions is based on a global value. Second, the assessments of operating cost savings and CO_2 savings are performed with different methods that use quite different time frames for analysis. The national operating cost savings is measured for the lifetime of ballasts shipped between 2014 and 2043. The SCC values, on the other hand, reflect the present value of all future climate-related impacts resulting from the emission of one ton of CO_2 in each year. These impacts go well beyond 2100.

Using a 7-percent discount rate and the SCC value of $21.40/ton in 2010 (in 2007$), which was derived using a 3-percent discount rate (see note below Table I.2), the cost of the standards proposed in today's rule is $276 million–437 million per year in increased equipment costs, while the annualized benefits are $931 million–1,359 million per year in reduced equipment operating costs, $44 million–111 million in CO_2 reductions, and $1.6 million–2.8 million in reduced NO_X emissions. In this case, the net benefit amounts to $701 million–1,036 million per year. Using a 3-percent discount rate and the SCC value of $21.40/ton in 2010 (in 2007$), the cost of the standards proposed in today's rule is $311 million–539 million per year in increased equipment costs, while the benefits are $1,153 million–1,800 million per year in reduced operating costs, $44 million–111 million in CO_2 reductions, and $2.1 million–3.3 million in reduced NO_X emissions. At a 3-

September 17, 2003). See section IV.G for further information.

[2] The LCC is the total consumer expense over the life of a product, consisting of purchase and installation costs plus operating costs (expenses for energy use, maintenance and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product.

[3] A metric ton is equivalent to 1.1 short tons. Results for NO_X and Hg are presented in short tons.

[4] DOE calculates emissions reductions relative to the most recent version of the Annual Energy Outlook (AEO) Reference case forecast. As noted in chapter 16 of the TSD, this forecast accounts for regulatory emissions reductions through 2008, including the Clean Air Interstate Rule (CAIR, 70 FR 25162 (May 12, 2005)), but not the Clean Air Mercury Rule (CAMR, 70 FR 28606 (May 18, 2005)). Subsequent regulations, including the proposed CAIR replacement rule and the proposed Clean Air Transport Rule (75 FR 45210 (August 2, 2010)), do not appear in the forecast.

[5] DOE is aware of multiple agency efforts to determine the appropriate range of values used in evaluating the potential economic benefits of reduced Hg emissions. DOE has decided to await further guidance regarding consistent valuation and reporting of Hg emissions before it once again monetizes Hg in its rulemakings.

[6] DOE used a two-step calculation process to convert the time-series of costs and benefits into annualized values. First, DOE calculated a present value in the same year used for discounting the NPV of total consumer costs and savings. To calculate the present value, DOE used discount rates of three and seven percent for all costs and benefits except for the value of CO_2 reductions. For the latter, DOE used a range of discount rates, as shown in Table I.2. From the present value, DOE then calculated the corresponding time-series of fixed annual payments over a 30-year period starting in the same year used for discounting the NPV of total consumer costs and savings. The fixed annual payment is the annualized value. Although DOE calculated annualized values, this does not imply that the time-series of cost and benefits from which the annualized values were determined would be a steady stream of payments.

percent discount rate, the net benefit amounts to $887 million–1,376 million per year.

TABLE I.2—ANNUALIZED BENEFITS AND COSTS OF PROPOSED STANDARDS FOR BALLASTS FOR 2014–2043 ANALYSIS PERIOD

	Discount rate	Monetized *million 2009$/year*		
		Primary estimate	Low estimate (emerging technologies, roll-up scenario)	High estimate (existing technologies, shift scenario)
Benefits				
Operating Cost Savings	7%	1,145	931	1,359.
	3%	1,477	1,153	1,800.
CO_2 Reduction at $4.7/t*	5%	20	12	28.
CO_2 Reduction at $21.4/t*	3%	78	44	111.
CO_2 Reduction at $35.1/t*	2.5%	122	68	177.
CO_2 Reduction at $64.9/t*	3%	237	134	340.
NO_X Reduction at $2,519/t*	7%	2.2	1.6	2.8.
	3%	2.7	2.1	3.3.
Total (Operating Cost Savings, CO_2 Reduction and NO_x Reduction)†	7% plus CO_2 range	1,167 to 1,384	945 to 1,067	1,389 to 1,702.
	7%	1,225	977	1,473.
	3%	1,557	1,199	1,915.
	3% plus CO_2 range	1,499 to 1,716	1,167 to 1,289	1,831 to 2,144.
Costs				
Incremental Product Costs	7%	357	276	437.
	3%	425	311	539.
Net Benefits/Costs				
Total (Operating Cost Savings, CO_2 Reduction and NO_x Reduction, Minus Incremental Product Costs)†	7% plus CO_2 range	810 to 1,027	669 to 790	952 to 1,264.
	7%	868	701	1,036.
	3%	1,131	887	1,376.
	3% plus CO_2 range	1,074 to 1,291	856 to 977	1,292 to 1,604.

*The CO_2 values represent global monetized values (in 2007$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.7, $21.4, and $35.1 per ton are the averages of SCC distributions calculated using 5-percent, 3-percent, and 2.5-percent discount rates, respectively. The value of $64.9 per ton represents the 95th percentile of the SCC distribution calculated using a 3-percent discount rate. The value for NO_x (in 2009$) is the average of the low and high values used in DOE's analysis.

† Total Benefits for both the 3-percent and 7-percent cases are derived using the SCC value calculated at a 3-percent discount rate, which is $21.4/ton in 2010 (in 2007$). In the rows labeled as "7% plus CO_2 range" and "3% plus CO_2 range," the operating cost and NO_x benefits are calculated using the labeled discount rate, and those values are added to the full range of CO_2 values with the $4.7/ton value at the low end, and the $64.9/ton value at the high end.

DOE has tentatively concluded that the proposed standards represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy. DOE further notes that products achieving these standard levels are already commercially available for all product classes covered by today's proposal. Ballasts are commercially available at the proposed standard level for all representative ballast types. Based on the analyses described above, DOE found the benefits of the proposed standards to the nation (energy savings, positive NPV of consumer benefits, consumer LCC savings, and emission reductions) outweigh the burdens (loss of INPV for manufacturers and LCC increases for some consumers).

Based on consideration of the public comments DOE receives in response to this notice and related information collected and analyzed during the course of this rulemaking effort, DOE may adopt energy use levels presented in this notice that are either higher or lower than the proposed standards, or some combination of level(s) that incorporate the proposed standards in part.

II. Introduction

The following section briefly discusses the statutory authority underlying today's proposal as well as some of the relevant historical background related to the establishment of standards for fluorescent lamp ballasts.

A. Authority

Title III of EPCA sets forth a variety of provisions designed to improve energy efficiency. Part B of Title III (42 U.S.C. 6291–6309) provides for the Energy Conservation Program for Consumer Products Other than Automobiles.[7] EPCA covers consumer products and certain commercial equipment (referred to collectively hereafter as "covered products"), including the types of fluorescent lamp ballasts that are the subject of this rulemaking.[8] (42 U.S.C. 6292(a)(13)) EPCA prescribes energy conservation standards for these products (42 U.S.C.

[7] This part was titled Part B in EPCA, but was subsequently codified as Part A in the U.S. Code for editorial reasons.

[8] Ballasts are used primarily in the commercial and industrial sectors. While Part B includes a range of consumer products that are used primarily in the residential sector, such as refrigerators, dishwashers, and clothes washers, Part B also includes several products used primarily in the commercial sector, including fluorescent lamp ballasts. (Part C of Title III—Certain Industrial Equipment, codified in the U.S. Code as Part A–1, concerns products used primarily in the commercial and industrial sectors, such as electric motors and pumps, commercial refrigeration equipment, and packaged terminal air conditioners and heat pumps.)

6295(g)(5), (6), and (8)), and also requires that DOE conduct two rulemakings to determine (1) whether EPCA's original standards for ballasts in 42 U.S.C. 6295(g)(5) should be amended, including whether such standards should apply to the ballasts in 42 U.S.C. 6295(g)(6) and other fluorescent ballasts; and (2) whether the standards then in effect for ballasts should be amended, including whether such standards should apply to additional ballasts. (42 U.S.C. 6295(g)(7)(A)–(B)) As explained in further detail in section II.C, "Background," this rulemaking is the second of the two required rulemakings. In this rulemaking, DOE considers whether to amend the existing standards for ballasts, including those in 42 U.S.C. 6295(g)(8), and also considers standards for additional ballasts. See section 0 for a discussion of additional fluorescent lamp ballasts DOE considered for coverage. In addition, under 42 U.S.C. 6295(m), DOE must periodically review established energy conservation standards for covered products.

Under EPCA, DOE's energy conservation program for covered products consists essentially of four parts: (1) Testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. The Federal Trade Commission (FTC) is primarily responsible for labeling, and DOE implements the remainder of the program. EPCA authorizes DOE, subject to certain criteria and conditions, to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6293) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted under EPCA. *Id.* The test procedures for ballasts currently appear at title 10, Code of Federal Regulations (CFR), part 430, subpart B, appendix Q.

EPCA provides criteria for prescribing amended standards for covered products. As indicated above, any amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, EPCA precludes DOE from adopting any standard that would not result in a significant conservation of energy. (42 U.S.C. 6295(o)(3)) Moreover, DOE may not prescribe a standard: (1) For certain products, including ballasts, if no test procedure has been established for the product, or (2) if DOE determines by rule that the proposed standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) EPCA also provides that, in determining whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must do so after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven factors:

1. The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

2. The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the imposition of the standard;

3. The total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;

4. Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

6. The need for national energy and water conservation; and

7. Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

EPCA also contains what is known as an "anti-backsliding" provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

Further, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. *See* 42 U.S.C. 6295(o)(2)(B)(iii).

EPCA requires DOE to specify a different standard level than that which applies generally to a type or class of products for any group of covered products that have the same function or intended use if DOE determines that products within such group (A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6294(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE must consider such factors as the utility to the consumer of the feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE can, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of section 327(d) of the Act. (42 U.S.C. 6297(d))

Finally, EPCA requires that energy conservation standards address standby mode and off mode energy use. (42 U.S.C. 6295(gg)) Specifically, when DOE adopts a standard for a covered product after July 1, 2010, DOE must, if justified by the criteria for adoption of standards in 42 U.S.C. 6295(o), incorporate standby mode and off mode energy use into the standard, if feasible. If incorporation is not feasible, DOE must adopt a separate standard for such energy use for that product, if justified under 42 U.S.C. 6295(o). (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE has determined

that ballasts do not operate in an "off mode" as defined by EPCA (42 U.S.C. 6291(gg)(1)(A)(ii)), and that the only ballasts that consume power in a "standby mode" as defined by EPCA (42 U.S.C. 6291(gg)(1)(A)(iii)) are those that incorporate an electronic circuit enabling the ballast to communicate with and be part of a lighting control system. DOE's current test procedures for ballasts address such standby mode energy use. 74 FR 54455 (October 22, 2009); 10 CFR part 430, subpart B, appendix Q, section 3.5. In this rulemaking, as discussed in section 0, DOE has not proposed amended standards for dimming ballasts currently covered by standards (42 U.S.C. 6295(g)(8)) because DOE has not found any of these covered products in the marketplace. As the scope of coverage does not include any additional dimming ballasts, this NOPR does not include energy conservation standards for standby mode energy use.

B. Background

1. Current Standards

The current Federal energy conservation standards for ballasts are set forth in Table II.1 and Table II.2 below. The standards in Table II.1 were adopted in a final rule published on September 19, 2000, 65 FR 56739, which completed the first of the two rulemakings required under 42 U.S.C. 6295(g)(7) to consider amending the standards for ballasts (hereafter referred to as the 2000 Ballast Rule). The standards in Table II.2 were established by amendments to EPCA in the Energy Policy Act of 2005 (EPACT 2005), Public Law 109–58.

TABLE II.1—ENERGY CONSERVATION STANDARDS FROM THE 2000 BALLAST RULE

Application for operation of	Ballast input voltage	Total nominal lamp watts	Ballast efficacy factor
One F40T12 lamp	120	40	2.29
	277	40	2.29
Two F40T12 lamps	120	80	1.17
	277	80	1.17
Two F96T12 lamps	120	150	0.63
	277	150	0.63
Two F96T12HO lamps	120	220	0.39
	277	220	0.39

10 CFR 430.32(m)(3).

TABLE II.2—ENERGY CONSERVATION STANDARDS FROM EPACT 2005

Application for operation of	Ballast input voltage	Total nominal lamp watts	Ballast efficacy factor
One F34T12 lamp	120/277	34	2.61
Two F34T12 lamps	120/277	68	1.35
Two F96T12/ES lamps	120/277	120	0.77
Two F96T12/HO/ES lamps	120/277	190	0.42

(42 U.S.C. 6295(g)(8)(A); 10 CFR 430.32(m)(5))

In summary, as reflected in the foregoing two tables, the ballasts currently regulated under EPCA consist of ballasts that are designed to operate:

- One and two nominally 40-watt (W) and 34W 4-foot T12 medium bipin (MBP) lamps (F40T12 and F34T12);
- Two nominally 75W and 60W 8-foot T12 single-pin (SP) slimline lamps (F96T12 and F96T12/ES); and
- Two nominally 110W and 95W 8-foot T12 recessed double contact high output lamps (F96T12 and F96T12/ES) at nominal input voltages of 120 or 277 volts (V) with an input current frequency of 60 hertz (Hz).

2. History of Standards Rulemaking for Fluorescent Lamp Ballasts

EPCA establishes energy conservation standards for certain ballasts and requires that DOE conduct two cycles of rulemakings to determine whether to amend the standards for ballasts, including whether to adopt standards for additional ballasts. (42 U.S.C. 6295(g)(5)–(8)) As indicated above, DOE completed the first of these rulemaking cycles in the 2000 Ballast Rule. 65 FR 56740 (Sept. 19, 2000). In this rulemaking, the second rulemaking cycle required by 42 U.S.C. 6295(g)(7), DOE considers whether to amend the existing standards for ballasts and whether to adopt standards for additional ballasts.

DOE initiated this rulemaking on January 14, 2008 by publishing in the **Federal Register** a notice announcing the availability of the "Energy Conservation Standards Rulemaking Framework Document for Fluorescent Lamp Ballasts." (A PDF of the framework document is available at *http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/ballast_framework_011408.pdf*. In this notice, DOE also announced a public meeting on the framework document and requested public comment on the matters raised in the document. 73 FR 3653 (Jan. 22, 2008). The framework document described the procedural and analytical approaches that DOE anticipated using to evaluate energy conservation standards for the ballasts, and identified various issues to be resolved in conducting this rulemaking.

DOE held the public meeting on February 6, 2008, where it: presented the contents of the framework document; described the analyses it planned to conduct during the rulemaking; sought comments from interested parties on these subjects; and in general, sought to inform interested parties about, and facilitate their involvement in, the rulemaking. Interested parties at the public meeting discussed the active mode test procedure and several major analyses related to this rulemaking. At the meeting and during the period for commenting on the framework document, DOE received many

comments that helped identify and resolve issues involved in this rulemaking.

DOE then gathered additional information and performed preliminary analyses to help develop potential energy conservation standards for ballasts. DOE published in the **Federal Register** an announcement of the availability of the preliminary technical support document (the preliminary TSD) and of another public meeting to discuss and receive comments on the following matters: the product classes DOE planned to analyze; the analytical framework, models, and tools that DOE was using to evaluate standards; the results of the preliminary analyses performed by DOE; and potential standard levels that DOE could consider. 75 FR 14319 (March 24, 2010) (the March 2010 notice). DOE also invited written comments on these subjects. *Id.* The preliminary TSD is available at *http://www1.eere.energy.gov/buildings/appliance_standards/residential/fluorescent_lamp_ballasts_ecs_prelim_tsd.html.* In the notice, DOE requested comment on other relevant issues that would affect energy conservation standards for ballasts or that DOE should address in this notice of proposed rulemaking (NOPR). *Id.* at 14322.

The preliminary TSD provided an overview of the activities DOE undertook in developing standards for ballasts, and discussed the comments DOE received in response to the framework document. It also described the analytical framework that DOE uses in this rulemaking, including a description of the methodology, the analytical tools, and the relationships among the various analyses that are part of the rulemaking. The preliminary TSD presented and described in detail each analysis DOE performed up to that point, including descriptions of inputs, sources, methodologies, and results. These analyses were as follows:

- A *market and technology assessment* addressed the scope of this rulemaking, identified the potential product classes for ballasts, characterized the markets for these products, and reviewed techniques and approaches for improving their efficiency;
- A *screening analysis* reviewed technology options to improve the efficiency of ballasts, and weighed these options against DOE's four prescribed screening criteria;
- An *engineering analysis* estimated the manufacturer selling prices (MSPs) associated with more energy-efficient ballasts;
- An *energy use analysis* estimated the annual energy use of ballasts;
- A *markups analysis* converted estimated MSPs derived from the engineering analysis to consumer prices;
- A *life-cycle cost analysis* calculated, for individual consumers, the discounted savings in operating costs throughout the estimated average life of the product, compared to any increase in installed costs likely to result directly from the imposition of a given standard;
- A *payback period (PBP) analysis* estimated the amount of time it takes individual consumers to recover the higher purchase expense of more energy efficient products through lower operating costs;
- A *shipments analysis* estimated shipments of ballasts over the time period examined in the analysis, which was used in performing the national impact analysis (NIA);
- A *national impact analysis* assessed the national energy savings, and the national net present value of total consumer costs and savings, expected to result from specific, potential energy conservation standards for ballasts; and
- A *preliminary manufacturer impact analysis* took the initial steps in evaluating the effects on manufacturers of new efficiency standards.

The public meeting announced in the March 2010 notice took place on April 26, 2010. At this meeting, DOE presented the methodologies and results of the analyses set forth in the preliminary TSD. Interested parties discussed the following major issues at the public meeting: the pros and cons of various efficiency metrics; how test procedure variation might affect efficiency measurements; special requirements for electromagnetic interference (EMI)-sensitive environments; product class divisions; MSPs and overall pricing methodology; markups; the maximum technologically feasible ballast efficiency; cumulative regulatory burden; and shipments. The comments received since publication of the March 2010 notice, including those received at the April 2010 public meeting, have contributed to DOE's proposed resolution of the issues in this rulemaking. This NOPR responds to the issues raised in the comments received.

Since the April 2010 public meeting, additional changes have been proposed to the active mode test procedure that have directly impacted this rulemaking. After reviewing comments submitted in response to the active mode test procedure NOPR (75 FR 14287, March 24, 2010) and conducting additional research, DOE issued a supplemental NOPR (SNOPR) proposing a lamp-based ballast efficiency metric instead of the resistor-based metric proposed in the NOPR. 75 FR 71570 (November 24, 2010). DOE believes the lamp-based metric more accurately assesses the real-life performance of a ballast. In the SNOPR, DOE sought additional comment on this approach. This NOPR evaluates standards for fluorescent lamp ballasts in terms of the new metric proposed in the active mode test procedure SNOPR. Please refer to section 0 for more details.

3. Compliance Date

EPCA contains specific guidelines regarding the compliance date for any standards amended by this rulemaking. EPCA requires DOE to determine whether to amend the standards in effect for fluorescent lamp ballasts and whether any amended standards should apply to additional ballasts. (42 U.S.C. 6295(g)(7)(B)). As stated above, the existing standards for ballasts are the standards established in the 2000 Ballast Rule and the standards established through the EPCA amendments to EPACT 2005. EPCA specifies that any amended standards established in this rulemaking shall apply to products manufactured after a date that is five years after—(i) The effective date of the previous amendment; or (ii) if the previous final rule did not amend the standards, the earliest date by which a previous amendment could have been effective; except that in no case may any amended standard apply to products manufactured within three years after publication of the final rule establishing such amended standard. (42 U.S.C. 6295(g)(7)(C)). DOE is required by consent decree to publish any amended standards for ballasts by June 30, 2011.[9] As a result, and in compliance with 42 U.S.C. 6295(g)(7)(C), DOE expects the compliance date to be 3 years after the publication of any final amended standards, by June 30, 2014.

[9] Under the consolidated Consent Decree in *New York* v. *Bodman,* No. 05 Civ. 7807 (S.D.N.Y. filed Sept. 7, 2005) and *Natural Resources Defense Council* v. *Bodman,* No. 05 Civ. 7808 (S.D.N.Y. filed Sept. 7, 2005) the U.S. Department of Energy is required to publish a final rule amending energy conservation standards for fluorescent lamp ballasts no later than June 30, 2011.

III. Issues Affecting the Scope of This Rulemaking

A. Additional Fluorescent Lamp Ballasts for Which DOE Is Proposing Standards

1. Scope of EPCA Requirement That DOE Consider Standards for Additional Ballasts

As discussed above, amendments to EPCA established energy conservation standards for certain fluorescent lamp ballasts, (42 U.S.C. 6295(g)(5), (6), and (8)) and directed DOE to conduct two rulemakings to consider amending the standards. The first amendment was completed with the publication of the 2000 Ballast Rule. This rulemaking fulfills the statutory requirement to determine whether to amend standards a second time. EPCA specifically directs DOE, in this second amendment, to determine whether to amend the standards in effect for fluorescent lamp ballasts and whether such standards should be amended so that they would be applicable to additional fluorescent lamp ballasts. (42 U.S.C. 6295(g)(7)(B))

The preliminary TSD notes that a wide variety of fluorescent lamp ballasts are not currently covered by energy conservation standards, and they are potential candidates for coverage under 42 U.S.C. 6295(g)(7). DOE encountered similar circumstances in a recent rulemaking that amended standards for general service fluorescent and incandescent reflector lamps (hereafter referred to as the 2009 Lamps Rule).[10] 74 FR 34080, 34087–8 (July 14, 2009). In that rule, DOE was also directed by EPCA to consider expanding its scope of coverage to include additional products: General service fluorescent lamps (GSFL). EPCA defines general service fluorescent lamps as fluorescent lamps that can satisfy the majority of fluorescent lamp applications and that are not designed and marketed for certain specified, non-general lighting applications. (42 U.S.C. 6291(30)(B)) As such, the term "general service fluorescent lamp" is defined by reference to the term "fluorescent lamp," which EPCA defines as "a low pressure mercury electric-discharge source in which a fluorescing coating transforms some of the ultraviolet energy generated by the mercury discharge into light," and as including the four enumerated types of fluorescent lamps for which EPCA already prescribes standards. (42 U.S.C. 6291(30)(A); 42 U.S.C. 6295(i)(1)(B)) To construe "general service fluorescent lamp" in 42 U.S.C. 6295(i)(5) as limited by those types of fluorescent lamps would mean there are no GSFL that are not already subject to standards, and hence, there would be no "additional" GSFL for which DOE could consider standards. Such an interpretation would conflict with the directive in 42 U.S.C. 6295(i)(5) that DOE consider standards for "additional" GSFL, thereby rendering that provision a nullity.

Therefore, DOE concluded that the term "additional general service fluorescent lamps" in 42 U.S.C. 6295(i)(5) allows DOE to set standards for GSFL other than the four enumerated lamp types specified in the EPCA definition of "fluorescent lamp." As a result, the 2009 Lamps Rule defined "fluorescent lamp" to include:

(1) Any straight-shaped lamp (commonly referred to as 4-foot medium bipin lamps) with medium bipin bases of nominal overall length of 48 inches and rated wattage of 25 or more;

(2) Any U-shaped lamp (commonly referred to as 2-foot U-shaped lamps) with medium bipin bases of nominal overall length between 22 and 25 inches and rated wattage of 25 or more;

(3) Any rapid start lamp (commonly referred to as 8-foot high output lamps) with recessed double contact bases of nominal overall length of 96 inches;

(4) Any instant start lamp (commonly referred to as 8-foot slimline lamps) with single pin bases of nominal overall length of 96 inches and rated wattage of 52 or more;

(5) Any straight-shaped lamp (commonly referred to as 4-foot miniature bipin standard output lamps) with miniature bipin bases of nominal overall length between 45 and 48 inches and rated wattage of 26 or more; and

(6) Any straight-shaped lamp (commonly referred to 4-foot miniature bipin high output lamps) with miniature bipin bases of nominal overall length between 45 and 48 inches and rated wattage of 49 or more.

10 CFR 430.2

In this rulemaking, DOE is directed to consider whether any amended standard should be applicable to additional fluorescent lamp ballasts. (42 U.S.C. 6295(g)(7)(B)) EPCA defines a "fluorescent lamp ballast" as "a device which is used to start and operate fluorescent lamps by providing a starting voltage and current and limiting the current during normal operation." (42 U.S.C. 6291(29)(A)) For this rule, DOE proposes to reference the definition of fluorescent lamp adopted by the 2009 Lamps Rule. This definition allows DOE to consider expanding coverage to include additional fluorescent lamp ballasts while not eliminating coverage of any ballasts for which standards already exist.

2. Identification of the Additional Ballasts for Which DOE Proposes Standards

In considering whether to amend the standards in effect for fluorescent lamp ballasts so that they apply to "additional" fluorescent lamp ballasts as specified in section 325(g)(7)(B) of EPCA, DOE will consider all fluorescent lamp ballasts (for which standards are not already prescribed) that operate fluorescent lamps, as defined in 10 CFR 430.2. For each additional fluorescent lamp ballast, DOE considers potential energy savings, technological feasibility and economic justification when determining whether to include them in the scope of coverage. In its analyses, DOE assessed the potential energy savings from market share estimates, potential ballast designs that improve efficiency, and other relevant factors. For market share estimates, DOE used both quantitative shipment data and information obtained during manufacturer interviews. DOE also assessed the potential to achieve energy savings in certain ballasts by considering whether those ballasts could serve as potential substitutes for other regulated ballasts.

In the preliminary TSD, DOE considered extending the scope of coverage to several additional ballast types including those that operate: Additional numbers and diameters of 4-foot MBP lamps, additional numbers and diameters of 8-foot high output (HO) lamps, additional numbers and diameters of 8-foot slimline lamps, 4-foot miniature bipin (miniBP) standard output (SO) lamps, 4-foot miniBP high output lamps, and 8-foot high output cold temperature lamps commonly used in outdoor signs. DOE also considered whether to extend coverage to dimming ballasts, but determined that those ballasts represent a very small portion of the overall market and are unlikely to be substituted for covered products due to their high first cost. The California investor-owned utilities (the California Utilities), and the Northwest Energy Efficiency Alliance (NEEA) and Northwest Power and Conservation Council (NPCC) agreed with the expanded scope of coverage presented in the preliminary TSD. In particular, the California Utilities commented that there is a wide range of efficiencies among the products included in the proposed coverage and that cost-effective standards will lead to significant energy savings. The National Electrical Manufacturers Association (NEMA) generally agreed with the expanded scope of coverage, but requested a specific exemption for

[10] Documents for the 2009 Lamps Rule are available at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/incandescent_lamps.html.*

magnetic ballasts that operate in EMI-sensitive applications. (NEMA, No. 29 at p. 2; California Utilities, No. 30 at p. 1; NEEA and NPCC, No. 32 at p. 2) [11] The sections below discuss the comments received in more detail.

a. Dimming Ballasts

Historically, energy conservation standards have exempted ballasts designed for dimming to 50 percent or less of their maximum output. (10 CFR 430.32(m)(4, 6–7)) However, in 2010, exemptions included in EPACT 2005 expired for dimming ballasts that operate certain reduced-wattage lamps. (10 CFR 430.32(m)(6–7)) DOE research has revealed no dimming ballasts currently on the market that operate these lamps because the gas composition of reduced-wattage lamps makes them undesirable for use in dimming applications. Additionally, dimming ballasts employ cathode heating to facilitate dimming and therefore operate lamps with two pins. Because 8-foot slimline lamps have only a single pin, these lamps are not suitable for use with dimming ballasts. Based on data from the 2005 U.S. Census and interviews with manufacturers, DOE determined in the preliminary TSD that dimming ballasts of all types had less than 1 percent market share. DOE also concluded that these ballasts are already used in energy-saving systems. After examining the potential for substitution from other ballast types, DOE believed there was little risk of dimming ballasts becoming a substitute for other covered ballast types. Dimming ballasts are more expensive than comparable fixed-light-output ballasts. Moreover, dimming ballasts require specialized control systems, resulting in additional up-front cost. For all of these reasons, DOE did not consider expanding coverage of dimming ballasts in the preliminary TSD.

NEMA, the California Utilities, and the NEEA and NPCC agreed with the exclusion of additional dimming ballasts. (NEMA, No. 29 at p. 2; California Utilities, No. 30 at p. 1; NEEA and NPCC, No. 32 at p. 3) Philips and Osram Sylvania emphasized that dimming ballasts are part of high-efficiency systems that realize greater energy savings than fixed-light-output systems. (Philips, Public Meeting Transcript, No. 34 at pp. 122–123; OSI, No. 34, Public Meeting Transcript, No. 34 at pp. 124–125) The California Utilities and the NEEA and NPCC also cited the lack of an industry-standard test procedure as a potential barrier to including dimming ballasts in this rulemaking. NEMA concurred, stating that industry has not agreed on the appropriate dimmed level for evaluation and that measuring at many levels is burdensome. (California Utilities, No. 30 at p. 1; NEEA and NPCC, No. 32 at p. 3; NEMA, No. 29 at p. 2)

DOE agrees that dimming ballasts have a very small market share and are already used in energy-saving systems. They are unlikely to become a substitute for fixed-light output ballasts due to their high up-front cost. The lack of an industry-standardized test procedure for newer dimming products makes it difficult for DOE to determine whether energy conservation standards for additional dimming ballasts are technologically feasible. For these reasons, DOE is not proposing to expand the coverage of dimming ballasts in this NOPR. However, the dimming ballasts that operate the four reduced-wattage lamp combinations described in 10 CFR 430.32(m)(5) (EPACT 2005 standards) will continue to be covered by existing energy conservation standards.

b. Sign Ballasts

Current energy conservation standards exclude ballasts designed to operate two F96T12HO lamps at ambient temperatures of 20 degrees Fahrenheit (°F) or less and for use in an outdoor sign. (10 CFR 430.32(m)) In the preliminary TSD, DOE considered whether to include these ballasts in the scope of coverage for this rulemaking. DOE found that the market share of cold temperature sign ballasts was about 1 percent in 2005. Despite their relatively small market share, the energy savings potential per ballast is substantial due to their operation of large numbers of high output lamps. Replacing a magnetic with an electronic [12] sign ballast could reduce energy consumption by as much as 25 percent to 35 percent. Given that sign ballasts exist at more than one level of efficiency, DOE has determined it is technologically feasible to improve the energy efficiency of sign ballasts. Preliminary results from the LCC and NIA analyses indicated that setting standards would be economically justified. For these reasons, DOE included them in the scope of coverage in the preliminary TSD.

The Appliance Standards Awareness Project (ASAP) and the NEEA and NPCC agreed with DOE's decision to expand coverage to include cold temperature outdoor sign ballasts. Although these products comprise a relatively small percentage of overall fluorescent ballast shipments, the NEEA and NPCC note that these ballasts have much higher energy use compared to other covered ballast types due to their high system input power and low efficiency of present systems. (ASAP, Public Meeting Transcript, No. 34 at pp. 121–122; NEEA and NPCC, No. 32 at p. 3) DOE received no comments suggesting that DOE should not include these ballasts in the scope of coverage for this rulemaking. Therefore, for the reasons set forth above, DOE proposes to include them in the scope of coverage for this NOPR. Cold temperature ballasts for outdoor signs are typically designed to operate a range of lamp lengths and numbers of lamps. Based on product catalogs and conversations with manufacturers, DOE found that a single sign ballast can be designed to operate a range of loads including HO lamps between 1.5 feet and 10 feet with one to six lamps per ballast. Because only 8-foot HO lamps are included in the definition of fluorescent lamp (10 CFR 430.2), DOE proposes to include sign ballasts that can operate 8-foot HO lamps in the scope of coverage.

c. T5 Ballasts

In the preliminary TSD, DOE considered whether to expand the scope of coverage to include ballasts that operate standard output and high output 4-foot miniBP T5 lamps. The U.S. Census reports that T5 HO ballasts comprised about 4 percent of the ballast market in 2005. Shipment data are available only for T5 high output ballasts, so the actual market share is likely larger. T5 ballast shipments have been steadily increasing since the shipments were first reported in 2002. Furthermore, DOE research indicates that T5 high output ballasts are rapidly taking market share from metal halide systems used in high-bay industrial applications. The shipment analysis confirms that T5 SO and T5 HO ballasts represent a significant portion of the market. Because higher-efficiency versions of some of these ballasts are already present in the market, DOE concluded that standards to increase the energy efficiency of these ballasts were technologically feasible. Based on LCC and NIA results in the preliminary TSD, coverage of T5 ballasts would be economically justified. For these reasons, DOE included T5 ballasts in the

[11] A notation in the form "NEMA, No. 29 at p. 2" identifies a written comment that DOE has received and has included in the docket of this rulemaking. This particular notation refers to a comment: (1) Submitted by NEMA; (2) in document number 29 of the docket, and (3) on page 2 of that document.

[12] When DOE refers to an electronic ballast throughout this document, it is referring to a high frequency ballast as defined by as defined in ANSI C82.13–2002. Similarly, when DOE refers to a magnetic ballast, it is referring to a low frequency ballast as defined by the same ANSI standard.

scope of coverage in the preliminary TSD.

DOE did not receive any adverse comment to its inclusion of T5 ballasts in the scope of coverage for the preliminary TSD. Therefore, for the reasons stated above, DOE proposes to include them in the scope in this NOPR. DOE found that T5 ballasts and lamps exist in a variety of lengths and wattages. Although standard T5 lamps include wattages ranging from 14W to 80W, and lengths ranging from nominally 2 feet to 6 feet, the primary driver of T5 ballast and lamp market share growth is substitution for currently regulated 4-foot T8 MBP ballasts and lamps. Therefore, DOE proposes to cover ballasts designed to operate nominally 4-foot lengths of standard output and high output T5 miniBP lamps.

d. Residential Ballasts

In the preliminary TSD, DOE considered whether to include residential ballasts in the scope of coverage. Residential ballasts, defined as ballasts that have a power factor less than 0.9 and are designed for use only in residential building applications, are currently exempt from existing energy conservation standards. Only magnetic residential ballast shipments are reported in the U.S. Census. The market for residential magnetic ballasts held steady at about 7 percent between 1995 and 2002, and then decreased to about 1.5 percent in 2005. In the preliminary TSD, DOE stated its belief that the 2005 market share and total shipments of residential ballasts was much higher than the 1.5 percent reported for magnetic residential ballasts in the U.S. census. First, many residential ballasts are manufactured overseas by foreign companies that do not share shipment data with the U.S. Census. Second, electronic ballasts are a common option for residential fluorescent lighting fixtures, but they were not reported in the Census data. Because of these omissions, DOE believes residential ballasts represent a more sizeable portion of the overall ballast market and represent significant potential energy savings.

DOE also found that residential ballasts exist at a range of efficiencies. They can be magnetic or electronic and exist for both T8 and T12 lamps. Therefore, DOE believed standards to increase the energy efficiency of residential ballasts were technologically feasible. Preliminary results in the LCC and NIA indicated that standards for residential ballasts were economically justified. For these reasons, DOE included residential ballasts in the scope of coverage in the preliminary TSD.

ASAP and the NEEA and NPCC agreed with DOE's decision to expand coverage to include residential ballasts. The NEEA and NPCC noted that the residential ballast market is expected to grow substantially as residential lighting energy codes become more stringent. They noted that California, Oregon, and Washington have codes that require fluorescent or higher-efficacy systems. Similarly, the 2009 International Energy Conservation Code requires that 50 percent of all permanently installed lighting in residences have a minimum efficacy of 45 lumens per watt. (ASAP, Public Meeting Transcript, No. 34 at pp. 121–122; NEEA and NPCC, No. 32 at pp. 2–3) DOE did not receive any adverse comments regarding coverage of residential ballasts. Therefore, for the reasons stated above, DOE proposes to include residential ballasts that operate 4-foot medium bipin or 2-foot U-shaped lamps in the scope of coverage for this NOPR.

e. Ballasts That Operate T8 4-Foot MBP and 2-Foot U-Shaped Lamps

Existing energy conservation standards do not apply to ballasts that operate T8 lamps. In the preliminary TSD, DOE considered whether to extend coverage to these types of ballasts. Ballasts that operate 4-foot T8 MBP and 2-foot T8 U-shaped lamps exhibit a range of efficiencies, indicating that standards to increase the energy efficiency of these ballasts are technologically feasible. According to the U.S. Census, the market share of 4-foot T8 MBP and 2-foot T8 U-shaped ballasts represented 55 percent of shipments in 2005. In addition, due to existing energy conservation standards promulgated for T12 ballasts, shipments of T8 ballasts have been increasing. T8 ballasts are being purchased and installed in applications previously popular for T12 systems. Thus, there is potential for significant energy savings by regulating the 4-foot T8 ballast market. Furthermore, preliminary results in the LCC and NIA demonstrated the potential for significant economic savings, indicating that standards for these ballasts would be economically justified. For these reasons, DOE included ballasts that operate 4-foot T8 MBP and 2-foot T8 U-shaped lamps in the scope of coverage in the preliminary TSD.

DOE did not receive any adverse comments regarding coverage of these ballasts. Therefore, for the reasons stated above, DOE proposes to include ballasts that operate 4-foot T8 MBP and 2-foot T8 U-shaped lamps in the scope of coverage for this NOPR.

f. Ballasts That Operate T8 8-Foot Slimline Lamps

Similar to ballasts that operate 4-foot T8 MBP and 2-foot T8 U-shaped lamps, ballasts that operate 8-foot T8 slimline lamps are also not subject to existing energy conservation standards. According to the U.S. Census, 8-foot slimline T8 ballasts had about 2 percent market share in 2005, while 8-foot slimline T12 ballasts had about 3 percent market share. Although the market share for 8-foot slimline T8 ballasts as reported by the U.S. Census is relatively small, the 2009 Lamps Rule will eliminate all currently commercially available T12 lamps in 2012, further increasing demand for T8 lamp-and-ballast systems. In addition, while some 8-foot slimline T12 systems are being replaced by two 4-foot T8 systems, others are being replaced by 8-foot slimline T8 systems. In addition, given that these ballasts exist at a range of efficiencies, DOE believes that energy conservation standards are technologically feasible. Thus, DOE believes there is potential for significant energy savings by covering ballasts that operate 8-foot slimline T8 lamps. Based on DOE's preliminary LCC and NIA results for these ballasts, coverage of these ballasts would be economically justified. For these reasons, in the preliminary TSD, DOE included ballasts that operate 8-foot SP slimline T8 lamps in the scope of coverage.

DOE did not receive any adverse comments regarding coverage of these ballasts. Therefore, for the reasons stated above, DOE proposes to include ballasts that operate 8-foot SP slimline T8 lamps in the scope of coverage for this NOPR.

g. Ballasts That Operate T8 8-Foot HO Lamps

In the preliminary TSD, DOE considered whether to cover ballasts designed to operate recessed double contact (RDC) HO T8 lamps. According to the U.S. Census, the market share of 8-foot HO (T8 and T12) ballasts (excluding cold temperature sign ballasts) was about 0.5 percent in 2005. Because shipments of 8-foot RDC HO lamps are mostly T12 lamps, DOE believes most of the 8-foot HO ballasts currently shipped are T12. However, according to analysis conducted for the 2009 Lamps Rule, most currently commercially available T12 HO lamps do not meet energy conservation standards that come into effect in 2012. Therefore, DOE believes that T8 HO ballast shipments will increase in

response to those standards. There is a range of efficiency levels for 8-foot T8 HO ballasts currently in the market; therefore, energy conservation standards to increase the energy efficiency of these ballasts are technologically feasible. In addition, preliminary LCC and NIA results demonstrated the potential for significant economic savings. Based on these findings, DOE included 8-foot HO T8 ballasts in the scope of coverage in the preliminary TSD.

DOE did not receive any adverse comments regarding coverage of these ballasts. Therefore, for the reasons stated above, DOE proposes to include ballasts that operate 8-foot RDC HO T8 lamps in the scope of coverage for this NOPR.

h. Ballasts That Operate in EMI-Sensitive Environments

At the public meeting, Philips commented that magnetic ballasts are currently used in certain EMI-sensitive environments, and that the proposals in the preliminary TSD would not allow these types of ballasts to exist in the future. (Philips, Public Meeting Transcript, No. 34 at pp. 125–126) GE agreed with Philips and cited critical care suites, surgery suites, airport control towers, and nuclear medicine laboratories as examples of situations where ballasts that generate low or no EMI are needed. (GE, Public Meeting Transcript, No. 34 at p. 126) In written comments, NEMA stated that DOE needs to address an exemption for magnetic ballasts in EMI-sensitive applications and proposed that they should be high-performance T8 ballasts, which would be more expensive than electronic ballasts (NEMA, No. 29 at p. 2).

DOE conducted research and interviews with fluorescent lamp ballast and fixture manufacturers to identify the following applications as potentially sensitive to EMI: Medical operating room telemetry or life support systems; airport control systems; electronic test equipment; radio communication devices; radio recording studios; correctional facilities; clean rooms; facilities with low signal-to-noise ratios; and aircraft hangers or other buildings with predominantly metal construction.

To understand the specifications that ballast consumers require for different applications, DOE researched existing regulations for EMI. DOE identified EMI standards for general applications such as commercial buildings, residential buildings, naval vessels, and other spaces. These standards include (1) the Federal Communications Commission (FCC) standards in 47 CFR part 18 for conducted EMI and (2) Department of Defense MIL–STD–461F [13] CE102 limits for all applications for conducted emissions from power leads between 10kHz and 10MHz. Table III.1 below shows the existing FCC and military standards for conducted electromagnetic interference. The frequency column indicates the frequency of the electromagnetic interference rather than the frequency at which the ballast operates.

TABLE III.1—CONDUCTED EMI REQUIREMENTS FOR FLUORESCENT LAMP BALLASTS

Frequency (MHz)	FCC Title 47 Part 18 conducted EMI, Maximum RF line voltage measured with a 50 micro Henry (μH)/50 ohm line impedance stabilization network (LISN) micro volt (μV)	CE 102 MIL–STD 461F, limit level for conducted emissions for all applications (μV)
Non-consumer equipment:		
0.45 to 1.6	1,000	1,000
1.6 to 30	3,000	1,000 *Applies up to 10 MHz
Consumer equipment:		
0.45 to 2.51	250	1,000
2.51 to 3.0	3,000	1,000
3.0 to 30	250	1,000 *Applies up to 10 MHz

In addition to using low-frequency magnetic ballasts in fixtures, DOE researched other ways that fixture manufacturers can reduce EMI. It is possible to install an external EMI filter on the input side of the ballast to limit conducted EMI that escapes the ballast from continuing to propagate through the building wiring. In addition, a grid lens can be installed to cover the lamp chamber to increase the impedance to a specific frequency or to bring radiated EMI to ground. DOE received mixed feedback from manufacturers concerning whether inline filters, special lenses, grounding cages, fixture design, and other external filters would be sufficient to reduce EMI from electronic ballasts to acceptable levels for EMI-sensitive applications. Electronic ballasts typically operate at a frequency above 20 kHz, which can turn the fluorescent lamp arc into an emitter of high-frequency electromagnetic waves. The switch mode power supply within electronic ballasts can also radiate high-frequency electromagnetic waves. Because the intensity of EMI is directly proportional to its frequency, the EMI from lighting systems containing high-frequency electronic ballasts may penetrate grid lenses and may affect other equipment over a farther range than the EMI from magnetic ballasts.

DOE learned from manufacturer interviews that magnetic ballasts are typically recommended for situations in which EMI has been or is expected to be a concern. These manufacturers believe the engineering investment to develop specialty electronic ballasts for EMI-sensitive applications would be burdensome and not economically justifiable given the very limited demand. Furthermore, manufacturers indicated uncertainty over the effectiveness of these measures for each individual application. DOE was also unable to determine whether EMI related issues with electronic ballasts could be eliminated with the methods described above. Manufacturers

[13] Department of Defense MIL-STD-461F is available at *http://www.cvel.clemson.edu/pdf/MIL–STD–461F.pdf.*

suggested that an exemption for T8 magnetic ballasts would not constitute a risk for magnetic ballast substitution in current electronic ballast applications because magnetic ballasts are generally heavier, more expensive, and use more energy than electronic ballast alternatives. Customers generally prefer magnetic ballasts only in situations where EMI is a particular concern.

Based on its analysis of EMI-sensitive ballast applications, DOE proposes that T8 magnetic ballasts designed and labeled for use in EMI-sensitive environments only and shipped by the manufacturer in packages containing not more than 10 ballasts be exempt from the standards established in this NOPR. Because of the diversity in magnetic T8 ballast applications, DOE has designed the exemption similar to the previous fluorescent lamp ballast exemptions for replacement ballasts. DOE believes the exemption is necessary because in some environments, EMI can pose a serious safety concern that is best mitigated with magnetic ballast technology. DOE does not believe magnetic ballasts would likely be used as substitutes in current electronic ballast applications due to their higher cost and weight. See appendix 5E of the TSD for more details.

3. Summary of Fluorescent Lamp Ballasts to Which DOE Proposes To Extend Coverage

With the exception of the comments discussed above, DOE received no other input related to coverage of fluorescent lamp ballasts. In addition, DOE's revised analyses indicate that energy conservation standards for the ballasts to which DOE preliminarily decided to extend coverage in the preliminary TSD are still expected to be technologically feasible, economically justified, and would result in significant energy savings. Therefore, in summary, DOE is proposing to cover the following additional fluorescent lamp ballasts:

(1) Ballasts that operate 4-foot medium bipin lamps with a rated wattage [14] of 25W or more, and an input voltage at or between 120V and 277V;

(2) Ballasts that operate 2-foot medium bipin U-shaped lamps with a rated wattage of 25W or more, and an input voltage at or between 120V and 277V;

(3) Ballasts that operate 8-foot high output lamps with an input voltage at or between 120V and 277V;

(4) Ballasts that operate 8-foot slimline lamps with a rated wattage of 52W or more, and an input voltage at or between 120V and 277V;

(5) Ballasts that operate 4-foot miniature bipin standard output lamps with a rated wattage of 26W or more, and an input voltage at or between 120V and 277V;

(6) Ballasts that operate 4-foot miniature bipin high output lamps with a rated wattage of 49W or more, and an input voltage at or between 120V and 277V;

(7) Ballasts that operate 4-foot medium bipin lamps with a rated wattage of 25W or more, an input voltage at or between 120V and 277V, a power factor of less than 0.90, and are designed and labeled for use in residential applications; and

(8) Ballasts that operate 8-foot high output lamps with an input voltage at or between 120V and 277V, and operate at ambient temperatures of 20 degrees F or less and are used in outdoor signs.

B. Off Mode and Standby Mode Energy Consumption Standards

EPCA requires energy conservation standards adopted for a covered product after July 1, 2010 to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Because DOE is required by consent decree to publish a final rule establishing any amended standards for fluorescent lamp ballasts by June 30, 2011, this rulemaking is subject to this requirement. DOE determined that it is not possible for the ballasts at issue in this rulemaking to meet the off-mode criteria because there is no condition in which a ballast is connected to the main power source and is not in a mode already accounted for in either active or standby mode. In the test procedure addressing standby mode energy consumption, DOE determined that the only ballasts that consume energy in standby mode are those that incorporate an electronic circuit that enables the ballast to communicate with and be part of a lighting control interface (e.g., DALI-enabled ballasts). 74 FR 54445, 54447–8 (October 22, 2009). DOE believes that the only commercially available ballasts that incorporate an electronic circuit to communicate with a lighting control interface are dimming ballasts.

As discussed in section 0, DOE does not propose to expand the scope of coverage to include additional dimming ballasts. Therefore, the only covered dimming ballasts are the products that operate the four reduced-wattage lamp combinations specified in 10 CFR 430.32(m)(5). DOE research has not revealed any dimming ballasts currently on the market that operate these lamps because the gas composition of reduced-wattage lamps makes them undesirable for use in dimming applications. Additionally, these ballasts employ cathode heating to facilitate dimming and therefore operate lamps with two pins. Because 8-foot slimline lamps have only a single pin, these lamps are not suitable for use with dimming ballasts. Because DOE did not discover any dimming products that are covered by existing standards, DOE was not able to characterize standby mode energy consumption. Thus, DOE is not able to set standards for standby mode energy consumption for these ballasts in accordance with 42 U.S.C. 6295(o). DOE did not receive any comments regarding this subject in response to the preliminary TSD. Therefore, for the reasons stated above, DOE does not propose to adopt provisions to address ballast operation in standby mode as part of the energy conservation standards that are the subject of this rulemaking.

IV. General Discussion

A. Test Procedures

As noted above, DOE's current test procedures for ballasts appear at 10 CFR part 430, subpart B, appendix Q. DOE issued a NOPR in which it proposed revisions to these test procedures. 75 FR 14288 (March 24, 2010). The principal change DOE proposed to the existing test methods, in an effort to reduce measurement variation, was to eliminate photometric measurements used to determine ballast efficacy factor (BEF). Instead, DOE proposed to use electrical measurements to determine ballast efficiency (BE), which could then be converted to BEF using empirically derived transfer equations. The proposed changes also specified that the ballast operate a resistive load rather than a lamp load during performance testing. No changes were proposed for the measurement of ballast factor (which required photometric measurements) for consistency with previous methods. Finally, DOE also proposed an update to an industry standard referenced in the existing test procedure. *Id.* at 14290, 14308. DOE also proposed to add methods for testing ballasts that are not currently covered by energy conservation standards, but that DOE is considering for standards in this rulemaking. *Id.* at 14289–91. Finally, DOE proposed provisions for manufacturers to report to DOE on the compliance of their ballasts with applicable standards. *Id.* at 14289, 14290, 14309.

More recently, DOE published a supplementary NOPR in which it proposed revisions to its test procedures

[14] The 2009 Lamps Rule adopted a new definition for rated wattage that can be found in 10 CFR 430.2.

for fluorescent lamp ballasts established under EPCA. 75 FR 71570 (Nov. 24, 2010). This test procedure proposes to measure a new metric, ballast luminous efficiency (BLE), which more directly assesses the electrical losses in a ballast compared to the existing ballast efficacy factor (BEF) metric. Rather than testing a ballast while operating a resistive load, the BLE test procedure measures the performance of a ballast while it is operating a fluorescent lamp. DOE found that a resistive load can model the effective resistance of a lamp operated only at a particular ballast factor, requiring multiple ballast factor specific resistors to be specified and increasing the testing cost to manufacturers. In written comments in response to the NOPR, NEMA suggested that ballast factor be calculated using a combination of electrical measurements and reference lamp arc power values from ANSI C78.81–2010. The SNOPR proposal outlines a new method for determination of ballast factor which requires only electrical measurements.

DOE also notes that EPCA requires DOE to amend its test procedures for all covered products, including those for ballasts, to include the measurement of standby mode and off mode energy consumption, except where current test procedures fully address such energy consumption or where an integrated or separate standard is technically infeasible. (42 U.S.C. 6295(gg)(2)) As indicated above, ballasts do not operate in the off mode and DOE has already amended its test procedures for ballasts to address standby mode energy use. 74 FR 54445 (Oct. 22, 2009). As a result, DOE's current test procedure rulemaking for ballasts does not address standby or off mode energy use.

B. Technological Feasibility

1. General

In each standards rulemaking, DOE conducts a screening analysis based on information it has gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the rulemaking. As the first step in such analysis, DOE develops a list of design options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of these means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially available products or in working prototypes to be technologically feasible. 10 CFR part 430, subpart C, appendix A, section 4(a)(4)(i).

Once DOE has determined that particular design options are technologically feasible, it further evaluates each of these design options in light of the following additional screening criteria: (1) Practicability to manufacture, install, or service; (2) adverse impacts on product utility or availability; and (3) adverse impacts on health or safety. Section 0 of this notice discusses the results of the screening analysis for ballasts, particularly the designs DOE considered, those it screened out, and those that are the basis for the trial standard levels (TSLs) in this rulemaking. For further details on the screening analysis for this rulemaking, *see* Chapter 4 of the NOPR TSD.

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt an amended standard for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for that product. (42 U.S.C. 6295(p)(1)) Accordingly, DOE determined the maximum technologically feasible ("max tech") ballast efficiency in the engineering analysis, using the design options identified in the screening analysis (*see* chapter 5 of the NOPR TSD).

As a first step to identifying the maximum technologically feasible efficiency level, DOE conducted testing of commercially available ballasts. In the preliminary analysis, DOE was not able to identify working prototypes that had a higher efficiency than the tested products. Therefore, the "max tech" level determined for the preliminary analysis was based on the most efficient commercially available ballasts tested. DOE presented additional research in appendix 5D of the preliminary TSD to explore whether technologies used in products similar to ballasts could be used to improve the efficiency of ballasts currently on the market.

DOE received several comments regarding its determination of max tech ballast efficiency. These comments are discussed in section 0. For this NOPR, DOE conducted additional analysis to determine the appropriate max tech levels for fluorescent lamp ballasts. Based on the additional testing conducted for this NOPR, DOE has determined that TSL 3 represents the highest efficiency level that is technologically feasible for a sufficient diversity of products (spanning several ballast factors, number of lamps per ballast, and types of lamps operated) within each product class. Table IV.1 presents the max tech efficiency levels for each product class.

TABLE IV.1—MAX TECH LEVELS

Product class	Equation*
IS and RS ballasts that operate 4-foot MBP lamps. 8-foot slimline lamps.	1.32 * ln (total lamp arc power) + 86.11.
PS ballasts that operate 4-foot MBP lamps. 4-foot MiniBP SO lamps. 4-foot MiniBP HO lamps.	1.79 * ln (total lamp arc power) + 83.33.
IS and RS ballasts that operate 8-foot HO lamps.	1.49 * ln (total lamp arc power) + 84.32.
PS ballasts that operate 8-foot HO lamps.	1.46 * ln (total lamp arc power) + 82.63.
Ballasts that operate 8-foot HO lamps in cold temperature outdoor signs.	1.49 * ln (total lamp arc power) + 81.34.

*Equation includes 0.8 percent reduction for testing variation.

Although DOE identified certain ballasts that achieved efficiencies higher than TSL 3, these ballasts were suitable for only a limited range of applications within their product class. DOE does not have sufficient data at this time to determine that a higher efficiency level is technologically feasible for the full range of ballast applications with alternate ballast factors, numbers of lamps, and lamp types. Before making this determination, DOE evaluated the possibility of improving the efficiency of three selected ballasts by inserting improved components in the place of existing components of commercially available ballasts. DOE's experiments with improving ballast efficiency through component substitution did not result in prototypes with improved overall ballast efficiency.

DOE is still considering whether an efficiency level higher than TSL 3 is technologically feasible for a sufficient diversity of lamp types, ballast factors, and numbers of lamps within each product class. Although DOE was unable to improve the efficiency of commercially available ballasts, DOE recognizes that component substitution is not the only method available for incrementally improving ballast efficiency. For example, further improvements may be possible through the incorporation of newly designed integrated circuits into the new ballast designs.

In Appendix 5F of the NOPR TSD, DOE presents additional analysis on the potential for an instant-start ballast efficiency level that exceeds TSL 3. DOE requests comments on its selection of the maximum technologically feasible level and whether it is technologically feasible to attain such higher efficiencies for the full range of instant start ballast applications. Specifically, DOE seeks quantitative information regarding the potential change in efficiency, the design options employed, and the associated change in cost. Any design option that DOE considers to improve efficiency must meet the four criteria outlined in the screening analysis: technological feasibility; practicability to manufacture, install, and service; adverse impacts on product or equipment utility to consumers or availability; and adverse impacts on health or safety. DOE also requests comments on any technological barriers to an improvement in efficiency above TSL 3 for all or certain types of ballasts.

C. Energy Savings

1. Determination of Savings

DOE used its NIA spreadsheet to estimate energy savings from new or amended standards for the ballasts that are the subject of this rulemaking. (The NIA spreadsheet model is described in section 0 of this notice and in chapter 11 of the TSD.) DOE forecasted energy savings beginning in 2014, the year that compliance with any new and amended standards is proposed to be required, and ending in 2043 for each TSL. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between the standards case and the base case. The base case represents the forecast of energy consumption in the absence of new and amended mandatory efficiency standards, and considers market demand for higher-efficiency products. For example, DOE models a shift in the base case from covered fluorescent lamp ballasts toward emerging technologies such as light emitting diodes (LEDs).

The NIA spreadsheet model calculates the electricity savings in "site energy" expressed in kilowatt-hours (kWh). Site energy is the energy directly consumed by ballasts at the locations where they are used. DOE reports national energy savings on an annual basis in terms of the aggregated source (primary) energy savings, which is the savings in energy used to generate and transmit the site energy. (See NOPR TSD chapter 11) To convert site energy to source energy, DOE derived conversion factors, which change with time, from the model used to prepare the Energy Information Administration's (EIA's) *Annual Energy Outlook 2010* (*AEO2010*).

2. Significance of Savings

As noted above, under 42 U.S.C. 6295(o)(3)(B) DOE is prohibited from adopting a standard for a covered product if such standard would not result in "significant" energy savings. While the term "significant" is not defined in the Act, the U.S. Court of Appeals, in *Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355, 1373 (D.C. Cir. 1985), indicated that Congress intended "significant" energy savings in this context to be savings that were not "genuinely trivial." The energy savings for all of the TSLs considered in this rulemaking are nontrivial, and therefore DOE considers them "significant" within the meaning of section 325 of EPCA.

D. Economic Justification

1. Specific Criteria

As noted in section II.B, EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)) The following sections discuss how DOE addresses each of those seven factors in this rulemaking.

a. Economic Impact on Manufacturers and Consumers

In determining the impacts of a new or amended standard on manufacturers, DOE first determines the quantitative impacts using an annual cash-flow approach. This includes both a short-term assessment—based on the cost and capital requirements during the period between the announcement of a regulation and when the regulation comes into effect—and a long-term assessment over the 30-year analysis period. The impacts analyzed include INPV (which values the industry based on of expected future cash flows), cash flows by year, changes in revenue and income, and other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including an analysis of impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. DOE also takes into account cumulative impacts of different DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and the PBP associated with new or amended standards. The LCC, which is separately specified as one of the seven factors to consider when determining the economic justification for a new or amended standard, (42 U.S.C. 6295(o)(2)(B)(i)(II)), is discussed in the following section. For consumers in the aggregate, DOE calculates the net present value from a national perspective of the economic impacts on consumers over the forecast period used in a particular rulemaking.

b. Life-Cycle Costs

The LCC is the sum of the purchase price of a product (including its installation) and the operating expense (including energy and maintenance and repair expenditures) discounted over the lifetime of the product. The LCC savings for the considered efficiency levels are calculated relative to a base case that reflects likely trends in the absence of new or amended standards. The LCC analysis required a variety of inputs, such as product prices, product energy consumption, energy prices, maintenance and repair costs, product lifetime, and consumer discount rates. DOE assumed in its analysis that

consumers purchase the product in 2014.

To account for uncertainty and variability in specific inputs, such as product lifetime and discount rate, DOE uses a distribution of values with probabilities attached to each value. A distinct advantage of this approach is that DOE can identify the percentage of consumers estimated to achieve LCC savings or experiencing an LCC increase, in addition to the average LCC savings associated with a particular standard level. In addition to identifying ranges of impacts, DOE evaluates the LCC impacts of potential standards on identifiable sub-groups of consumers that may be disproportionately affected by a national standard.

c. Energy Savings

While significant conservation of energy is a separate statutory requirement for imposing an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) DOE uses the NIA spreadsheet results in its consideration of total projected savings.

d. Lessening of Utility or Performance of Products

In establishing classes of products, and in evaluating design options and the impact of potential standard levels, DOE seeks to develop standards that would not lessen the utility or performance of the products under consideration. The efficiency levels considered in today's NOPR will not affect any features valued by consumers, such as starting method, ballast factor, or cold temperature operation. Therefore, DOE believes that none of the TSLs presented in section 0 would reduce the utility or performance of the ballasts considered in the rulemaking. (42 U.S.C. 6295(o)(2)(B)(i)(IV))

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider any lessening of competition likely to result from standards. It directs the Attorney General to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination to the Secretary, not later than 60 days after the publication of a proposed rule, together with an analysis of the nature and extent of such impact. (42 U.S.C. 6295(o)(2)(B)(i)(V) and (B)(ii)) DOE has transmitted a copy of today's proposed rule to the Attorney General and has requested that the Department of Justice (DOJ) provide its determination on this issue. DOE will address the Attorney General's determination in any final rule.

f. Need of the Nation to Conserve Energy

The non-monetary benefits of the proposed standards are likely to be reflected in improvements to the security and reliability of the nation's energy system. Reduced demand for electricity may also result in reduced costs for maintaining the reliability of the nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the Nation's needed power generation capacity.

Energy savings from the proposed standards are also likely to result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases (GHG) associated with energy production. DOE reports the environmental effects from the proposed standards—and from each TSL it considered for ballasts—in the environmental assessment contained in the NOPR TSD. DOE also reports estimates of the economic value of reduced emissions reductions resulting from the considered TSLs.

g. Other Factors

The Act allows the Secretary of Energy to consider any other factors he or she deems relevant in determining whether a standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) Under this provision, DOE considered subgroups of consumers that may be adversely affected by the standards proposed in this rule. DOE specifically assessed the impact of standards on low-income consumers, institutions of religious worship, and institutions that serve low-income populations. In considering these subgroups, DOE analyzed variations on electricity prices, operating hours, discount rates, and baseline ballasts. See section 0 of this notice for further detail.

2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii), EPCA provides for a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of a product that meets the standard is less than three times the value of the first-year energy (and, as applicable, water) savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and PBP analyses generate values that calculate the payback period for consumers of potential new and amended energy conservation standards. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable presumption test. However, DOE routinely conducts an economic analysis that considers the full range of impacts to the consumer, manufacturer, nation, and environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE to evaluate definitively the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section 0 of this NOPR.

V. Methodology and Discussion

DOE used two spreadsheet tools to estimate the impact of today's proposed standards. The first spreadsheet calculates LCCs and payback periods of potential new energy conservation standards. The second provides shipments forecasts and then calculates national energy savings and net present value impacts of potential new energy conservation standards. The Department also assessed manufacturer impacts, largely through use of the Government Regulatory Impact Model (GRIM).

Additionally, DOE estimated the impacts of energy efficiency standards on utilities and the environment. DOE used a version of EIA's National Energy Modeling System (NEMS) for the utility and environmental analyses. The NEMS model simulates the energy sector of the U.S. economy. EIA uses NEMS to prepare its *Annual Energy Outlook,* a widely known baseline energy forecast for the United States. The version of NEMS used for appliance standards analysis is called NEMS–BT, and is based on the *AEO2010* version with minor modifications. The NEMS–BT offers a sophisticated picture of the effect of standards, because it accounts for the interactions between the various energy supply and demand sectors and the economy as a whole.

The EIA approves the use of the name "NEMS" to describe only an *AEO* version of the model without any modification to code or data. Because the present analysis entails some minor code modifications and runs the model under various policy scenarios that deviate from *AEO* assumptions, the name "NEMS–BT" refers to the model as used here. (BT stands for DOE's Building Technologies Program.) For more information on NEMS, refer to *The National Energy Modeling System: An Overview,* DOE/EIA–0581 (98) (Feb. 1998), available at: *http://*

tonto.eia.doe.gov/FTPROOT/forecasting/058198.pdf.

A. Market and Technology Assessment

1. General

When beginning an energy conservation standards rulemaking, DOE develops information that provides an overall picture of the market for the products concerned, including the purpose of the products, the industry structure, and market characteristics. This activity includes both quantitative and qualitative assessments based on publicly available information. The subjects addressed in the market and technology assessment for this rulemaking include product classes and manufacturers; historical shipments; market trends; regulatory and non-regulatory programs; and technologies or design options that could improve the energy efficiency of the product(s) under examination. *See* chapter 3 of the TSD for further discussion of the market and technology assessment.

2. Product Classes

In evaluating and establishing energy conservation standards, DOE divides covered products into classes by the type of energy used, or by capacity or other performance-related feature that justifies a different standard for products having such feature. (See 42 U.S.C. 6295(q)) In deciding whether a feature justifies a different standard, DOE must consider factors such as the utility of the feature to users. *Id.* DOE establishes energy conservation standards for different product classes based on the criteria set forth in 42 U.S.C. 6295(o).

In the preliminary TSD, DOE evaluated the performance of a ballast using the BEF metric. DOE considered several potential class-setting factors and ultimately separated product classes based on lamp length, ballast factor, lumen package, maximum number of lamps operated, starting method, and market sector. In general, when considering the above characteristics, DOE identified three main factors as affecting consumer utility: (1) The lumen package of the lamp-and-ballast system; (2) the physical constraints of the lamp-and-ballast system; and (3) the use of the ballast in an application for which other ballasts are not suitable. Philips, along with the NEEA and NPCC, generally agreed with DOE's initial determination of the product class structure. (NEEA and NPCC, No. 32 at p. 3; Philips, Public Meeting Transcript, No. 34 at pp. 153–154)

After the April 2010 public meeting, DOE received comments from interested parties that caused it to reevaluate the test method proposed in the active mode test procedure NOPR. As discussed in section 0, DOE published an SNOPR for the active mode test procedure on November 24, 2010. In that document, DOE proposed a lamp-based test procedure for measuring ballast luminous efficiency. Thus, when considering product classes in this NOPR, DOE evaluates potential class-setting factors by considering features that affect BLE instead of BEF.

a. Power Versus Efficiency Relationship

As described in section 0, DOE undertook extensive testing of fluorescent lamp ballasts to evaluate the impact of numerous ballast characteristics on BLE. In its written comments on the active mode test procedure, NEMA suggested that a relationship existed between lamp arc power and BLE such that the product class structure from the preliminary TSD could be greatly simplified. NEMA suggested that instant start ballasts with input power less than or equal to 45 W, greater than 45 W and less than or equal to 125 W, and greater than 125 W could be subject to standards of 85 percent, 88 percent, and 90 percent efficiency respectively. For programmed start ballasts, NEMA recommended standards for the same wattage bins, but with a downward adjustment of 3 percent compared to the instant start values. NEMA provided supplementary information showing that these standard levels in many cases were similar to the levels proposed by DOE in the preliminary TSD. NEMA noted it was only sharing a methodology that could be employed by DOE, not making a formal proposal. (NEMA, No. 15 at p. 9–10) [15] NEMA had previously discussed this methodology as a possible approach at a meeting with DOE in April 2010, subsequent to the public workshop.[16]

Although not a formal proposal for the energy conservation standards rulemaking, this methodology was supported by several manufacturers during interviews for this NOPR. Manufacturers indicated that ballasts that operate similar lamp powers often share similar topologies and component, and thus, should have similar efficiencies. DOE analyzed its test data to attempt to characterize a relationship between BLE and lamp arc power.

It is DOE's understanding that there are both fixed and variable losses in any fluorescent ballast. Fixed losses consist of switching losses, due to components such as transistors, and fixed voltage drops across certain components, such as diodes. These components are necessary for proper ballast operation but will always contribute some amount to overall ballast losses. In ballasts that operate at low powers, fixed losses comprise a significant amount of the power lost. Variable losses consist primarily of resistive losses (also referred to as I^2R losses) which increase as current increases. Ballasts that operate at higher powers also operate at a higher current and therefore have greater resistive losses. At a certain power level, resistive losses will be greater than fixed losses, as resistive losses continue to increase as power increases.

Using test data, DOE empirically found a relationship between the BLE metric and the natural log of lamp arc power. The logarithmic relationship is consistent with current energy conservation standards for external power supplies.[17] 42 USC 6295(u)(3)(A). In general, as lamp arc power increases, BLE increases as well. DOE believes this is because the fixed losses of a ballast become proportionally less significant at higher lamp arc powers. Using this relationship has several benefits for determining product classes compared to DOE's approach in the preliminary TSD. Equations allow DOE to set efficiency levels as a function of lamp arc power across a wide range, which simplifies the product class structure and the amount of scaling required between product classes. Furthermore, setting efficiency levels in this manner allows for greater flexibility regarding future innovation. For example, an equation would account for the introduction of new ballast factors. It would also not necessarily have to be revised if the test procedure were modified to require testing with reduced-wattage lamps. By contrast, other approaches could require separate product classes for factors that affect the total wattage operated by a ballast (such as lumen output, ballast factor, and number of lamps operated).

The sections below discuss specific class-setting factors considered in the preliminary TSD and whether product classes based on these factors are necessary given the power-efficiency relationship.

[15] This comment is from the docket for the fluorescent lamp ballast active mode test procedure, which is docket number EERE–2009–BT–TP–0016.

[16] A summary of the meeting is available at *http://www.gc.energy.gov/documents/Ex_parte_Meeting_NEMA_05_25_2010.pdf.*

[17] External power supplies perform a related function to fluorescent lamp ballasts in that they convert AC to DC, filter unwanted frequencies, and can step up or down voltage.

b. Starting Method

In the preliminary TSD, DOE considered establishing separate product classes based on starting method. DOE found RS and PS ballasts to be inherently less efficient than IS ballasts because RS and PS ballasts provide filament power to the lamp. Although some PS ballasts cut out the filament power during normal operation (using the cathode cutout technology option discussed in chapter 3 of the NOPR TSD), the extra circuitry to remove this power still consumes some amount of power. Whereas RS and IS ballasts are commonly used as substitutes for each other, PS ballasts are not. Programmed start ballasts are commonly used in combination with occupancy sensors because of their ability to maintain the lifetime of the fluorescent lamp. The lifetime of a lamp operated on a PS ballast with occupancy sensors can be as much as three times longer than the lifetime of a lamp operated on an IS or RS ballast in the same application. Thus, DOE's research indicates that use of instant start ballasts with occupancy sensors can result in a significant reduction in lamp lifetime. Because the application in which they are used significantly affects lamp lifetime, programmed start ballasts offer the user a distinct utility. In consideration of their affect on both BEF and utility, DOE established separate product classes for programmed start ballasts in the preliminary TSD.

Philips agreed that RS and PS ballasts would have lower BEFs than IS ballasts. Philips stated that cathode heating of RS and PS ballasts would make the lamps more efficient, which would increase ballast factor and therefore increase overall system efficacy, or BEF. The corresponding increase in ballast input power for these ballasts, however, would offset any overall gain in BEF. Despite this difference in BEF for RS and PS ballasts compared to IS ballasts, Philips did not think NEMA would object to the inclusion of rapid and instant start ballasts in the same product class. Whereas IS and RS ballasts offer the consumer similar utility, Philips believed PS ballasts offered consumers unique utility because of the application in which they are used. Regarding the impact of starting method on ballast efficiency, Philips pointed out that a metric of lamp arc power divided by ballast input power would consider power used to heat cathodes as losses. GE and Philips believed that this should be considered when defining product classes and setting standards. (GE, Public Meeting Transcript, No. 34 at p. 43; Philips, Public Meeting Transcript, No. 34 at pp. 44–46, 71–72)

DOE agrees with GE and Philips that cathode heating is counted as a loss in the BLE metric because it does not directly contribute to the creation of light. Thus, similar to BEF, RS and PS ballasts have lower BLEs than comparable IS ballasts. Because starting method affects BLE in the same way it affects BEF, and DOE has already established a unique utility associated with PS ballasts, DOE proposes to maintain product class divisions for starting method in this NOPR and establish separate product classes for programmed start ballasts and instant and rapid start ballasts.

c. Ballast Factor

Ballast factor (BF) is the ratio of light output of a reference lamp operated by a ballast to the light output of the same lamp operated by a reference ballast. It is typically used to adjust the lumen package of a lamp-and-ballast system. The ballasts proposed for coverage in this rulemaking are available with a variety of ballast factors. In the preliminary TSD, DOE classified a low BF as less than or equal to 0.78, a normal BF as greater than 0.78 but less than 1.1, and a high BF as greater than or equal to 1.1. In its previous analysis, DOE found that ballasts with high or low BFs had lower BEFs than ballasts with a normal ballast factor. Because BF affected the lumen output of the lamp-and-ballast system, DOE observed that consumers tended to use ballasts with different ballast factors for different applications. DOE believed this behavior constituted a unique utility. Therefore, because of the impact on BEF and utility, DOE established separate product classes in the preliminary TSD for low, normal, and high ballast factor when these products existed for covered ballast types. In the preliminary TSD, however, DOE did not establish separate product classes for high, low, and normal BF for 4-foot T5 MiniBP HO, 8-foot HO, residential, or sign ballasts because products in this category were predominantly offered in one ballast factor range.

The California Utilities commented that DOE should divide residential ballasts into high, normal, and low BF categories because test results showed that residential products existed at more than one BF. (California Utilities, No. 30 at p. 5) Philips commented that the range considered for normal BF was unreasonably large. For T8 ballasts, industry typically considers normal BF to be from 0.85 to 1.00, whereas for T5 ballasts industry considers normal BF to be about 1.00. (Philips, Public Meeting Transcript, No. 34 at p. 136–137)

Because DOE is evaluating a new metric for this NOPR, DOE analyzed the impact of ballast factor on BLE. During interviews, manufacturers stated that as ballast factor increases, BLE should also increase. This is the same observation as the one discussed in section 0, that BLE increases as overall lamp arc power increases, but on a smaller scale. As ballast factor increases, the ballast drives the lamp harder, which increases measured lamp arc power. Because the ballast operates at higher power, its fixed losses become proportionally less significant in comparison to lower BFs. Because BF affects the total power operated by a ballast, and DOE has established a relationship relating total lamp arc power to ballast efficiency, DOE believes the efficiency equation will account for any changes in BF. Thus, in this NOPR, DOE does not propose to establish separate product classes for high, low, or normal BF.

d. Lumen Package

Lumen package refers to the quantity of light that a lamp-and-ballast system provides to a consumer. To obtain a high lumen package, certain lamps are designed to operate with ballasts that run the lamps at high currents. For example, 8-foot HO lamps and 4-foot MiniBP HO lamps tend to operate at higher currents than 8-foot slimline lamps and 4-foot MiniBP SO lamps, respectively. This difference in operating design increases the quantity of light per unit of lamp length. High output lamps generally operate at higher wattages than comparable (same length, diameter) standard output lamps. In the preliminary TSD, DOE observed that this difference in lamp wattage caused ballasts that operate high output lamps to have lower BEFs than ballasts that operate comparable standard output lamps.

In addition, consumers tend to use systems with different lumen packages for different applications. For example, high-lumen-output systems may be installed in certain high-ceiling or outdoor applications where large quantities of light are needed. Alternatively, standard-lumen-output systems might be installed in lower-ceiling applications such as offices or hospitals, where the distance between the light source and the illuminated surface is not as large. Notable differences in the application of ballasts designed to operate SO lamps versus HO lamps indicate a difference in utility. Therefore, given the observed utility distinctions and notable efficiency differences, DOE established

separate product classes in the preliminary TSD for ballasts that operate SO lamps and ballasts that operate HO lamps.

DOE did not receive any adverse comment to its separation of ballasts that operate HO lamps from those that operate SO lamps due to the impact of larger input powers on BEF. In this NOPR, however, DOE proposes standards based on the BLE metric. Therefore, DOE evaluated the impact of HO lamp operation versus SO lamp operation on BLE. DOE found that BLE is not dependent on system light output, but rather on the total power operated by the ballast. As HO lamps have higher rated powers than SO lamps, DOE believes ballasts that operate HO lamps would be more efficient than comparable ballasts that operate SO lamps. An analysis of test data generally confirmed this prediction. Therefore, because the power-efficiency equation accounts for HO versus SO lamp operation, DOE does not propose to establish separate product classes for ballasts that operate HO lamps, with one exception as explained in the following paragraph.

DOE found that ballasts that operate 8-foot HO lamps did not follow the expected relationship. Compared to 8-foot slimline ballasts, DOE found that 8-foot HO ballasts exhibited lower BLEs although they operated higher lamp powers. DOE believes a separate product class is necessary for 8-foot HO ballasts because there is a significant change in lumen package accompanied by a decrease in BLE. Based on manufacturer interviews, DOE believes 8-foot HO ballasts may have different topology, or circuit design, than other ballast types (*e.g.* 4-foot MBP and 8-foot slimline ballasts). Because DOE has established that lumen package offers a unique utility, and in this case a change in lumen package is accompanied by a change in BLE from what the efficiency equation would predict, DOE proposes to establish a separate product class for ballasts that operate 8-foot HO lamps. DOE requests comment on this decision in section 0.

e. Lamp Diameter

Differences in lamp diameter can be accompanied by differences in rated lamp wattage and lumen output. In the preliminary TSD, DOE observed that T8 ballasts generally had higher BEFs than T12 ballasts due to T8 lamps having a lower rated wattage than T12 lamps. DOE noted, however, that T8 lamp-and-ballast systems are commonly used as substitutes for T12 lamp-and-ballast systems, suggesting that there was no unique utility associated with T12 systems. Although the lamps have different wattages, the two systems often have the same lamp lengths and bases, offer comparable lumen output, and can fit within the same fixtures. For these reasons, DOE included T8 and T12 ballasts in the same product class in the preliminary TSD.

In contrast, DOE established separate product classes for ballasts that operate T5 lamps. DOE observed that 4-foot T5 ballasts generally had lower input powers (due to the lower wattage of the test lamp), and therefore higher BEFs, than comparable T8 or T12 ballasts. T5 lamp-and-ballast systems, however, are not always interchangeable with T8 and T12 systems. Because T5 lamps have similar total lumen output to T8 and T12 lamps over a significantly smaller surface area, T5 lamp-and-ballast systems are often marketed as too bright for use in direct lighting fixtures. Because of the impact on BEF and consumer utility, DOE established a separate product class in the preliminary TSD for ballasts that operate T5 lamps.

The California Utilities and the NEEA and NPCC supported DOE's conclusion in the preliminary TSD to include T8 and T12 ballasts in the same product class based on their use as substitutes for one another. (California Utilities, No. 30 at p. 1; NEEA and NPCC, No. 32 at p. 3) However, Philips believed that because BEF includes a measure of light output, it should be used to compare ballasts of similar light output only. Philips noted that because F96T12HO/ES lamps have a 13-percent greater lumen output than F96T8HO lamps, ballasts that operate these lamps should not be subject to the same BEF standard. NEMA agreed with Philips and supported different BEF standards for ballasts that operate these lamps. However, NEMA did comment that a single ballast efficiency standard could be set for ballasts that operate F96T8HO and F96T12HO/ES lamps. (Philips, Public Meeting Transcript, No. 34 at pp. 16, 50; NEMA, No. 29 at p. 3, 7)

In this NOPR, DOE considered the impact of lamp diameter on the BLE metric. As described above, differences in lamp diameter can be accompanied by differences in rated lamp wattage and lumen output. Because the efficiency equation sets standards specific to the total lamp power operated by the ballast of interest, the equation will also account for the impact of lamp diameter if there is an associated change in lamp arc power (as is the case with T8HO versus T12HO lamps). In addition, DOE believes that T5HO ballasts operate similar total lamp powers and employ similar technologies to 4-lamp 4-foot MBP PS ballasts that are able to meet the most efficient levels. Furthermore, 2-lamp 4-foot MBP PS ballasts operate similar total lamp power and employ similar technologies to 2-lamp T5 SO ballasts that are able to meet the most efficient levels. Therefore, DOE does not propose to establish separate product classes for ballasts that have different lamp diameters.

f. Lamp Length

Of the fluorescent ballasts DOE proposes to include in the scope of coverage, all are designed to operate lamps with lengths of 4 or 8 feet. As lamp length increases, lamp arc power tends to increase as well. In the preliminary TSD, DOE observed that this increase in lamp power resulted in lower BEFs for ballasts that operate 8-foot lamps as compared to those that operate 4-foot lamps. Furthermore, DOE concluded that because consumers are often physically constrained by their building ceiling layout, systems operating 8-foot and 4-foot lamps are not always substitutable for each other. Given the impact on both BEF and utility, DOE established separate product classes in the preliminary TSD for ballasts that operate different lamp lengths.

In this NOPR, DOE evaluates impacts of lamp length on BLE. Test data showed that ballasts that operate 8-foot slimline lamps are more efficient than comparable ballasts that operate the same number of 4-foot MBP lamps due to the increased lamp wattage operated by these ballasts. As described in section 0, DOE has developed an efficiency equation for the relationship between BLE and lamp arc power, which accounts for differences in lamp length if there is an associated change in lamp arc power. Therefore, DOE does not propose to establish separate product classes for ballasts that operate 4-foot versus 8-foot lamps.

g. Number of Lamps

Fluorescent lamp ballasts are designed to operate a certain maximum number of lamps. For example, ballasts designed to operate 4-foot MBP lamps can operate as few as one or as many as six lamps. In the preliminary TSD, DOE found that BEF decreased with each additional lamp operated because additional lamps increased the ballast's input power. DOE determined that the ability to operate different maximum number of lamps impacts utility because this capacity affects the space required by fixtures (a four-lamp fixture requires more physical space than one-lamp fixture). Given the impact on both BEF and consumer utility, DOE established

separate product classes in the preliminary TSD based on the maximum number of lamps operated by a ballast.

Philips agreed that based on BEF data, 1-lamp ballasts are less efficient than 4-lamp ballasts. (Philips, Public Meeting Transcript, No. 34 at pp. 137–139) In this NOPR, DOE analyzed the impact of operating different numbers of lamps on BLE. Test data generally showed that the more lamps a ballast operates the higher the BLE for that ballast. DOE believes this is because as a ballast operates a larger total lamp power, fixed losses are diluted over a greater power. DOE believes that this relationship is accounted for in the efficiency equation described in section 0, because an increase in the number of lamps operated is associated with an increase in total lamp arc power. Therefore, DOE does not propose to establish separate product classes for ballasts that operate different numbers of lamps.

h. Residential Ballasts

Separate minimum power factor and electromagnetic interference requirements exist for residential and commercial ballasts. Residential ballasts have more stringent (or lower maximum allowable) EMI requirements than commercial ballasts; they also have less stringent (or lower minimum allowable) power factor requirements.[18] In the preliminary TSD, DOE concluded these requirements impact utility because they serve distinct market sectors and applications. In addition, DOE believed that the differing requirements caused residential ballasts to have lower BEFs than commercial ballasts. For these reasons, in the preliminary TSD, DOE established a separate product class for ballasts that are designed for use in the residential sector.

Philips agreed that the FCC has more stringent EMI requirements for residential ballasts than commercial ballasts. The NEEA and NPCC commented that they have not seen evidence of any impact on efficiency due to the FCC EMI standards. Philips disagreed, stating that the FCC Class B requirements necessitate a more sophisticated EMI filter that results in greater losses than the commercial FCC requirements. Philips noted, however, these losses are offset by the difference in power factor requirements for the two market sectors. The power losses associated with the high power factor requirements in the commercial sector are greater than the losses associated with the more stringent EMI requirements in the residential sector. As evidence, Philips indicated that compliance data from the California Energy Commission (CEC) database indicates that some residential ballasts have higher BEFs than commercial ballasts. (Philips, Public Meeting Transcript, No. 34 at p. 134–6; NEEA and NPCC, Public Meeting Transcript, No. 34 at p. 135)

In this NOPR, DOE evaluated the impact of the more stringent EMI and less stringent power factor requirements on the BLE of residential ballasts. DOE tested several residential ballasts including models with the highest reported BLEs in the CEC database. DOE found that residential ballasts achieved the same efficiencies as their commercial counterparts. DOE believes that because these two ballast types can achieve the same efficiency, it is not necessary to establish a separate product class for residential ballasts, and therefore does not propose to do so in this NOPR.

i. Sign Ballasts

Ballasts designed for use in cold temperature outdoor signs have slightly different characteristics than those ballasts that operate in the commercial sector. First, sign ballasts are designed to operate in cold temperature environments—as low as negative 20 degrees Fahrenheit (F). Second, sign ballasts are classified by the total length (in feet) of lamps they can operate as well as the total number of lamps. To operate in cold temperature environments and to be able to handle numerous lamp combinations, sign ballasts contain more robust components compared to regular 8-foot HO ballasts in the commercial sector. Thus, sign ballasts are inherently less efficient. In the preliminary TSD, DOE concluded that regular 8-foot HO ballasts cannot serve as substitutes for sign ballasts due to their inability to operate in cold temperature environments. For these reasons, DOE believes that cold temperature sign ballasts offer the consumer a distinct utility. Therefore, DOE established a separate product class for cold temperature sign ballasts in the preliminary TSD.

At the public meeting, DOE received several comments regarding which characteristics distinguish sign ballasts from regular ballasts designed to operate 8-foot HO lamps. OSI stated that a "cold temperature starting" label means the ballast can start a lamp at temperatures typically as low as −20 degrees F. (OSI, Public Meeting Transcript, No. 34 at pp. 116–117) Philips stated that there are two UL safety ratings for outdoor environments: type 1 outdoor which requires a basic moisture resistant enclosure, and type 2 outdoor which requires a hermetic enclosure to prevent all moisture from entering the ballast. However, the outdoor rating is not of concern regarding efficiency. Instead, Philips stated that a cold-temperature sign ballast delivers increased ignition voltages to the lamp, resulting in more resistive losses in the secondary transformer. If two high output ballasts have the same input power but one has a higher open circuit voltage, the ballast with the higher open circuit voltage will generally be less efficient. (Philips, Public Meeting Transcript, No. 34 at pp. 118–119, 139–140) The California Utilities, however, questioned whether cold-temperature sign ballasts were inherently less efficient because they noted some regular 8-foot HO ballasts are capable of starting lamps at temperatures of negative 20 degrees F or lower. (California Utilities, No. 30 at p. 2)

In this NOPR, DOE reviewed whether sign ballasts had different BLEs than regular 8-foot HO ballasts. Based on its test data, DOE found that sign ballasts did not achieve the expected BLE predicted by the power-efficiency relationship. Test data indicated these ballasts were not as efficient as regular 8-foot HO ballasts. DOE believes this is because sign ballasts are generally more robust and flexible. For example, sign ballasts are often specified to operate multiple-lamp-length combinations as well as both T12HO and T8HO lamps. As a result, a sign ballast is not optimized for the operation of a particular lamp whereas a regular 8-foot HO ballast is designed specifically for a T8HO or T12HO lamp. Regular 8-foot HO ballasts cannot always serve as substitutes for sign ballasts due to their lack of moisture seals and the more limited load specifications. For these reasons—and the associated differences in BLE compared to ballasts of similar lamp arc power—DOE proposes to establish separate a product class for sign ballasts.

j. Premium Features

During product research and manufacturer interviews, DOE found that several high-efficiency ballasts possess premium features such as a low temperature rating, type CC protection, lamp striation control, and small can size. Below DOE discusses each feature and considers whether to propose separate product classes for them.

[18] ANSI C82.77–2002 requires residential ballasts to have a minimum power factor of 0.5 and commercial ballasts to have a minimum power factor of 0.9.

Low Temperature Rating

DOE surveyed the market and found that all ballast types covered by this rulemaking have cold temperature ratings. This rating was typically associated with high-performance products; standard-efficiency ballasts were less likely to have this feature. Ballasts with low temperature ratings (−20 degrees F) can be used in applications such as parking garages, warehouses, and cold storage areas. In cold temperature environments, a fluorescent ballast must supply a higher starting voltage to establish the lamp arc. To create this higher voltage, the output transformer may have additional windings. In addition, components throughout the ballast must be able to withstand this higher voltage, even if only for a short amount of time. The additional windings and slightly different components may increase resistive losses.

DOE conducted research to determine how this rating might impact BLE. DOE was unable to find pairs of the same ballasts in which one had a cold temperature rating and one did not. Thus, DOE looked at groups of ballasts that achieved the same efficiency level based on its test data. The data showed no clear trend of a cold temperature rating impacting BLE. In most cases, DOE found the most efficient ballast in a particular category had the lowest rated starting temperature. Thus, DOE believes that the rated starting temperature of a ballast does not substantively impact overall efficiency. Therefore, DOE does not propose to establish a separate product class based on this feature.

Type CC

Arcing can occur when a lamp is not well connected to its socket or when it is removed from a fixture. To prevent this phenomenon, UL 1598 requires luminaires using instant start ballasts with bipin lamp holders to: (1) Include ballasts identified as Type CC, or (2) be constructed with lampholders marked with a circle "I." Ballasts labeled as Type CC include extra circuitry to monitor frequency and remove power to the lamp if any unwanted arcing is detected. Additional circuitry has the potential to increase resistive losses.

A survey of the market found that ballasts with Type CC protection were available, although far fewer models were offered with this feature than without it. Analysis of catalog data found that ballasts with Type CC protection had slightly lower BEFs than ballasts without this feature. However, as UL 1598 can be met with different lampholders rather than adding circuitry within the ballast itself, DOE believes that Type CC protection does not provide a unique utility. Therefore, DOE does not propose to establish a separate product class for ballasts with a Type CC rating.

Lamp Striation Control

Lamp striations are a series of bright and dim regions in a fluorescent lamp and are considered an undesirable visual effect. Striations are most common when ballasts operate reduced-wattage, energy-saving lamps due to their different fill-gas composition. To prevent this effect from occurring, ballasts with lamp striation control usually have additional circuitry, which has the potential to increase resistive losses.

During manufacturer interviews, DOE learned that striation control is a necessary feature for ballasts that can operate reduced-wattage, energy-saving lamps. DOE observed that most ballasts already offer lamp striation control as a standard feature on both regular and high-efficiency product lines. Test data showed that the most efficient 4-foot MBP and 8-foot slimline ballasts already included lamp striation control. Thus, this feature does not prevent ballasts from reaching the highest efficiency levels identified by this rulemaking. Therefore, DOE does not propose to establish a separate product class for ballasts with lamp striation control.

Small Case Size

During interviews, DOE learned that smaller fixtures can have reduced material costs and higher optical efficiency. Optical efficiency describes the percentage of light emanated from the lamps that exits the fixture or reaches the desired surface. Therefore, ballast manufacturers are beginning to offer ballasts with smaller case sizes than what is offered as standard in the industry. A ballast with a small case size may use different components due to size restraints.

With a limited number of small case size ballasts commercially available, DOE is uncertain of the relationship between ballast enclosure size and efficiency. Furthermore, interested parties did not provide comments on the product class structure put forward in the preliminary TSD suggesting that DOE should not include ballasts of all enclosure sizes in the same product class. Based on this uncertainty and absence of contrary comments in the preliminary TSD, DOE proposes to include ballasts of all enclosure sizes in the same product class.

k. Summary

In summary, after evaluating all potential class-setting factors, DOE decided to establish separate product classes based on starting method, ballasts that operate 8-foot HO lamps, and ballasts designed for use in cold-temperature outdoor signs. Table V.1 summarizes the five product classes.

TABLE V.1—FLUORESCENT LAMP BALLAST NOPR PRODUCT CLASSES

Description	Product class number**
IS and RS ballasts that operate	
4-foot MBP lamps*	1
8-foot slimline lamps	
PS ballasts that operate	
4-foot MBP lamps*	2
4-foot MiniBP SO lamps	
4-foot MiniBP HO lamps	
IS and RS ballasts that operate	
8-foot HO lamps	3
PS ballasts that operate	
8-foot HO lamps	4
Ballasts that operate	
8-foot HO lamps in cold temperature outdoor signs	5

* Includes both commercial and residential ballasts.

** Efficiency levels for all product classes are based on an equation.

3. Technology Options

In the technology assessment, DOE identifies technology options that appear to improve product efficiency. This assessment provides the technical background and structure on which DOE bases its screening and engineering analyses. DOE received one comment on the technology options identified in the preliminary TSD.

Philips agreed that ballasts that employ integrated circuits can have higher efficiencies but pointed out that the integrated circuit itself does not provide the efficiency, but rather integrated circuits are required by more efficient topologies. Philips also noted that integrated circuits are generally used with topologies that operate lamps in series rather than those that operate lamps in parallel. For parallel lamp operation, integrated circuits may be cost prohibitive. (Philips, Public Meeting Transcript, No. 34 at pp. 142–143)

In response, DOE agrees with Philips that in many cases inclusion of an integrated circuit does not increase efficiency on its own. DOE believes, however, that some integrated circuits directly influence BLE. For example, there is an integrated circuit that can increase ballast efficiency by replacing transistors in the direct current (DC) to alternating current (AC) inverter.[19] Therefore, DOE proposes to maintain integrated circuits as a technology option in this NOPR. Regarding the high cost of an integrated circuit, DOE does not evaluate technology options based on cost. Rather, DOE calculates prices for each efficiency level in the engineering analysis and evaluates economic impacts on consumers, manufacturers, and the nation in subsequent analyses.

B. Screening Analysis

As discussed in chapter 3 of the preliminary TSD, DOE consults with industry, technical experts, and other interested parties to develop a list of technology options for consideration. The purpose of the screening analysis is to determine which options to consider further and which to screen out. DOE uses the following four screening criteria to determine which design options are suitable for further consideration in a standards rulemaking:

1. *Technological feasibility.* DOE will consider technologies incorporated in commercially available products or in working prototypes to be technologically feasible.

2. *Practicability to manufacture, install, and service.* If mass production and reliable installation and servicing of a technology in commercial products could be achieved on the scale necessary to serve the relevant market at the time compliance with the standard is required, then DOE will consider that technology practicable to manufacture, install, and service.

3. *Adverse impacts on product utility or product availability.* If DOE determines a technology would have significant adverse impact on the utility of the product to significant subgroups of consumers, or would result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not consider this technology further.

4. *Adverse impacts on health or safety.* If DOE determines that a technology will have significant adverse impacts on health or safety, it will not consider this technology further.

10 CFR part 430, subpart C, appendix A, (4)(a)(4) and (5)(b).

For the preliminary TSD analysis, DOE consulted with industry, technical experts, and other interested parties to develop a list of technology options for consideration. DOE identified the following technology options that could improve the efficiency of a ballast:

TABLE V.2—TECHNOLOGY OPTIONS

Technology option		Description
Electronic Ballast		Use an electronic ballast design.
Improved Components	Transformers	Use grain-oriented silicon steel, amorphous steel, or laminated sheets of amorphous steel to reduce core losses.
		Use litz wire to reduce winding losses.
	Diodes	Use diodes with lower losses.
	Capacitors	Use capacitors with a lower effective series resistance.
	Transistors	Use transistors with low drain-to-source resistance.
Improved Circuit Design	Cathode Cutout	Remove filament heating after the lamp has started.
	Integrated Circuits	Substitute discrete components with an integrated circuit.
	Starting Method	Use IS instead of RS as a starting method for lamp operation.

In the preliminary TSD, DOE screened out "using laminated sheets of amorphous steel" because this option increases the size and weight of the ballast and therefore is not "practicable to manufacture, install, and service." Larger magnetic components could cause problems in installing and servicing ballasts because the ballast could be too large to fit in a fixture. DOE also stated that this technology option could have adverse impacts on consumer utility. Specifically, increasing the size and weight of the ballast could limit the places a consumer could use the ballast in a building.

The NEEA and NPCC agreed with DOE's decision to eliminate laminated sheets of amorphous steel as a design option. (NEEA and NPCC, No. 32 at p. 4) Earthjustice commented, however, that size and weight constraints for ballasts needed to be defined before DOE could screen out a technology option based on increased size or weight. (Earthjustice, Public Meeting Transcript, No. 34 at p. 148) Regarding size constraints, the NEEA and NPCC commented that new ballasts being installed during retrofits are significantly smaller than older ballasts being removed. They believe that technology options that would result in small increases in ballast size are not necessarily problematic for retrofits because new ballasts would still fit in the fixtures designed for older ballasts. (NEEA and NPCC, Public Meeting Transcript, No. 34 at pp. 148–149) Philips disagreed with the idea that increasing ballast size was not

[19] International Rectifier. *International Rectifier Introduces Robust Self-Oscillating Electronic Ballast Lighting Control IC.* November 22, 2005. (Last accessed October 25, 2010.) *http://www.irf.com/whats-new/nr051122.html*

problematic, commenting that newer ballasts have smaller cross-sections than older ballasts. Smaller ballasts have allowed luminaire manufacturers to decrease the size and material requirements of their luminaires while also improving optics. (Philips, Public Meeting Transcript, No. 34 at pp. 149–150) Acuity Brands agreed with Philips that newer luminaires are designed around the smaller sizes of current ballasts and confirmed that the smaller designs have improved optics. Acuity Brands stated that a few luminaires could accommodate an increase in the length of the ballast, but that many luminaires are already designed around the smaller size of current ballasts. (Acuity Brands, Public Meeting Transcipt, No. 34 at p. 150)

While older ballasts can be larger than newer ones, DOE's research indicates that the overall market trend is to create increasingly smaller ballast sizes for use in smaller and more highly optimized fixtures. As the trend toward smaller fixtures has existed for a number of years, new building designs are already incorporating smaller plenum spaces. Thus, an increase in the size of a ballast could affect its ability to be used in certain existing buildings or in new construction. Accordingly, DOE considers any increase in the existing footprint of a ballast to have adverse impacts on product utility and product availability.

Based on the above discussion, DOE maintains the elimination of laminated sheets of amorphous steel as a design option because it fails to meet the screening criteria of practicality to manufacture, install, and service, and adverse impacts on product utility. DOE considers the remaining technology options as design options in the engineering analysis.

C. Engineering Analysis

1. Approach

The engineering analysis develops cost-efficiency relationships to show the manufacturing costs of achieving increased efficiency. DOE has identified the following three methodologies to generate the manufacturing costs needed for the engineering analysis: (1) The design-option approach, which provides the incremental costs of adding to a baseline model design options that will improve its efficiency; (2) the efficiency-level approach, which provides the relative costs of achieving increases in energy efficiency levels, without regard to the particular design options used to achieve such increases; and (3) the cost-assessment (or reverse engineering) approach, which provides "bottom-up" manufacturing cost assessments for achieving various levels of increased efficiency, based on detailed data as to costs for parts and material, labor, shipping/packaging, and investment for models that operate at particular efficiency levels.

In the preliminary TSD, DOE determined that an efficiency level approach paired with reverse engineering cost estimates would yield the most realistic data. In this way, DOE would not rely solely on product lists or minimum cost data supplied by manufacturers. DOE conducted teardowns for unpotted ballasts and ballasts removed from a manufacturing facility before the potting procedure because potting (a tar-like fill material) inhibits visual observation of the components). Details of the engineering analysis are in NOPR TSD chapter 5. The following discussion summarizes the general steps of the engineering analysis:

Determine Representative Product Classes. DOE first reviews covered ballasts and the associated product classes. When multiple product classes exist, DOE selects certain classes as "representative" primarily because of their high market volumes. DOE extrapolates the efficiency levels (ELs) from representative product classes to those product classes it does not analyze directly.

Select Baseline Ballasts. For each representative product class, DOE establishes baseline ballasts. The baseline serves as a reference point for each product class, against which DOE measures changes resulting from potential amended energy conservation standards. For ballasts subject to existing Federal energy conservation standards, a baseline ballast is a commercially available ballast that just meets existing standards and provides basic consumer utility. If no standard exists for that specific ballast type, the baseline ballast represents the typical ballast sold within a product class with the lowest tested ballast efficiency. To determine energy savings and changes in price, DOE compares each higher energy-efficiency level with the baseline unit.

DOE tested a range of ballasts from multiple manufacturers to identify baseline ballasts and determine their BLE. Appendix 5C of the NOPR TSD presents the test results. DOE selects specific characteristics such as starting method, ballast factor, and input voltage to characterize the most common ballast at the baseline level. DOE also selects multiple baseline ballasts in certain product classes to ensure consideration of different ballast types and their associated consumer economics.

Select Representative Ballasts. DOE selects commercially available ballasts with higher BLEs as replacements for each baseline ballast in the representative product classes by considering the design options identified in the technology assessment and screening analysis (NOPR TSD chapter 4). In general, DOE can identify the design options associated with each more efficient ballast. Where design options cannot be identified by the product number or catalog description, DOE determines the design options likely to be used in the ballast to achieve a higher BLE based on information gathered during manufacturer interviews. In identifying more efficient substitutes, DOE uses a database of commercially available ballasts. DOE then tests these ballasts to establish their appropriate BLE. Appendix 5C of the NOPR TSD presents these test results.

Because fluorescent lamp ballasts are designed to operate fluorescent lamps, DOE considers properties of the entire lamp and ballast system in the engineering analysis. Though ballasts are capable of operating several different lamp wattages, DOE chooses the most common fluorescent lamp used with each ballast for analysis. DOE also includes two substitution cases in the engineering analysis. In the first case, the consumer is not able to change the spacing of the fixture and therefore replaces one baseline ballast with a more efficient ballast. This generally represents the lighting retrofit scenario where fixture spacing is predetermined by the existing installation. In this case, light output is generally maintained to within 10 percent of the baseline system lumen output.[20] In the second case, the consumer is able to change the spacing of the fixture and either purchases more or fewer ballasts to maintain light output. This represents a new construction scenario in which the consumer has the flexibility to assign fixture spacing based on the light output of the new system. In this case, DOE normalizes the light output relative to the baseline ballast.

Determine Efficiency Levels. DOE develops ELs based on two factors: (1) The design options associated with the specific ballasts studied; and (2) the maximum technologically feasible efficiency level. As discussed in section 0, DOE's efficiency levels are based on

[20] In some instances (*e.g.,* when switching from T12 to T8 ballasts), light output exceeds these limits.

test data collected from products currently on the market.

Conduct Price Analysis. DOE generated a bill of material (BOM) by disassembling multiple manufacturers' ballasts that spanned a range of efficiency levels for some of the representative ballast types. DOE generated BOMs for two- and four-lamp T8 MBP IS, two-lamp T8 MBP PS, and 2-lamp, 8-foot slimline ballasts only because these ballasts were not filled with potting (a tar like substance). As stated previously, potting obscures the identification of individual components. The BOMs describe the products in detail, including all manufacturing steps required to make and/or assemble each part. DOE then developed a cost model that converts the BOMs for each efficiency level into manufacturer production costs (MPCs). By applying derived manufacturer markups to the MPCs, DOE calculated the manufacturer selling prices [21] and constructed industry cost-efficiency curves. In those cases where DOE was not able to generate a BOM for a given ballast, DOE estimated an MSP based on the relationship between teardown data, blue book prices, and manufacturer-supplied MSPs.

a. Metric

One change to engineering approach from the preliminary TSD is the use of a new metric, BLE. Although DOE evaluates ballast efficiency in terms of the BLE metric in this NOPR, DOE received several comments regarding the relationship between ballast efficiency (as determined by the method proposed in the active mode test procedure NOPR) and ballast efficacy factor (BEF). OSI commented that there might be variation introduced into the BEF values due to the fact that it is correlated to BE, and both of these metrics have a distribution of error. (OSI, Public Meeting Transcript, No. 34 at p. 166–167) GE agreed that there was error in the correlation equations because a BEF for a 2-lamp 4-foot normal BF IS ballast could be correlated back to 93 percent efficiency, which is higher than any efficiency measured during NEMA's round robin testing. (GE, Public Meeting Transcript, No. 34 at p. 171) The NEEA and NPCC pointed out that it is not worth discussing the measurement variation associated with the ballast efficiency metric if correlating it to BEF introduces significant error. (NEEA and NPCC, Public Meeting Transcript, No. 34 at pp. 167–168) On the other hand, Philips commented that when considering only their products, the BEFs determined by the correlation equations were very close to the values obtained during testing in their own lab. (Philips, Public Meeting Transcript, No. 34 at p. 168)

DOE agrees with stakeholders that calculating BEF as a function of ballast efficiency could introduce error into the BEF value. In the separate test procedure SNOPR, however, DOE proposes to directly evaluate ballasts using BLE, and the measurement variation present in the BLE metric is significantly less than that which existed for BEF due to the elimination of photometric measurements. More detail regarding measurement variation can be found in section 0 of this notice or in the active mode test procedure SNOPR.

b. Test Data

In the preliminary TSD, DOE conducted an extensive amount of testing in support of the active mode test procedure. DOE provided this data in appendix 5C. The appendix contained various ballast characteristics such as starting method, maximum number of lamps operated, ballast factor, and other relevant characteristics. It also contained each ballast's BEF value as measured by the existing light-output based procedure and, for some ballasts, ballast efficiency as measured by the resistor-based method proposed in the active mode test procedure NOPR. DOE provided the raw data in the appendix so that interested parties could form their own conclusions regarding the two metrics. Throughout the rest of the chapters and appendices in the preliminary TSD, however, the BEF values used in the analysis were calculated using the correlation equations specified in the active mode test procedure NOPR. DOE received several comments related to the test data.

The California Utilities, ASAP, and the NEEA and NPCC commented on the discrepancy between the tested BEF values and the values contained in other sources—such as product catalogs and the CEC database. The California Utilities cited an example of the CEC database containing several ballasts with a reported BEF higher than the max tech BEF for the relevant product class in the preliminary TSD. The NEEA and NPCC noted that the largest discrepancies existed for IS and RS ballasts that operate T12 and T8 lamps. They concluded that these differences are due to manufacturers overstating catalog data. The NEEA and NPCC believe that this practice can adversely affect a building's lighting systems to the extent that it may not meet code requirements. (California Utilities, Public Meeting Transcript, No. 34 at pp. 157–8; ASAP, Public Meeting Transcript, No. 34 at p. 160; NEEA and NPCC, No. 32 at p. 2)

DOE agrees with the above-mentioned groups that the tested BEF values are different than those presented in catalogs or the CEC database. To gather BEF values for various ballasts, DOE could have consulted manufacturer catalogs, the CEC database, or its own database of tested ballasts. It became clear during DOE's initial testing that manufacturers were overstating BEF values in their catalogs. Thus, DOE sought an alternate source of information. The CEC maintains a public database of BEF values submitted to show compliance with state-level energy conservation standards. Philips pointed out that the CEC database should, by definition, contain test data from certified laboratories whereas catalogs do not. (Philips, Public Meeting Transcript, No. 34 at pp. 162–163) Although the California Utilities pointed out that the CEC database reported higher BEFs than the max tech level reported in the preliminary TSD, Philips commented that the highest candidate standard level (CSL) in the 2-lamp 4-foot MBP IS/RS product class was close enough to the higher values in the CEC database to be within the margin of error associated with the BEF metric. (Philips, Public Meeting Transcript, No. 34 at pp. 158–159)

While the CEC database represented an improvement over catalog data, commenters voiced concern with the information in the database. Philips commented that according to the CEC database, some manufacturers reported the same BEF for multiple ballast models. (Philips, Public Meeting Transcript, No. 34 at pp. 158–9) This indicates that all ballast models listed may not have been individually tested. In addition, Philips cited several other factors to consider when reviewing data from the CEC database, such as: Different manufacturers offering their most efficient ballasts at different efficiencies, measurement variation between testing labs; and measurement variation due to the test procedure itself. (Philips, Public Meeting Transcript, No. 34 at pp. 162–163)

DOE agrees that because each manufacturer likely tested their ballasts in different labs, the CEC database does not provide the best comparison. It is less meaningful for DOE to compare the BEF of a ballast tested in lab A to the

[21] The MSP is the price at which the manufacturer can recover all production and non-production costs and earn a profit. Non-production costs include selling, general, and administration (SG&A) costs, the cost of research and development, and interest.

BEF of a different ballast tested in lab B, as measurement variation will exist between the two labs. DOE also acknowledges that there will be additional measurement variation within a lab due to tolerances allowed in the BEF test procedure. Although test procedure variation cannot be eliminated, the lab-to-lab variation can be eliminated by testing all ballasts in the same lab. Thus, in the preliminary TSD and this NOPR, DOE chose to rely on data obtained from its own testing. DOE acknowledges that manufacturers may use different labs for testing and certification purposes. Therefore, DOE accounts for both these sources of variation by decreasing efficiency levels by 0.8 percent. See section 0 for more details.

The California Utilities and the NEEA and NPCC noticed the discrepancy between DOE's test data contained in Appendix 5C and the values reported in chapter 5 of the preliminary TSD. They noted that the measured input power reported for a representative unit in the chapter 5 of the preliminary TSD did not match the input power listed in Appendix 5C for a ballast with the same BEF. In addition, all CSLs reported in the chapter 5 of the preliminary TSD for T5 standard output ballasts were lower than the BEFs reported in Appendix 5C. (California Utilities, No. 30 at p. 3; NEEA and NPCC, No. 32 at p. 5)

DOE acknowledges that the BEFs are not the same. The reason for the differences is that the data provided in Appendix 5C included DOE's test results for BEF and BE. BEF was measured according to the test procedure outlined in 10 CFR Part 430, Subpart B, Appendix Q—a procedure which includes photometric measurements. Ballast efficiency was measured according to the resistor-based method in the active mode test procedure NOPR. In chapter 5 of the preliminary TSD, DOE presented data based on its proposed test procedure—which included measuring a resistor-based ballast efficiency and using a correlation equation to calculate BEF. Thus, the BEFs presented in chapter 5 of the preliminary TSD are calculated values, whereas the BEFs presented in Appendix 5C are actual measured values.

DOE also received several comments regarding the ballasts it selected for testing. The NEEA and NPCC believed that DOE did not select any low- or high-BF products for testing. They therefore expressed concern that DOE had scaled efficiency levels to two-thirds of the product classes but had not obtained any test data for those classes. The NEEA and NPCC encouraged DOE to conduct additional testing to look at the relationship between low-, normal-, and high-ballast factor. (NEEA and NPCC, No. 32 at pp. 3, 4) For the preliminary TSD, DOE did measure BEF and resistor-based BE for low-, normal-, and high-ballast factor products. As described in the active mode test procedure NOPR, however, DOE needed to create separate correlation equations for low, normal, and high BF ballasts because all testing was conducted with resistors corresponding to normal BF. 75 FR 14288, 14303–4 (Mar. 24, 2010). For this NOPR, DOE continued to test low and high BF products in addition to those with normal BF.

The California Utilities expressed concern that DOE's testing may not have captured the entire ballast market. They stated that their alternate sources of data indicated a larger range of BEFs than the range shown by the test data contained in Appendix 5C of the preliminary TSD. (California Utilities, Public Meeting Transcript, No. 34 at pp. 157–158) DOE found after conducting its own testing for the preliminary TSD that the actual range of BEF values was much narrower than indicated by catalog values. DOE believes its testing accurately characterized the market because it selected ballasts to capture variations in manufacturer, standard and high-efficiency product lines, lamp diameter, starting method, and other relevant factors. These variations have also been captured in the lamp-based BE testing that DOE has conducted to determine efficiency levels for this NOPR.

To ensure that DOE establishes the appropriate max tech level, the California Utilities recommended DOE test the ballasts with the highest BEF values as indicated in the CEC and CEE databases. (California Utilities, No. 30 at p. 2) DOE tested the most efficient (highest BEF) ballast in the CEC database for each representative ballast type identified in this NOPR. DOE did not review the CEE database as values submitted to this program are based on catalogs. Catalog data typically is not based on the DOE test procedure for every unit presented. Instead manufacturers often assign the same BEF to a family of products or approximate the BEF based on constituent measurements such as input power.

2. Representative Product Classes

For the preliminary TSD, DOE was not able to analyze all 70 product classes. Instead, DOE selected representative product classes to analyze based primarily on their high market volumes, and then scaled its analytical findings for those representative product classes to other product classes that were not analyzed. In the preliminary TSD, DOE identified 10 product classes as representative: (1) 2-lamp 4-foot MBP normal-BF IS/RS ballasts in the commercial sector; (2) 4-lamp 4-foot MBP normal-BF IS/RS ballasts in the commercial sector; (3) 2-lamp 4-foot MBP normal-BF PS ballasts; (4) 4-lamp 4-foot MBP normal-BF PS ballasts; (5) 2-lamp 4-foot MiniBP SO normal-BF ballasts; (6) 2-lamp 4-foot MiniBP HO ballasts; (7) 2-lamp 8-foot slimline normal-BF ballasts; (8) 2-lamp 8-foot HO IS/RS ballasts; (9) 2-lamp 4-foot MBP normal-BF IS/RS ballasts in the residential sector; and (10) 4-lamp sign ballasts. For each ballast type, DOE selected product classes with the highest volume of shipments to be representative. DOE analyzed at least one representative product class for each ballast type included in the scope of coverage. For the most prevalent ballast types (*e.g.,* for ballasts that operate 4-foot MBP and 2-foot U-shaped lamps), DOE chose to analyze multiple representative product classes. While DOE received several stakeholder comments regarding methods of scaling (discussed in section 0), DOE did not receive objections to the decision to analyze certain product classes as representative and scale to those not analyzed. Thus, DOE maintains this methodology in this NOPR.

DOE also did not receive any objections to the product classes it chose as representative. Due to the changes in product class structure discussed above, however, DOE's selection of representative classes for this NOPR differs from that presented in the preliminary TSD. Instead of 70 product classes, there are now a total of 5 classes. DOE defines separate product classes based on starting method (PS and IS/RS), 8-foot HO ballasts, and sign ballasts. The first product class indicated in Table V.1 includes IS and RS ballasts that operate 4-foot MBP and 8-foot slimline lamps. According to the U.S. Census, the market share of 4-foot T8 MBP ballasts represented 55 percent of shipments in 2005. While this data is not segregated by starting method, based on product catalogs and manufacturer interviews, DOE believes that over half of the 4-foot MBP T8 ballast shipments are IS. In addition, the U.S. Census indicates that 8-foot slimline ballasts had about 5-percent market share in 2005. As these ballast types represent significant shipments relative to the overall fluorescent ballast market, DOE analyzes this product class as representative.

The third product class indicated in Table V.1 includes PS ballasts that

operate 4-foot MBP, 4-foot T5 MiniBP SO, and 4-foot T5 MiniBP HO lamps. The U.S. Census reports that T5 ballasts comprised about 4 percent of the ballast market in 2005. Shipment data are available only for T5 high output ballasts, so the actual market share is likely larger. T5 ballast shipments have been steadily increasing since the shipments were first reported in 2002. Furthermore, DOE research indicates that T5 high output ballasts are rapidly taking market share from metal halide systems used in high bay industrial applications. DOE therefore concluded that T5 ballasts are a growing market segment of significant size. As mentioned above, ballasts that operate 4-foot MBP lamps represent a significant portion of the overall fluorescent ballast market. Although PS ballasts are not as popular as IS ballasts, DOE believes that 4-foot MBP PS ballasts represent a sizeable portion of the market due to the increasing use of occupancy sensors. Because of the large portion of ballast shipments contained within this product class, DOE analyzes this product class as representative.

According to the U.S. Census, the market share of 8-foot HO (T8 and T12) ballasts (excluding cold temperature sign ballasts) was about 0.5 percent in 2005. In the preliminary TSD, DOE concluded that IS and RS ballasts were more popular than PS ballasts. These conclusions were supported by product catalogs and manufacturer interviews. DOE received no adverse comment regarding its selection of the 2-lamp IS and RS 8-foot HO ballast product class as representative in the preliminary TSD and continues to analyze IS and RS 8-foot HO ballasts as representative for this NOPR. DOE identified less than five 8-foot HO PS ballasts currently being sold by major manufacturers, limiting the potential for a detailed direct analysis. Instead, DOE scaled its results from the larger 8-foot RDC HO IS and RS product class to the PS product class as described in section 0.

In the preliminary TSD, DOE analyzed 4-lamp sign ballasts, or those that operate a maximum of 32 feet of lamps, as the representative product class for that ballast type because it believed that to be the most common lamp-and-ballast system. DOE received no objection to its decision to analyze sign ballasts as a representative product class in the preliminary TSD and continues to analyze sign ballasts as a representative product class for this NOPR.

3. Baseline Ballasts

Once DOE identified the representative product classes for analysis, DOE selected representative ballast types to analyze from within each product class. For each ballast type analyzed, DOE selected a baseline ballast from which to measure improvements in efficiency. Baseline ballasts are what DOE believes to be the most common, least efficacious ballasts for each representative ballast type. For ballasts subject to existing Federal energy conservation standards, a baseline ballast is a commercially available ballast that just meets existing standards and provides basic consumer utility. If no standard exists for that specific ballast type, the baseline ballast represents the typical ballast sold within a representative ballast type with the lowest tested ballast efficiency. In cases where two types of ballasts (each operates a different lamp diameter) are included in the same representative ballast type, DOE chose multiple baseline ballasts.

DOE considered each ballast's characteristics in choosing the most appropriate baseline ballast for each ballast type. These characteristics include the ballast's starting method (*e.g.,* rapid start, instant start, or programmed start), input voltage (277 V versus 120 V), type (magnetic versus electronic), power factor (PF), total harmonic distortion, ballast factor, ballast luminous efficiency, and whether the ballast can operate at multiple voltages [22] (universal voltage) or only one (dedicated voltage).

a. IS and RS Ballasts

In this NOPR, DOE combined several product classes from the preliminary TSD into one product class. Thus, the IS and RS product class in this NOPR refers to IS and RS ballasts that operate 4-foot MBP and 8-foot slimline lamps. This product class contains the following representative product classes from the preliminary TSD: (1) 2-lamp 4-foot MBP IS and RS normal BF; (2) 4-lamp 4-foot MBP IS and RS normal BF; (3) 2-lamp 8-foot slimline normal BF; and (4) 2-lamp 4-foot MBP IS and RS ballasts in the residential sector. DOE analyzed these classes in the preliminary TSD because DOE chose at least one representative product class for each ballast type and these classes contained the highest volume of shipments. In this NOPR, DOE continues to analyze products for each ballast type included in the proposed scope of coverage. DOE also continues to analyze more than one representative ballast type if shipments suggest that there is more than one high-volume unit (e.g. DOE analyzes both 2- and 4-lamp 4-foot MBP ballasts). Thus, although several ballast types are combined within the IS and RS product class, DOE analyzes the following representative ballast types within that class: (1) Ballasts that operate two 4-foot MBP lamps; (2) ballasts that operate four 4-foot MBP lamps; (3) ballasts that operate two 8-foot slimline lamps; and (4) ballasts that operate two 4-foot MBP lamps in the residential sector.

Two 4-Foot MBP Lamps

In the preliminary TSD, DOE analyzed two baselines for 2-lamp 4-foot MBP IS and RS ballasts. Census data indicated that 2001 shipments of 4-foot MBP T12 ballasts represented 14 percent of all 4-foot MBP ballast shipments, while 4-foot MBP T8 ballasts represented 86 percent of all shipments for this ballast type.[23] Therefore, DOE analyzed both a T12 and T8 ballast as baselines. Though the 2009 Lamps Rule will eliminate all currently commercially available T12 lamps as of July 2012, DOE learned that some lamp manufacturers planned to produce a T12 lamp that just met the 2009 Lamp Rule efficacy standards. Therefore, DOE included an F34T12 lamp in its analysis, assigning it performance parameters that would comply with the 2009 Lamps Rule. DOE analyzed only those T12 ballasts that operate F34T12 lamps because only the most efficient T12 lamps will be available when compliance with any amended standards established in this ballast rulemaking is required (by June 30, 2014). For the T8 baseline, DOE analyzed only those ballasts that operate the F32T8 lamp because it is the most common 4-foot MBP T8 lamp.

The Federal minimum energy conservation standard for ballasts that operate two F34T12 lamps became effective for ballasts manufactured on or after July 1, 2009, sold by the manufacturer on or after October 1, 2009, or incorporated into a luminaire by a luminaire manufacturer after July 1, 2010. (10 CFR 430.32 (m)(5)). This energy conservation standard now effectively allows only electronic F34T12 ballasts. Therefore, DOE chose an electronic model as the F34T12 baseline ballast. Currently there is no Federal minimum energy conservation standard for ballasts that operate F32T8 lamps. Therefore, in choosing the baseline ballast for this lamp type, DOE

[22] Universal voltage ballasts can operate at 120V or 277V.

[23] More recent census data for ballasts are available. However, shipments of T12 ballasts have not been publicly released for all product classes after 2001. DOE used 2001 Census data when selecting baselines for all ballast types.

chose the most common, least efficient ballast on the market.

ASAP commented that because electronic T12 ballasts are more expensive than comparable T8 ballasts and also use a more expensive lamp, the market is going to shift to T8 ballasts, leading them to believe the T8 ballast is a more appropriate baseline. Philips agreed with ASAP that a T8 ballast was a more appropriate baseline because an electronic T8 instant start ballast is the dominant ballast sold. (ASAP, Public Meeting Transcript, No. 34 at p. 255; Philips, Public Meeting Transcript, No. 34 at p. 256) DOE agrees with Philips that, in recent years, T8 ballast shipments have overtaken T12 shipments. For this reason, DOE analyzes a T8 ballast as a baseline. DOE continues to analyze a T12 ballast as a baseline ballast, however, because while electronic T12 ballasts may have a lower shipment volume, they are the least efficient products available that operate two 2-foot MBP lamps.

Four 4-Foot MBP Lamps

Although Census data indicated that both T12 and T8 ballasts operate 4-foot MBP lamps, DOE's research found that only T8 ballasts operate four lamps. Therefore, in the preliminary TSD, DOE analyzed only a T8 ballast as a baseline for 4-lamp 4-foot MBP IS and RS ballasts. Because there is no Federal energy conservation standard, DOE chose a baseline for this ballast type that exhibits the characteristics of the least efficient and most common ballast on the market. DOE paired this ballast with an F32T8 lamp because this lamp is the most common 4-foot MBP T8 lamp. DOE did not receive any adverse comment regarding its methodology for selecting a baseline for 4-lamp 4-foot MBP IS and RS ballasts. Therefore, for these reasons, DOE maintains this methodology for this NOPR.

Two 8-Foot Slimline Lamps

For ballasts that operate two 8-foot slimline lamps, DOE analyzed two baseline ballasts in the preliminary TSD. Census data indicated that 2001 shipments of 8-foot slimline T12 ballasts represented approximately 50 percent of all shipments for this ballast type, whereas T8 ballasts represented the remaining 50 percent.[24] Therefore, DOE analyzed both a T12 and T8 ballast as baselines. The 2009 Lamps Rule will eliminate all currently commercially available T12 lamps as of July 2012. However, DOE learned that some lamp manufacturers planned to produce a T12 lamp that just meets the 2009 Lamp Rule efficacy standards. Therefore, DOE included an F96T12/ES lamp in its analysis, assigning it performance parameters that would comply with the 2009 Lamps Rule. For the T8 baseline, DOE analyzed only those ballasts that operate the F96T8 lamp because this lamp is the most common 8-foot SP slimline T8 lamp.

The Federal minimum energy conservation standards for ballasts that operate two F96T12/ES lamps became effective for ballasts manufactured on or after July 1, 2009. (10 CFR Part 430.32 (m)(5)). This energy conservation standard effectively allowed only electronic T12 products. Therefore, DOE chose an electronic ballast as the T12 baseline for this ballast type. Currently there is no Federal minimum energy conservation standard for ballasts that operate F96T8 lamps. Therefore, DOE analyzed the most common, least efficient ballast on the market as the baseline. DOE did not receive any adverse comment regarding this methodology and maintains this approach in this NOPR.

Two 4-Foot MBP Lamps, Residential Sector

Through manufacturer interviews, DOE learned that both T12 and T8 ballasts are popular in the residential market. Therefore, DOE analyzed both a T12 and T8 ballast as baselines in the preliminary TSD. Currently there are federal minimum energy conservation standards for ballasts that operate F34T12 lamps in the residential sector. These standards became effective for ballasts manufactured on or after July 1, 2010 or sold by the manufacturer on or after October 1, 2010. (10 CFR 430.32 (m)(5–6)). This energy conservation standard now effectively allows only electronic F34T12 residential ballasts. Therefore, DOE chose an electronic model as the F34T12 baseline ballast. Because no federal minimum energy conservation standard exists for T8 residential ballasts, DOE chose the most common, least efficient ballast on the market. DOE research discovered that most ballasts sold in the residential market are sold as part of a fixture. Therefore, DOE researched the most common fixtures sold in the residential market. DOE then obtained the fixtures, removed the ballast, and tested the ballast to determine the least efficient and most common option. DOE tested a range of F32T8 ballasts from multiple ballast manufacturers and in multiple fixtures.

Though the 2009 Lamps Rule will eliminate all currently commercially available T12 lamps as of July 2012, DOE learned that some lamp manufacturers planned to produce a T12 lamp that just met the 2009 Lamps Rule efficacy standards. Therefore, DOE included an F34T12 lamp in its analysis, assigning it performance parameters that would comply with the 2009 Lamps Rule. Because only the most efficient T12 lamps will be available when compliance with any amended standards established by this ballast rulemaking is required, DOE analyzed only those T12 ballasts that operate F34T12 lamps. For the T8 baseline, DOE paired its T8 baseline ballast with an F32T8 lamp because DOE believed, based on catalogs and feedback from manufacturers, that that was the most common wattage lamp at that diameter.

DOE received several comments on its selection of a baseline in the residential sector. The California Utilities and the NEEA and NPCC believed that DOE's baseline selection underestimated the energy savings possible in the residential sector. They believed that the most common 2-lamp residential fixture had a higher ballast factor than that represented in the preliminary TSD. The NEEA and NPCC pointed out that the quality of a linear fluorescent product designed for use in a kitchen, utility room, or other inside space may be different than the quality of a shop or strip light typically used in garages. Furthermore, the NEEA and NPCC believed that because the residential market represented a frequent switching environment, programmed start ballasts should be considered. (California Utilities, No. 30 at p. 5; NEEA and NPCC, No. 32 at p. 7, 8)

DOE appreciates the comments regarding the residential baselines and reexamined the selection of baseline ballasts for this NOPR. DOE conducted additional testing in this market and found that the least efficient T12 ballast had a higher ballast factor than that presented in the preliminary TSD. Thus, the input power for this baseline ballast is also higher, which results in greater energy savings. Regarding programmed start ballasts, DOE agrees that the residential market may represent a frequent switching environment. Based on catalog data and manufacturer interviews, however, DOE continues to believe that IS and RS ballasts are the most common in this market sector. Therefore, DOE continues to analyze residential ballasts with these starting methods for this NOPR.

[24] While more recent census data for ballasts is available, shipments of T12 ballasts have not been publicly released after 2001. T12 shipments for this ballast type also include data for the 6-foot SP slimline ballast, which DOE estimates is negligible compared to the 8-foot shipments.

b. PS Ballasts

In this NOPR, the PS product class refers to PS ballasts that operate 4-foot MBP, 4-foot MiniBP SO, and 4-foot MiniBP HO lamps. The PS product class contains the following representative product classes from the preliminary TSD: (1) 2-lamp 4-foot MBP PS normal BF; (2) 4-lamp 4-foot MBP PS normal BF; (3) 2-lamp 4-foot T5 MiniBP SO normal BF; and (4) 2-lamp 4-foot T5 MiniBP HO ballasts. DOE analyzed these classes in the preliminary TSD because DOE chose at least one representative product class for each ballast type and these classes contained the highest volume of shipments. As described in the section above, DOE continues to analyze products for each ballast type included in the proposed scope of coverage. DOE also continues to analyze more than one representative ballast type if shipments suggest that there is more than one high volume unit. Thus, although several ballast types are combined within the PS product class, DOE analyzes the following as representative ballast types within that class: (1) Ballasts that operate two 4-foot MBP lamps; (2) ballasts that operate four 4-foot MBP lamps; (3) ballasts that operate two 4-foot T5 SO lamps; and (4) ballasts that operate two 4-foot T5 HO lamps.

Two 4-Foot MBP Lamps and Four 4-Foot MBP Lamps

In the preliminary TSD, DOE analyzed one baseline for both 2-lamp and 4-lamp 4-foot MBP PS ballasts. DOE found that no T12 ballasts existed with this starting method. DOE paired the T8 baseline with an F32T8 lamp because it is the most common 4-foot MBP T8 lamp. As there are currently no Federal minimum energy conservation standards for ballasts that operate F32T8 lamps, DOE chose the most common, least efficient ballast on the market to be the baseline. DOE did not receive any adverse comment regarding its methodology for selecting a baseline for 2-lamp and 4-lamp 4-foot MBP PS ballasts and maintains this methodology for this NOPR.

Two 4-Foot T5 SO Lamps and Two 4-Foot T5 HO Lamps

In the preliminary TSD, DOE chose to analyze one baseline for both 2-lamp 4-foot T5 SO and 2-lamp 4-foot T5 HO ballasts. For ballasts that operate standard output T5 lamps, DOE believes that F28T5 lamps encompass the vast majority of these lamp sales.[25] Therefore, DOE chose a baseline ballast that operates two F28T5 lamps. For high output T5 lamps, DOE believes that F54T5HO lamps are the most common and therefore chose a baseline ballast that operates this lamp type.[26] Currently there are no federal minimum energy conservation standards for either T5 ballast type. In addition, only electronic T5 ballasts are sold on the U.S. market. In the preliminary TSD, however, DOE modeled the potential substitution of less efficient T5 ballasts by examining the difference between magnetic and electronic ballasts. Inclusion of less efficient T5 ballasts in the preliminary TSD led to increased energy consumption in the absence of standards and to increased energy savings with the adoption of T5 standards. Although DOE did not receive any comments on this methodology, for this NOPR, DOE developed baseline T5 ballasts by evaluating the difference in BLE between the baseline and more efficient replacements for 2-lamp 4-foot MBP PS ballasts. Rather than assume magnetic ballasts would be the less efficient substitute, DOE instead approximates the less efficient substitute through comparison to a similar PS product that uses inefficient electronic ballast technology.

c. 8-Foot HO Ballasts

As described in section 0, DOE analyzed the IS and RS 8-foot HO product class as representative. This product class contains IS and RS ballasts that operate a maximum of one or two 8-foot HO lamps. In the preliminary TSD, DOE estimated that the majority of 8-foot HO ballasts are 2-lamp ballasts and therefore analyzed the two-lamp model as representative. DOE received no objection to its decision to analyze 2-lamp 8-foot HO ballasts and continues to analyze these ballasts as representative in this NOPR.

In the preliminary TSD, DOE analyzed two baselines for this ballast type. DOE believes most of the 8-foot HO ballasts currently shipped are T12. Though the 2009 Lamps Rule will eliminate all currently commercially available T12 lamps as of July 2012, DOE learned that some lamp manufacturers planned to produce a T12 lamp that just met the 2009 Lamp Rule efficacy standards. Therefore, DOE included an F96T12HO/ES lamp in its analysis, assigning it performance parameters that would comply with the 2009 Lamps Rule. Therefore, DOE analyzed both T12 and T8 ballasts as baselines. The Federal minimum energy conservation standards for ballasts that operate two F96T12HO/ES lamps became effective for ballasts manufactured on or after July 1, 2009. 10 CFR Part 430.32 (m)(5). These standards did not eliminate magnetic ballasts from the market. Therefore, DOE chose a magnetic ballast for the T12 baseline. Because there are currently no Federal minimum energy conservation standards for ballasts that operate F96T8HO lamps, DOE analyzed the most common, least efficient ballast on the market. For this T8 baseline, DOE paired the ballast with an F96T8HO lamp because this lamp is the most common 8-foot HO T8 lamp. DOE received no adverse comment regarding this methodology and continues to use the same approach for this NOPR.

d. Sign Ballasts

In this NOPR, the sign ballast product class includes sign ballasts that operate 8-foot HO lamps. In the preliminary TSD, DOE found the most common lamp-and-ballast combination for this ballast type to be sign ballasts operating a maximum of four 8-foot HO cold temperature lamps. DOE received no adverse comment regarding this selection and continues to analyze 4-lamp sign ballasts as representative in this NOPR.

In the preliminary TSD, DOE research indicated that ballasts that operate in outdoor signs or in other cold temperature applications are designed for use with T12 lamps. Therefore, DOE chose a T12 ballast as a baseline for this ballast type. Current Federal energy conservation standards cover sign ballasts that operate two F96T12HO/ES lamps. These standards became effective for ballasts manufactured on or after July 1, 2010 or sold by the manufacturer on or after October 1, 2010. (10 CFR Part 430.32 (m)(5–6)). However, DOE analyzed sign ballasts that operate four 8-foot HO lamps because this is the most common lamp and ballast combination. DOE chose the most common and least efficient ballast on the market to be the baseline unit. DOE paired this baseline ballast with an F96T12HO lamp that represented the most common cold temperature lamp available on the market. DOE received no adverse comment regarding this approach and maintains this methodology in this NOPR.

4. Selection of More Efficient Ballasts

As described in the preliminary TSD, in the engineering analysis, DOE considered only "design options"—

[25] Currently only one manufacturer sells a 4-foot MiniBP T5 lamp that is not a F28T5. This lamp is a reduced wattage (F26T5).

[26] Currently only two manufacturers sell a 4-foot MiniBP T5 HO lamp that is not a F54T5HO. One manufacturer sells a reduced wattage (F51T5HO). Another manufacturer sells a F49T5HO.

technology options used to improve ballast efficiency that were not eliminated in the screening analysis. DOE's selection of design options guided its selection of ballast designs and efficiency levels. For example, DOE noted separation in efficiencies due to electronic ballast design, starting method, and improved components. All more efficient ballast alternatives DOE identified are based on commercially available ballasts.

In the preliminary TSD, for each representative product class, DOE surveyed and tested many of the manufacturers' product offerings to identify the efficiency levels corresponding to the highest number of models. DOE identified the most prevalent BEF values in the range of available products and established CSLs based on those products. To determine the max tech level in the preliminary TSD, DOE conducted a survey of the fluorescent lamp ballast market and the research fields that support the market. DOE found that within a given product class, no working prototypes existed that had a distinguishably higher BEF than currently available ballasts. Therefore, the highest CSL presented—which represented the most efficient tier of commercially available ballasts—was the max tech level that DOE determined for the preliminary TSD. DOE presented additional research in appendix 5D of the preliminary TSD to explore whether technologies used in products similar to ballasts could be used to improve the efficiency of ballasts currently on the market. DOE considered the use of active rectification (a technology used in some power supplies) and improved (lower electrical loss) components. Power supplies perform a similar power conversion function as fluorescent lamp ballasts, and improved components could potentially be substituted into the existing ballast circuit.

a. Max Tech Ballast Efficiency

DOE received several comments regarding its determination of max tech ballast efficiency. GE stated the importance of looking at ballast efficiency and converting it to BEF rather than looking at BEF catalog values and calculating the ballast efficiency. GE supported this approach because ballast efficiency test data avoids error measurement associated with the BEF test procedure and is therefore more accurate. (GE, Public Meeting Transcript, No. 34 at pp. 165–166) DOE agrees with GE's suggestion to consider tested ballast efficiency rather than calculated ballast efficiency when determining the max tech level. As discussed in the active mode test procedure SNOPR, DOE proposed a lamp-based procedure to measure ballast efficiency. 75 FR 71570, 71573 (November 24, 2010). For this NOPR, DOE evaluates standards in terms of ballast efficiency, using the BLE metric.

The California Utilities commented that in attempting to identify the max tech level commercially available, DOE should not limit itself to evaluating ballasts from the four major manufacturers. (California Utilities, Public Meeting Transcript, No. 34 at pp. 171–172) DOE agrees with the California Utilities that all manufacturers should be considered when identifying the max tech level. DOE reviewed the California Energy Commission's (CEC's) ballast database to identify the most efficient ballast in terms of BEF (because ballast efficiency data was not provided in the database) for each analyzed ballast type. DOE then tested those ballasts to ensure that it considered the most efficient products regardless of manufacturer.

DOE received several comments supporting DOE's conclusion from the preliminary TSD that commercially available ballasts are also the maximum technologically feasible. NEMA and Philips commented that premium products are approaching the point of diminishing returns. Furthermore, Philips believes that the premium products of all manufacturers are very close to max tech. In support of this point, Philips stated that fixed-output fluorescent ballasts are a mature technology and that the state-of-the-art product on the market today represents a high-performance, cost-effective product. Philips would prefer regulations that existing high-performance products can meet. If DOE were to set a standard at an efficiency higher than that achievable by commercially available products, Philips stated that engineering resources would be pulled from developing areas like control systems, solid-state lighting and new light sources. (Philips, Public Meeting Transcript, No. 34 at pp. 144–145, 155–156, 163; NEMA, No. 29 at p. 17)

In addition to commenting that DOE should not set a standard that would require a redesign of existing products, Philips commented that all major manufacturers are concentrating their resources on lighting controls. Philips cited the New York Times building as an example in which lighting controls contributed to energy savings of 60 percent. Philips stated DOE should not require manufacturers to redesign existing ballasts to pursue efficiency gains of 1 or 2 percent when they can dedicate resources to lighting controls, which have the potential to achieve 30 percent–60 percent energy savings. (Philips, Public Meeting Transcript, No. 34 at p. 156)

In contrast to the manufacturers, the California Utilities and the NEEA and NPCC commented that DOE should further consider the technology options described in Appendix 5D of the preliminary TSD. They commented that the technologies DOE identified to improve efficiency, such as improved components and active rectification, have been employed in other electronic products similar to ballasts, including power supplies. They believe that both active rectification and Schottky diodes could be incorporated into fluorescent ballasts and could generate savings in the range DOE estimated, or greater. They also believe active rectification may be becoming more common in inexpensive consumer products. Additionally, the California Utilities pointed out that savings of 1 to 2 percent are significant when considering that for many ballast types, the efficiency savings identified by DOE are about 2 to 7 percent. They suggested that DOE conduct research with manufacturers of power supplies incorporating active rectification, because cost and efficiency estimates for power supplies may be applicable to electronic ballasts as well. (California Utilities, No. 30 at p. 2; NEEA and NPCC, No. 32 at p. 4)

Osram Sylvania and NEMA stated that active rectification could potentially achieve energy savings of about one percent, depending on the line voltage and power levels of the ballast. Lower input voltage ballasts have higher currents, which can result in potentially higher energy savings due to active rectification. Because DOE's active mode test procedure proposes testing ballasts at 277 volts (and most commercial ballasts operate at 277V), the full one percent energy savings will not be realized for most ballasts covered by this rulemaking. NEMA and Philips stated that the industry is not currently using active rectification because it would be prohibitively more expensive than passive rectification. Furthermore, energy savings in one- or two-lamp ballasts have not been proven. (NEMA, No. 29 at p. 16; OSI, Public Meeting Transcript, No. 34 at p. 141; Philips, Public Meeting Transcript, No. 34 at pp. 144–145)

DOE also believed that the efficiency of commercially available ballasts could be improved by substituting more efficient components, in addition to active rectification. NEMA had several comments regarding the more efficient components identified by DOE in Appendix 5D. Philips commented that

Schottky diodes do not exist in the voltage ranges that are required for the input stage as these components tend to be low voltage devices. Osram Sylvania and NEMA commented that using silicon carbide Schottky diodes for the input rectifier stage would be about 10 times more expensive than the existing components. Using them in other parts of the circuit, such as the power factor correction stage, could save some power, but these components are much better suited to ballasts with power levels of 250 W or higher. As the majority of fluorescent ballasts are around 120 W or below, existing designs do not employ these components. (Philips, Public Meeting Transcript, No. 34 at p. 142; OSI, Public Meeting Transcript, No. 34 at p. 141; NEMA, No. 29 at p. 16)

Osram Sylvania, Philips, and NEMA commented that the improved transformer core materials cited by DOE in Appendix 5D are typically used in magnetic ballasts. These technologies are being phased out or are not in use in most newer ballast designs. The ferrite material used in transformers and other magnetic components present in electronic ballasts is appropriate for the ballasts' 45 kilohertz (kHz) operating frequency. If the operating frequency were above 500 kHz, a higher quality core material may increase ballast performance. Similarly, litz wire is used with magnetic components when the frequency is high enough to justify it. (OSI, Public Meeting Transcript, No. 34 at pp. 141–142; Philips, Public Meeting Transcript, No. 34 at pp. 146–147; NEMA, No. 29 at pp. 16–17)

NEMA also provided feedback on the use of more efficient transistors and capacitors. NEMA commented that transistors have both conductive and switching losses. Minimizing one type of losses may increase the other so the appropriate balance must be considered when selecting these components. Regarding capacitors, NEMA commented that electrolytic capacitors offer the best value when high storage capability is needed. The losses due to effective series resistance are minimal in these components and are related to ripple current. (NEMA, No. 29 at p. 17)

DOE appreciates manufacturers' comments regarding the potential energy savings due to lighting controls and agrees that adding controls to a lamp-and-ballast system significantly increases the potential energy savings of the system. EPCA requires DOE to conduct this rulemaking to determine whether to amend the existing standards for ballasts and set standards for additional ballasts. Any new or amended standards established by DOE must achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. DOE also appreciates the above comments on active rectification and improved components as a means of increasing ballast efficiency. In this NOPR, DOE determined the maximum technologically feasible efficiency level to be the highest efficiency level that is technologically feasible for a sufficient diversity of products (spanning several ballast factors, number of lamps per ballast, and types of lamps operated) within each product class. DOE's max tech efficiency levels are supported by a significant amount of DOE test data. All representative ballast types have products commercially available at the max tech ELs for their respective product classes.

Before making this determination, DOE evaluated the possibility of improving the efficiency of three selected ballasts by inserting improved components in the place of existing components of commercially available ballasts. DOE's experiments with improving ballast efficiency through component substitution did not result in prototypes with improved overall ballast efficiency. However, DOE recognizes that component substitution is not the only method available for incrementally improving ballast efficiency. For example, further improvements may be possible through the incorporation of newly designed integrated circuits into the new ballast designs. Therefore, DOE is still considering whether an efficiency level higher than TSL 3 is technologically feasible for a sufficient diversity of lamp types, ballast factors, and numbers of lamps within each product class. In Appendix 5F of the NOPR TSD, DOE presents additional analysis on the potential for an instant-start ballast efficiency level that exceeds TSL 3. DOE requests comments in section 0 on its selection of the maximum technologically feasible level and whether it is technologically feasible to attain higher efficiencies for the full range of instant start ballast applications.

b. Lumen Output

In the preliminary TSD, DOE based its engineering analysis on two substitution cases. In the first case, the consumer is not able to change the spacing of fixtures and therefore replaces one baseline ballast with a more efficient ballast. In this case, light output is maintained to within 10 percent of the light output of the baseline system, when possible. In the second case, the consumer is able to change the spacing of the fixture. To show how energy savings would change due to this change in fixture spacing, DOE provided a normalized system input power.

DOE received several comments regarding lumen output and the two analyzed substitution cases. When consumers are not able to change fixture spacing, the California Utilities and the NEEA and NPCC believe that DOE incorrectly assumed that standards-case replacements will not always maintain the baseline light level. In some cases, both the light output and system wattage increased at higher CSLs. The California Utilities believed this was highly unlikely for two reasons: (1) Higher-BEF replacements that also have high ballast factors can be redesigned to maintain efficiency at lower ballast factors and (2) lighting retrofits allow consumers to maintain lumen output at desired levels. Although the products may not exist in today's market, the California Utilities and the NEEA and NPCC assert that manufacturers will be able to provide similar-BEF products that will not require significant increases in ballast factor. In addition, the California Utilities believe that consumers can change several factors to maintain lumen output: Manufacturer, ballast factor, number of lamps, type of lamp, and fixture reflector. The NEEA and NPCC suggested that because it is possible to maintain light output during ballast replacement, DOE should simplify the analysis by analyzing normalized system input power in all cases. (California Utilities, No. 30 at pp. 3–5; NEEA and NPCC, No. 32 at pp. 6–7) Philips disagreed that light output could be maintained in all substitution cases. They specifically cited the residential sector as an example of a market in which luminaire spacing could not be changed and consumers would simply have more light output when installing a more efficient system. (Philips, Public Meeting Transcript, No. 34 at p. 227)

DOE appreciates these comments but believes, based on its test data, that light output is not always maintained when directly replacing a baseline system with a more efficient one. Although DOE acknowledges that ballast factors may be modified in the future to better maintain light output of popular lamp-and-ballast systems, DOE relied on current product offerings when selecting units for this analysis, and believes that two substitution cases do in fact exist. For this NOPR, DOE maintained this methodology for the LCC analysis, which it believes reflects anticipated product offerings facing the individual consumer in the near term (*see section*

0 below). However, DOE used normalized system input power in the NIA to reflect the ballast technology options and system configurations that could be available to consumers over the 30-year analysis period, as well as increase the simplicity and transparency of its NIA spreadsheet model (*see section 0* below).

c. Other Regulations

In the preliminary TSD, NEMA commented that several possible upcoming regulations would affect the engineering and LCC analysis for fluorescent lamp ballasts. Specifically, NEMA was concerned about four possible regulations: Safety requirements for system interconnects, safety requirements for lamp end-of-life (EOL) protection, electromagnetic field requirements, and hazardous material regulation. NEMA stated that these potential requirements could result in lower ballast efficiency and affect payback calculations. (NEMA, No. 11 at p. 6; NEMA, Public Meeting Transcript, No. 9 at pp. 133–134) DOE agreed that the above requirements could affect ballast efficiency, cost, or both. DOE requested information on the quantitative impacts of these requirements so that it could modify ballast efficiency or cost if these regulations were to become final prior to publication of the final rule.

Philips commented that the International Electrotechnical Commission (IEC) recently adopted requirements for end-of-life (EOL) circuitry for ballasts operating T8 lamps. Previously, the IEC required this circuitry only for ballasts that operate T5 or smaller diameter lamps. If CSA and UL adopted this requirement, as they adopted the requirement for T5 and smaller diameter lamps, U.S. companies would have started redesigning their products to accommodate it. The additional control circuitry required to implement an EOL regulation would decrease ballast efficiency. Ballasts that operate one or two lamps would notice a greater decrease than ballasts that operate three or four lamps because the fixed losses would be smaller relative to the total output power. (Philips, Public Meeting Transcript, No. 34 at pp. 185–186; NEMA, No. 29 at p. 10)

DOE appreciates the comments regarding EOL circuitry and acknowledges that the additional circuitry will likely decrease efficiency. During interviews, manufacturers noted that T8 lamps in the U.S. are different than the T8 lamps used in Europe. For this reason, manufacturers believe it is unlikely that EOL requirements will be adopted in the U.S. If such requirements are adopted in advance of the publication of the final rule, DOE will consider them in its analysis.

Another regulation that could potentially affect ballasts is the adoption of hazardous substance regulation in the U.S. The European Union Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment 2002/95/EC, usually referred to as the Restriction of Hazardous Substances Directive or RoHS, restricts the use of six hazardous materials (lead, mercury, hexavalent chromium, cadmium, polybrominated biphenyls, and polybrominated diphenyl ethers) in the manufacture of various types of electronic and electrical equipment, including fluorescent lamp ballasts. RoHS has been in force since July 2006. If these restrictions were adopted in the U.S., Philips commented that complying with RoHS would increase capital and component costs. (Philips, Public Meeting Transcript, No. 34 at pp. 186–187)

DOE appreciates Philips' comments. During interviews, some manufacturers confirmed that they already comply with RoHS as part of a proactive effort coordinated by NEMA. For these manufacturers, no adjustments to ballast efficiency and price would be necessary if hazardous material regulation were adopted prior to publication of the final rule for this rulemaking. Other manufacturers stated that if all of their products did not already comply, full compliance was expected by the time they would need to comply with any amended ballast standards. If RoHS regulations are adopted, DOE will consider whether any adjustments to its analysis are warranted.

OSI commented that stricter EMI requirements might affect ballast efficiency but did not provide any quantitative data regarding the impacts of stricter EMI requirements on efficiency or cost. (OSI, Public Meeting Transcript, No. 34 at p. 188) DOE conducted significant research regarding EMI emitted by fluorescent lamp ballasts, as discussed in section 0. DOE found that most manufacturers have not altered internal ballast designs to meet the strict standards required by a few special applications. Rather, luminaire manufacturers have employed magnetic ballasts or electronic ones in combination with an external EMI filter and modified fixture. Therefore, DOE has not been able to quantify impacts of more stringent EMI standards on ballast efficiency or price. If the U.S. adopts stricter EMI standards, DOE will consider whether adjustments to its analysis are warranted for the final rule.

5. Efficiency Levels

a. Preliminary TSD Approach

In the preliminary TSD, DOE surveyed and tested many of the manufacturers' product offerings to identify the efficiency levels corresponding to the highest number of models. DOE identified the most prevalent BEF values in the range of available products and established CSLs based on those products. Because the baseline ballasts had different BEF values and represented various design options, in some product classes CSLs affected only one of the two baseline ballasts. For example, CSL1 may have required a more efficient T12 ballast than the baseline T12 ballast, but not have required a ballast more efficient than the T8 baseline. However, the full range of CSLs ultimately specified requirements that were above the BEF values of all the baseline ballasts sold, and therefore affected all baseline ballasts. The highest CSL presented, which represents the most efficient tier of commercially available ballasts, was also the max tech level that DOE determined for the preliminary TSD.

b. NOPR Approach

Based on comments and feedback received during manufacturer interviews, DOE sought to determine whether developing an equation that relates total lamp arc power to BLE could be an effective means of setting energy conservation standards for fluorescent lamp ballasts. As discussed in section 0, DOE tested many different types of ballasts from various manufacturers. DOE conducted extensive testing of the representative ballast types as well as certain ballasts with different numbers of lamps, starting methods, and ballast factor permutations. After compiling the test data, DOE plotted BLE versus total lamp arc power for both standard- and high-efficiency product lines from multiple manufacturers. Though each product line was slightly different, DOE observed the expected positive sloping curve whose slope decreased with increasing total lamp arc power. DOE also observed distinct groupings when comparing a single manufacturer's high and standard-efficiency product families.

After developing several regression lines, DOE found that a logarithmic relationship best modeled the observed trend between total lamp arc power and BLE. A logarithmic relationship has a positive slope that is largest (steepest) at low lamp arc power levels and has a decreasing slope with increasing lamp power. Furthermore, the use of a natural

logarithm to relate total lamp arc power to BLE is consistent with current energy conservation standards for external power supplies, which also use an equation to define efficiency as a function of output power.

Next, DOE plotted curves that aligned with certain key divisions in product offerings. Using an equation of the form:

BLE = coefficient * ln (total lamp arc power) + constant

DOE adjusted the coefficient and constant to delineate different efficiency levels. In general, DOE found that ballasts that generate a total lamp arc power of 50 W or less had a greater range of efficiency than ballasts that operated a total lamp arc power of 50 W or more. DOE also found that the more efficient ballast product lines generally had a reduced (flatter) slope than the standard-efficiency products. To reflect this observation, DOE decreased the coefficient of the more efficient EL equations and increased the coefficient of the less efficient EL equations. Based on analysis of test data for representative ballast types, DOE identified certain natural divisions in BLE and generated curves that corresponded to these divisions. The equations presented in the following sections also reflect a 0.8 percent reduction to account for lab-to-lab variation and the compliance requirements. This reduction is discussed in more detail in section 0.

i. IS and RS Ballasts

DOE developed three efficiency levels for the IS and RS product class. DOE found commercially available ballasts for all representative ballast types in these product classes. The least efficient level (EL1) takes the form:

BLE = 2.98 * ln(total lamp arc power) + 72.61

While the least efficient 2-lamp MBP T8 electronic ballasts (commercial and residential) would meet this level, 2-lamp T12 MBP electronic ballasts would not. The least efficient 4-lamp MBP and 2-lamp T12 slimline ballasts already meet EL1. Next, EL2 takes the form:

BLE = 2.48 * ln(total lamp arc power) + 79.16

The least efficient universal voltage 4-foot MBP T8 and 8-foot T8 slimline ballasts would meet this level. The least efficient universal voltage 2-lamp MBP T8 ballast (in the commercial sector) also meets EL2. Finally, EL3 takes the form:

BLE = 1.32 * ln(total lamp arc power) + 86.11

EL3 represents a level met by high efficiency 4-foot MBP T8 (commercial and residential) and 8-foot T8 slimline ballasts.

ii. PS Ballasts

For the PS product class, DOE developed three efficiency levels. The least efficient level (EL1) takes the form:

BLE = 2.48 * ln(total lamp arc power) + 77.87

After plotting the test data, DOE observed three distinct efficiency levels in addition to a baseline level. The least efficient T5 standard and high output ballasts (as calculated by section 0) and the least efficient 4-foot MBP ballasts (those that had BLEs between 82 and 86 percent) would not meet this EL. DOE did not identify any 2-lamp 4-foot MBP PS ballasts at the efficiency level represented by EL1, but did identify ballasts of this type at higher efficiency levels. Next, EL2 took the form:

BLE = 2.48 * ln(total lamp arc power) + 78.86

EL2 represents high efficiency 4-foot MBP, T5 SO, and T5 HO ballasts. DOE did not identify any 4-lamp, 4-foot MBP PS ballasts at the efficiency level represented by EL2, but did identify ballasts of this type at the highest efficiency level. Finally, DOE developed EL3, which took the form:

BLE = 1.79 * ln(total lamp arc power) + 83.33

EL3 is designed to represent the most efficient PS ballasts tested by DOE. The single most efficient 2-lamp T5 standard output, 2-lamp T5 high output, 2-lamp MBP PS and 4-lamp MBP PS ballasts tested meet this level.

iii. 8-foot HO Ballasts

For the 8-foot HO IS and RS product class, DOE developed three efficiency levels. For this product class, DOE tested ballasts that operate two lamps, the most popular lamp-and-ballast combination. Because the resulting test data did not provide a sufficient range in total lamp arc power for DOE to develop EL equations directly using the same methodology as for the IS and RS, PS, and sign ballast product classes, DOE used the shape of the curves developed for the sign ballast product class. For EL1, EL2, and EL3, DOE used the coefficient of the sign ballast EL1 equation. One- and 2-lamp sign ballasts operate similar lamp powers as regular 8-foot HO ballasts and use the same starting methods (IS and RS). Based on the similarity in lamp power and starting method, DOE believes the coefficient of the equation that represents the most efficient IS electronic sign ballasts is a reasonable approximation of the coefficient for 8-foot HO ballasts. EL1 took the form:

BLE = 1.49 * ln(total lamp arc power) + 72.22

The least efficient T12 electronic ballasts meet EL1. EL2 took the form:

BLE = 1.49 * ln(total lamp arc power) + 83.33

EL2 is met with T8 electronic HO ballasts and represents a division in efficiency between the most efficient T12 electronic ballasts and the high-efficiency T8 electronic ballast. Finally, DOE developed EL3, a standard level that represents the most efficient 2-lamp, 8-foot HO ballast tested by DOE. EL3 took the form:

BLE = 1.49 * ln(total lamp arc power) + 84.32

iv. Sign Ballasts

For the sign ballast product class, DOE identified one efficiency level. The sign ballast market is primarily comprised of magnetic and electronic ballasts that operate T12 HO lamps. DOE tested sign ballasts that operate up to one, two, three, four, or six 8-foot T12 HO lamps. The test data showed that sign ballasts exist at two levels of efficiency. Therefore, DOE analyzed a baseline and one efficiency level above that baseline. Using its test data, DOE developed an equation for EL1 that was met by the most efficient 4-lamp sign ballast (representative ballast type) and the corresponding 1-lamp sign ballast. This EL represents an electronic sign ballast efficiency level and the most efficient sign ballast tested for the representative ballast type. EL1 took the form:

BLE = 1.49 * ln(total lamp arc power) + 81.34

c. Measurement Variation and Compliance

In the preliminary TSD, DOE calculated the average ballast efficiency for a sample size of three ballasts. DOE then used this average value to represent the efficiency of a model when analyzing data to determine efficiency levels. DOE received several comments regarding this approach. Regarding sample size, Philips stated that a sample size of three is not statistically significant, especially when ballasts are purchased from one location and may all have the same date code. The California Utilities encouraged DOE to increase the sample size of tested models. Philips commented that although a larger sample size is necessary to obtain a statistically significant average, testing a large number of ballasts would be highly burdensome. (Philips, Public Meeting Transcript, No. 34 at pp. 176–178, 180–181; California Utilities, No. 30 at p. 2)

In this NOPR, DOE modified its approach to testing in light of these comments. For the representative ballast types analyzed in this NOPR, DOE tested five samples of each model number and used the average to represent the overall efficiency of the model. For non-representative ballast types, DOE maintained its approach from the preliminary TSD to use the average of three samples. DOE believes that testing five ballasts for its representative product classes improves the reliability of the efficiency calculated for the representative ballast types.

DOE received several comments regarding its specification of efficiency levels using the ballast's average efficiency. Earthjustice noted that in the preliminary TSD, DOE did not follow the compliance testing requirements when it determined efficiency levels. Philips commented that DOE cannot use average values to specify an efficiency level and then require that 95 percent of products meet that level. When determining an efficiency level, Philips also encouraged DOE to consider measurement error. Because of measurement error inherent in the test procedure, Philips believed it was inappropriate for DOE to require all manufacturers to meet the highest claimed tested value when setting standards. Products that do not meet that highest measurement value are not necessarily out of compliance, but rather may be within the test procedure's range of accuracy. Philips encouraged DOE to adjust efficiency levels such that high-efficiency products would comply with the level even with the expected measurement variation. (Earthjustice, Public Meeting Transcript, No. 34 at p. 177; Philips, Public Meeting Transcript, No. 34 at pp. 173–174, 176, 177–178)

DOE acknowledges that compliance requirements and measurement variation affect reported efficiency. The current and proposed active mode test procedure requires manufacturers to report the lower of either the sample average or the value calculated by an equation intended to account for small sample sizes. DOE's analysis of its own test data showed that it was more likely that manufacturers would be reporting the result of the compliance equation, as this proved to be the lower of the two values. Thus, DOE calculated how much lower the value determined by the compliance equation was compared to the sample mean and reduced the efficiency levels, based on average BLEs, by this value.

Furthermore, DOE also agrees with manufacturers that measurement variation should be considered when determining efficiency levels. DOE tested ballasts at more than one lab and found that tested efficiencies for the ballast models sent to the independent lab were slightly lower than the values measured at the main test facility. Therefore, DOE evaluated the data to determine the average variation between the independent facilities.

Combined with the adjustment for using the compliance equation, DOE calculated that a 0.8 percent reduction was necessary. The 0.8 percent reduction corresponds to a 0.6 percent average difference in efficiency between data collected at the two laboratories used by DOE, and a reported value that is on average 0.2 percent less than the average of the samples included in testing. Therefore, in this NOPR, DOE adjusts the efficiency levels, which are based on average ballast efficiency data, downward by 0.8 percent to account for compliance requirements and lab-to-lab measurement variation.

6. Price Analysis

In the preliminary TSD, developing the manufacturer selling price for different fluorescent lamp ballasts involved two main inputs, a teardown analysis to develop the manufacturer production costs and a markup analysis to arrive at the MSP.

DOE summed the cost of direct materials, labor, and overhead costs used to manufacture a product to calculate the MPC.[27] Direct material costs represent the direct purchase price of components (resistors, connecting wires, etc.). DOE estimated the manufacturer overhead from a representative electronic fabrication company's U.S. Securities and Exchange Commission (SEC) 10–k's aggregated confidential manufacturer selling prices. DOE believed that the teardown prices reflected the long term average and were independent of long term commodity prices. For more detail, *see* chapter 5 and appendix 5A of the preliminary TSD.

DOE selected ballasts for the teardown analysis to estimate manufacturer production costs. DOE mapped out a matrix of product specifications and selected ballasts so that comparisons could be made among ballasts that differed by only one characteristic (such as starting method or input voltage). Ballasts are described by a long list of specifications, so DOE concentrated on those that were expected to have the greatest impact on efficiency—high versus regular advertised efficiency, maximum number of lamps driven, starting method, and universal versus single input voltage. DOE conducted teardown analyses on 13 ballasts. When possible, in the preliminary TSD, DOE assigned the MPC from the teardown directly to the CSL.

DOE notes that it was able to select only unpotted ballasts for the teardown analysis. As explained previously, some ballast manufacturers add potting, a type of black pitch, to the ballast enclosure to improve durability and manage heat distribution. Because the sticky potting inhibits visual observation of the components, DOE was unable to reverse engineer potted ballasts through a teardown analysis.

To estimate MPCs for ballasts that were not submitted for teardowns, DOE used online ballast supplier pricing to develop ratios relating online prices to teardown-sourced MPCs. After developing a ratio specific to each manufacturer, DOE then estimated the MPC for a particular CSL. DOE identified ballasts from multiple manufacturers that just meet the CSL and then marked down the online prices to the MPC using the manufacturer-specific MPC ratio. DOE averaged the MPCs for all the ballasts just meeting the CSL to calculate the MPC.

The last step in determining preliminary TSD manufacturer selling prices was developing markups to scale the MPCs assigned to each CSL to MSPs. DOE relied on income statements found in 10–K reports from publicly owned ballast manufacturing companies. Using multi-year average financial data, DOE used the ratio of net sales to cost of goods sold to mark up the MPC to the MSP.

NEMA and Philips commented that a teardown analysis is an unreliable way to develop manufacturer production costs. They stated that it is difficult even for a ballast manufacturer to determine prices of competitors' ballasts using this method. As an example, Philips and NEMA pointed out that DOE's teardown analysis determined that the most efficient ballast was cheaper than a less efficient ballast. NEMA strongly disagreed with DOE's conclusion. At the public meeting, Philips stated that NEMA was attempting to provide industry-average incremental MPC values for all efficiency levels. (NEMA, Public Meeting Transcript, No. 34 at p. 17; Philips, Public Meeting Transcript, No. 34 at pp. 183–184, 204; NEMA, No. 29 at p. 19) ASAP commented that it is valuable to have industry provide that kind of pricing information, but

[27] When viewed from the company-wide perspective, the sum of all material, labor, and overhead costs equals the company's sales cost, also referred to as the cost of goods sold (COGS).

encouraged DOE to continue with a teardown approach as well. (ASAP, Public Meeting Transcript No. 34 at pp. 184–185) Regarding scaling from retail prices to MSP, the NEEA and the NPCC agreed that DOE's scaling methods to determine MSPs are valid (NEEA and NPCC, No. 32 at p. 6). OSI agreed, citing an example that a T12 electronic ballast (price determined using retail scaling method) is generally more expensive than a T8 electronic ballast (OSI, No. 34 at p. 254).

DOE agrees that a teardown analysis may be sensitive to the dynamic nature of the electrical component market, but believes the teardown results should still be used considering limited pricing information is publicly available. In the NOPR, DOE amended its teardown approach such that incremental differences between two efficiency levels were based on increments between single manufacturers' ballasts rather than basing prices directly from teardowns of different manufacturers. DOE notes that the industry was unable to provide average incremental MPC values. Instead, some manufacturers provided confidential data on an individual basis.

For the NOPR, DOE developed prices using three main inputs. The first input was teardown data from the preliminary TSD. DOE compared teardown-sourced MSPs from the same manufacturer to establish incremental costs between ELs for a representative ballast type. The second input was blue book prices from manufacturer price lists. DOE estimated MSPs from these blue-book prices by using manufacturer-specific ratios between blue book prices and teardown- or aggregated manufacturer-sourced MSPs. The third input was confidential manufacturer-supplied MSPs and incremental MPC values. DOE aggregated these inputs to establish MSPs for efficiency levels of representative ballast types for which all data were available. DOE used ratios of online supplier retail prices to scale to ELs where both teardown and blue book prices were unavailable. In general, DOE used a combination of the teardown- and blue book-sourced prices throughout the analysis and used the aggregated manufacturer-supplied MSPs for normalization and comparison purposes.

For the teardown-sourced prices, DOE used the teardown data generated during the preliminary TSD. As discussed in section 0, DOE revised the manufacturer markup (used to convert MPC to MSP) from 1.5 to 1.4 based on inputs from manufacturer interviews. As a result, the teardown-sourced MSPs decreased slightly from the values presented in the preliminary TSD. In the preliminary TSD, DOE used the teardown-sourced MSP that corresponded directly to the representative ballast at each efficiency level. DOE noticed, however, that teardowns of ballasts from different manufacturers sometimes resulted in different MSPs, although they had approximately the same measured BLE. DOE believed this could potentially be due to differences in the brand of component used in the ballasts. As a result, DOE normalized the teardown-sourced MSPs so that the incremental difference between ELs would be less impacted by differences in component prices from one manufacturer to another. Using this technique, DOE assigned teardown-sourced MSPs to efficiency levels at which a ballast was torn down.

For the blue book-sourced MSPs, DOE developed manufacturer-specific discount ratios between blue book prices and either teardown-sourced MSPs or aggregated manufacturer-supplied MSPs. If teardown-sourced MSPs were available, DOE used these values to create discount ratios; otherwise, DOE used an aggregated manufacturer-supplied MSP. When a blue book value was not available from any manufacturer for a particular EL, DOE used a retail price scaling technique. DOE scaled the blue book-sourced price of an adjacent efficiency level using a ratio of retail prices (from a single online supplier) between ballasts in the adjacent EL and the EL without a blue book-sourced price. For example, if a blue book value was not available for EL2, a ratio of retail prices between EL2 and EL3 could be used to scale the blue book-sourced MSP from EL3 to EL2.

In the NOPR, DOE assigned MSPs to efficiency levels for representative ballast types according to the following methodology. For representative ballast type ELs with teardown-sourced MSPs, DOE averaged the teardown-sourced MSP with the blue book-sourced MSP. For the representative ballast type efficiency levels without teardown-sourced MSPs, DOE used the blue-book sourced MSP directly. For the two theoretical inefficient T5 baselines, neither a teardown- nor blue book-sourced MSP was available. As discussed in section 0, DOE established T5 standard output and high output baselines to model the situation in which inefficient T5 ballast entered the market in future years. To establish a price for the T5 standard output baseline, DOE scaled the EL1 blue book-sourced MSP using the ratio of the baseline and EL2 blue book-sourced MSPs for the 2-lamp, 4-foot MBP PS representative ballast type. To establish a price for the T5 high output baseline, DOE scaled the EL1 blue book-sourced MSP using the ratio of the baseline and EL1 blue book-sourced MSPs for the 4-lamp, 4-foot MBP PS representative ballast type. More detail on this methodology is provided in chapter 5 of the NOPR TSD.

In the preliminary TSD, DOE mentioned several possible regulations that could affect the price of fluorescent ballasts. NEMA expressed concern that safety requirements for system interconnects and safety requirements for lamp end-of-life protection could result in lower ballast efficiency and affect payback calculations. NEMA also commented that current internationally accepted EMI levels may be modified, which could lower the efficiency of commercially available ballasts. NEMA identified a final issue concerning hazardous material regulations that may be implemented which would affect component availability and raise the cost of ballasts. The NEEA and NPCC believe that the costs of the EOL and EMI features are very small or non-existent once they are engineered into most or all products (NEEA and NPCC, No. 32 at p. 6). They also believe the lead-free solder would affect ballasts of different efficiency levels equally and should therefore be ignored from the purposes of this rulemaking (NEEA and NPCC, No. 32 at p. 6). DOE appreciates these comments. Because none of these potential regulations have been promulgated, however, DOE has not included the effect of these potential regulations on ballast price or efficiency in this rulemaking. DOE will consider making changes to its analysis for the final rule if any of these potential regulations are adopted.

7. Results

In this NOPR, DOE changed its methodology from that presented in the preliminary TSD. DOE proposes to set standards in terms of an equation that relates total lamp arc power to BLE. For both the IS and RS product class and PS product class, DOE developed three efficiency levels and analyzed four representative ballast types. For the 8-foot HO IS and RS product class, DOE developed three efficiency levels and analyzed one representative ballast type. Finally, for sign ballasts, DOE developed one efficiency level and analyzed one representative ballast type. For each EL of each representative ballast type, DOE specified characteristics of a representative unit at that level and calculated an MSP. These values were used in the LCC, NIA, and

MIA analyses to model the impact of setting standards on consumers, the nation, and manufacturers, respectively. The table below summarizes the efficiency levels developed by DOE for each representative product class based on average tested BLE and total lamp arc power values. The efficiency level equations presented in Table V.3 incorporate the 0.8 percent reduction for lab to lab testing variation and compliance requirements and are the equations used to establish energy conservation standards for fluorescent lamp ballasts.

TABLE V.3—NOPR EFFICIENCY LEVELS FOR REPRESENTATIVE PRODUCT CLASSES WITH 0.8 PERCENT VARIATION REDUCTION

Representative product class	Efficiency level	BLE
IS and RS ballasts that operate	EL1	2.98 * n(total lamp arc power) + 72.61.
4-foot MBP lamps	EL2	2.48 * n(total lamp arc power) + 79.16.
8-foot slimline lamps	EL3	1.32 * n(total lamp arc power) + 86.11.
PS ballasts that operate	EL1	2.48 * n(total lamp arc power) + 77.87.
4-foot MBP lamps	EL2	2.48 * n(total lamp arc power) + 78.86.
4-foot MiniBP SO lamps 4-foot MiniBP HO lamps	EL3	1.79 * n(total lamp arc power) + 83.33.
IS and RS ballasts that operate 8-foot HO lamps	EL1	1.49 * n(total lamp arc power) + 72.22.
	EL2	1.49 * n(total lamp arc power) + 83.33.
	EL3	1.49 * n(total lamp arc power) + 84.32.
Ballasts that operate 8-foot HO lamps in cold temperature outdoor signs	EL1	1.49 * n(total lamp arc power) + 81.34.

8. Scaling to Product Classes Not Analyzed

As discussed above, DOE identified and selected certain product classes as "representative" product classes where DOE would concentrate its analytical effort. DOE chose these representative product classes and the representative units within them primarily because of their high market volumes. The following section discusses how DOE scaled efficiency standards from those product classes it analyzed to those it did not.

In the preliminary TSD, DOE created scaling relationships for number of lamps, starting method, and ballast factor. DOE used extensive test data obtained for ballasts that operate 4-foot MBP lamps and developed equations relating total rated lamp power to BEF for each ballast type. DOE identified a reduction to apply to the BEF of an IS ballast to calculate the BEF of a comparable programmed start ballast. DOE also determined a relationship between ballasts with low, normal, and high ballast factor. Both high and low BF ballasts were found to have, on average, lower BEFs than comparable normal BF ballasts. Therefore, DOE applied a discount factor to calculate the appropriate BEFs for ballasts with low and high ballast factors. When applying this scaling methodology, DOE first scaled by number of lamps, then starting method, and finally ballast factor. DOE received several comments on its scaling methodology and results presented in the preliminary TSD.

Philips stated that DOE's scaling techniques were valid based on an analysis using data contained in the CEC's ballast database. (Philips, Public Meeting Transcript, No. 34 at pp. 17, 155) As discussed in the paragraphs that follow, however, manufacturers recommended adjustments to bring the scaled results more in line with actual data.

For number of lamps, Philips requested a greater allowance for one-lamp ballasts because the difference between one- and two-lamp ballasts was greater than indicated by DOE's scaling. Philips found the average BEF of one-lamp ballasts to be 3.5 percent lower than that of comparable two-lamp ballasts. Philips also commented that they found ballasts that operate four lamps to be about two percent more efficient than those that operate two lamps. In contrast, the NEEA and NPCC found that DOE's scaling factors for number of lamps seemed valid because there seems to be a strong correlation between BEF and lamp power. (Philips, Public Meeting Transcript, No. 34 at pp. 17, 103–104, 137–139; NEEA and NPCC, No. 32 at p. 5)

DOE also received several comments related to its ballast factor scaling techniques. Philips commented that high-BF ballasts do not necessarily have lower BEFs than normal-BF ballasts, and tend to be more efficient. Philips believes that DOE's results indicating that normal-BF ballasts have the highest BEF may be due to DOE's measurement procedures using the same resistors for low-, normal-, and high-BF ballasts. Philips also commented that low-BF ballasts do have lower BEF than normal-BF ballasts and that they may seek a larger reduction for those ballasts than that applied in the preliminary TSD. Based on the data in the CEC database, Philips concluded that a low-BF ballast is about one percent less efficient than a normal-BF ballast, whereas a high-BF ballast is about one percent more efficient than a normal-BF ballast. (Philips, Public Meeting Transcript, No. 34 at pp. 17–18, 103–104, 137) The California Utilities also noted that, based on the data provided in Appendix 5C, DOE's scaling factors did not accurately capture the relationship between BF and BEF. The NEEA and NPCC agreed, noting that while DOE used a very consistent set of scaling factors to scale the test results from normal ballast factor products to low- and high-ballast factor products, the test data was not nearly as consistent as the scaling factors. They did not believe that high ballast factor ballasts necessarily had lower BEFs than normal ballast factor products. The NEEA and NPCC believed DOE should proceed in a way that eliminates the need to use scaling factors to determine baseline models and efficiency levels for the low- and high-BF products. For example, if efficiency increased with ballast factor, it would be reasonable to set standards as a function of ballast factor, similar to the way refrigeration products are regulated in terms of refrigerated volume. (California Utilities, No. 30 at p. 3; NEEA and NPCC, No. 32 at pp. 3, 5)

Regarding starting method, GE commented that DOE's scaling yields slightly higher efficiency ratings for some programmed start ballasts

compared to instant start ballasts, which is not consistent with what is found in the industry. Philips' analysis found that the scaling factor for programmed start should be 3 percent relative to instant start ballasts instead of the 2.2 percent calculated by DOE. The NEEA and NPCP suggested that DOE re-verify its scaling factor for starting method in light of the differences between DOE's scaling factors and those found by Philips. (GE, Public Meeting Transcript, No. 34 at pp. 25–26; Philips, Public Meeting Transcript, No. 34 at p. 190; NEEA and NPCC, No. 32 at p. 6)

As discussed in section 0, DOE found that BLE could be modeled as a function of total lamp arc power. In this NOPR, DOE proposes to set standards in terms of an equation that assigns a BLE value based on the total rated lamp power operated by the ballast. This equation eliminates the need for scaling relationships based on number of lamps and ballast factor that were necessary in the preliminary TSD. A scaling factor was still necessary for starting method, as described below.

Although DOE set efficiency levels for some PS ballasts directly, DOE did not analyze 8-foot HO PS ballasts directly. Thus, it was necessary to develop a scaling relationship for this starting method. To do so, DOE compared 4-foot MBP IS ballasts to their PS counterparts. DOE found the average reduction in BLE to be 2 percent. Thus, DOE proposes to apply this scaling factor to the efficiency levels for 8-foot HO IS ballasts to determine the appropriate values for programmed start products.

D. Markups To Determine Product Price

By applying markups to the MSPs estimated in the engineering analysis, DOE estimated the amounts consumers would pay for baseline and more efficient products. At each step in the distribution channel, companies mark up the price of the product to cover business costs and profit margin. Identifying the appropriate markups and ultimately determining consumer product price depend on the type of distribution channels through which the product moves from manufacturer to consumer.

1. Distribution Channels

Before it could develop markups, DOE needed to identify distribution channels (*i.e.,* how the products are distributed from the manufacturer to the end user) for the ballast designs addressed in this rulemaking. Most ballasts used in commercial and industrial applications pass through one of two types of distribution channels—an original equipment manufacturer (OEM) channel and a wholesaler channel. The OEM distribution channel applies to ballasts installed in fixtures. In this distribution channel, the ballast passes from the manufacturer to a fixture OEM who in turn sells it to an electrical wholesaler (*i.e.,* distributor); from the wholesaler it passes to a contractor, and finally to the end user. The wholesaler distribution channel applies to ballasts not installed in fixtures (*e.g.,* replacement ballasts). In this distribution channel, the ballast passes from the manufacturer to an electrical wholesaler, then to a contractor, and finally to the end user.

The NEEA and NPCC asked why DOE had not considered a distribution channel for residential ballasts in its preliminary TSD. (NEEA and NPCC, Public Meeting Transcript, No. 12 at p. 225; NEEA and NPCC, No. 32 at p. 8) The NEEA and NPCC and Philips noted that end users of residential ballasts would typically purchase an entire new fixture rather than replace a ballast in an existing fixture; GE questioned this generalization. (NEEA and NPCC, Public Meeting Transcript, No. 22 at pp. 225–226; Philips, Public Meeting Transcript, No. 7 at p. 258; GE, Public Meeting Transcript, No. 16 at p. 259) DOE agreed that a separate distribution channel is applicable for residential ballasts, and included it in the revised markups analysis. Because DOE could not obtain retailer sales data detailing the breakdown between fixture ballasts and replacement ballasts, however, DOE assumed for the markups analysis that the manufacturer sells the residential ballast to a fixture OEM who in turn sells it in a fixture to a home improvement retailer, where it is purchased by the end user.

2. Estimation of Markups

Publicly-owned companies must disclose financial information regularly through filings with the U.S. Securities and Exchange Commission (SEC). Filed annually, SEC form 10-K provides a comprehensive overview of the company's business and financial conditions. To estimate OEM, wholesaler, and retailer markups, DOE used financial data from 10-K reports from publicly owned lighting fixture manufacturers, electrical wholesalers, and home improvement retailers.

DOE's markup analysis developed both baseline and incremental markups to transform the ballast MSP into an end user equipment price. DOE used the baseline markups to determine the price of baseline designs. Incremental markups are coefficients that relate the change in the MSP of higher-efficiency designs to the change in the OEM, wholesaler, and retailer sales prices. These markups refer to higher-efficiency designs sold under market conditions with new energy conservation standards. The calculated average baseline markups for fixture OEM companies, electrical wholesalers, and home improvement retailers were 1.50, 1.23, and 1.51, respectively. The average incremental markups for OEMs, wholesalers, and home improvement retailers were 1.17, 1.05, and 1.15, respectively.

Several commenters expressed concern that markups based on companies' overall financial data might not represent actual markups for ballasts. (Osram Sylvania, Public Meeting Transcript, No. 2 at p. 205; NEEA and NPCC, No. 32 at p. 6; NEMA, No. 29 at pp. 12–13) In contrast, ASAP supported DOE's markups estimation method, citing the public availability of SEC data. (ASAP, No. 2 at p. 207) While recognizing that SEC form 10-K data is not product-specific, DOE assumes that actual product markups are generally business-sensitive. DOE contacted the National Association of Electrical Distributors (NAED) and received feedback from two NAED member companies, both confirming that DOE's calculated wholesaler markups were consistent with their actual ballast markups. With assistance from NEMA, DOE sought a similar evaluation of ballast markups from several representative fixture OEMs, but did not receive feedback in time for publication of the proposed rule. DOE will consider any data received in response to this NOPR in developing markups for the final rule.

To estimate markups for residential ballast designs, DOE requested financial data for representative home improvement retailers. The NEEA and NPCC commented that Home Depot and Lowe's together account for a significant portion of the home improvement retail market. (NEEA and NPCC, Public Meeting Transcript, No. 12 at p. 225) Philips corroborated this point. (Philips, Public Meeting Transcript, No. 7 at p. 258) DOE contacted Home Depot and Lowe's regarding price markups for fluorescent lighting products, but both organizations declined to comment, citing competition concerns. Consequently, DOE based its retailer markups on financial data from 10-K reports.

For ballasts used in commercial and industrial applications, DOE adjusted the calculated average baseline and incremental markups to reflect estimated proportions of ballasts sold through the OEM and wholesaler distribution channels. DOE assumed ballasts in the fixture OEM channel

represent 63 percent of the market and ballasts in the wholesaler channel represent 37 percent. These percentages are from chapter 3 (engineering analysis) of the final TSD for the 2000 Ballast Rule and were based on a comment submitted by NEMA for that rulemaking. DOE then multiplied the resulting weighted average markups by a contractor markup of 1.13 (also from the 2000 Ballast Rule, and used in the 2009 Lamps Rule) and sales tax to develop total weighted baseline and incremental markups, which reflect all individual markups incurred in the ballast distribution channels. For residential ballasts, DOE assumed that end users purchased ballasts—already installed in fixtures—directly from home improvement retailers with no contractor involvement or markup. DOE used OEM and retailer markups and sales tax to calculate total baseline and incremental markups for residential ballasts.

The sales tax represents state and local sales taxes applied to the end user equipment price. DOE derived state and local taxes from data provided by the Sales Tax Clearinghouse.[28] These data represent weighted averages that include state, county and city rates. DOE then derived population-weighted average tax values for each census division and large State, and then derived U.S. average tax values using a population-weighted average of the census division and large State values. This approach provided a national average tax rate of 7.25 percent.

3. Summary of Markups

Table V.4 summarizes the markups at each stage in the distribution channel and the overall baseline and incremental markups, and sales taxes, for each of the three identified channels. For commercial and industrial ballasts, weighting the markups in each channel by the share of shipments in that channel yields an average overall baseline markup of 1.96 and an average overall incremental markup of 1.41. For residential ballasts, DOE calculated an overall baseline markup of 2.43 and an overall incremental markup of 1.43.

TABLE V.4—SUMMARY OF BALLAST DISTRIBUTION CHANNEL MARKUPS

VI.	Commercial/industrial ballasts				Residential ballasts	
	OEM distribution (ballasts in fixtures)		Wholesaler distribution (ballasts only)		Retailer distribution (ballasts in fixtures)	
	Baseline	Incremental	Baseline	Incremental	Baseline	Incremental
Fixture OEM	1.50	1.17			1.50	1.17
Electrical Wholesaler (Distributor)	1.23	1.05	1.23	1.05		
Home Improvement Retailer					1.51	1.15
Contractor or Installer	1.13	1.13	1.13	1.13		
Sales Tax	1.07		1.07		1.07	
Overall	2.24	1.48	1.49	1.27	2.43	1.43
Assumed Market Percentage	63		37		100	
Overall (Weighted)	1.96 (Baseline)		1.41 (Incremental)		2.43	1.43

Using these markups, DOE generated ballast end user prices for each efficiency level it considered, assuming that each level represents a new minimum efficiency standard. Chapter 7 of the TSD provides additional detail on the markups analysis.

A. Energy Use Analysis

For the energy use analysis, DOE estimated the energy use of ballasts in the field (*i.e.,* as they are actually used by consumers). The energy use analysis provided the basis for other DOE analyses, particularly assessments of the energy savings and the savings in consumer operating costs that could result from DOE's adoption of new and amended standard levels.

To develop annual energy use estimates, DOE multiplied annual usage (in hours per year) by the lamp-and-ballast system input power (in watts). DOE characterized representative lamp-and-ballast systems in the engineering analysis, which provided measured and normalized system input power ratings (the latter used to compare baseline- and standards-case systems on an equal light-output basis). To characterize the country's average use of lamp-and-ballast systems for a typical year, DOE developed annual operating hour distributions by sector, using data published in the U.S. Lighting Market Characterization: Volume I (LMC),[29] the Commercial Building Energy Consumption Survey (CBECS),[30] the Manufacturer Energy Consumption Survey (MECS),[31] and the Residential Energy Consumption Survey (RECS).[32] DOE assumed, based on its market and technology assessment, that PS ballasts operating 4-foot MBP T8 lamps in the commercial sector were operated on occupancy sensors. Based on its survey of available literature, DOE assumed that occupancy sensors would result, on average, in a 30-percent reduction in annual operating hours.

The NEEA and NPCC generally approved of DOE's analysis of lighting end-use profiles and the resulting annual operating hour estimates. (NEEA and NPCC, No. 32 at p. 7) NEMA agreed, but asked if the commercial average operating hours accounted for retailers

[28] The Sales Tax Clearinghouse. Available at *https://thestc.com/STRates.stm.* (Last accessed July 20, 2010.)

[29] U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy. *U.S. Lighting Market Characterization. Volume I: National Lighting Inventory and Energy Consumption Estimate.* 2002. Available at *http://apps1.eere.energy.gov/buildings/publications/pdfs/corporate/lmc_vol1.pdf.*

[30] U.S. Department of Energy, Energy Information Agency. *Commercial Building Energy Consumption Survey: Micro-Level Data, File 2 Building Activities, Special Measures of Size, and Multi-building Facilities.* 2003. Available at *http://www.eia.doe.gov/emeu/cbecs/public_use.html.*

[31] U.S. Department of Energy, Energy Information Agency. *Manufacturing Energy Consumption Survey, Table 1.4: Number of Establishments Using Energy Consumed for All Purpose.* 2006. Available at *http://www.eia.doe.gov/emeu/mecs/mecs2006/2006tables.html.*

[32] U.S. Department of Energy, Energy Information Agency. *Residential Energy Consumption Survey: File 1: Housing Unit Characteristics.* 2005. Available at *http://www.eia.doe.gov/emeu/recs/recspubuse05/pubuse05.html.*

with longer or continuous daily operations. (NEMA, No. 29 at p. 11) As noted in the LMC final report, some expected data points are lost in the averaging process. For example, 24-hour retailers are outweighed in the commercial sector by the volume of office and retail space that does not operate 24 hours per day. For the proposed rule, DOE retained its approach for estimating average sector operating hours, the values for which changed slightly based on updated census data inputs.

Based on a range of published estimates, DOE assumed energy savings of 30 percent for lamp-and-ballast systems using occupancy sensors in the commercial sector. To account for these energy savings, DOE reduced average operating hours for analyzed PS ballast systems by 30 percent. Lutron's literature review indicated savings from 17 percent–60 percent, and they agreed that 30 percent was a reasonable average value. (Lutron, Public Meeting Transcript, No. 4 at p. 206) While noting that the use of occupancy sensors is not limited to the commercial sector, NEMA agreed with DOE's assumption that PS ballasts were used with occupancy sensors and commented that DOE's 30-percent savings estimate was conservative. (NEMA, No. 29 at p. 12) DOE agrees that occupancy sensor use is not limited to the commercial sector, but notes that the analyzed PS ballast designs (which operate 4-foot MBP T8 lamps) are intended primarily for commercial applications. The analyzed ballasts for 4-foot MiniBP T5 lamps (SO and HO) are also PS designs; however, unlike T8 systems, PS ballast design is intrinsic to T5 systems and not conditioned on occupancy sensor use. Therefore, DOE did not assume operating hour reductions for T5 SO (commercial sector) and T5 HO (industrial sector) lamp-and-ballast systems in its energy use analysis.

Chapter 6 of the TSD provides a more detailed description of DOE's energy use analysis for ballasts.

B. Life-Cycle Cost and Payback Period Analyses

DOE conducted LCC and PBP analyses to evaluate the economic impacts of potential energy conservation standards for ballasts on individual consumers. The LCC is the total consumer expense over the life of a product, consisting of purchase and installation costs and operating costs (expenses for energy use, maintenance, and repair). To compute the operating costs, DOE discounted future operating costs to the time of purchase and summed them over the lifetime of the product. The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost (normally higher) by the change in average annual operating cost (normally lower) that results from the more efficient standard.

For any given efficiency or energy use level, DOE measures the PBP and the change in LCC relative to an estimated base-case product efficiency or energy use level. The base-case estimate reflects the market without new or amended mandatory energy conservation standards, including the market for products that exceed the current energy conservation standards.

Inputs to the calculation of total installed cost include the cost of the product—which includes MSPs, distribution channel markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs, product lifetimes, discount rates, and the year that proposed standards take effect. To account for uncertainty and variability, DOE created value distributions for selected inputs, including: operating hours, electricity prices, discount rates and sales tax rates, and disposal costs. For example, DOE created a probability distribution of annual energy consumption in its energy use analysis, based in part on a range of annual operating hours. The operating hour distributions capture variation across census divisions and large States, building types, and lamp-and-ballast systems for three sectors (commercial, industrial, and residential). In contrast, ballast MSPs were specific to the representative ballast designs evaluated in DOE's engineering analysis; and price markups were based on limited publicly available financial data. Consequently, DOE used discrete values instead of distributions for these inputs.

The computer model DOE uses to calculate the LCC and PBP, which incorporates Crystal Ball (a commercially available software program), relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and ballast user samples, performing more than 10,000 iterations per simulation run. The NOPR TSD chapter 8 and its appendices provide details on the spreadsheet model and of all the inputs to the LCC and PBP analyses.

Table V.5 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations for the preliminary TSD as well as the changes made for today's NOPR. The subsections that follow discuss the initial inputs and DOE's changes to them. In addition, as noted in section 0 "Issues on Which DOE Seeks Comment", DOE seeks comment on the appropriateness of including T12 ballasts in the baseline analysis for life cycle costs.

TABLE V.5—SUMMARY OF INPUTS AND KEY ASSUMPTIONS IN THE LCC AND PBP ANALYSES*

Inputs	Preliminary TSD	Changes for the proposed rule
Product Cost	Derived by multiplying ballast MSPs by distribution channel markups and sales tax.	No change.
Installation Cost	Derived costs using estimated labor times, and applicable labor rates from *RS Means Electrical Cost Data* (2007) and U.S. Bureau of Labor Statistics.	Updated labor rates from 2008$ to 2009$.
Annual Energy Use	Determined operating hours by associating building type-specific operating hours with regional distributions of various building types using lighting market and building energy consumption survey data (see section 0 above).	Used the most recent available versions of building energy consumption survey data: LMC (2002), CBECS (2003), MECS (2006), and RECS (2005).
Energy Prices	Electricity: Based on EIA's Form 861 data for 2007 Variability: Regional energy prices determined for 13 regions.	Electricity: Updated using Form 826 data for 2009. Variability: Energy prices determined at state level.

TABLE V.5—SUMMARY OF INPUTS AND KEY ASSUMPTIONS IN THE LCC AND PBP ANALYSES*—Continued

Inputs	Preliminary TSD	Changes for the proposed rule
Energy Price Projections	Forecasted using Annual Energy Outlook 2009 *AEO2009*.	Forecasts updated using *AEO2010*.
Replacement and Disposal Costs	Commercial/Industrial: Included labor and materials costs for lamp replacement, and disposal costs for failed lamps. Residential: Included only materials cost for lamps, with no lamp disposal costs.	Updated labor rates from 2008$ to 2009$. Variability: Assumed commercial and industrial consumers pay recycling costs in approximately 30 percent of lamp failures and 5 percent of ballast failures.
Product Lifetime	Ballasts: Lifetime based on average lifetimes from the 2000 Ballast Rule (and used in the 2009 Lamps Rule). Lamps: assumed as 91 percent–94 percent of rated life, to account for lamp type and relamping practices.	No change.
Discount Rates	Commercial/Industrial: Estimated cost of capital to affected firms and industries; developed weighted average of the cost to the company of equity and debt financing. Residential: Estimated by examining all possible debt or asset classes that might be used to purchase ballasts.	Variability: Developed a distribution of discount rates for each end-use sector.
Compliance Date of Standards	2014	No change.
Ballast Purchasing Events	Assessed two events: Ballast failure and new construction/renovation.	No change.

* References for the data sources mentioned in this table are provided in the sections following the table or in chapter 8 of the NOPR TSD.

1. Product Cost

To calculate consumer product costs, DOE multiplied the MSPs developed in the engineering analysis by the distribution channel markups described above (along with sales taxes). DOE used different markups for baseline products and higher-efficiency products, because the markups estimated for incremental costs differ from those estimated for baseline models. In response to comments on the preliminary TSD, DOE's revised analysis included a distribution channel with corresponding markups for residential ballasts.

On February 22, 2011, DOE published a Notice of Data Availability (NODA, 76 FR 9696) stating that DOE may consider improving regulatory analysis by addressing equipment price trends. Consistent with the NODA, DOE examined historical producer price indices (PPI) for fluorescent ballasts and found both positive and negative real price trends depending on the specific time period examined. Therefore, in the absence of a definitive trend, DOE assumes in its price forecasts for this NOPR that the real prices of fluorescent ballasts are constant in time and that fluorescent ballast prices will trend the same way as prices in the economy as a whole. DOE is aware that there have been significant changes in both the regulatory environment and mix of fluorescent ballast technologies during this period that create analytical challenges for estimating longer-term product price trends from the product-specific PPI data. DOE performed price trends sensitivity calculations to examine the dependence of the analysis results on different analytical assumptions. A more detailed discussion of price trend modeling and calculations is provided in Appendix 8A of the TSD. DOE invites comment on methods to improve its equipment price forecasting for fluorescent lamp ballasts beyond the assumption of constant real prices, as well as any data supporting alternate methods.

2. Installation Cost

The installation cost is the total cost to the consumer to install the equipment, excluding the marked-up consumer product price. Installation costs include labor, overhead, and any miscellaneous materials and parts. As detailed in the preliminary TSD, DOE considered the total installed cost of a lamp-and-ballast system to be the consumer product price (including sales taxes) plus the installation cost. DOE applied installation costs to lamp-and-ballast systems installed in the commercial and industrial sectors, treating an installation cost as the product of the average labor rate and the time needed for installation. Using the same approach, DOE assumed that residential consumers must pay for the installation of a fixture containing a lamp-and-ballast system, and calculated installation price in the same manner.

3. Annual Energy Use

As discussed above, DOE estimated the annual energy use of representative lamp-and-ballast systems using system input power ratings and sector operating hours. The annual energy use inputs to the LCC and PBP analyses are based on average annual operating hours, whereas the Monte Carlo simulation draws on a distribution of annual operating hours to determine annual energy use.

4. Energy Prices

For the LCC and PBP, DOE derived average energy prices for 13 U.S. geographic areas consisting of the nine census divisions, with four large States (New York, Florida, Texas, and California) treated separately. For census divisions containing one of these large States, DOE calculated the regional average excluding the data for the large State. The derivation of prices was based on data from EIA Form 861, "Annual Electric Power Industry Database," and EIA Form 826, "Monthly Electric Utility Sales and Revenue Data."

5. Energy Price Projections

To estimate the trends in energy prices for the preliminary TSD, DOE used the price forecasts in *AEO2009*. To arrive at prices in future years, DOE multiplied current average prices by the forecast of annual average price changes in *AEO2009*. Because *AEO2009* forecasts prices to 2035, DOE followed past EIA guidelines and used the average rate of change from 2020 to 2035 to estimate the price trend for electricity after 2035. For today's proposed rule, DOE used the same approach, but updated its energy price

forecasts using *AEO2010.* DOE intends to update its energy price forecasts for the final rule based on the latest available *AEO.* In addition, the spreadsheet tools that DOE used to conduct the LCC and PBP analyses allow users to select price forecasts from *AEO's* low-growth, high-growth, and reference case scenarios to estimate the sensitivity of the LCC and PBP to different energy price forecasts.

The California Utilities commented that DOE should address the time-dependent value of energy to account for the potentially higher value of energy savings that occur during peak demand periods. (California Utilities, No. 30 at p. 5) DOE acknowledges that using peak and off-peak electricity prices in estimating the value of energy savings is consistent with using marginal electricity prices to assign value to energy savings, with the assumption that standards reduce energy consumption at the margin. A 1999 DOE report presents a procedure for deriving marginal prices for rulemaking and compares resulting marginal prices to average prices in the commercial and residential sectors.[33] Even though the variation in differences between marginal and average prices was high (from −85 percent to 51 percent), marginal prices were lower than average prices by 5.2 percent on average; the median value for the difference was 3.3 percent. For the proposed rule, DOE's analytical tools allow users to select between the low, high, and reference case scenario *AEO.* DOE believes this approach captures variation in energy prices (and in the value of energy savings) within a range similar to the difference between marginal and average prices.

6. Replacement and Disposal Costs

In its preliminary TSD, DOE addressed lamp replacements occurring within the analysis period as part of operating costs for considered lamp-and-ballast system designs. Replacement costs in the commercial and industrial sectors included the labor and materials costs associated with replacing a lamp at the end of its lifetime, discounted to $2011. For the residential sector, DOE assumed that consumers would install their own replacement lamps and incur no related labor costs.

Some consumers recycle failed lamps and ballasts, thus incurring a disposal cost. In its research, DOE found average disposal costs of 10 cents per linear foot for GSFL and $3.50 for each ballast.[34] A 2004 report by the Association of Lighting and Mercury Recyclers noted that approximately 30 percent of lamps used by businesses and 2 percent of lamps in the residential sector are recycled nationwide.[35] Consistent with the 2009 Lamps Rule, DOE considered the 30-percent lamp-recycling rate to be significant and incorporated lamp disposal costs into the LCC analysis for commercial and industrial consumers. DOE was not able to obtain ballast recycling rate data, but assumed that higher disposal costs would largely discourage voluntary ballast recycling by commercial and industrial consumers, and did not include ballast disposal costs in the LCC analysis. Given the very low (2 percent) estimated lamp recycling rate in the residential sector, DOE assumed that residential consumers would be even less likely to voluntarily incur the higher disposal costs for ballasts. Therefore, DOE excluded the disposal costs for lamps or ballasts from the LCC analysis for residential ballast designs.

DOE received no comments on the preliminary TSD concerning these assumed recycling rates, disposal costs, and their application in the LCC analysis. The Monte Carlo simulation for the proposed rule allowed DOE to examine variability in recycling practices; consequently, DOE assumed that commercial and industrial consumers pay recycling costs in 5 percent of ballast failures—as well as the 30 percent of lamp failures assumed in the LCC analysis. As in the LCC analysis, DOE assumed that residential lamp and ballast disposal rates were insignificant, and excluded the related disposal costs from the Monte Carlo simulation for residential ballast designs.

7. Product Lifetime

Chapter 8 of the preliminary TSD detailed DOE's basis for average ballast lifetimes, which were based on assumptions used in the 2000 Ballast Rule and the 2009 Lamps Rule. For ballasts in the commercial and industrial sectors, DOE used an average ballast lifetime of 49,054 hours that, when combined the respective average annual operating hours, yielded average ballast lifetimes of approximately 13 years and 10 years, respectively. Consistent with the 2000 Ballast Rule and the 2009 Lamps Rule, DOE assumed an average ballast lifetime of approximately 15 years in the residential sector, which corresponds with 11,835 hours total on an assumed 789 hours per year operating schedule. To account for a range of group and spot relamping practices, DOE assumed that lamps operated, on average, for 91 percent–94 percent of rated life, depending on lamp type.

DOE received several general comments on ballast design and lifetime. Philips and NEMA noted that lead-free solder used per RoHS directives could affect ballast lifetime, but that its effects on reliability were still largely unknown. (Philips, Public Meeting Transcript, No. 8 at p. 187; NEMA, No. 29 at p. 14) Philips agreed with DOE's assumption that lifetime would not increase with more efficient ballast designs, based in part on the trend toward smaller luminaires and higher operating temperatures. (Philips, Public Meeting Transcript, No. 18 at pp. 231–232) In contrast, the NEEA and NPCC saw no reason to assume that ballast lifetime would be affected by luminaire or ballast enclosure size, but conceded that related ballast failure data is limited. (NEEA and NPCC, No. 32 at p. 8) There was general agreement that ballast lifetime can vary widely and encompasses both physical failure and economic lifetime (*e.g.,* replacement of functioning ballasts due to retrofits). (NEMA, Public Meeting Transcript, No. 20 at pp. 244–246; NEEA and NPCC, No. 32 at p. 8) However, NEMA agreed with DOE's assumed average ballast lifetimes of 10 − 15 years used in the LCC analysis. (NEMA, No. 29 at p. 14)

Based on comments received to date, DOE believes that its assumed average ballast lifetimes are appropriate and applied these lifetimes in the LCC analysis for today's proposed rule. DOE also agrees that ballast lifetimes can vary due to both physical failure and economic factors (*e.g.,* early replacements due to retrofits). Consequently, DOE accounted for variability in lifetime in LCC and PBP via the Monte Carlo simulation, and in the shipments and NIA analyses by assuming a Weibull distribution for lifetimes to accommodate failures and replacement.

8. Discount Rates

The discount rate is the rate at which future expenditures are discounted to estimate their present value. In its preliminary TSD, DOE derived separate discount rates for commercial,

[33] U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy. *Marginal Energy Prices Report.* July 1999. Available at *http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/marg_eprice_0799.pdf.*

[34] Environmental Health and Safety Online's fluorescent lights and lighting disposal and recycling Web page—Recycling Costs. Available at *http://www.ehso.com/fluoresc.php.* (Last accessed Sept. 26, 2010.)

[35] Association of Lighting and Mercury Recyclers, "National Mercury-Lamp Recycling Rate and Availability of Lamp Recycling Services in the U.S." Nov. 2004.

industrial, and residential consumers. For commercial and industrial consumers, DOE estimated the cost of capital to affected firms and industries, from which it developed a weighted average of the cost to the company of equity and debt financing. DOE estimated the discount rate for residential consumers by looking across all possible debt or asset classes that might be used to purchase ballasts. For the proposed rule, DOE also developed a distribution of discount rates for each end-use sector from which the Monte Carlo simulation samples.

For the industrial and commercial sectors, DOE assembled data on debt interest rates and the cost of equity capital for representative firms that use ballasts. DOE determined a distribution of the weighted-average cost of capital for each class of potential owners using data from the Damodaran online financial database.[36] DOE used the same distribution of discount rates for the commercial and industrial sectors. The average discount rates in DOE's analysis, weighted by the shares of each rate value in the sectoral distributions, are 6.86 percent for commercial end users and 7.15 percent for industrial end users.

For the residential sector, DOE assembled a distribution of interest or return rates on various equity investments and debt types from a variety of financial sources, including the Federal Reserve Board's "Survey of Consumer Finances" (SCF) in 1989, 1992, 1995, 1998, 2001, and 2004. DOE added 2007 SCF data for today's proposed rule and assigned weights in the distribution based on the shares of each financial instrument in household financial holdings according to SCF data. The weighted-average discount rate for residential product owners is 5.55 percent.

In response to the preliminary LCC analysis, NEMA commented that DOE should examine the effects of applying higher discount rates to the value of projected energy savings, contending that consumers will discount future benefits heavily and place greater emphasis on a product's first cost. (NEMA, Public Meeting Transcript, No. 2 at p. 251) DOE believes that its weighted-average discount rates are representative and appropriate for the LCC analysis because they are grounded in a vetted, transparent methodology and publicly-available financial data. DOE lacks a defensible basis for estimating a representative, individual discount rate, which would vary significantly by company and product type. However, DOE also considered a distribution of discount rates (lower and higher than the average) in its Monte Carlo simulation for today's proposed rule.

[36] The data are available at *http://pages.stern.nyu.edu/~adamodar.*

9. Compliance Date of Standards

The compliance date is the date when a covered product is required to meet a new or amended standard. EPCA requires that any amended standards established in this rule apply to products manufactured after a date that is five years after—(i) the effective date of the previous amendment; or (ii) if the previous final rule did not amend the standards, the earliest date by which a previous amendment could have been effective; except that in no case may any amended standard apply to products manufactured within three years after publication of the final rule establishing such amended standard. (42 U.S.C. 6295(g)(7)(C)). DOE is required by consent decree to publish any amended standards for ballasts by June 30, 2011. As a result, and in compliance with 42 U.S.C. 6295(g)(7)(C), DOE expects the compliance date to be three years after the publication of any final amended standards, by June 30, 2014. DOE received no comments on its expected effective date of June 2014 and calculated the LCC for all end users as if each one would purchase a new ballast in the year compliance with the standard is required.

10. Ballast Purchasing Events

DOE designed the LCC and PBP analyses for this rulemaking around scenarios where consumers need to purchase a ballast. Each of these events may give the consumer a different set of ballast or lamp-and-ballast designs and, therefore, a different set of LCC savings for a certain efficiency level. The two scenarios were (1) ballast failure and (2) new construction/renovation. In the ballast failure scenario, DOE assumed that the consumer would generally select a standards-compliant lamp-and-ballast combination such that the system light output never drops below 10 percent of the baseline system. For new construction/renovation, DOE assumed that consumers were not constrained by existing fixture layouts, and could design a new installation that matched the overall light output of a base-case system, independent of individual system light output. DOE used rated system input power to calculate annual energy use for the ballast failure scenario. For new construction/renovation, DOE used normalized system input power, adjusted to yield equivalent light output from both the base-case and substitute systems.

The California Utilities stated that failure replacements were rare and commented that DOE should include a separate ballast purchasing event for retrofits in its LCC analysis, as the California Utilities consider that the more common purchasing event. (California Utilities, No. 30 at p. 4) In its review of available studies and *EIA* data, DOE found that predicted retrofit rates for the nation were comparatively low (*i.e.,* less than 5 percent). DOE assumes that retrofit rates in areas with utility incentive programs would typically be higher; however, DOE could not substantiate extending these higher retrofit rates to all consumers and therefore did not consider a separate retrofit scenario in its LCC analysis.

As discussed in section 0 above, the California Utilities and the NEEA and NPCC and the California Utilities believe that DOE was incorrect in assuming consumers would not be able to normalize individual system light output in a ballast failure replacement scenario. Both sets of commenters contended that ballast designs will be available that maintain efficiency across different ballast factors and system light outputs. The California Utilities also noted that users can also maintain system light output by adjusting the number of lamps, lamp type, or fixture reflectors. To simplify the analysis, the NEEA and NPCC suggested that DOE should analyze normalized system input power in all scenarios. (California Utilities, No. 30 at pp. 3–5; NEEA and NPCC, No. 32 at pp. 6–7) Philips disagreed that light output could be maintained in all substitution cases. (Philips, Public Meeting Transcript, No. 34 at p. 227)

For this NOPR, DOE maintained the input power distinction (*i.e.,* rated versus normalized) for purchasing scenarios in the LCC analysis, which it believes reflects product offerings facing the individual consumer in the near term (*i.e.,* 2014). With the exception of system input power, the ballast failure and new construction/renovation scenarios differ only slightly, with the latter scenario requiring an additional 2.5 minutes of labor for installing a luminaire disconnect. The results for the new construction/renovation scenario could, therefore, be considered similar to a ballast failure replacement scenario based on normalized system input power. For the proposed rule, DOE used normalized system input power only in the NIA, for reasons discussed in section 0 below.

C. National Impact Analysis—National Energy Savings and Net Present Value Analysis

DOE's NIA assessed the national energy savings (NES) and the national net present value (NPV) of total consumer costs and savings that they would be expect to result from new or amended standards at specific efficiency levels. ("Consumer" in this context refers to consumers of the regulated product.)

DOE used an MS Excel spreadsheet model to calculate the energy savings and the national consumer costs and savings from each TSL. In addition, the TSD and other documentation that DOE provides during the rulemaking help explain the models and how to use them, allowing interested parties to review DOE's analyses by changing various input quantities within the spreadsheet.

DOE used the NIA spreadsheet to calculate the NES and NPV, based on the annual energy consumption and total installed cost data from the energy use and LCC analyses. DOE forecasted the energy savings, energy cost savings, product costs, and NPV of consumer benefits for each product class for products sold from 2014 through 2043. The forecasts provided annual and cumulative values for all four output parameters. DOE examines sensitivities in the NIA by analyzing different efficiency scenarios, such as Roll-up and Shift.

DOE evaluated the impacts of new and amended standards for ballasts by comparing base-case projections with standards-case projections. The base-case projections characterize energy use and consumer costs for each product class in the absence of new or amended energy conservation standards. DOE compared these projections with projections characterizing the market for each product class if DOE adopted new or amended standards at specific energy efficiency levels (*i.e.,* the TSLs or standards cases) for that class. In characterizing the base and standards cases, DOE considers historical shipments, the mix of efficiencies sold in the absence of new standards, and how that mix may change over time. Additional information about the NIA spreadsheet is in NOPR TSD chapter 11.

Table V.6 summarizes the approach and data DOE used to derive the inputs to the NES and NPV analyses for the preliminary TSD, as well as the changes to the analyses for the proposed rule. A discussion of selected inputs and changes follows. See chapter 11 of the NOPR TSD for further details.

TABLE V.6—APPROACH AND DATA USED FOR NATIONAL ENERGY SAVINGS AND CONSUMER NET PRESENT VALUE ANALYSES

Inputs	Preliminary TSD	Changes for the proposed rule
Shipments	Derived annual shipments from shipments model.	*See* Table V.7.
Compliance Date of Standard	2014	No change.
Annual Energy Consumption per Unit	Established in the energy use characterization (preliminary TSD chapter 6).	Energy use characterization updated using most recent available inputs; based annual unit energy consumption on normalized system input power.
Rebound Effect	1 percent in commercial and industrial sectors, 8.5 percent in residential sector.	No change.
Electricity Price Forecast	*AEO2008*	*AEO2010*.
Energy Site-to-Source Conversion Factor	Used average conversion factors based on *AEO2008*.	Used marginal conversion factors generated by NEMS–BT; factors held constant after 2035.
Discount Rate	3% and 7% real	No change.
Present Year	2009	2011.

1. Annual Energy Consumption per Unit

As discussed in section 0 above, the California Utilities and the NEEA and NPCC suggested that both individual ballast failure replacements and system installations for new construction/renovation could be normalized for light output at any given efficiency level. This could be accomplished through foreseeable ballast design options and/or lighting system modifications (*e.g.,* number of lamps, lamp type, or fixture reflector). NEEA and NPCC contended that DOE could then simplify its analyses by applying normalized system input power throughout. (California Utilities, No. 30 at pp. 3–5; NEEA and NPCC, No. 32 at pp. 6–7)

In its preliminary analysis, DOE used both rated and normalized system input power in determining the annual unit energy consumption for the NIA. As in the LCC analysis, ballast shipments for failure replacements were assigned rated system input power, and this assumption was applied across the entire 30-year analysis period. DOE agrees that the lighting system modifications noted by the California Utilities can have the practical effect of normalizing light output for individual replacement systems. Therefore, DOE believes that normalized system input power provides a reasonable basis for estimating future energy savings.

For the proposed rule, DOE revised the shipments and NIA spreadsheet models to reflect the revised product class structure, and provide increased flexibility and transparency for the spreadsheet user. Using only normalized system input power also simplified the accounting functions within the NIA model, compared to the combined (rated and normalized input power) approach used in the preliminary analysis.

DOE also examined the relative effects of applying normalized versus rated input power in determining energy savings. Normalizing the input power of replacement systems typically reduces the differences in input power between the baseline system and replacement systems; consequently, DOE found that normalized values resulted in lower energy savings estimates than those based on rated input power. However, DOE believes that the differences in estimated NES between a normalized-only and combined approach would be minor, particularly compared to the range of NES bounded by DOE's two ballast shipment scenarios (existing and emerging technologies, discussed in section 0 below).

In summary, DOE believes that its revised NIA using normalized system input power produces a range of estimated NES that captures the

potential—and significant—energy savings for ballasts.

2. Shipments

Product shipments are an important component of any estimate of the future impact of a standard. Using a three-step process, DOE developed the shipments portion of the NIA spreadsheet, a model that uses historical data as a basis for projecting future ballast shipments. First, DOE used 1990–2005 shipment data from the U.S. Census Bureau to estimate the total historical shipments for each ballast type analyzed. Second, DOE calculated an installed stock for each ballast type based on an assumed service lifetime distribution. Third, by modeling ballast market segments (*i.e.,* purchasing events) and applying growth rate, lifetime distribution, and emerging technologies penetration rate assumptions, DOE developed annual shipment projections for the analysis period 2014–2043. In projecting ballast shipments, DOE accounted for two market segments: (1) Replacement of failed equipment and (2) retrofits/renovation and new construction. Table V.7 summarizes the approach and data DOE used to derive the inputs to the shipments analysis for the preliminary TSD and the changes DOE made for today's proposed rule. A discussion of these inputs and changes follows. For details on the shipments analysis, *see* chapter 10 of the NOPR TSD.

TABLE V.7—APPROACH AND DATA USED FOR THE SHIPMENTS ANALYSIS

Inputs	Preliminary TSD	Changes for the proposed rule
Historical Shipments	Used historical shipments for 1990–2005 to develop shipments and stock projections for the analysis period; growth pattern exhibited oscillations in shipments projections for some ballast types.	Used same historical data and changed lifetime distribution and growth assumptions, mitigating oscillations in shipment projections.
Ballast Stock	Based projections on the shipments that survive up to a given date; assumed simplified lifetime distribution.	No change for projection methodology; assumed Weibull lifetime distribution.
Growth	Assumed the same growth rate for commercial/industrial and residential floorspace.	Updated using 2010 *AEO* projections for floorspace growth.
Base Case Scenarios	Analyzed both existing technology and emerging technology scenarios.	No change.
Standards Case Scenarios	Analyzed Shift and Roll-up scenarios based on both existing and emerging technology cases.	No change.

a. Historical Shipments

For the preliminary TSD, DOE used U.S. Census Bureau Current Industrial Reports (CIR) to estimate historical shipments for affected ballast designs. The census CIR data cover the period 1990–2005 and contain NEMA shipments for individual ballast designs (*e.g.,* 2-lamp F96T8), as well as aggregated shipments for multiple designs to prevent disclosing data for individual companies. For some ballast designs, the CIR withheld shipments data entirely to avoid disclosing data for individual companies.

For CIR reporting years for which specific shipments data were aggregated or unavailable, DOE estimated historical shipments using trends within the available data and/or market trends identified in ballast manufacturer interviews, the 2009 Lamps Rule, and the 2000 Ballast Rule. DOE then increased these estimates to account for the volume of ballasts that non-NEMA companies import or manufacture. To validate its estimation methods for the preliminary TSD, DOE requested historical ballast and residential fixture shipments from NEMA, but was unable to obtain these data due to confidentiality concerns of some affected manufacturers.

In their comments on the preliminary shipments analysis, the NEEA and NPCC noted that census CIR data are incomplete, do not address non-NEMA shipments, and should not be relied on if their deficiencies cannot be remedied. (NEEA and NPCC, No. 32 at p. 10) NEMA agreed in general with DOE's modeled shipment trends in the preliminary TSD. (NEMA, No. 29 at p. 15) DOE acknowledges the shortcomings of CIR data, which are truncated at 2005 (the U.S. Census Bureau discontinued ballast CIR reports in 2006), but believes that census data are the only practical basis for estimating shipments because actual shipments data are either withheld by manufacturers due to confidentiality concerns or not retained in company records, as discussed below. DOE also notes that it accounted for imports and other non-NEMA manufacturers in its preliminary historical shipments analysis, and provides additional discussion in chapter 10 of the NOPR TSD.

To validate its NOPR analysis, DOE again requested historical ballast shipment data from NEMA, but was informed that neither NEMA nor its member companies typically retain data of the vintage in question (1990–2005). Where possible, DOE refined its historical shipment estimates with additional data collected in manufacturer interviews during the NOPR analysis. Based on review of available data and NEMA's general validation of the preliminary shipments model, DOE concludes that census data remain the most reasonable basis for estimating historical ballast shipments, and retains this approach for today's proposed rulemaking.

b. Ballast Stock Projections

In its preliminary shipments analysis, DOE calculated the installed ballast stock using historical shipments estimated from U.S. Census Bureau CIR data (1990–2005) and projected shipments for future years. DOE typically estimates the installed stock during the analysis period by taking ballast shipments and calculating how many will survive up to a given year based on a lifetime distribution for each ballast type. The estimated historical shipments for electronic ballasts exhibited striking growth in 1990–2005, a trend not consistent with a mature market. For the preliminary TSD, DOE reasoned that this significant growth in shipments did not translate to equivalent growth in ballast stock, assuming instead a 2-percent annual growth rate in shipments for new construction and attributing the additional shipments to retrofits.

NEMA, as well as the NEEA and NPCC, questioned attributing the

historical growth in electronic ballast shipments to retrofits, rather than of absolute growth in ballast stock. (NEMA, Public Meeting Transcript, No. 7 at p. 248; NEEA and NPCC, No. 32 at p. 9) NEMA contended that strong growth in non-residential construction explained a larger share of new ballast demand than assumed by DOE. (NEMA, Public Meeting Transcript, No. 14 at p. 248) Philips noted that DOE did not account for a corresponding decline in shipments of magnetic ballasts during the period 1990–2005. (Philips, Public Meeting Transcript, No. 6 and No. 15 at p. 244) However, commenters also acknowledged the continuing influence of retrofits driven by utility incentive programs and new lighting technologies. (NEEA and NPCC, Public Meeting Transcript, No. 20 at pp. 246–247; NEMA, Public Meeting Transcript, No. 11 at p. 248)

In its revised analysis, DOE examined census data for ballast shipments and confirmed that magnetic ballast shipments declined significantly in 1990–2005, corresponding with the increase in electronic ballast shipments during the same period. These trends suggest that electronic ballasts (*e.g.,* for 4-foot MBP T8 systems) were eroding shipments of magnetic ballasts (*e.g.,* for 4-foot MBP T12 systems) for retrofits and new construction. Available data do not support NEMA's claim of strong non-residential construction growth in 1990–2005; according to EIA estimates (*e.g.,* in *AEO1996* and *AEO2000*), commercial floorspace growth averaged approximately 1.35 percent annually during this period. A recent DOE lighting report suggests that replacements of failed lighting equipment and lighting retrofits contribute more to shipments than new construction.[37] Based on available information, DOE maintains that the growth rate for historical ballast stock was less than the growth rate for historical shipments of electronic ballasts, which instead reflected a market transition from magnetic to electronic ballasts.

c. Projected Shipments

By modeling ballast market segments and applying lifetime distribution, growth and emerging technologies penetration rate assumptions, and efficiency scenarios, DOE developed annual shipment projections for the analysis period (2014–2043). DOE could not obtain historical ballast shipments data from NEMA to validate its preliminary or NOPR analyses; however, NEMA agreed with DOE's preliminary TSD shipment trends and emerging technology forecasts in general. (NEMA, No. 29 at p. 2; NEMA No. 29 at p. 15) The subsections below address the lifetime, emerging technology, market trend, and efficiency scenario issues that DOE considered in its shipments analysis for the proposed rule.

i. Shipment Patterns and Ballast Lifetime Assumptions

Estimated historical shipments varied from year to year and, when combined with preliminary assumptions for ballast lifetimes, lifetime distributions and floorspace growth, produced periodic oscillations in shipment projections for some ballast types (*e.g.,* ballasts operating 4-foot MBP T8 lamps). For the preliminary TSD, DOE assumed that ballast lifetimes were distributed across the last 3 years of the average physical lifetime for each analyzed ballast type.

DOE received multiple comments regarding the oscillations in its preliminary shipment projections and its underlying assumptions about average ballast lifetimes and lifetime distributions. NEMA commented that the oscillations were too pronounced to be attributed to historical market trends or ballast performance. (NEMA, Public Meeting Transcript, No. 18 at pp. 248–249) The NEEA and NPCC agreed with NEMA that the oscillations were not realistic and suggested that the shipment patterns might stem from DOE's narrow assumed lifetime distributions. (NEEA and NPCC, No. 32 at p. 8) NEMA agreed with DOE's assumed average physical lifetimes for ballasts, but other commenters noted that ballast lifetime distributions should encompass "economic lifetime" (*e.g.,* retrofits of functioning ballasts) as well as physical lifetime (*e.g.,* replacement of failed ballasts). (NEMA, No. 29 at p. 14; Philips, Public Meeting Transcript, No. 25 at pp. 245–246; NEEA and NPCC, No. 32 at p. 9)

DOE agrees that its preliminary ballast shipment projections did not account for a sufficient range of economic and physical lifetimes. In its revised shipment analysis, DOE retained the original average physical lifetimes and used Weibull distributions for ballast lifetimes to better accommodate failures and retrofits. In combination with DOE's revised growth assumptions, the expanded lifetime distributions largely eliminated the pronounced shipment oscillations seen for some ballast types in the preliminary TSD.

ii. Emerging Technology Shipment Forecasts

In its preliminary TSD, DOE modeled the impacts of emerging solid-state lighting (SSL) technologies on shipments of analyzed ballasts used in the commercial sector (*e.g.,* ballasts operating 4-foot MBP T8 lamps). Philips commented that some projections showed SSL technologies capturing as much as 50 percent of the lighting market within 10 years. (Philips, Public Meeting Transcript, No. 22 at pp. 18–19) NEMA agreed with the overall trends in DOE's emerging technology shipment forecasts (excluding oscillations); however, Philips noted that DOE had not included sign ballasts in the same forecasts. (NEMA, No. 29 at p. 2; Philips, Public Meeting Transcript, No. 24 at pp. 234–235) While acknowledging some SSL market penetration, the NEEA and NPCC contended that fluorescent technologies would retain a large share of the signage market, particularly in backlighting applications. (NEEA and NPCC, No. 32 at p. 3)

For its revised shipments analysis, DOE retained its original emerging technology assumptions, with SSL penetration increasing to a maximum of 40 percent by 2028, resulting in decreased shipments for affected ballast types. DOE added sign ballasts to its revised emerging technology shipment forecasts, but agrees that SSL will have only limited penetration of backlit signage applications that currently use linear fluorescent sources based on DOE's previous research of SSL niche applications, which indicated that SSL is viable for neon and channel letter signage but is not yet suitable for fluorescent backlighting applications. Consequently, DOE assumed lower SSL penetration for sign ballast shipments, increasing to a maximum of 20 percent by 2028.

iii. Anticipated Market Trends

DOE also received comments about anticipated market trends for the period 2014–2043, addressing utility incentive programs, ballast replacement options, and new construction and renovation. NEEA and NPCC observed that utility incentive programs have driven lighting retrofits for many years and suggested that this trend would continue as more locations adopted incentive programs. (NEEA and NPCC, No. 32 at p. 9) NEEA and NPCC also commented that (1) new commercial construction will remain depressed but will be accompanied by an upsurge in major renovation and

[37] U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy. *Energy Savings Potential of Solid-State Lighting in General Illumination Applications, 2010 to 2030.* February 2010. Available at *http://apps1.eere.energy.gov/buildings/publications/pdfs/ssl/ssl_energy-savings-report_10-30.pdf.*

lighting retrofits, and (2) overall ballast shipments may hold steady, exclusive of emerging technology penetration. (NEEA and NPCC, No. 32 at p. 10) At the same time, NEEA and NPCC were concerned that DOE lacked adequate market data to apportion ballast shipments between failure replacements and retrofits/new construction; further, they suggested that DOE should eliminate these distinctions if they have significant effects on selection of TSLs or final standards. (NEEA and NPCC, No. 32 at p. 7) However, NEMA supported DOE's assumption that replacements would dominate future shipments of these ballasts, contending that the majority of building owners that already use T8 fluorescent systems would not retrofit their fixtures. (NEMA, Public Meeting Transcript, No. 10 at p. 250) The NEEA and NPCC believed that the market for ballasts in the residential sector would grow substantially as residential energy codes became more stringent and contended that DOE underestimated the associated savings potential for this product class. (NEEA and NPCC, No. 32 at pp. 2–3)

DOE agrees that retrofits (incentive-induced, efficiency-induced, or both) will continue to contribute to future ballast shipments. For owners of existing improved lighting systems (*e.g.,* 4-foot MBP T8, commercial sector), DOE agrees that these consumers will be less likely to retrofit their systems than to replace failed ballasts in kind because incremental efficiency gains would not justify the expense of system retrofits. DOE's research of available economic data also indicates that new commercial construction will remain relatively flat during the period 2014–2043. DOE agrees that residential energy codes will drive the market toward higher efficacy lighting systems, such as fluorescent; however, DOE believes that the related market growth will be greater for CFL-based fixtures than for 4-foot MBP fluorescent systems. DOE's review of available residential fixture surveys confirms that linear fluorescent fixtures are typically relegated to utility room, laundry, and some kitchen applications. Recent California tracking reports for residential lamps no longer address linear fluorescent lamps, given the dramatically increased adoption of screw- base CFLs, and a comparison of residential lighting data for 2005 [38] and 2009 [39] shows no significantly increased penetration for linear fluorescent systems. Viewing these trends in combination, DOE believes it has a reasonable basis for the market segments underlying its shipment projections (*i.e.,* replacements of failed ballasts, retrofits, and new construction), and believes that these trends will contribute to modest future growth in ballast shipments and stock (exclusive of SSL penetration).

iv. Efficiency Scenarios

Several of the inputs for determining NES (*e.g.,* the annual energy consumption per unit) and NPV (*e.g.,* the total annual installed cost and the total annual operating cost savings) depend on product efficiency. For the preliminary analysis, DOE developed two shipment efficiency scenarios: "Roll-up" and "Shift." The Roll-up scenario represents a standards case in which all product efficiencies in the base case that do not meet the standard would roll up to meet the new standard level. Consumers in the base case who purchase ballasts above the standard level are not affected as they are assumed to continue to purchase the same base-case ballast or lamp-and-ballast system. The Roll-up scenario characterizes consumers primarily driven by the first-cost of the analyzed products.

In contrast, the Shift scenario models a standards case in which the standard affects all base-case consumer purchases (regardless of whether their base-case efficiency is below the standard). In this scenario, any consumer may purchase a more efficient ballast, preserving the same relationship to the baseline ballast efficiency. For example, if a consumer purchased a ballast one efficiency level above the baseline, he would do the same after a standard is imposed. For this rulemaking, DOE assumed product efficiencies in the base case that do not meet the standard would roll up to meet the new standard level, as in a roll-up scenario. However, product efficiencies at or above the new standard level would shift to higher efficiency levels. As the standard level increases, market share incrementally accumulates at the highest standard level because it represents max tech (*i.e.,* moving beyond this efficiency level is not achievable with today's technology).

DOE received no comments to the preliminary TSD regarding its Roll-up and Shift efficiency scenarios, and retained this approach for the proposed rule shipments analysis.

3. Site-to-Source Energy Conversion

To estimate the national energy savings expected from appliance standards, DOE uses a multiplicative factor to convert site energy consumption (at the home or commercial building) into primary or source energy consumption (the energy required to convert and deliver the site energy). These conversion factors account for the energy used at power plants to generate electricity and losses in transmission and distribution, as well as for natural gas losses from pipeline leakage and energy used for pumping. For electricity, the conversion factors vary over time due to projected changes in generation sources (*i.e.,* the types of power plants projected to provide electricity to the country). The factors that DOE developed are marginal values, which represent the response of the system to an incremental decrease in consumption associated with appliance standards.

In the ballasts preliminary analysis, DOE used annual site-to-source conversion factors based on the version of NEMS that corresponds to *AEO2009.* For today's NOPR, DOE updated its conversion factors based on the NEMS that corresponds to *AEO2010,* which provides energy forecasts through 2035. For 2036–2043, DOE used conversion factors that remain constant at the 2035 values.

Section 1802 of the Energy Policy Act of 2005 (EPACT 2005) directed DOE to contract a study with the National Academy of Science (NAS) to examine whether the goals of energy efficiency standards are best served by measurement of energy consumed, and efficiency improvements, at the actual point of use or through the use of the full fuel cycle, beginning at the source of energy production. (Pub. L. 109–58 (Aug. 8, 2005)) NAS appointed a committee on "Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards" to conduct the study, which was completed in May 2009. The NAS committee defined full-fuel-cycle (FFC) energy consumption as including, in addition to site energy use, the following: Energy consumed in the extraction, processing, and transport of primary fuels such as coal, oil, and natural gas; energy losses in thermal combustion in power generation plants; and energy losses in transmission and distribution to homes and commercial buildings.[40]

[38] RLW Analytics, "2005 California statewide residential lighting and appliance efficiency saturation study, Final Report." August 2005. Available at: *http://www.calmac.org/.*

[39] Abstract for ongoing KEMA California residential lighting inventory and metering study available at: *http://www.cee1.org/eval/db_pdf/1268.pdf.*

[40] The National Academies, Board on Energy and Environmental Systems, Letter to Dr. John Mizroch, Acting Assistant Secretary, U.S. DOE, Office of EERE from James W. Dally, Chair, Committee on

Continued

In evaluating the merits of using point-of-use and FFC measures, the NAS committee noted that DOE uses what the committee referred to as "extended site" energy consumption to assess the impact of energy use on the economy, energy security, and environmental quality. The extended site measure of energy consumption includes the energy consumed during the generation, transmission, and distribution of electricity; unlike the FFC measure, however, it does not include the energy consumed in extracting, processing, and transporting primary fuels. A majority of the NAS committee concluded that extended site energy consumption understates the total energy consumed to make an appliance operational at the site. As a result, the NAS committee recommended that DOE consider shifting its analytical approach over time to use a FFC measure of energy consumption when assessing national and environmental impacts, especially with respect to the calculation of GHG emissions. The NAS committee also recommended that DOE provide more comprehensive information to the public through labels and other means, such as an enhanced Web site. For those appliances that use multiple fuels (*e.g.,* water heaters), the NAS committee indicated that measuring FFC energy consumption would provide a more complete picture of energy consumption and would allow comparisons across many different appliances as well as an improved assessment of impacts.

In response to the NAS recommendations, DOE issued, on August 20, 2010, a Notice of Proposed Policy proposing to incorporate an FFC analysis into the methods it uses to estimate the likely impacts of energy conservation standards on energy use and emissions. Specifically, DOE proposed to use FFC measures of energy and GHG emissions, rather than the primary (extended site) energy measures it currently uses. Additionally, DOE proposed to work collaboratively with the Federal Trade Commission (FTC) to make FFC energy and GHG emissions data publicly available, which would enable consumers to make cross-class comparisons. On October 7, 2010, DOE held an informal public meeting to discuss and receive comments on its planned approach. The Notice, a transcript of the public meeting and all public comments received by DOE are available at *http://www.regulations.gov/search/Regs/home.html#docketDetail?R=EERE-2010-BT-NOA-0028.* Following the close of the public comment period, DOE intends to develop a final policy statement on these subjects and then take steps to implement that policy in rulemakings and other activities.

Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards, May 15, 2009.

D. Consumer Sub-Group Analysis

In analyzing the potential impact of new or amended standards on consumers, DOE evaluates the impact on identifiable sub-groups of consumers (*e.g.,* low-income households) that a national standard may disproportionately affect. DOE received no comments regarding specific sub-groups and, therefore, evaluated the same sub-groups addressed in the 2009 Lamps Rule, assuming that consumers using GSFL would share similar characteristics with ballast consumers. Specifically, DOE evaluated the following consumer sub-groups for the proposed rule: Low-income households; institutions of religious worship; and institutions that serve low-income populations (*e.g.,* small nonprofits).

The NOPR TSD chapter 12 presents the consumer subgroup analysis.

E. Manufacturer Impact Analysis

1. Overview

DOE performed a manufacturer impact analysis (MIA) to estimate the financial impact of new and amended energy conservation standards on manufacturers of ballasts, and to calculate the impact of such standards on employment and manufacturing capacity. The MIA has both quantitative and qualitative aspects. The quantitative part of the MIA primarily relies on the GRIM, an industry cash-flow model using inputs specific to this rulemaking. The key GRIM inputs are data on the industry cost structure, product costs, shipments, and assumptions about markups and conversion expenditures. The key output is the industry net present value (INPV). Different sets of shipment and markup assumptions (scenarios) will produce different results. The qualitative part of the MIA addresses factors such as product characteristics, characteristics of and impacts on particular sub-groups of firms, as well as important market and product trends. Chapter 13 of the NOPR TSD outlines the complete MIA.

DOE conducted the MIA for this rulemaking in three phases. In Phase 1, Industry Profile, DOE prepared an industry characterization. Phase 2, Industry Cash Flow, focused on the financial aspects of the industry as a whole. In this phase, DOE used the GRIM to prepare an industry cash-flow analysis based on publicly available information gathered in Phase 1. This information enabled DOE to adapt the GRIM structure to analyze the impact of new and amended standards on ballast manufacturers specifically. In Phase 3, Sub-Group Impact Analysis, the Department conducted structured, detailed interviews with a representative cross-section of manufacturers that represent more than 90 percent of domestic ballast sales. During these interviews, DOE discussed engineering, manufacturing, procurement, and financial topics specific to each company, and obtained each manufacturer's view of the industry as a whole. The interviews provided valuable information that the Department used to evaluate the impacts of new and amended standards on manufacturers' cash flows, manufacturing capacities, and employment levels. Each of these phases is discussed in further detail below.

a. Phase 1: Industry Profile

In Phase 1 of the MIA, DOE prepared a profile of the ballast industry based on the market and technology assessment prepared for this rulemaking. Before initiating the detailed impact studies, DOE collected information on the present and past structure and market characteristics of the industry. This information included market share data, product shipments, manufacturer markups, and the cost structure for various manufacturers. The industry profile includes: (1) Further detail on the overall market and product characteristics; (2) estimated manufacturer market shares; (3) financial parameters such as net plant, property, and equipment; selling, general, and administrative (SG&A) expenses; cost of goods sold; and other parameters; and (4) trends in the ballast market, including the number of firms, technology, sourcing decisions, and pricing.

The industry profile included a top-down cost analysis of ballast manufacturers that DOE used to derive preliminary financial inputs for the GRIM (*e.g.,* revenues; material, labor, overhead, and depreciation expenses; SG&A expenses; and research and development (R&D) expenses). DOE also used public sources of information to further calibrate its initial characterization of the industry, including Security and Exchange Commission 10–K filings (available at *http://www.sec.gov*), Standard & Poor's stock reports (available at *http://www2.standardandpoors.com*), and corporate annual reports. DOE

supplemented this public information with data released by privately held companies.

b. Phase 2: Industry Cash-Flow Analysis

Phase 2 of the MIA focused on the financial impacts of the potential new and amended energy conservation standards on the industry as a whole. New or amended energy conservation standards can affect manufacturer cash flow in three distinct ways: (1) By creating a need for increased investment, (2) by raising production costs per unit, and (3) by altering revenue due to higher per-unit prices and possible changes in sales volumes. To quantify these impacts, in Phase 2 DOE used the GRIM to perform a preliminary cash-flow analysis of the ballast industry. In performing this analysis, DOE used the financial values determined during Phase 1 and the shipment scenarios used in the NIA.

c. Phase 3: Sub-Group Impact Analysis

In Phase 3, DOE conducted interviews with manufacturers and refined its preliminary cash-flow analysis. Many of the manufacturers interviewed also participated in interviews for the engineering analysis. As indicated above, the MIA interviews broadened the discussion from primarily technology-related issues to include business-related topics. One key objective for DOE was to obtain feedback from the industry on the assumptions used in the GRIM and to isolate key issues and concerns. *See* section 0 for a description of the key issues manufacturers raised during the interviews.

Using average cost assumptions to develop an industry cash-flow estimate does not adequately assess differential impacts of new or amended standards among manufacturer sub-groups. For example, small manufacturers, niche manufacturers, or manufacturers exhibiting a cost structure that largely differs from the industry average could be more negatively affected. To address this possible impact, DOE used the results of the industry characterization analysis in Phase 1 to group manufacturers that exhibit similar production and cost structure characteristics. Furthermore, interview discussions that focused on financial topics specific to each manufacturer allowed DOE to gauge the potential for differential impacts on any sub-groups of manufacturers.

DOE identified two sub-groups for a separate impact analysis—small manufacturers and sign ballast manufacturers. For its small business manufacturer sub-group analysis DOE used the small business size standards published by the Small Business Administration (SBA) to determine whether a company is considered a small business 65 FR 30836, 30848 (May 15, 2000), as amended at 65 FR 53533, 53544 (Sept. 5, 2000) and codified at 13 CFR part 121. To be categorized as a small business, a fluorescent lamp ballast manufacturer and its affiliates may employ a maximum of 750 employees. The 750-employee threshold includes all employees in a business's parent company and any other subsidiaries. Based upon this classification, DOE identified at least ten small fluorescent lamp ballast manufacturers that qualify as small businesses per the applicable SBA definition.

DOE investigated sign ballast manufacturers as a second sub-group. Unlike the traditional fluorescent lamp ballast market, which is dominated by four large manufacturers with high-volume product lines, the sign ballast market is significantly more fragmented, with many small manufacturers providing products in low volumes to distinct markets. The fluorescent lamp ballast sub-groups are discussed in chapter 13 of the TSD and in section 0 of today's notice, and small business impacts are analyzed in section VII.B.

2. GRIM Analysis

DOE uses the GRIM to quantify the changes in cash flow that result in a higher or lower industry value. The GRIM analysis uses a standard, annual cash-flow analysis that incorporates manufacturer costs, markups, shipments, and industry financial information as inputs, and models changes in costs, investments, and manufacturer margins that would result from new and amended energy conservation standards. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning with the base year of the analysis, 2011, and continuing to 2043. DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. For ballasts, DOE uses a real discount rate of 7.4 percent for all products. DOE's discount rate estimate was derived from industry financials then modified according to feedback during manufacturer interviews.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between a base case and various TSLs (the standards cases). The difference in INPV between the base case and a standards case represents the financial impact of the amended standard on manufacturers. As discussed previously, DOE collected this information on the critical GRIM inputs from a number of sources, including publicly available data and interviews with a number of manufacturers (described in the next section). The GRIM results are shown in section 0. Additional details about the GRIM can be found in chapter 13 of the TSD.

DOE typically presents its estimates of industry impacts by groups of the major product types served by the same manufacturers. In the fluorescent lamp ballast industry, four major manufacturers sell the vast majority of shipments in nearly all product classes, with the exception of sign ballasts, although some major manufacturers sell into that market as well. As such, DOE decided to present the GRIM results for all four analyzed product classes in one product grouping. The impacts on sign ballast manufacturers are broken out separately as a sub-group analysis in section 0.

a. GRIM Key Inputs

i. Manufacturer Production Costs

Manufacturing a higher-efficiency product is typically more expensive than manufacturing a baseline product due to the use of more complex components, which are more costly than baseline components. The changes in the MPCs of the analyzed products can affect the revenues, gross margins, and cash flow of the industry, making these product cost data key GRIM inputs for DOE's analysis.

To calculate MPCs at each EL, DOE followed a two-step process. First, DOE derived MSPs for each analyzed product and efficiency level from blue book, online retail, and teardown-sourced prices as described in section 0 above. Next, DOE discounted these MSPs by the manufacturer markup to arrive at the MPCs. For all product classes, DOE used a 1.4 manufacturer markup based on manufacturer feedback. DOE also used confidential information from manufacturer interviews to verify its MPC estimates. In addition, DOE used teardown cost data to disaggregate the MPCs into material, labor, and overhead costs.

ii. Base-Case Shipments Forecast

The GRIM estimates manufacturer revenues based on total unit shipment forecasts and the distribution of these values by efficiency level. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For this analysis, the GRIM uses the NIA's annual shipment forecasts from 2011 to 2043, the end of the analysis period. In the

shipments analysis, DOE also estimated the distribution of efficiencies in the base case for all product classes. *See* chapter 10 of the TSD for additional details.

iii. Product and Capital Conversion Costs

New and amended energy conservation standards will cause manufacturers to incur conversion costs to bring their production facilities and product designs into compliance. For the MIA, DOE classified these conversion costs into two major groups: (1) Product conversion costs and (2) capital conversion costs. Product conversion costs are investments in research, development, testing, marketing, and other non-capitalized costs necessary to make product designs comply with the new or amended energy conservation standard. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new product designs can be fabricated and assembled.

DOE's interviews with manufacturers revealed that the majority of the conversion costs manufacturers expect to incur at various TSLs derive from the need to develop new and improved circuit designs, rather than the purchase of new capital equipment. Due to the flexible nature of most ballast production equipment, manufacturers do not expect new or amended standards to strand a significant share of their production assets. As opposed to other more capital-intensive appliance industries, much of the cash outlay required to achieve higher efficiency levels would be expensed through research and development, engineering, and testing efforts.

DOE based its estimates of the product conversion costs that would be required to meet each TSL on information obtained from manufacturer interviews, the engineering analysis, the NIA shipment analysis, and market information about the number of models and stock-keeping units (SKUs) each major manufacturer supports. DOE estimated the product development costs manufacturers would incur for each model that would need to be converted in response to new or amended energy conservation standards based on the necessary engineering and testing resources required to redesign each model. The R&D resources required to reach the efficiency levels represented at each TSL varied according to whether models could be converted based on minor upgrades, redesigns based on existing topologies, or full redesigns. In addition to per-model R&D costs, DOE considered testing and validation costs for every SKU, which included internal testing, UL testing, additional certifications, pilot runs, and product training. DOE then multiplied these per-model and per-SKU estimates by the total number of ballast models and SKUs offered based on information from manufacturer catalogs and interviews to calculate the total potential costs each manufacturer could incur to redesign its products. Next, to assign these costs to particular representative product classes, DOE multiplied this total for each manufacturer by the percentage of models in each product class based on the NIA shipment analysis and manufacturer feedback. Lastly, to consider the models manufacturers offered that already met efficiency levels above baseline, DOE multiplied the total costs for each product class by the percentage of models DOE determined would need to be redesigned at each efficiency level based on data from the engineering analysis and manufacturer catalogs.

This methodology derived total product conversion cost estimates for most product classes and efficiency levels. For residential ballasts, DOE assumed a smaller redesign cost per model. According to manufacturer interviews, the residential ballast market does not support manufacturer attempts to differentiate through better designs, product variation, or additional value-added features. As such, suppliers, often Asian manufacturers selling directly to fixture manufacturers, make little attempt to compete on anything other than price. Interviews suggested suppliers would leverage R&D invested in the larger, more valuable commercial market, making minor design adjustments to meet minimum requirements of the residential market. For sign ballasts, DOE determined the number of magnetic models on the market based on manufacturer catalogs and estimated testing and redesign costs for each of these models. DOE's estimates of the product conversion costs for fluorescent lamp ballasts addressed in this rulemaking can be found in section 0, below and in chapter 13 of the NOPR TSD.

As discussed above, DOE also estimated the capital conversion costs manufacturers would incur to comply with potential amended energy conservation standards represented by each TSL. During interviews, DOE asked manufacturers to estimate the capital expenditures required to expand the production of higher-efficiency products. These estimates included the required tooling and plant changes that would be necessary if product lines meeting the potential required efficiency level did not currently exist. Estimates for capital conversion costs varied greatly from manufacturer to manufacturer, as manufacturers anticipated different paths to compliance based on the modernity, flexibility, and level of automation of the equipment already existing in their factories. However, all manufacturers DOE interviewed indicated that capital costs would be relatively moderate compared to the required engineering effort. The modular nature of ballast production and the flexibility of the necessary production capital allows for significant equipment sharing across product lines. Based on interviews, DOE assumed that for most manufacturers, design changes would require moderate product conversion costs but would not require significant changes to existing production lines and equipment. It is therefore unlikely that most manufacturers would require high levels of capital expenditures compared to ordinary capital additions or existing net plants, property, and equipment (PPE).

To calculate its estimates of capital conversion costs, DOE aggregated its estimated capital costs for the major players in the industry rather than scaled up a "typical" manufacturer's expected conversion costs. Two considerations drove this choice in methodology. First, manufacturer feedback varied widely, making it impossible to characterize a "typical" manufacturer for conversion cost purposes. Second, the expected costs often depended upon the timing of the manufacturers' last redesign efforts and its strategy regarding the capital intensity of their plants and sourcing decisions. DOE estimated that some manufacturers would incur very minor capital expenditures per product class for testing equipment, even at max tech levels, as their factories' capital equipment would not require significant modification to produce higher-efficiency ballasts. For other manufacturers, DOE assumed greater investments would be necessary to upgrade lines for each product class with new wave solder equipment, reflow solder systems and surface mount device placement machines. The placement machines become increasingly important as ballasts become more complex with additional circuitry and components. DOE estimates capital conversion costs would rise most rapidly at high-efficiency levels not only because of the

new production and testing equipment described above but also because manufacturers would need to expand capacity to account for lower throughput on high-efficiency lines.

For residential ballasts, DOE assumed the same magnitude of conversion costs as for commercial ballasts of the same starting method. While residential ballasts are generally not produced by the major four manufacturers, the Asian manufacturers who source them to domestic companies would be required to make similar modifications to their production lines in response to standards. For sign ballasts, DOE was unable to interview a representative sample of the industry. However, DOE recognizes that magnetic ballast lines have more capital exposure to changes in efficiency standards than electronic lines due to the change in technology. Because several manufacturers produce magnetic sign ballasts, DOE assumed new lines would be needed to convert magnetic products to electronic ballasts and scaled these line costs to the entire sign ballast market for this product class.

Finally, DOE estimated industry capital conversion costs for all analyzed product classes other than residential ballasts and sign ballasts by extrapolating the interviewed manufacturers' costs for each product class to account for the companies that DOE did not interview. DOE's estimates of the capital conversion costs for fluorescent lamp ballasts can be found in section 0, below and in chapter 13 of the NOPR TSD.

b. GRIM Scenarios

i. Shipment Scenarios

In the NIA, DOE modeled a roll-up and a shift scenario to represent two possible standards case efficiency distributions for the years beginning 2014, the year that compliance with revised standards is proposed to be required, through 2043. The GRIM uses each of these forecasts as alternative scenarios. The roll-up scenario represents the case in which all shipments in the base case that do not meet the new standard roll up to meet the new standard level. Consumers in the base case who purchase ballasts above the standard level are not affected as they are assumed to continue to purchase the same base-case ballast or lamp-and-ballast system in the standards case. In contrast, in a shift scenario, DOE assumes that any consumer may purchase a more efficient ballast. The shift scenario models a standards case in which all base-case consumer purchases are affected by the standard (regardless of whether their base-case efficiency is below the standard). As the standard level increases, market share migrates to, and accumulates at, the highest efficiency level because it represents "max tech" for each representative ballast type (*i.e.,* moving beyond it is impossible given available technology options). *See* chapter 10 of the NOPR TSD for more information on the ballasts standards-case shipment scenarios.

ii. Technology Scenarios

Each shipment scenario (roll-up and shift) described above is modeled in combination with the existing and emerging technologies base case shipment scenarios, resulting in four sets of shipments. The GRIM uses each set of shipment results to separately model impacts on INPV. In the existing technologies scenario, no technologies outside of those covered by this rulemaking were analyzed for market penetration. However, DOE recognizes that rapidly emerging new lighting technologies could penetrate the fluorescent lighting market and significantly affect ballast shipment forecasts. Therefore, in the emerging technologies scenario, DOE calculated the market penetration of light emitting diode (LED) and ceramic metal halide (CMH) systems annually through 2043, assessing each sector separately. DOE decreased the analyzed market size in each year in each sector by the amount that corresponded to the highest level of market penetration achieved by LED or CMH systems. The assumptions and methodology that drive these scenarios and the details specific to each are described in chapter 10 of the NOPR TSD.

iii. Markup Scenarios

As discussed above, manufacturer selling prices include direct manufacturing production costs (*i.e.,* labor, material, and overhead estimated in DOE's MPCs) and all non-production costs (*i.e.,* SG&A, R&D, and interest), along with profit. To calculate the MSPs in the GRIM, DOE applied markups to the MPCs estimated in the engineering analysis for each product class and efficiency level. Modifying these markups in the standards case yields different sets of impacts on manufacturers. For the MIA, DOE modeled two standards-case markup scenarios to represent the uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of amended energy conservation standards: (1) A preservation of operating profit markup scenario, and (2) a two-tier markup scenario. These scenarios lead to different markups values, which, when applied to the inputted MPCs, result in varying revenue and cash flow impacts.

DOE implemented the preservation of operating profit markup scenario because manufacturers stated that they do not expect to be able to markup the full cost of production given the highly competitive market, in the standards case. The preservation of operating profit markup scenario assumes that manufacturers are able to maintain only the base-case total operating profit in absolute dollars in the standards case, despite higher product costs and investment. The base-case total operating profit is derived from marking up the cost of goods sold for each product by a flat percentage (the baseline markup, discussed in chapter 5 of the NOPR TSD) to cover standard SG&A expenses, R&D expenses, and profit. To derive this percentage, DOE evaluated publicly available financial information for manufacturers of ballasts. DOE also requested feedback on this value during manufacturer interviews. DOE adjusted the manufacturer markups in the GRIM at each TSL to yield approximately the same earnings before interest and taxes in the standards case in the year after the compliance date of the amended standards as in the base case. DOE assumed that the industry-wide impacts would occur under the new minimum efficiency levels. DOE altered the markups only for the minimally compliant products in this scenario, with margin impacts not occurring for products that already exceed the amended energy conservation standard. The preservation of operating profit markup scenario represents the upper bound of industry profitability following amended energy conservation standards. Under this scenario, while manufacturers are not able to yield additional operating profit from higher production costs and the investments required to comply with the amended energy conservation standard, they are able to maintain the same operating profit in the standards case as was earned in the base case.

DOE also modeled a lower bound profitability scenario. During interviews, multiple manufacturers stated that they offer two tiers of product lines that are differentiated, in part, by efficiency level. The higher-efficiency tier typically earns a premium over the baseline efficiency tier. Several manufacturers suggested that the premium currently earned by the higher-efficiency tier would erode under new or amended standards due to the

disappearance of the baseline efficiency tier, which would significantly harm profitability. Because of this pricing dynamic described by manufacturers and because of the pressure from luminaire manufacturers to commoditize the baseline efficiency tier, DOE also modeled a two-tier markup scenario. In this scenario, DOE assumed that the markup on fluorescent lamp ballasts varies according to two efficiency tiers in both the base case and the standards case. During the MIA interviews, manufacturers provided information on the range of typical efficiency levels in those two tiers and the change in profitability at each level. DOE used this information, retail prices derived in its product price determination, and industry average gross margins to estimate markups for fluorescent lamp ballasts under a two-tier pricing strategy in the base case. In the standards case, DOE modeled the situation in which portfolio reduction squeezes the margin of higher-efficiency products as they become the new baseline, presumably high-volume products. This scenario is consistent with information submitted during manufacturing interviews and responds to manufacturers' concern that DOE standards could severely disrupt profitability.

3. Discussion of Comments

During the April 2010 public meeting, interested parties commented on the assumptions and results of the preliminary TSD. Oral and written comments discussed several topics, including conversion costs, impact on competition, potential benefits to ballast manufacturers, and manufacturer information. DOE addresses these comments below.

a. Conversion Costs

Several manufacturers expressed concerns about the capital and product conversion costs that would be necessary to meet particular efficiency levels. Philips stated that improvements would yield only minor efficiency gains, but may require redesigning entire product lines. As such, the manufacturer questioned whether the potential returns merited these large investments in time and resources. Philips noted that this phenomenon of diminishing returns is particularly true for those efficiency levels DOE identified as max tech. (Philips, Public Meeting Transcript, No. 12 at p. 155–156)

In this NOPR, DOE estimates the capital and product conversion costs required to meet all TSLs, including the max tech level. These conversion costs are a key input into the GRIM and directly impact the change in INPV (which is outputted from the model) due to standards. DOE conducts the manufacturing impact analysis, including the calculation of conversion costs, regardless of the energy savings that result from a given TSL. When determining which TSL to propose, DOE weighs the benefits, such as energy savings, against the burdens, such as loss of INPV, to determine the highest TSL that is both technologically feasible and economically justified.

Philips and NEMA also expressed concern that the investments made to meet new or amended energy conservation standards may never be recouped because of potential changes to the lighting market landscape. Philips stated that the industry is transitioning from traditional fixed light output lighting to alternatives such as control systems and solid-state lighting, so the opportunity for investment payback will be severely diminished. (Philips, Public Meeting Transcript, No. 12 at p. 274–275) NEMA similarly stated that the additional cost required to meet max tech standard levels would be a burden for manufacturers without subsequent benefit because the demand for fixed output ballasts is expected to significantly decline in the future. (NEMA, No. 29 at p. 17–18)

As stated in section 0 above, DOE recognizes that rapidly emerging new lighting technologies, such as LEDs, could penetrate the fluorescent lighting market and significantly affect ballast shipment forecasts. Therefore, DOE modeled an emerging technologies scenario in its shipments analysis. DOE input this scenario into the GRIM to demonstrate the impact that reduced demand could have on fluorescent lamp ballast manufacturers. The INPV results presented under the emerging technologies scenario show the impacts of the capital and product conversion costs required to meet each TSL under the base-case assumption that emerging lighting technologies will penetrate the ballast market. The INPV results for the existing and emerging technologies scenarios are shown in section 0, and more information on the methodology behind these scenarios can be found in chapter 10 of the NOPR TSD.

NEMA was also concerned about the conversion costs required for a particular product class. NEMA noted that for 8-foot HO lamps product offerings are limited and the power levels involved can make development of a reliable product more time-consuming than the other product categories considered. (NEMA, No. 29 at p. 7) DOE takes development time into account in its product conversion cost estimates. The increased development time for 8-foot HO lamps is reflected through higher estimated R&D costs due to the need to put more resources toward product design for a longer period of time.

b. Impact on Competition

NEMA stated that adoption of NEMA Premium levels for national requirements could impose a disproportionate burden on companies that do not currently have product lines compliant with the NEMA Premium program, which could unfairly impact the competitive nature of the marketplace. (NEMA, No. 29 at p. 4) Similarly, NEMA stated that adoption of the max tech levels in the preliminary analysis could impose a disproportionate burden on companies that do not currently have product lines utilizing the latest technology from the major manufacturers. (NEMA, No. 29 at p. 6)

According to a NEMA Premium publication [41] that lists qualifying electronic ballast models, at least fourteen ballast manufacturers already have product lines compliant with the NEMA Premium program. These manufacturers represent both large manufacturers, with over 90 percent of fluorescent lamp ballast market share, and smaller, niche manufacturers. While DOE will solicit the views of the Attorney General on impacts of these proposed standards as required by EPCA, DOE does not believe at this time that setting standards at NEMA Premium levels would unfairly impact competition in the ballast market because a large quantity and variety of manufacturers already offer NEMA Premium models. DOE agrees, however, that adoption of max tech levels presented in the preliminary analysis could impose a disproportionate burden on smaller manufacturers. During manufacturer interviews, DOE questioned whether any firms held intellectual property that gave them a competitive advantage. DOE did not learn of any technologies that some manufacturers employ that enable them to meet max tech levels that other manufacturers cannot. However, DOE believes that smaller manufacturers may not be able to redesign all of their product offerings within the 3-year compliance period because of limited R&D resources and low shipment volumes over which to spread out conversion costs. *See* the Regulatory

[41] *http://www.nema.org/gov/energy/efficiency/upload/nema_premium_electronic_ballast_program.pdf.*

Flexibility Analysis in section 0 for a full discussion on DOE's assessment of potential impacts on small manufacturers.

c. Potential Benefits to Ballast Manufacturers

Earthjustice stated that if DOE concludes that amended standards for fluorescent lamp ballasts would result in a market shift to other lighting products such as LEDs, DOE must take into account any positive impacts of that market shift on fluorescent lamp ballast manufacturers who also produce those substitute technologies. Earthjustice further commented that EPCA requires DOE to consider positive impacts (due to revenues from substitute products) in addition to any negative impacts from new or amended standards because DOE must consider the impact on the entire company rather than only the ballasts division. (Earthjustice, No. 31 at p. 1–2)

DOE does believe that there is potential for the market to increasingly migrate from traditional fixed light output fluorescent lamp ballasts to alternate technologies such as LEDs. For this reason, DOE models the emerging technologies shipment scenario as described in section 0 above and in chapter 10 of the NOPR TSD. This market shift to emerging technologies occurs in the base case. That is, the shift is not standards-induced. DOE excludes the revenue from substitute technologies earned by manufacturers who produce ballasts in the GRIM since the revenue stream would be present in both the base case and the standards case, resulting in no impact on the change in INPV.

4. Manufacturer Interviews

DOE interviewed manufacturers representing more than 90 percent of fluorescent lamp ballast sales. These interviews were in addition to those DOE conducted as part of the engineering analysis. The information gathered during these interviews enabled DOE to tailor the GRIM to reflect the unique financial characteristics of the ballasts industry. All interviews provided information that DOE used to evaluate the impacts of potential new and amended energy conservation standards on manufacturer cash flows, manufacturing capacities, and employment levels. Appendix 13A of the NOPR TSD contains the interview guides DOE used to conduct the MIA interviews.

During the manufacturer interviews, DOE asked manufacturers to describe their major concerns about this rulemaking. The following sections describe the most significant issues identified by manufacturers. DOE also includes additional concerns in chapter 13 of the TSD.

a. Component Shortage

An ongoing shortage of electronic components critical to the production of ballasts remains a key concern for all ballast manufacturers. Because the shortage is particularly acute for those components critical to high efficiency ballasts, new and amended standards could exacerbate the market situation, according to manufacturers.

During the recent economic downturn, component suppliers significantly scaled back production. When demand recovered as the recession ended, electronics suppliers lacked the capacity to meet demand beginning in the fall of 2009. Since then, component suppliers have been reluctant to invest in additional capacity because of concerns that the downturn has not actually ended. Additionally, component manufacturers have seen customers place duplicate orders with several suppliers (only to later cancel the orders with all but one supplier), a practice that has reinforced supplier skepticism over market demand. Electrolytic capacitors and transistors, which are produced almost entirely in Asia, are key examples of ballast components in relatively short supply. The fact that these components are shared among many electronics industries has exacerbated the problem for the ballast industry. Manufacturers of more expensive electronic applications, such as televisions and cell phones, can more easily absorb what for them are relatively smaller cost increases. In turn, these other industries can afford to pay more and receive priority over the ballast industry.

As a result, manufacturers have faced longer lead times and higher rush-order charges to fill their own customers' orders. Manufacturers predicted the component shortage will last at least into 2011 and were concerned that energy conservation standards for fluorescent lamp ballasts would exacerbate the ongoing component shortage.

b. Market Erosion

Manufacturers stated that emerging technologies are penetrating the fluorescent lamp ballasts market. Several manufacturers worried that new and amended energy conservation standards for ballasts would force them to invest in a shrinking market. Depending on the pace of market penetration of emerging technologies—such as LEDs—these investments might never be recouped. Also, manufacturers were concerned that new and amended standards on ballasts could hasten the switch to emerging technologies by lowering the difference in their first-cost price. If the standard did increase the natural migration toward new technology, manufacturers said they would be less likely to make the substantial investments to modify ballasts production equipment for some of their product lines. (To address emerging technologies issues discussed by manufacturers, DOE included several shipment scenarios in both the NIA and the GRIM. *See* chapter 10 and chapter 13 of the NOPR TSD for a discussion of the shipment scenarios used in the respective analyses.)

c. Opportunity Cost of Investments

Manufacturers also stated that the financial burden of developing products to meet amended energy conservation standards has an opportunity cost due to the limited pool of capital and R&D dollars. Currently, manufacturers are reinvesting a significant share of the cash flow from fluorescent lamp ballast operations into emerging technologies such as LEDs and control systems. Any investments incurred to meet amended ballast standards would therefore reflect foregone investments in these emerging technologies, which the industry believes offer both better prospects for market growth and greater potential for energy savings than traditional fixed-light-output fluorescent lamp ballasts. Compared to these emerging technologies, manufacturers stated that they have little room for efficiency improvements within their ballast product lines.

d. Maintaining Product Tiers

Several manufacturers stated that they would not want standards to be so stringent that they eliminate the ability to carry two efficiency tiers within a product class. Most manufacturers—and all major manufacturers—currently offer both standard-efficiency and high-efficiency product lines. The standard-efficiency product lines are typically lower cost and lower margin. These high-volume products provide economies of scale and, by establishing a market presence and brand, enhance manufacturers' ability to enter the more profitable retrofit and aftermarket sales. Meanwhile, the high-efficiency product lines allow manufacturers to bundle other features within these products, which allows them to command a better margin. Utility rebates and other similar programs also play a large role in driving the purchase of higher efficiency ballasts.

If DOE set standards that did not leave room for a high-efficiency product to differentiate itself from a baseline product, manufacturers believe the new standard would commoditize these now-premium products. In turn, prices of the high-efficiency ballasts would fall to the level of what were formerly the lower-tier products, harming manufacturer profitability. Utility companies and other programs would have little incentive to offer rebates for these former upper-tier products, which would then be baseline units. Without rebate incentives, sales to the energy retrofit market could decrease greatly due to cost, which would diminish the potential for energy savings due to the standard.

e. Adequate Compliance Periods

A number of manufacturers expressed concern about the timing between the announcement of the standard and the compliance date of the standard. Manufacturers stated that they need adequate time to develop products that meet the amended efficiency standards. Without enough development time, manufacturers may not have the resources to redesign and test all of their product lines before the required compliance date, which could result in lost sales opportunities in the market.

F. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting a proposed standard. Employment impacts consist of direct and indirect impacts. Direct employment impacts are any changes in the number of employees working for manufacturers of the appliance products that are the subject of this rulemaking, their suppliers, and related service firms. Indirect employment impacts are changes in employment within the larger economy that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more efficient appliances. The MIA addresses the direct employment impacts that concern ballast manufacturers in section 0.

The indirect employment impacts of standards consist of the net jobs created or eliminated in the national economy, outside of the manufacturing sector being regulated, due to: (1) Reduced spending on energy by end users; (2) reduced spending on new energy supplies by the utility industry; (3) increased spending on new products to which the new standards apply; and (4) the effects of those three factors throughout the economy. DOE expects the net monetary savings from standards to be redirected to other forms of economic activity, and expects these shifts in spending and economic activity to affect the demand for labor in the short term, as explained below.

One method for assessing the possible effects of such shifts in economic activity on the demand for labor is to compare sector employment statistics developed by the Labor Department's Bureau of Labor Statistics (BLS). (Data on industry employment, hours, labor compensation, value of production, and the implicit price deflator for output for these industries are available upon request by calling the Division of Industry Productivity Studies (202–691–5618) or by sending a request by e-mail to *dipsweb@bls.gov.* These data are also available at *http://www.bls.gov/news.release/prin1.nr0.htm.*) The BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy. There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital intensive and less labor intensive than other sectors. *See* Bureau of Economic Analysis, Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II), Washington, DC, U.S. Department of Commerce, 1992.

Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and manufacturing sectors). Thus, based on the BLS data alone, the Department believes net national employment will increase due to shifts in economic activity resulting from new and amended standards for ballasts.

In developing today's proposed standards, DOE estimated indirect national employment impacts using an input/output model of the U.S. economy called Impact of Sector Energy Technologies (ImSET). ImSET is a spreadsheet model of the U.S. economy that focuses on 188 sectors most relevant to industrial, commercial, and residential building energy use. (Roop, J. M., M. J. Scott, and R. W. Schultz, *ImSET: Impact of Sector Energy Technologies* (PNNL–15273 Pacific Northwest National Laboratory) (2005). Available at *http://www.pnl.gov/main/publications/external/technical_reports/PNNL-15273.pdf.*) ImSET is a special purpose version of the "U.S. Benchmark National Input-Output" (I–O) model, designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model with structural coefficients to characterize economic flows among the 188 sectors. ImSET's national economic I–O structure is based on a 1997 U.S. benchmark table (Lawson, Ann M., Kurt S. Bersani, Mahnaz Fahim-Nader, and Jiemin Guo, "Benchmark Input-Output Accounts of the U.S. Economy, 1997," *Survey of Current Business* (Dec. 2002) pp. 19–117), specially aggregated to the 188 sectors. DOE estimated changes in expenditures using the NIA spreadsheet. Using ImSET, DOE estimated the net national, indirect-employment impacts on employment by sector of potential new efficiency standards for ballasts. For more details on the employment impact analysis, see NOPR TSD chapter 15.

G. Utility Impact Analysis

The utility impact analysis estimates the effects of the adopting new or amended standards on the utility industry. For this analysis, DOE used the NEMS–BT model to generate forecasts of electricity consumption, electricity generation by plant type, and electric generating capacity by plant type that would result from each TSL. DOE conducted the impact analysis as a scenario that departed from the latest *AEO* reference case. In other words, the estimated impacts of a standard are the differences between values forecasted by NEMS–BT and the values in the *AEO2010* reference case.

Chapter 14 of the TSD accompanying this notice presents results of the utility impact analysis.

H. Environmental Assessment

Pursuant to the National Environmental Policy Act of 1969 and the requirements of 42 U.S.C. 6295(o)(2)(B)(i)(VI) and 6316(a), DOE has prepared a draft environmental assessment (EA) of the impacts of the potential standards for the fluorescent lamp ballasts in today's proposed rule, which it has included as chapter 16 of the NOPR TSD.

In the EA, DOE estimated the reduction in power sector emissions of carbon dioxide (CO_2), nitrogen oxides (NO_X), and mercury (Hg) using the NEMS–BT computer model. In the EA, NEMS–BT is run similarly to the AEO NEMS, except that ballast energy use is

reduced by the amount of energy saved (by fuel type) due to each TSL. The inputs of national energy savings come from the NIA spreadsheet model, while the output is the forecasted physical emissions. The net benefit of each TSL in today's proposed rule is the difference between the forecasted emissions estimated by NEMS–BT at each TSL and the *AEO 2010* Reference Case. NEMS–BT tracks CO_2 emissions using a detailed module that provides results with broad coverage of all sectors and inclusion of interactive effects. For today's NOPR, DOE used the *AEO2010.* For the final rule, DOE intends to revise the emissions analysis using the most current version of NEMS.

SO_2 emissions from affected electric generating units (EGUs) are subject to nationwide and regional emissions cap-and-trade programs, and DOE has preliminarily determined that these programs create uncertainty about the potential amended standards' impact on SO_2 emissions. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for affected EGUs in the 48 contiguous States and the District of Columbia (DC). SO_2 emissions from 28 eastern states and D.C. are also limited under the Clean Air Interstate Rule (CAIR; 70 FR 25162 (May 12, 2005)), which created an allowance-based trading program. Although CAIR has been remanded to EPA by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), *see North Carolina* v. *EPA,* 550 F.3d 1176 (D.C. Cir. 2008), it remains in effect temporarily, consistent with the D.C. Circuit's earlier opinion in *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008). On July 6, 2010, EPA issued the Transport Rule proposal, a replacement for CAIR, which would limit emissions from EGUs in 32 states, potentially through the interstate trading of allowances, among other options. 75 FR 45210 (Aug. 2, 2010).

The attainment of emissions caps is typically flexible among EGUs and is enforced through the use of emissions allowances and tradable permits. Under existing EPA regulations, and under the Transport Rule if it is finalized, any excess SO_2 emissions allowances resulting from the lower electricity demand caused by the imposition of an efficiency standard could be used to permit offsetting increases in SO_2 emissions by any regulated EGU. However, if the amended standards resulted in a permanent increase in the quantity of unused emissions allowances, there would be an overall reduction in SO_2 emissions from the standards. While there remains some uncertainty about the ultimate effects of efficiency standards on SO_2 emissions covered by the existing cap-and-trade system, the NEMS–BT modeling system that DOE uses to forecast emissions reductions currently indicates that no physical reductions in power sector emissions would occur for SO_2.

A cap on NO_X emissions, affecting electric generating units in the CAIR region, means that the energy conservation standards for ballasts may have little or no physical effect on NO_X emissions in the 28 eastern States and the DC covered by CAIR or any States covered by the proposed Transport Rule if the Transport Rule if finalized. The proposed standards would, however, reduce NO_X emissions in those 22 states not affected by the CAIR. As a result, DOE used NEMS–BT to forecast emission reductions from the standards considered for today's NOPR.

Similar to emissions of SO_2 and NO_X, future emissions of Hg would have been subject to emissions caps. In May 2005, EPA issued the Clean Air Mercury Rule (CAMR). 70 FR 28606 (May 18, 2005). CAMR would have permanently capped emissions of mercury for new and existing coal-fired power plants in all states by 2010. However, on February 8, 2008, the D.C. Circuit issued a decision in *New Jersey* v. *Environmental Protection Agency,* 517 F.3d 574 (D.C. Cir. 2008), in which it vacated CAMR. EPA has decided to develop emissions standards for power plants under Section 112 of the Clean Air Act, consistent with the DC Circuit's opinion on CAMR. *See http://www.epa.gov/air/mercuryrule/pdfs/certpetition_withdrawal.pdf.* Pending EPA's forthcoming revisions to the rule, DOE is excluding CAMR from its environmental assessment. In the absence of CAMR, a DOE standard would likely reduce Hg emissions and DOE used NEMS–BT to estimate these reductions. However, DOE continues to review the impact of rules that reduce energy consumption on Hg emissions, and may revise its assessment of Hg emission reductions in future rulemakings.

I. Monetizing Carbon Dioxide and Other Emissions Impacts

As part of the development of this proposed rule, DOE considered the estimated monetary benefits likely to result from the reduced emissions of CO_2 and NO_X that are expected to result from each of the TSLs considered. In order to make this calculation similar to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in the forecast period for each TSL. This section summarizes the basis for the monetary values used for each of these emissions and presents the values considered in this rulemaking.

For today's NOPR, DOE is relying on a set of values for the social cost of carbon (SCC) that was developed by an interagency process. A summary of the basis for these values is provided below, and a more detailed description of the methodologies used is provided as an appendix to chapter 16 of the TSD.

1. Social Cost of Carbon

Under section 1(b) of Executive Order 12866, agencies must, to the extent permitted by law, "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." The purpose of the SCC estimates presented here is to allow agencies to incorporate the monetized social benefits of reducing CO_2 emissions into cost-benefit analyses of regulatory actions that have small, or "marginal," impacts on cumulative global emissions. The estimates are presented with an acknowledgement of the many uncertainties involved and with a clear understanding that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts.

As part of the interagency process that developed these SCC estimates, technical experts from numerous agencies met on a regular basis to consider public comments, explore the technical literature in relevant fields, and discuss key model inputs and assumptions. The main objective of this process was to develop a range of SCC values using a defensible set of input assumptions grounded in the existing scientific and economic literatures. In this way, key uncertainties and model differences transparently and consistently inform the range of SCC estimates used in the rulemaking process.

a. Monetizing Carbon Dioxide Emissions

The SCC is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services. Estimates of the SCC are provided in dollars per metric ton of carbon dioxide.

When attempting to assess the incremental economic impacts of carbon dioxide emissions, the analyst faces a

number of serious challenges. A recent report from the National Research Council [42] points out that any assessment will suffer from uncertainty, speculation, and lack of information about (1) Future emissions of greenhouse gases, (2) the effects of past and future emissions on the climate system, (3) the impact of changes in climate on the physical and biological environment, and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional.

Despite the serious limits of both quantification and monetization, SCC estimates can be useful in estimating the social benefits of reducing carbon dioxide emissions. Consistent with the directive in Executive Order 12866 quoted above, the purpose of the SCC estimates presented here is to make it possible for Federal agencies to incorporate the social benefits from reducing carbon dioxide emissions into cost-benefit analyses of regulatory actions that have small, or "marginal," impacts on cumulative global emissions. Most Federal regulatory actions can be expected to have marginal impacts on global emissions.

For such policies, the agency can estimate the benefits from reduced (or costs from increased) emissions in any future year by multiplying the change in emissions in that year by the SCC value appropriate for that year. The net present value of the benefits can then be calculated by multiplying each of these future benefits by an appropriate discount factor and summing across all affected years. This approach assumes that the marginal damages from increased emissions are constant for small departures from the baseline emissions path, an approximation that is reasonable for policies that have effects on emissions that are small relative to cumulative global carbon dioxide emissions. For policies that have a large (non-marginal) impact on global cumulative emissions, there is a separate question of whether the SCC is an appropriate tool for calculating the benefits of reduced emissions. This concern is not applicable to this notice, and DOE does not attempt to answer that question here.

At the time of the preparation of this notice, the most recent interagency estimates of the potential global benefits resulting from reduced CO_2 emissions in 2010, expressed in 2009$, were $4.9, $22.1, $36.3, and $67.1 per metric ton avoided. For emissions reductions that occur in later years, these values grow in real terms over time. Additionally, the interagency group determined that a range of values from 7 percent to 23 percent should be used to adjust the global SCC to calculate domestic effects,[43] although preference is given to consideration of the global benefits of reducing CO_2 emissions.

It is important to emphasize that the interagency process is committed to updating these estimates as the science and economic understanding of climate change and its impacts on society improves over time. Specifically, the interagency group has set a preliminary goal of revisiting the SCC values within 2 years or at such time as substantially updated models become available, and to continue to support research in this area. In the meantime, the interagency group will continue to explore the issues raised by this analysis and consider public comments as part of the ongoing interagency process.

b. Social Cost of Carbon Values Used in Past Regulatory Analyses

To date, economic analyses for Federal regulations have used a wide range of values to estimate the benefits associated with reducing carbon dioxide emissions. In the final model year 2011 CAFE rule, the U.S. Department of Transportation (DOT) used both a "domestic" SCC value of $2 per ton of CO_2 and a "global" SCC value of $33 per ton of CO_2 for 2007 emission reductions (in 2007$), increasing both values at 2.4 percent per year.[44] DOT also included a sensitivity analysis at $80 per ton of CO_2. *See Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011,* 74 FR 14196 (March 30, 2009) (Final Rule); Final Environmental Impact Statement Corporate Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2011–2015 at 3–90 (Oct. 2008) (Available at: *http://www.nhtsa.gov/fuel-economy*). A domestic SCC value is meant to reflect the value of damages in the United States resulting from a unit change in carbon dioxide emissions, while a global SCC value is meant to reflect the value of damages worldwide.

A 2008 regulation proposed by DOT assumed a domestic SCC value of $7 per ton of CO_2 (in 2006$) for 2011 emission reductions (with a range of $0–$14 for sensitivity analysis), also increasing at 2.4 percent per year. *See Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2011–2015,* 73 FR 24352 (May 2, 2008) (Proposed Rule); Draft Environmental Impact Statement Corporate Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2011–2015 at 3–58 (June 2008) (Available at: *http://www.nhtsa.gov/fuel-economy*). A regulation for packaged terminal air conditioners and packaged terminal heat pumps finalized by DOE in October of 2008 used a domestic SCC range of $0 to $20 per ton CO_2 for 2007 emission reductions (in 2007$). 73 FR 58772, 58814 (Oct. 7, 2008) In addition, EPA's 2008 Advance Notice of Proposed Rulemaking for Greenhouse Gases identified what it described as "very preliminary" SCC estimates subject to revision. *See Regulating Greenhouse Gas Emissions Under the Clean Air Act,* 73 FR 44354 (July 30, 2008). EPA's global mean values were $68 and $40 per ton CO_2 for discount rates of approximately 2 percent and 3 percent, respectively (in 2006$ for 2007 emissions).

In 2009, an interagency process was initiated to offer a preliminary assessment of how best to quantify the benefits from reducing carbon dioxide emissions. To ensure consistency in how benefits are evaluated across agencies, the Administration sought to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced CO_2 emissions. The interagency group did not undertake any original analysis. Instead, it combined SCC estimates from the existing literature to use as interim values until a more comprehensive analysis could be conducted. The outcome of the preliminary assessment by the interagency group was a set of five interim values: global SCC estimates for 2007 (in 2006$) of $55, $33, $19, $10, and $5 per ton of CO_2. These interim values represent the first sustained interagency effort within the U.S. government to develop an SCC for use in regulatory analysis. The results of this preliminary effort were presented in several proposed and final rules and were offered for public comment in connection with proposed rules, including the joint EPA–DOT fuel economy and CO_2 tailpipe emission proposed rules.

[42] National Research Council. *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use.* National Academies Press: Washington, DC (2009).

[43] It is recognized that this calculation for domestic values is approximate, provisional, and highly speculative. There is no a priori reason why domestic benefits should be a constant fraction of net global damages over time.

[44] Throughout this section, references to tons of CO_2 refer to metric tons.

c. Current Approach and Key Assumptions

Since the release of the interim values, the interagency group reconvened on a regular basis to generate improved SCC estimates, which were considered for this proposed rule. Specifically, the group considered public comments and further explored the technical literature in relevant fields. The interagency group relied on three integrated assessment models (IAMs) commonly used to estimate the SCC: The FUND, DICE, and PAGE models.[45] These models are frequently cited in the peer-reviewed literature and were used in the last assessment of the Intergovernmental Panel on Climate Change. Each model was given equal weight in the SCC values that were developed.

Each model takes a slightly different approach to model how changes in emissions result in changes in economic damages. A key objective of the interagency process was to enable a consistent exploration of the three models while respecting the different approaches to quantifying damages taken by the key modelers in the field. An extensive review of the literature was conducted to select three sets of input parameters for these models: climate sensitivity, socio-economic and emissions trajectories, and discount rates. A probability distribution for climate sensitivity was specified as an input into all three models. In addition, the interagency group used a range of scenarios for the socio-economic parameters and a range of values for the discount rate. All other model features were left unchanged, relying on the model developers' best estimates and judgments.

The interagency group selected four SCC values for use in regulatory analyses. Three values are based on the average SCC from three integrated assessment models, at discount rates of 2.5, 3, and 5 percent. The fourth value, which represents the 95th percentile SCC estimate across all three models at a 3-percent discount rate, is included to represent higher-than-expected impacts from temperature change further out in the tails of the SCC distribution. For emissions (or emission reductions) that occur in later years, these values grow in real terms over time, as depicted in Table V.8.

TABLE V.8—SOCIAL COST OF CO_2, 2010–2050 (IN 2007 DOLLARS PER METRIC TON)

VII.	Discount rate			
	5% Avg	3% Avg	2.5% Avg	3% 95th
2010	4.7	21.4	35.1	64.9
2015	5.7	23.8	38.4	72.8
2020	6.8	26.3	41.7	80.7
2025	8.2	29.6	45.9	90.4
2030	9.7	32.8	50.0	100.0
2035	11.2	36.0	54.2	109.7
2040	12.7	39.2	58.4	119.3
2045	14.2	42.1	61.7	127.8
2050	15.7	44.9	65.0	136.2

It is important to recognize that a number of key uncertainties remain, and that current SCC estimates should be treated as provisional and revisable since they will evolve with improved scientific and economic understanding. The interagency group also recognizes that the existing models are imperfect and incomplete. The National Research Council report mentioned above points out that there is tension between the goal of producing quantified estimates of the economic damages from an incremental ton of carbon and the limits of existing efforts to model these effects. There are a number of concerns and problems that should be addressed by the research community, including research programs housed in many of the Federal agencies participating in the interagency process to estimate the SCC.

DOE recognizes the uncertainties embedded in the estimates of the SCC used for cost-benefit analyses. As such, DOE and others in the U.S. Government intend to periodically review and reconsider those estimates to reflect increasing knowledge of the science and economics of climate impacts, as well as improvements in modeling. In this context, statements recognizing the limitations of the analysis and calling for further research take on exceptional significance.

In summary, in considering the potential global benefits resulting from reduced CO_2 emissions, DOE used the most recent values identified by the interagency process, adjusted to 2009$ using the GDP price deflator values for 2008 and 2009. For each of the four cases specified, the values used for emissions in 2010 were $4.9, $22.1, $36.3, and $67.1 per metric ton avoided (values expressed in 2009$).[46] To monetize the CO_2 emissions reductions expected to result from amended standards for ballasts, DOE used the values identified in Table A1 of the "Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866," which is reprinted in appendix 16–A of the NOPR TSD, appropriately adjusted to 2009$. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SCC values in each case.

1. Valuation of Other Emissions Reductions

DOE investigated the potential monetary benefit of reduced NO_X emissions from the TSLs it considered. As noted above, new or amended energy conservation standards would reduce NO_X emissions in those 22 states that are not affected by the CAIR. DOE estimated the monetized value of NO_X emissions reductions resulting from each of the TSLs considered for today's NOPR based on environmental damage estimates found in the relevant scientific literature. Available estimates suggest a very wide range of monetary values, ranging from $370 per ton to $3,800 per ton of NO_X from stationary sources, measured in 2001$ (equivalent to a range of $447 to $4,591 per ton in 2009$).[47] In accordance with OMB guidance, DOE conducted two calculations of the monetary benefits derived using each of the economic values used for NO_X, one using a real discount rate of 3 percent and another using a real discount rate of 7 percent.[48]

DOE is aware of multiple agency efforts to determine the appropriate range of values used in evaluating the potential economic benefits of reduced Hg emissions. DOE has decided to await further guidance regarding consistent valuation and reporting of Hg emissions before it once again monetizes Hg emissions in its rulemakings.

Commenting on the preliminary TSD, NEEA and NPCC supported DOE monetizing emissions reductions, but urged that the monetary values be accounted for in the NIA, and not used only as a qualitative decision factor. (NEEA and NPCC, No. 32 at p. 11) In contrast, NEMA advocated keeping the environmental assessment and NIA separate, citing the ranges of emission dollar values and other uncertainties in DOE's emissions monetization

[45] The models are described in appendix 16–A of the TSD.

[46] Table A1 presents SCC values through 2050. For DOE's calculation, it derived values after 2050 using the 3-percent per year escalation rate used by the interagency group.

[47] For additional information, refer to U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, *2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* Washington, DC.

[48] OMB, Circular A–4: Regulatory Analysis (Sept. 17, 2003).

approach. (NEMA, No. 29 at p. 18) In the NIA, DOE estimates the national net present value of total consumer costs and savings that would be expected to result from new or amended standards at specific efficiency levels. Separately, DOE considers the estimated monetary benefits likely to result from the reduced emissions of CO_2 and other pollutants that are expected to result from each of the considered TSLs. The NPV of the monetized benefits associated with emissions reductions can be viewed as a complement to the NPV of the consumer savings calculated for each TSL considered in this rulemaking. In section 0 of today's NOPR, DOE presents the NPV values that result from adding the estimates of the potential economic benefits resulting from reduced CO_2 and NO_X emissions in each of four valuation scenarios to the NPV of consumer savings calculated for each TSL considered in this rulemaking, at both a 7-percent and 3-percent discount rate.

VIII. Analytical Results

A. Trial Standard Levels

DOE analyzed the benefits and burdens of a number of TSLs for the ballasts that are the subject of today's proposed rule. Table VIII.1 presents the trial standard levels and the corresponding product class efficiency levels. See the engineering analysis in section 0 of this NOPR for a more detailed discussion of the efficiency levels.

In this section, DOE presents the analytical results for the TSLs of the product classes that DOE analyzed directly (the "representative product classes"). DOE scaled the standards for these representative product classes to create standards for other product classes that were not directly analyzed (programmed start ballasts that operate 8-foot HO lamps), as set forth in chapter 5 of the TSD.

TABLE VIII.1—TRIAL STANDARD LEVELS

Representative product class	TSL 1	TSL 2	TSL 3
IS and RS ballasts that operate:			
4-foot MBP lamps, 8-foot slimline lamps	EL1	EL2	EL3
PS ballasts that operate:			
4-foot MBP lamps, 4-foot MiniBP SO lamps, 4-foot MiniBP HO lamps	EL1	EL2	EL3
IS and RS ballasts that operate 8-foot HO lamps	EL1	EL2	EL3
Ballasts that operate 8-foot HO lamps in cold temperature outdoor signs	EL1	EL1	EL1

TSL 1, which would set energy conservation standards at EL1 for all product classes, would eliminate currently available 2-lamp MBP T12 RS (commercial and residential), low-efficiency 2-lamp 4-foot MBP T8 PS, magnetic 8-foot HO, and magnetic sign ballasts. TSL 1 would require IS and RS 2-lamp MBP ballasts that operate T8 lamps. TSL 1 does not impact 8-foot slimline or 4-lamp MBP IS and RS ballasts. TSL 1 also prevents the baseline inefficient T5 standard and high output ballasts from becoming prevalent in future years. For the reasons explained in section 0, sign ballasts have only one EL, so TSL 1 represents the max tech level for the sign ballast representative product class. TSL 2 and TSL 3 also require EL1 for sign ballasts.

TSL 2 would set energy conservation standards at EL2 for the IS and RS, PS, and 8-foot HO IS and RS product classes. This level would eliminate standard-efficiency, dedicated voltage 2-lamp MBP T8 IS ballasts (commercial and residential), but can be met with standard-efficiency universal input voltage 2-lamp MBP T8 IS ballasts commercial ballasts and high-efficiency dedicated input voltage 2-lamp MBP T8 IS residential ballasts. TSL 2 eliminates the least efficient T12 2-lamp slimline ballasts, and is just met by the least efficient T8 8-foot slimline ballasts. TSL 2 does not affect 4-lamp MBP T8 IS ballasts. For PS ballasts, high-efficiency 4-foot MBP and high-efficiency T5 standard and high output ballasts are required at TSL 2. This TSL would eliminate the least efficient currently available standard and high output T5 ballasts. TSL 2 for the 8-foot HO IS and RS product class results in the elimination of current T12 electronic ballasts, but can be met with T8 electronic ballasts. All three of these ELs represent the elimination of the least efficient T8 electronic ballasts.

TSL 3 would set energy conservation standards at EL3 for the IS and RS, PS, and 8-foot HO IS and RS product class. TSL 3 represents the highest EL analyzed in all representative product classes and is the max tech TSL. Ballasts that meet TSL 3 represent the most efficient models tested by DOE in their respective representative product classes.

B. Economic Justification and Energy Savings

1. Economic Impacts on Individual Consumers

a. Life-Cycle Cost and Payback Period

Consumers affected by new or amended standards usually experience higher purchase prices and lower operating costs. Generally, these impacts on individual consumers are best captured by changes in LCCs and by the payback period. Therefore, DOE calculated the LCC and PBP analyses for the potential standard levels considered in this rulemaking. DOE's LCC and PBP analyses provide key outputs for each TSL, which are reported by product class in Table VIII.2–Table VIII.15 below. Each table includes the average total LCC and the average LCC savings, as well as the fraction of product consumers for which the LCC will either decrease (net benefit), or increase (net cost) relative to the base-case forecast. The last outputs in the tables are the median PBPs for the consumer that is purchasing a design compliant with the TSL. Negative PBP values indicate standards that reduce both operating costs and installed costs. Entries of "N/A" indicate standard levels that do not reduce operating costs; which prevents the consumer from recovering the increased purchase cost. This occurred with residential ballasts operating 4-foot MBP lamps (T8 baseline), where the system input power ratings for the standards-case replacements were greater than that for the baseline system. As discussed in section 0 above, the replacement systems use more energy but produce more light with greater efficiency than the baseline T8 system.

The results for each TSL are relative to the energy use distribution in the base case (no amended standards), based on energy consumption under conditions of actual product use. The rebuttable presumption PBP is based on test values under conditions prescribed by the DOE test procedure, as required by EPCA. (42 U.S.C. 6295(o)(2)(B)(iii))

TABLE VIII.2—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS (COMMERCIAL, T12 BASELINE): LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period * *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
	Baseline	64.63	234.65	299.28				
1	1	55.91	225.82	281.73	17.54	0.0	100.0	−8.99
2	2	58.58	215.70	274.27	25.00	0.0	100.0	−2.88
3	3	59.16	197.70	256.87	42.41	0.0	100.0	−1.35
Event II: New Construction/Renovation								
	Baseline	67.02	234.65	301.66				
1	1	58.30	199.89	258.19	43.47	0.0	100.0	−2.29
2	2	60.97	191.12	252.09	49.58	0.0	100.0	−1.27
3	3	61.55	187.43	248.98	52.68	0.0	100.0	−1.06

* Negative PBP values indicate standards that reduce operating costs and installed costs.

TABLE VIII.3—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS (COMMERCIAL, T8 BASELINE): LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period * *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
1	Baseline/1	55.08	225.82	280.90				
2	2	57.74	215.70	273.44	7.46	0.0	100.0	2.43
3	3	58.33	197.70	256.03	24.87	0.0	100.0	1.07
Event II: New Construction/Renovation								
1	Baseline/1	57.47	225.82	283.29				
2	2	60.13	215.79	275.92	7.37	0.0	100.0	2.46
3	3	60.72	211.57	272.28	11.00	0.0	100.0	2.11

TABLE VIII.4—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS (RESIDENTIAL, T12 BASELINE): LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period * *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
	Baseline	52.99	67.73	120.72				
1	1	45.02	56.40	101.42	19.29	0.0	100.0	−7.60
2, 3	3	46.24	57.30	103.53	17.18	0.0	100.0	−6.99
Event II: New Construction/Renovation								
	Baseline	55.38	67.73	123.10				
1	1	47.41	56.00	103.40	19.70	0.0	100.0	−7.34
2, 3	3	48.63	53.54	102.16	20.94	0.0	100.0	−5.14

* Negative PBP values indicate standards that reduce operating costs and installed costs.

TABLE VIII.5—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS (RESIDENTIAL, T8 BASELINE): LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period* *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
1	Baseline/1	44.11	56.40	100.51				
2, 3	3	45.33	57.30	102.63	−2.11	100.0	0.0	N/A
Event II: New Construction/Renovation								
1	Baseline/1	46.50	56.40	102.90				
2, 3	3	47.72	53.93	101.65	1.26	10.6	89.4	5.37

* Entries of "N/A" indicate standard levels that do not reduce operating costs.

TABLE VIII.6—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE FOUR 4-FOOT MBP LAMPS: LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
1, 2	Baseline/2	76.77	407.73	484.49				
3	3	79.33	398.46	477.79	6.70	0.0	100.0	2.56
Event II: New Construction/Renovation								
1, 2	Baseline/2	79.16	407.73	486.88				
3	3	81.72	402.21	483.94	2.95	0.7	99.3	4.31

TABLE VIII.7—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 8–FOOT SLIMLINE LAMPS (T12 BASELINE): LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period* *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
1	Baseline/1	90.06	434.50	524.56				
2	2	89.34	413.71	503.05	21.50	0.0	100.0	−0.31
3	3	89.68	401.02	490.69	33.86	0.0	100.0	−0.10
Event II: New Construction/Renovation								
1	Baseline/1	92.45	434.50	526.94				
2	2	91.73	420.63	512.37	14.58	0.0	100.0	−0.47
3	3	92.07	414.38	506.45	20.50	0.0	100.0	−0.17

* Negative PBP values indicate standards that reduce operating costs and installed costs.

TABLE VIII.8—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 8-FOOT SLIMLINE LAMPS (T8 BASELINE): LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
1, 2	Baseline/2	90.03	413.71	503.74				
3	3	90.37	401.02	491.38	12.36	0.0	100.0	0.24
Event II: New Construction/Renovation								
1, 2	Baseline/2	92.42	413.71	506.13				
3	3	92.75	407.57	500.33	5.80	0.0	100.0	0.50

TABLE VIII.9—PRODUCT CLASS 2—PS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS: LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
	Baseline	57.92	202.24	260.16				
1, 2	2	59.17	188.88	248.04	12.12	0.0	100.0	1.07
3	3	59.60	186.40	246.00	14.17	0.0	100.0	1.22
Event II: New Construction/Renovation								
	Baseline	60.31	202.24	262.55				
1, 2	2	61.55	188.79	250.34	12.21	0.0	100.0	1.06
3	3	61.99	186.62	248.60	13.95	0.0	100.0	1.23

TABLE VIII.10—PRODUCT CLASS 2—PS BALLASTS THAT OPERATE FOUR 4-FOOT MBP LAMPS: LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
	Baseline	75.31	372.68	448.00				
1	1	79.20	368.71	447.92	0.08	71.7	28.3	11.27
2, 3	3	81.28	359.20	440.48	7.52	1.3	98.7	5.09
Event II: New Construction/Renovation								
	Baseline	77.70	372.68	450.39				
1	1	81.59	340.40	421.99	28.39	0.0	100.0	1.39
2, 3	3	83.67	332.50	416.17	34.22	0.0	100.0	1.71

TABLE VIII.11—PRODUCT CLASS 2—PS BALLASTS THAT OPERATE TWO 4-FOOT MINIBP SO LAMPS: LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
	Baseline	63.45	252.21	315.66				

TABLE VIII.11—PRODUCT CLASS 2—PS BALLASTS THAT OPERATE TWO 4-FOOT MINIBP SO LAMPS: LCC AND PBP RESULTS—Continued

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
1	1	63.55	238.21	301.76	13.90	0.0	100.0	0.06
2	2	65.04	228.05	293.09	22.57	0.0	100.0	0.61
3	3	69.84	243.99	313.83	1.83	39.1	60.9	7.19
Event II: New Construction/Renovation								
	Baseline	65.84	252.21	318.05				
1	1	65.94	238.21	304.15	13.90	0.0	100.0	0.06
2	2	67.43	236.07	303.50	14.55	0.0	100.0	0.91
3	3	72.23	230.07	302.30	15.75	0.0	100.0	2.67

TABLE VIII.12—PRODUCT CLASS 2—PS BALLASTS THAT OPERATE TWO 4-FOOT MINIBP HO LAMPS: LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
	Baseline	63.55	338.93	402.49				
1	1	67.70	315.58	383.28	19.21	0.0	100.0	1.28
2	2	70.65	310.87	381.52	20.96	0.0	100.0	1.82
3	3	73.52	308.29	381.81	20.68	0.0	100.0	2.34
Event II: New Construction/Renovation								
	Baseline	65.94	338.93	404.88				
1	1	70.08	315.58	385.67	19.21	0.0	100.0	1.28
2	2	73.04	312.98	386.02	18.85	0.0	100.0	1.97
3	3	75.91	310.04	385.95	18.92	0.0	100.0	2.48

TABLE VIII.13—PRODUCT CLASS 3—IS AND RS BALLASTS THAT OPERATE TWO 8-FOOT HO LAMPS (T12 BASELINE): LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period * *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
	Baseline	116.92	619.03	735.95				
1	1	111.77	554.36	666.13	69.82	0.0	100.0	−0.57
2	2	96.97	404.53	501.51	234.45	0.0	100.0	−0.67
3	3	101.02	398.16	499.18	236.77	0.0	100.0	−0.52
Event II: New Construction/Renovation								
	Baseline	119.31	619.03	738.34				
1	1	114.15	574.24	688.39	49.95	0.0	100.0	−0.83
2	2	99.36	499.29	598.65	139.69	0.0	100.0	−1.21
3	3	103.41	494.49	597.89	140.45	0.0	100.0	−0.93

* Negative PBP values indicate standards that reduce operating costs and installed costs.

TABLE VIII.14—PRODUCT CLASS 3—IS AND RS BALLASTS THAT OPERATE TWO 8-FOOT HO LAMPS (T8 BASELINE): LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period * *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
1, 2	Baseline/2	94.07	404.53	498.61				
3	3	98.12	398.16	496.28	2.33	13.2	86.8	4.57
Event II: New Construction/Renovation								
1, 2	Baseline/2	96.46	404.53	501.00				
3	3	100.51	400.71	501.22	−0.22	70.4	29.6	7.62

TABLE VIII.15—PRODUCT CLASS 5—BALLASTS THAT OPERATE FOUR 8-FOOT HO LAMPS IN COLD TEMPERATURE OUTDOOR SIGNS: LCC AND PBP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period * *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event I: Replacement								
	Baseline	163.93	1,403.06	1,566.99				
1, 2, 3	1	157.45	1,019.63	1,177.07	389.91	0.0	100.0	−0.16
Event II: New Construction/Renovation								
	Baseline	166.32	1,403.06	1,569.38				
1, 2, 3	1	159.84	1,177.81	1,337.64	231.73	0.0	100.0	−0.27

* Negative PBP values indicate standards that reduce operating costs and installed costs.

b. Consumer Sub-Group Analysis

Using the LCC spreadsheet model, DOE determined the impact of the trial standard levels on the following consumer sub-groups: Low-income consumers, institutions of religious worship, and institutions that serve low-income populations. Representative ballast designs used in the industrial sector (*e.g.,* ballasts operating HO lamps) are not typically used by the identified sub-groups, and were not included in the sub-group analysis. Similarly, DOE assumed that low-income consumers use residential ballasts only, and did not include commercial ballast designs in the LCC analysis for this sub-group. DOE assumed that institutions of religious worship and institutions that serve low-income populations use commercial ballasts only, and did not include residential ballast designs in their sub-group analysis.

To reflect conditions faced by the identified subgroups, DOE adjusted particular inputs to the LCC model. For low-income consumers, DOE adjusted electricity prices to represent rates paid by consumers living below the poverty line. DOE assumed that institutions of religious worship have lower annual operating hours than the commercial sector average used in the main LCC analysis. For institutions serving low-income populations, DOE assumed that the majority of these institutions are small nonprofits, and used a higher discount rate of 10.7 percent (versus 6.9 percent for the main commercial sector analysis).

Table VIII.16 through Table VIII.25 below show the LCC impacts and payback periods for identified sub-groups that purchase ballasts. Negative PBP values indicate standards that reduce operating costs and installed costs. Entries of "N/A" indicate standard levels that do not reduce operating costs. In general, the average LCC savings for the identified sub-groups at the considered efficiency levels are not significantly different from the average for all consumers.

TABLE VIII.16—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS (COMMERCIAL, T12 BASELINE): LCC AND PBP SUB-GROUP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period * *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Sub-Group: Institutions of Religious Worship								
Event I: Replacement								
	Baseline	64.63	185.70	250.33				
1	1	55.91	178.85	234.76	15.57	0.0	100.0	−15.61
2	2	58.58	170.82	229.40	20.93	0.0	100.0	−5.00
3	3	59.16	156.54	215.71	34.62	0.0	100.0	−2.35
Event II: New Construction/Renovation								
	Baseline	67.02	185.70	252.72				
1	1	58.30	158.28	216.58	36.14	0.0	100.0	−3.98
2	2	60.97	151.32	212.29	40.43	0.0	100.0	−2.21
3	3	61.55	148.39	209.95	42.77	0.0	100.0	−1.84
Sub-Group: Institutions Serving Low-Income Populations								
Event I: Replacement								
	Baseline	64.63	198.59	263.22				
1	1	55.91	191.11	247.02	16.20	0.0	100.0	−8.99
2	2	58.58	182.54	241.12	22.10	0.0	100.0	−2.88
3	3	59.16	167.32	226.48	36.74	0.0	100.0	−1.35
Event II: New Construction/Renovation								
	Baseline	67.02	198.59	265.61				
1	1	58.30	169.17	227.47	38.14	0.0	100.0	−2.29
2	2	60.97	161.75	222.71	42.90	0.0	100.0	−1.27
3	3	61.55	158.63	220.18	45.43	0.0	100.0	−1.06

* Negative PBP values indicate standards that reduce operating costs and installed costs.

TABLE VIII.17—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS (COMMERCIAL, T8 BASELINE): LCC AND PBP SUB-GROUP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period * *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Sub-Group: Institutions of Religious Worship								
Event I: Replacement								
1	Baseline/1	55.08	178.85	233.93				
2	2	57.74	170.82	228.56	5.37	0.1	99.9	4.23
3	3	58.33	156.54	214.87	19.06	0.0	100.0	1.86
Event II: New Construction/Renovation								
1	Baseline/1	57.47	178.85	236.32				
2	2	60.13	170.89	231.02	5.29	0.1	99.9	4.27
3	3	60.72	167.54	228.26	8.06	0.0	100.0	3.66
Sub-Group: Institutions Serving Low-Income Populations								
Event I: Replacement								
1	Baseline/1	55.08	191.11	246.19				
2	2	57.74	182.54	240.29	5.90	0.0	100.0	2.43
3	3	58.33	167.32	225.64	20.54	0.0	100.0	1.07

TABLE VIII.17—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS (COMMERCIAL, T8 BASELINE): LCC AND PBP SUB-GROUP RESULTS—Continued

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period* *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Event II: New Construction/Renovation								
1	Baseline/1	57.47	191.11	248.58				
2	2	60.13	182.62	242.75	5.82	0.0	100.0	2.46
3	3	60.72	179.05	239.77	8.81	0.0	100.0	2.11

TABLE VIII.18—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS (RESIDENTIAL, T12 BASELINE): LCC AND PBP SUB-GROUP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period* *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Sub-Group: Low-Income Consumers								
Event I: Replacement								
	Baseline	52.99	67.85	120.84				
1	1	45.02	56.51	101.53	19.31	0.0	100.0	−7.60
2, 3	3	46.24	57.41	103.64	17.20	0.0	100.0	−6.99
Event II: New Construction/Renovation								
	Baseline	55.38	67.85	123.23				
1	1	47.41	56.10	103.51	19.72	0.0	100.0	−7.43
2, 3	3	48.63	53.64	102.27	20.96	0.0	100.0	−5.14

* Negative PBP values indicate standards that reduce operating costs and installed costs.

TABLE VIII.19—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS (RESIDENTIAL, T8 BASELINE): LCC AND PBP SUB-GROUP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period* *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Sub-Group: Low-Income Consumers								
Event I: Replacement								
1	Baseline/1	44.11	56.51	100.62				
2, 3	3	45.33	57.41	102.74	−2.12	100.0	0.0	N/A
Event II: New Construction/Renovation								
1	Baseline/1	46.50	56.51	103.01				
2, 3	3	47.72	54.03	101.75	1.26	10.6	89.4	5.37

* Entries of "N/A" indicate standard levels that do not reduce operating costs.

TABLE VIII.20—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE FOUR 4-FOOT MBP LAMPS: LCC AND PBP RESULTS: LCC AND PBP SUB-GROUP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period * *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Sub-Group: Institutions of Religious Worship								
Event I: Replacement								
1, 2	Baseline/2	76.77	323.00	399.77				
3	3	79.33	315.65	394.98	4.78	0.3	99.7	4.45
Event II: New Construction/Renovation								
1, 2	Baseline/2	79.16	323.00	402.16				
3	3	81.72	318.63	400.35	1.81	13.7	86.3	7.48
Sub-Group: Institutions Serving Low-Income Populations								
Event I: Replacement								
1, 2	Baseline/2	76.77	345.04	421.81				
3	3	79.33	337.21	416.54	5.27	0.0	100.0	2.56
Event II: New Construction/Renovation								
1, 2	Baseline/2	79.16	345.04	424.20				
3	3	81.72	340.38	422.10	2.10	6.7	93.3	4.31

TABLE VIII.21—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 8-FOOT SLIMLINE LAMPS (T12 BASELINE): LCC AND PBP SUB-GROUP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period * *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Sub-Group: Institutions of Religious Worship								
Event I: Replacement								
1	Baseline/1	90.06	343.91	433.97				
2	2	89.34	327.51	416.86	17.12	0.0	100.0	−0.55
3	3	89.68	317.44	407.12	26.85	0.0	100.0	−0.18
Event II: New Construction/Renovation								
1	Baseline/1	92.45	343.91	436.36				
2	2	91.73	333.01	424.74	11.68	0.0	100.0	−0.81
3	3	92.07	328.05	420.11	16.25	0.0	100.0	−0.30
Sub-Group: Institutions Serving Low-Income Populations								
Event I: Replacement								
1	Baseline/1	90.06	367.73	457.79				
2	2	89.34	350.13	439.48	18.31	0.0	100.0	−0.31
3	3	89.68	339.39	429.07	28.72	0.0	100.0	−0.10
Event II: New Construction/Renovation								
1	Baseline/1	92.45	367.73	460.18				
2	2	91.73	355.99	447.72	12.45	0.0	100.0	−0.47
3	3	92.07	350.70	442.77	17.41	0.0	100.0	−0.17

* Negative PBP values indicate standards that reduce operating costs and installed costs.

TABLE VIII.22—PRODUCT CLASS 1—IS AND RS BALLASTS THAT OPERATE TWO 8-FOOT SLIMLINE LAMPS (T8 BASELINE): LCC AND PBP SUB-GROUP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Sub-Group: Institutions of Religious Worship								
Event I: Replacement								
1, 2	Baseline/2	90.03	327.51	417.55				
3	3	90.03	317.44	407.81	9.74	0.0	100.0	0.42
Event II: New Construction/Renovation								
1, 2	Baseline/2	92.42	327.51	419.93				
3	3	92.75	322.64	415.40	4.54	0.0	100.0	0.88
Sub-Group: Institutions Serving Low-Income Populations								
Event I: Replacement								
1, 2	Baseline/2	90.03	350.13	440.16				
3	3	90.37	339.39	429.76	10.41	0.0	100.0	0.24
Event II: New Construction/Renovation								
1, 2	Baseline/2	92.42	350.13	442.55				
3	3	92.75	344.94	437.69	4.86	0.0	100.0	0.50

TABLE VIII.23—PRODUCT CLASS 2—PS BALLASTS THAT OPERATE TWO 4-FOOT MBP LAMPS: LCC AND PBP SUB-GROUP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Sub-Group: Institutions of Religious Worship								
Event I: Replacement								
	Baseline	57.92	147.32	205.24				
1, 2	2	59.17	137.56	196.73	8.51	0.0	100.0	1.85
3	3	59.60	135.76	195.35	9.89	0.0	100.0	2.11
Event II: New Construction/Renovation								
	Baseline	60.31	147.32	207.63				
1, 2	2	61.55	137.50	199.05	8.58	0.0	100.0	1.84
3	3	61.99	135.91	197.90	9.73	0.0	100.0	2.14
Sub-Group: Institutions Serving Low-Income Populations								
Event I: Replacement								
	Baseline	57.92	161.44	219.37				
1, 2	2	59.17	150.78	209.94	9.42	0.0	100.0	1.07
3	3	59.60	148.80	208.40	10.97	0.0	100.0	1.22
Event II: New Construction/Renovation								
	Baseline	60.31	161.44	221.76				
1, 2	2	61.55	150.71	212.26	9.49	0.0	100.0	1.06
3	3	61.99	148.97	210.96	10.79	0.0	100.0	1.23

TABLE VIII.24—PRODUCT CLASS 2—PS BALLASTS THAT OPERATE FOUR 4-FOOT MBP LAMPS: LCC AND PBP SUB-GROUP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Sub-Group: Institutions of Religious Worship								
Event I: Replacement								
	Baseline	75.31	271.57	346.88				
1	1	79.20	268.67	347.87	−0.99	94.4	5.6	19.57
2, 3	3	81.28	261.72	343.01	3.88	22.4	77.6	8.84
Event II: New Construction/Renovation								
	Baseline	77.70	271.57	349.27				
1	1	81.59	248.00	329.60	19.67	0.0	100.0	2.41
2, 3	3	83.67	242.23	325.91	23.36	0.0	100.0	2.97
Sub-Group: Institutions Serving Low-Income Populations								
Event I: Replacement								
	Baseline	75.31	297.48	372.80				
1	1	79.20	294.31	373.52	-0.72	89.3	10.7	11.27
2, 3	3	81.28	286.72	368.00	4.79	11.2	88.8	5.09
Event II: New Construction/Renovation								
	Baseline	77.70	297.48	375.18				
1	1	81.59	271.72	353.31	21.87	0.0	100.0	1.39
2, 3	3	83.67	265.41	349.08	26.10	0.0	100.0	1.71

TABLE VIII.25—PRODUCT CLASS 2—PS BALLASTS THAT OPERATE TWO 4-FOOT MINIBP SO LAMPS: LCC AND PBP SUB-GROUP RESULTS

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
Sub-Group: Institutions of Religious Worship								
Event I: Replacement								
	Baseline	63.45	199.70	263.15				
1	1	63.55	188.59	252.15	11.01	0.0	100.0	0.11
2	2	65.04	180.53	245.58	17.57	0.0	100.0	1.06
3	3	69.84	193.18	263.02	0.13	72.9	27.1	12.49
Event II: New Construction/Renovation								
	Baseline	65.84	199.70	265.54				
1	1	65.94	188.59	254.53	11.01	0.0	100.0	0.11
2	2	67.43	186.89	254.33	11.21	0.0	100.0	1.58
3	3	72.23	182.14	254.37	11.17	0.5	99.5	4.64
Sub-Group: Institutions Serving Low-Income Populations								
Event I: Replacement								
	Baseline	63.45	213.44	276.90				
1	1	63.55	201.60	265.15	11.75	0.0	100.0	0.06
2	2	65.04	193.00	258.05	18.85	0.0	100.0	0.61
3	3	69.84	206.49	276.33	0.57	67.0	33.0	7.19
Event II: New Construction/Renovation								
	Baseline	65.84	213.44	279.29				
1	1	65.94	201.60	267.54	11.75	0.0	100.0	0.06

TABLE VIII.25—PRODUCT CLASS 2—PS BALLASTS THAT OPERATE TWO 4-FOOT MINIBP SO LAMPS: LCC AND PBP SUB-GROUP RESULTS—Continued

Trial standard level	Efficiency level	Life-cycle cost *2009$*			Life-cycle cost savings			Median payback period *years*
		Installed cost	Discounted operating cost	LCC	Average savings *2009$*	Percent of consumers that experience		
						Net cost	Net benefit	
2	2	67.43	199.79	267.22	12.07	0.0	100.0	0.91
3	3	72.23	194.72	266.94	12.34	0.0	100.0	2.67

c. Rebuttable Presumption Payback

As discussed above, EPCA provides a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. DOE's LCC and PBP analyses generate values that calculate the payback period for consumers of potential energy conservation standards, which includes, but is not limited to, the 3-year payback period contemplated under the rebuttable presumption test discussed above. However, DOE routinely conducts a full economic analysis that considers the full range of impacts—including those on consumers, manufacturers, the nation, and the environment—as required under 42 U.S.C. 6295(o)(2)(B)(i).

In the present case, DOE calculated a rebuttable presumption payback period for each TSL. Rather than using distributions for input values, DOE used discrete values and, as required by EPCA, based the calculation on the assumptions in the DOE test procedures for ballasts. As a result, DOE calculated a single rebuttable presumption payback value, rather than a distribution of payback periods, for each TSL. Table VIII.26 shows the rebuttable presumption payback periods that are less than 3 years. Negative PBP values indicate standards that reduce operating costs and installed costs.

While DOE examined the rebuttable-presumption criterion, it considered whether the standard levels considered for today's rule are economically justified through a more detailed analysis of the economic impacts of these levels pursuant to 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE to evaluate the economic justification for a potential standard level definitively (thereby supporting or rebutting the results of any preliminary determination of economic justification).

TABLE VIII.26—BALLAST EFFICIENCY LEVELS WITH REBUTTABLE PAYBACK PERIOD LESS THAN THREE YEARS

IX. Product class	X. Ballast type	XI. Efficiency level	Mean payback period * *years*	
			Event I: Replacement	Event II: New construction/ renovation
1	IS and RS ballasts that operate:			
	Two 4-foot MBP lamps (commercial, T12 baseline).	1	−8.99	−2.29
		2	−2.88	−1.27
		3	−1.35	−1.06
	Two 4-foot MBP lamps (commercial, T8 baseline).	2	2.43	2.46
		3	1.07	2.11
	Two 4-foot MBP lamps (residential, T12 baseline).	1	−7.60	−7.34
		2, 3	−6.99	−5.14
	Four 4-foot MBP lamps	3	2.56	
	Two 8-foot slimline lamps (T12 baseline).	2	−0.31	−0.47
		3	−0.10	−0.17
	Two 8-foot slimline lamps (T8 baseline).	3	0.24	0.50
2	PS ballasts that operate:			
	Two 4-foot MBP lamps	1, 2	1.07	1.06
		3	1.22	1.23
	Four 4-foot MBP lamps	1		1.39
		3		1.71
	Two 4-foot MiniBP SO lamps	1	0.06	0.06
		2	0.61	0.91
		3		2.67
	Two 4-foot MiniBP HO lamps	1	1.28	1.28
		2	1.82	1.97
		3	2.34	2.48
3	IS and RS ballasts that operate:			
	Two 8-foot HO lamps (T12 baseline)	1	−0.57	−0.83
		2	−0.67	−1.21

TABLE VIII.26—BALLAST EFFICIENCY LEVELS WITH REBUTTABLE PAYBACK PERIOD LESS THAN THREE YEARS—Continued

IX. Product class	X. Ballast type	XI. Efficiency level	Mean payback period * *years*	
			Event I: Replacement	Event II: New construction/ renovation
		3	−0.52	−0.93
5	Ballasts that operate: Four 8-foot HO lamps in cold temperature outdoor signs.	1, 2, 3	−0.16	−0.27

* Negative PBP values indicate standards that reduce operating costs and installed costs.

1. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of amended energy conservation standards on manufacturers of fluorescent lamp ballasts. The section below describes the expected impacts on manufacturers at each TSL. Chapter 13 of the TSD explains the analysis in further detail.

The tables below depict the financial impacts (represented by changes in INPV) of amended energy standards on manufacturers as well as the conversion costs that DOE estimates manufacturers would incur at each TSL. DOE shows the results for all product classes in one group, as most product classes are generally made by the same manufacturers. DOE breaks out results for the sign ballast manufacturer subgroup in section 0 below. To evaluate the range of cash flow impacts on the ballast industry, DOE modeled eight different scenarios using different assumptions for markups, shipments, and technologies that correspond to the range of anticipated market responses to new and amended standards. Each scenario results in a unique set of cash flows and corresponding industry value at each TSL. Two of these scenarios are presented below, corresponding to the bounds of a range of market responses that DOE anticipates could occur in the standards case. In the following discussion, the INPV results refer to the difference in industry value between the base case and the standards case that result from the sum of discounted cash flows from the base year (2011) through the end of the analysis period. The results also discuss the difference in cash flow between the base case and the standards case in the year before the compliance date for new and amended energy conservation standards. This figure represents how large the required conversion costs are relative to the cash flow generated by the industry in the absence of new and amended energy conservation standards. In the engineering analysis, DOE presents its findings of the common technology options that achieve the efficiencies for each of the representative product classes. To refer to the description of technology options and the required efficiencies at each TSL, see section 0 of today's notice.

a. Industry Cash-Flow Analysis Results

The set of results below shows two tables of INPV impacts: The first table reflects the lower (less severe) bound of impacts and the second represents the upper bound. To assess the lower end of the range of potential impacts, DOE modeled the preservation of operating profit markup scenario. As discussed in section 0, the preservation of operating profit markup scenario assumes that in the standards case, manufacturers would be able to earn the same operating margin in absolute dollars in the standards case as in the base case. In general, the larger the product price increases, the less likely manufacturers are to preserve the cash flow from operations calculated in this scenario because it is less likely that manufacturers would be able to markup these larger cost increases to the same degree.

DOE also incorporated the existing technologies scenario and the shift shipment scenario to assess the lower bound of impacts. Under the existing technologies scenario, base-case shipments of fluorescent lamp ballasts are not impacted by any emerging technologies that could potentially penetrate the market over the analysis period. Under the shift shipment scenario, all base-case consumer purchases are affected by the standard (regardless of whether their base-case efficiency is below the standard) as consumers may seek to shift to a higher efficiency level. Of all the scenario combinations analyzed in the MIA, conditions for generating cash flow are greatest under the preservation of operating profit markup, existing technologies, and shift shipment scenarios—the annual shipment volume, efficiency mix, and the ability to preserve operating margins is greatest. Thus, this scenario set yields the greatest modeled industry profitability.

Through its discussions with manufacturers, DOE found that many manufacturers typically offer two tiers of product lines differentiated by efficiency level, with the higher efficiency tier earning a premium over the baseline efficiency tier. Several manufacturers expected that the premium currently earned by the higher efficiency tier would erode under new or amended standards due to the disappearance of the baseline efficiency tier. The market effect would be to commoditize the higher tier product line (the new baseline in the standards case), which would significantly harm profitability. Therefore, to assess the higher (more severe) end of the range of potential impacts, DOE modeled a two-tier markup scenario in which higher energy conservation standards result in lower manufacturer markups for products that earn a premium in the base case. In this scenario, DOE assumed that the markup on fluorescent lamp ballasts varies according to two efficiency tiers in both the base case and the standards case. In the standards case, DOE modeled the situation in which portfolio reduction squeezes the margin of higher-efficiency products as they become lower-relative-efficiency-tier products. This commoditization would occur for several reasons. The large fixture manufacturers have substantial purchasing power due to the share of the market they represent (approximately two-thirds of the ballast market) and the high-volume orders placed by the largest fixture OEMs. Ballast manufacturers must compete aggressively for this business, not simply because of the volume of sales, but also because of the need to keep factories utilized and achieve economies of scale. By manufacturing in high volumes, ballast manufacturers can drive down fixed costs per unit, as they

spread overhead over more volume. Manufacturers can also lower variable costs per unit. Large volumes allow manufacturers to order from their component suppliers in large quantities, enabling better purchasing terms, thereby reducing per unit costs.

Price is often the primary rationale in purchasing decisions for fixture manufacturers, so ballast manufacturers face intense pressure to make their baseline models as cost-competitive as possible, even if the baseline model was once a premium model. To meet the needs of these price-driven customers by reducing costs, ballast manufacturers may have to remove features in the new baseline models that had commanded a price premium when bundled with high-efficiency. Without being able to use these extra features as a selling point, margins could decrease even further. As a result, ballast manufacturers would earn the same markup on these new high-volume baseline models as they did on their lower efficiency, former baseline models. This scenario represents the upper end (more severe) of the range of potential impacts on manufacturers because units that commanded a higher markup under the base case earn a lower markup under the standards case.

DOE also incorporated the emerging technologies scenario and the roll-up shipment scenario to assess the upper bound of impacts. Under the emerging technologies scenario fluorescent lamp ballasts lose market share to emerging technologies such as LEDs over the analysis period. Under the roll-up shipment scenario, no consumer purchases beyond those that do not meet the new standard level are affected by the standard, so premium pricing tiers are not continually maintained. Thus, under the two-tier markup scenario, emerging technologies scenario, and roll-up shipment scenario, the quantity of annual shipments is lowest and manufacturers have the least ability to pass on costs to consumers.

TABLE VIII.27—MANUFACTURER IMPACT ANALYSIS FOR FLUORESCENT LAMP BALLASTS—PRESERVATION OF OPERATING PROFIT MARKUP, EXISTING TECHNOLOGIES, AND SHIFT SHIPMENT SCENARIO

XII.	Units	Base case	Trial standard level		
			1	2	3
INPV	(2009$ millions)	1,241	1,221	1,189	1,145
Change in INPV	(2009$ millions)		(19.4)	(51.6)	(95.3)
	(%)		−1.6%	−4.2%	−7.7%
Product Conversion Costs	(2009$ millions)		5	24	57
Capital Conversion Costs	(2009$ millions)		11	25	34
Total Conversion Costs	(2009$ millions)		17	49	91

TABLE VIII.28—MANUFACTURER IMPACT ANALYSIS FOR FLUORESCENT LAMP BALLASTS—TWO-TIER MARKUP, EMERGING TECHNOLOGIES, AND ROLL-UP SHIPMENT SCENARIO

XIII.	Units	Base case	Trial standard level		
			1	2	3
INPV	(2009$ millions)	853	740	635	557
Change in INPV	(2009$ millions)		(112.7)	(217.9)	(296.2)
	(%)		−13.2%	−25.5%	−34.7%
Product Conversion Costs	(2009$ millions)		5	24	57
Capital Conversion Costs	(2009$ millions)		11	25	34
Total Conversion Costs	(2009$ millions)		17	49	91

TSL 1 represents EL1 for all four representative product classes. At TSL 1, DOE estimates impacts on INPV to range from −$19.4 million to −$112.7 million, or a change in INPV of −1.6 percent to −13.2 percent. At this proposed level, industry free cash flow is estimated to decrease by approximately 11.9 percent to $43.8 million, compared to the base-case value of $49.7 million in the year leading up to the proposed energy conservation standards.

The INPV impacts at TSL 1 are relatively minor, in part because the vast majority of shipments already meet EL1. DOE estimates that in 2014, the year in which compliance with any new and amended standards is proposed to be required, 98 percent of product class 1 shipments, 69 percent of product class 2 shipments, 88 percent of product class 3 shipments, and 64 percent of product class 5 shipments would meet EL1 or higher in the base case. The majority of shipments that are at baseline efficiency levels and would need to be converted at TSL 1 are 2-lamp, 4-foot MBP IS/RS residential ballasts in product class 1, 2-lamp and 4-lamp, 4ft MBP PS ballasts in product class 4, and 4-lamp sign ballasts in product class 5.

Because most fluorescent lamp ballast shipments already meet the efficiency levels analyzed at TSL 1, DOE expects conversion costs to be small compared to the industry value. DOE estimates product conversion costs of $5 million due to the research, development, testing, and certification costs needed to upgrade product lines that do not meet TSL 1. For capital conversion costs, DOE estimates $11 million for the industry, largely driven by the cost of converting all magnetic sign ballast production lines to electronic sign ballast production lines.

Under the preservation of operating profit markup scenario, impacts on manufacturers are marginally negative because while manufacturers earn the same operating profit as is earned in the base case for 2015 (the year following the compliance date of amended standards), they are faced with $17 million in conversion costs. INPV impacts on manufacturers are not as significant under this scenario as in other scenarios because despite most shipments already meeting TSL 1, the shift shipment scenario moves products beyond the eliminated baseline to higher-price (and higher gross profit) levels. This results in a shipment-weighted average MPC increase of 7.8 percent applied to a growing market

over the analysis period. While total shipments increase under both technology scenarios, shipments under the existing technologies scenario are 216 percent greater than shipments under the emerging technologies scenario by the end of the analysis period. At TSL 1, the moderate price increase applied to a large quantity of shipments lessens the impact of the minor conversion costs estimated at TSL 1, resulting in slightly negative impacts at TSL 1 under the preservation of operating profit markup scenario.

Under the two-tier markup scenario, manufacturers are not able to fully pass on additional costs to consumers and are not guaranteed base-case operating profit levels. Rather, products that once earned a higher-than-average markup at EL1 become commoditized once baseline products are eliminated at TSL 1. Thus, the average markup drops below the base-case average markup (which is equal to the flat manufacturer markup of 1.4). There is a slight increase in shipment-weighted average MPC (less than 1 percent) under the roll-up scenario, but this increase is much smaller than under the shift scenario because shipments above the baseline do not move to higher efficiencies with greater costs. This MPC increase is outweighed by a lower average markup of 1.38 and $17 million in conversion costs, resulting in more negative impacts at TSL 1 under the two-tier markup scenario. These impacts increase on a percentage basis under the emerging technologies scenario relative to the existing technologies scenario because the base-case INPV against which changes are compared is 31 percent lower.

TSL 2 represents EL1 for product class 5 (4-lamp sign ballasts). For product classes 1 (4-foot MBP IS/RS and 8-foot SP Slimline), 2 (4-foot MBP PS, 4-foot T5 MiniBP SO, and 4-foot T5 MiniBP HO),and 3 (2-lamp 8-foot HO), TSL 2 represents EL2. At TSL 2, DOE estimates impacts on INPV to range from −$51.6 million to −$217.9 million, or a change in INPV of −4.2 percent to −25.5 percent. At this proposed level, industry free cash flow is estimated to decrease by approximately 32.9 percent to $33.3 million, compared to the base-case value of $49.7 million in the year leading up to the proposed energy conservation standards.

Because product class 5 remains at EL1 at TSL 2, the additional impacts at TSL 2 relative to TSL 1 result from increasing product classes 1, 2, and 3 to EL2. At TSL 2, DOE estimates that 40 percent of product class 1 shipments, 13 percent of product class 2 shipments, and 27 percent of product class 3 shipments would meet EL2 or higher in the base case. Since product class 3 represents only 0.1 percent of the fluorescent lamp ballast market, the vast majority of impacts at TSL 2 relative to TSL 1 result from changes in product classes 1 and 2.

At TSL 2, conversion costs nearly triple compared to TSL 1 but remain small compared to the industry value. Product conversion costs increase to $24 million due to the increase in the number of product lines within product classes 1 and 2 that would need to be redesigned at TSL 2. Capital conversion costs grow to $25 million at TSL 2 because manufacturers would need to invest in additional testing equipment and convert some production lines.

Under the preservation of operating profit markup scenario, INPV impacts are negative because manufacturers are not able to fully pass on higher product costs to consumers. The shipment-weighted average MPC increases by 11.1 percent compared to the baseline MPC, but this increase does not generate enough cash flow to outweigh the $49 million in conversion costs at TSL 2, resulting in a −4.2 percent change in INPV at TSL 2 compared to the base case.

Under the two-tier markup scenario, more products are commoditized to a lower markup at TSL 2. The impact of this lower average markup of 1.36 outweighs the impact of a 10.3 percent increase in shipment-weighted average MPC, resulting in a negative change in INPV at TSL 2. The $49 million in conversion costs further erodes profitability, and the lower base case INPV against which the change in INPV is compared under the emerging technologies scenario increases impacts on a percentage basis.

TSL 3 represents EL1 for product class 5 and EL3 for product classes 1, 2, and 3. At TSL 3, DOE estimates impacts on INPV to range from −$95.3 million to −$296.2 million, or a change in INPV of −7.7 percent to −34.7 percent. At this proposed level, industry free cash flow is estimated to decrease by approximately 57.4 percent to $21.2 million, compared to the base-case value of $49.7 million in the year leading up to the proposed energy conservation standards.

Because product class 5 remains at EL1 at TSL 3, the additional impacts at TSL 3 relative to TSL 2 result from increasing product classes 1, 2, and 3 to EL3. At TSL 3, DOE estimates that only 20 percent of product class 1 shipments, 5 percent of product class 2 shipments, and 2 percent of product class 3 shipments would meet the efficiency levels proposed by TSL 3 or higher in the base case.

At TSL 3, conversion costs nearly double again compared to TSL 2. Product conversion costs increase to $57 million because a far greater number of product lines within product classes 1, 2, and 3 would need to be redesigned at TSL 3. Capital conversion costs rise to $34 million at TSL 3 because manufacturers would need to invest in equipment such as surface-mount device placement machinery and solder machines to convert production lines for the manufacturing of more efficient ballast designs.

Under the preservation of operating profit markup, existing technologies, and shift shipment scenarios, INPV decreases by 7.7 percent at TSL 3 compared to the base case, which is nearly double the percentage impact at TSL 2. The shipment-weighted average MPC increases by 19.5 percent, but manufacturers are not able to pass on the full amount of these higher costs to consumers. This MPC increase is outweighed by the $91 million in conversion costs at TSL 3.

Under the two-tier markup scenario, at TSL 3, products are commoditized to a lower markup to an even greater extent. The impact of this lower average markup of 1.34 outweighs the impact of a 19.3 percent increase in shipment-weighted average MPC, resulting in a negative change in INPV at TSL 3 compared to TSL 2. Profitability is further impacted by the $91 million in conversion costs and the lower base-case INPV over which change in INPV is compared under the emerging technologies scenario.

a. Impacts on Employment

DOE typically presents modeled quantitative estimates of the potential changes in production employment that could result following amended energy conservation standards. However, for this rulemaking, DOE determined that none of the major manufacturers, which compose more than 90 percent of the market, have domestic fluorescent lamp ballast production. Although a few niche manufacturers have relatively limited domestic production, based on interviews, DOE believes there are very few domestic production employees in the United States Because many niche manufacturers did not respond to interview requests, DOE is unable to fully quantify domestic production employment. Therefore, while DOE qualitatively discusses potential employment impacts below, DOE did not model direct employment impacts explicitly because the results would not be meaningful given the very low

number of domestic production employees.

Based on interviews, DOE believes that direct employment impacts of relatively significant magnitude would only occur in the event that one or more businesses chose to exit the market due to new standards. Discussions with manufacturers indicated that, at the highest efficiency level (TSL 3), some small manufacturers will be faced with the decision to make the investments necessary to remain in the market based on their current technical capabilities. In general, however, DOE believes that TSL 3, the level proposed in today's notice, will not have significant adverse impacts on employment because achieving these levels is within the expertise of most manufacturers, including small manufacturers, due to the lack of intellectual property restrictions and similarity of products among manufacturers.

In summary, however, given the low number of production employees and the unlikelihood that manufacturers would exit the market at the efficiency levels proposed in today's notice, DOE does not expect a significant impact on direct employment following new and amended energy conservation standards.

DOE notes that the employment impacts discussed here are independent of the employment impacts from the broader U.S. economy, which are documented in chapter 15, Employment Impact Analysis, of the NOPR TSD.

b. Impacts on Manufacturing Capacity

Manufacturers stated that new and amended energy conservation standards could harm manufacturing capacity due to the current component shortage discussed in section 0 above. Manufacturers presently are struggling to produce enough fluorescent lamp ballasts to meet demand because of a worldwide shortage of electrical components. The components most affected by this shortage are high-efficiency parts, for which demand would increase even further following new and amended conservation standards. The increased demand could exacerbate the component shortage, thereby impacting manufacturing capacity in the near term. While DOE recognizes that the component shortage is currently a significant issue for manufacturers, DOE believes it is a relatively short term phenomenon to which component suppliers will ultimately adjust. According to manufacturers, suppliers have the ability to ramp up production to meet ballast component demand by the compliance date of potential new standards, but those suppliers have hesitated to invest in additional capacity due to economic uncertainty and skepticism about the sustainability of demand. The state of the macroeconomic environment through 2014 will likely impact the duration of the component shortage. However, potential mandatory standards could create more certainty for suppliers about the eventual demand for these components. Additionally, the components at issue are not new technologies; rather, they have simply not historically been demanded in large quantities by ballast manufacturers.

c. Impacts on Sub-Groups of Manufacturers

As discussed in section 0, using average cost assumptions to develop an industry cash-flow estimate is inadequate to assess differential impacts among manufacturer sub-groups. DOE used the results of the industry characterization to group ballast manufacturers exhibiting similar characteristics. DOE identified two sub-groups that would experience differential impacts: Small manufacturers and sign ballast manufacturers. For a discussion of the impacts on the small manufacturer sub-group, see the Regulatory Flexibility Analysis in section 0 and chapter 13 of the NOPR TSD.

DOE is not presenting results under the two-tier markup scenario for sign ballasts because it did not observe this two-tier effect in the sign ballast market. Electronic ballasts at EL1 neither command a higher price nor a higher markup in the base case. Additionally, roll-up and shift scenarios do not have separate impacts for sign ballasts because there are no higher ELs above the new baseline to which products could potentially shift in the standards case. As such, the tables below present the cash-flow analysis results under the preservation of operating profit markup and roll-up shipment scenarios with existing or emerging technologies for sign ballast manufacturers.

TABLE VIII.29—MANUFACTURER IMPACT ANALYSIS FOR SIGN BALLASTS—PRESERVATION OF OPERATING PROFIT MARKUP, EXISTING TECHNOLOGIES, AND ROLL-UP SHIPMENT SCENARIO

XIV.	Units	Base case	Trial standard level		
			1	2	3
INPV	(2009$ millions)	142	138	138	138
Change in INPV	(2009$ millions)		(4.2)	(4.2)	(4.2)
	(%)		−2.9%	−2.9%	−2.9%
Product Conversion Costs	(2009$ millions)		2	2	2
Capital Conversion Costs	(2009$ millions)		6	6	6
Total Conversion Costs	(2009$ millions)		8	8	8

TABLE VIII.30—MANUFACTURER IMPACT ANALYSIS FOR SIGN BALLASTS—PRESERVATION OF OPERATING PROFIT MARKUP, EMERGING TECHNOLOGIES, AND ROLL-UP SHIPMENT SCENARIO

XV.	Units	Base case	Trial standard level		
			1	2	3
INPV	(2009$ millions)	116	111	111	111
Change in INPV	(2009$ millions)		(5.1)	(5.1)	(5.1)
	(%)		−4.4%	−4.4%	−4.4%.
Product Conversion Costs	(2009$ millions)		2	2	2
Capital Conversion Costs	(2009$ millions)		6	6	6

TABLE VIII.30—MANUFACTURER IMPACT ANALYSIS FOR SIGN BALLASTS—PRESERVATION OF OPERATING PROFIT MARKUP, EMERGING TECHNOLOGIES, AND ROLL-UP SHIPMENT SCENARIO—Continued

XV.	Units	Base case	Trial standard level		
			1	2	3
Total Conversion Costs	(2009$ millions)		8	8	8

For sign ballasts (product class 5), DOE analyzed only one efficiency level; thus, the results are the same at each TSL. TSLs 1 through 3 represent EL1 for product class 5. At TSLs 1 through 3, DOE estimates impacts on INPV to range from −$4.2 million to −$5.1 million, or a change in INPV of −2.9 percent to −4.4 percent. At these proposed levels, industry free cash flow is estimated to decrease by approximately 38.4 percent to $4.9 million, compared to the base-case value of $7.9 million in the year leading up to the proposed energy conservation standards.

As shown by the results, DOE expects sign ballast manufacturers to face small negative impacts under TSLs 1 through 3. DOE estimates that 64 percent of product class 5 shipments would meet EL1 in the base case. This means that many manufacturers already produce electronic sign ballasts, which is the design option represented by EL1. However, many other manufacturers produce only magnetic T12 sign ballasts and therefore would face significant capital exposure moving from magnetic to electronic to meet TSLs 1 through 3. For that reason, DOE estimates relatively high capital conversion costs of $6 million for sign ballast manufacturers. Product redesign and testing costs are expected to total $2 million for sign ballasts.

Unlike most product classes, sign ballasts are expected to decrease rather than increase in price moving from baseline to EL1 by a shipment-weighted average decrease in MPC of 4.5 percent. This is because electronic ballasts are a cheaper alternative to magnetic ballasts, even though the industry has not fully moved toward electronic production yet. During interviews, manufacturers stated that consumers were reluctant to convert to electronic ballasts although there were no technical barriers to doing so. Under the preservation of operating profit markup scenario, however, manufacturers are able to maintain the base-case operating profit for the year following the compliance date of amended standards despite lower production costs, so the average markup increases slightly to 1.41 to account for the decrease in MPC. Despite this markup increase, revenue is lower at TSLs 1 through 3 than in the base case because of the lower average unit price, and the $8 million in conversion costs increases the negative impact. When the preservation of operating profit markup is combined with the existing technologies scenario rather than the emerging technologies scenario, the impact of this maximized revenue per unit is greatest because it is applied to a larger total quantity of shipments.

a. Cumulative Regulatory Burden

While any one regulation may not impose a significant burden on manufacturers, the combined effects of recent or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Assessing the impact of a single regulation may overlook this cumulative regulatory burden. In addition to energy conservation standards, other regulations can significantly affect manufacturers' financial operations. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

During previous stages of this rulemaking DOE identified a number of requirements, in addition to amended energy conservation standards for ballasts, that manufacturers of these products will face for products and equipment they manufacture within approximately 3 years prior to and 3 years after the anticipated compliance date of the amended standards. The following section briefly addresses comments DOE received with respect to cumulative regulatory burden and summarizes other key related concerns that manufacturers raised during interviews.

NEMA stated that the effects of most safety, electromagnetic interference (EMI), and toxic materials regulations are the same on all ballast manufacturers. (NEMA, No. 29 at p. 9) DOE agrees that all ballast manufacturers are subject to the same requirements as described in this section and in chapter 13 of the NOPR TSD. Small manufacturers may be impacted differentially and are therefore analyzed as a manufacturer sub-group in section 0.

NEMA also stated that regulatory actions generally limit competitiveness and force ballast manufacturers to add cost to their base designs to comply with the regulatory requirements. (NEMA, No. 29 at p. 9) DOE asked manufacturers to quantify impacts of regulatory actions where possible, and in the engineering analysis, DOE modified the ballast efficiency, cost, or both at each analyzed efficiency level according to the impacts of these regulations. These specific regulatory actions and DOE's treatment of their impacts are discussed below and in section 0.

NEMA further suggested that regulatory pressure on traditional ballasts takes investments away from efforts to further develop dimming ballasts and their related controls. (NEMA, No. 29 at p. 12) DOE recognizes that there is an opportunity cost associated with any investment, and this opportunity cost is reflected in the discount rate used in the GRIM. In deciding which TSL to propose, DOE weighs the potential benefits of new and amended energy conservation standards against the potential burdens, including the impact on manufacturers, to determine which TSL is technologically feasible and economically justified.

Several manufacturers expressed concern during interviews about the overall volume of DOE energy conservation standards with which they must comply. Most fluorescent lamp ballast manufacturers also make a full range of lighting products and share engineering and other resources with these other internal manufacturing divisions for different products (including certification testing for regulatory compliance). For example, DOE amended standards in 2009 for general service fluorescent lamps and incandescent reflector lamps for which compliance will be required in 2012. Manufacturers were concerned that the other products facing new or amended energy conservation standards would compete for the same engineering and financial resources.

DOE takes into account the cost of compliance with other published Federal energy conservation standards, such as those established in the 2009 lamps rule, in weighing the benefits and burdens of today's proposed rulemaking. These costs and the extent to which they could be incurred by fluorescent lamp ballast manufacturers are provided in chapter 13 of the NOPR TSD. DOE does not include the impacts of standards that have not yet been finalized because any impacts would be speculative.

Several manufacturers noted the safety requirements ballast manufacturers must meet. NEMA described the need to add a line voltage disconnect to certain lighting systems and the need to use UL Type CC rated (anti-arcing) ballasts or high temperature circle "I" rated lampholders in OEM fixtures and UL-marked retrofit kits. The Type CC rating requires control circuitry to implement, and these circuits will consume system power, which decreases overall ballast electrical efficiency. (NEMA, No. 29 at p. 9) DOE appreciates this information on safety requirements, but DOE has not adjusted its engineering analysis according to these potential impacts. The burden for line voltage disconnect requirements falls solely on luminaire manufacturers rather than on ballast manufacturers. For anti-arcing protection, most fixture manufacturers comply with UL 1598 by using circle "I" lampholders. Fixture manufacturers can also comply by purchasing premium Type CC rated ballasts, which are often bundled with high-efficiency to command a higher markup. Because providing Type CC ballasts to fixture manufacturers is not required, DOE does not believe UL 1598 warrants adjustment of the TSLs proposed in today's notice. *See* section 0 in the engineering analysis for more information on Type CC protection. Further detail on UL 1598 and the burden it imposes is provided in chapter 13 of the NOPR TSD.

Manufacturers also discussed requirements regarding EMI. Currently, ballasts are tested only for conducted emissions under FCC Part 18, which is not as rigorous as the CISPR 15 requirements effective in Europe. The burden of proof for existing EMI tests rests with the luminaire manufacturers. (NEMA, No. 29 at p. 10) Manufacturers noted that they could be required to comply with the model European EMI regulation in the future, which would result in design changes that could decrease efficiency. (NEMA, No. 29 at p. 10; OSI, Public Meeting Transcript, No. 12 at p. 188) DOE has not adjusted its estimates for ballast efficiency or price because NEMA's comment refers to potential EMI regulations, but DOE will consider adjusting its analysis for the final rule if these regulations are required prior to issuance of the final rule.

Manufacturers also stated that lamp end-of-life (EOL) requirements are a regulatory burden. T5 ballasts are required to have EOL protection systems that detect characteristic electrical signals of a lamp in distress and activate control functions in the ballast to limit energy supplied to the lamp. Compliance with EOL requirements has added cost and design complexity to these systems. (NEMA, No. 29 at p. 9–10) In the future, T8 and T12 ballasts could also require EOL protection, which could add cost and decrease efficiency. (NEMA, No. 29 at p. 10; Philips, Public Meeting Transcript, No. 12 at p. 185–186) DOE agrees that EOL requirements have affected the cost and design of T5 ballasts, but because all T5 ballasts on the market, including those selected as representative ballast types for DOE's engineering analysis, already include these EOL protection systems, the effects of this requirement are already taken into account. As stated in section 0, DOE does not expect EOL protection to be required for T8 and T12 ballasts in the United States as required in Europe due to significant differences between the lamps used in the United States and Europe. If EOL requirements change prior to the issuance of the final rule, DOE will consider adjusting its analysis.

Manufacturers also expressed concern about the increasing stringency of international energy efficiency standards and materials requirements. Compliance with many regulations such as the Restriction of Hazardous Substances (RoHS) directive in Europe on the use of lead-based solder and other toxic materials is currently optional but could become a requirement in the future. Compliance with toxic material regulations could result in cost increases, component shortages, and product quality concerns. (NEMA, No. 29 at p. 10, 13; Philips, Public Meeting Transcript, No. 12 at p. 186–188; GE, Public Meeting Transcript, No. 12 at p. 243–244) As described in section 0, DOE does not believe any adjustment to ballast price or efficiency is necessary to comply with toxic material regulations because compliance is optional, but DOE will consider adjusting its analysis for the final rule if these regulations are required prior to issuance of the final rule.

DOE discusses these and other requirements, and includes the full details of the cumulative regulatory burden analysis, in chapter 13 of the NOPR TSD.

2. National Impact Analysis

a. Significance of Energy Savings

To estimate the energy savings through 2043 attributable to potential standards for ballasts, DOE compared the energy consumption of these products under the base case to their anticipated energy consumption under each TSL. The table below presents DOE's forecasts of the national energy savings for each TSL, calculated using the *AEO2010* energy price forecast. This table presents the results of the two scenarios that represent the maximum and minimum energy savings resulting from all the scenarios analyzed. Chapter 11 of the NOPR TSD describes these estimates in more detail.

TABLE VIII.31—SUMMARY OF CUMULATIVE NATIONAL ENERGY SAVINGS FOR BALLASTS (2014–2043)

XVI. Trial standard level	XVII. Product class and ballast type	National energy savings quads	
		Existing technologies, shift	Emerging technologies, roll-up
1	1—IS and RS ballasts that operate:		
	Two 4-foot MBP lamps (commercial)	1.42	0.002
	Two 4-foot MBP lamps (residential)	0.22	0.01
	Four 4-foot MBP lamps	0	0
	Two 8-foot slimline lamps	0	0
	2—PS ballasts that operate:		
	Two 4-foot MBP lamps	0.19	0.09

TABLE VIII.31—SUMMARY OF CUMULATIVE NATIONAL ENERGY SAVINGS FOR BALLASTS (2014–2043)—Continued

XVI. Trial standard level	XVII. Product class and ballast type	National energy savings quads	
		Existing technologies, shift	Emerging technologies, roll-up
	Four 4-foot MBP lamps	0.45	0.22
	Two 4-foot MiniBP SO lamps	0.37	0.18
	Two 4-foot MiniBP HO lamps	0.20	0.19
	3—IS and RS ballasts that operate:		
	Two 8-foot HO lamps	0.0003	0.0003
	5—Ballasts that operate:		
	Four 8-foot HO lamps in cold temperature outdoor signs	0.90	0.68
	Total	3.74	1.38
2	1—IS and RS ballasts that operate:		
	Two 4-foot MBP lamps (commercial)	1.42	0.68
	Two 4-foot MBP lamps (residential)	0.23	0.21
	Four 4-foot MBP lamps	0	0
	Two 8-foot slimline lamps	0.02	0.001
	2—PS ballasts that operate:		
	Two 4-foot MBP lamps	0.19	0.09
	Four 4-foot MBP lamps	0.55	0.29
	Two 4-foot MiniBP SO lamps	0.72	0.32
	Two 4-foot MiniBP HO lamps	0.36	0.32
	3—IS and RS ballasts that operate:.		
	Two 8-foot HO lamps	0.0003	0.0002
	5—Ballasts that operate:		
	Four 8-foot HO lamps in cold temperature outdoor signs	0.90	0.68
	Total	4.39	2.59
3	1—IS and RS ballasts that operate:		
	Two 4-foot MBP lamps (commercial)	1.97	1.02
	Two 4-foot MBP lamps (residential)	0.23	0.21
	Four 4-foot MBP lamps	0.32	0.17
	Two 8-foot slimline lamps	0.02	0.02
	2—PS ballasts that operate:		
	Two 4-foot MBP lamps	0.22	0.11
	Four 4-foot MBP lamps	0.55	0.29
	Two 4-foot MiniBP SO lamps	1.52	0.71
	Two 4-foot MiniBP HO lamps	0.52	0.49
	3—IS and RS ballasts that operate:		
	Two 8-foot HO lamps	0.0006	0.0005
	5—Ballasts that operate:		
	Four 8-foot HO lamps in cold temperature outdoor signs	0.90	0.68
	Total	6.25	3.70

a. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV to the nation of the total costs and savings for consumers that would result from particular standard levels for ballasts. In accordance with the OMB's guidelines on regulatory analysis (OMB Circular A–4, section E, September 17, 2003), DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. The 7-percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy, and reflects the returns to real estate and small business capital as well as corporate capital. DOE used this discount rate to approximate the opportunity cost of capital in the private sector, because recent OMB analysis has found the average rate of return to capital to be near this rate. In addition, DOE used the 3-percent rate to capture the potential effects of standards on private consumption (*e.g.,* through higher prices for products and the purchase of reduced amounts of energy). This rate represents the rate at which society discounts future consumption flows to their present value. This rate can be approximated by the real rate of return on long-term government debt (*i.e.,* yield on Treasury notes minus annual rate of change in the Consumer Price Index), which has averaged about 3 percent on a pre-tax basis for the last 30 years.

The table below shows the consumer NPV results for each TSL DOE considered for ballasts, using both a 7-percent and a 3-percent discount rate. Similar to the results presented for NES, this table presents the results of the two scenarios that represent the maximum and minimum NPV resulting from all the scenarios analyzed. See chapter 11 of the NOPR TSD for more detailed NPV results.

TABLE VIII.32—SUMMARY OF CUMULATIVE NET PRESENT VALUE FOR BALLASTS (2014–2043)

XVIII. Trial standard level	XIX. Product class and ballast type	Net present value (billion 2009$)			
		Existing technologies, shift		Emerging technologies, roll-up	
		7 Percent discount rate	3 Percent discount rate	7 Percent discount rate	3 Percent discount rate
1	1—IS and RS ballasts that operate:				
	Two 4-foot MBP lamps (commercial)	3.11	6.82	0.004	0.006
	Two 4-foot MBP lamps (residential)	0.44	0.97	0.15	0.24
	Four 4-foot MBP lamps	0	0	0	0
	Two 8-foot slimline lamps	0	0	0	0
	2—PS ballasts that operate:				
	Two 4-foot MBP lamps	0.48	0.93	0.27	0.50
	Four 4-foot MBP lamps	0.97	2.10	0.58	1.16
	Two 4-foot MiniBP SO lamps	0.88	1.95	0.56	1.08
	Two 4-foot MiniBP HO lamps	0.32	0.66	0.32	0.66
	3—IS and RS ballasts that operate:				
	Two 8-foot HO lamps	0.02	0.03	0.001	0.001
	5—Ballasts that operate:				
	Four 8-foot HO lamps in cold temperature outdoor signs.	2.72	5.12	2.33	4.27
	Total	8.93	18.58	4.21	7.91
2	1—IS and RS ballasts that operate:				
	Two 4-foot MBP lamps (commercial)	3.11	6.82	1.79	3.65
	Two 4-foot MBP lamps (residential)	0.45	0.98	0.45	0.98
	Four 4-foot MBP lamps	0	0	0	0
	Two 8-foot slimline lamps	0.06	0.11	0.01	0.01
	2—PS ballasts that operate:				
	Two 4-foot MBP lamps	0.48	0.93	0.27	0.50
	Four 4-foot MBP lamps	1.15	2.50	0.71	1.45
	Two 4-foot MiniBP SO lamps	1.06	2.50	0.67	1.38
	Two 4-foot MiniBP HO lamps	0.26	0.60	0.26	0.59
	3—IS and RS ballasts that operate:				
	Two 8-foot HO lamps	0.03	0.04	0.03	0.04
	5—Ballasts that operate:				
	Four 8-foot HO lamps in cold temperature outdoor signs.	2.72	5.12	2.33	4.27
	Total	9.31	19.62	6.51	12.88
3	1—IS and RS ballasts that operate:				
	Two 4-foot MBP lamps (commercial)	4.52	9.84	2.84	5.73
	Two 4-foot MBP lamps (residential)	0.45	0.98	0.45	0.98
	Four 4-foot MBP lamps	0.44	1.02	0.28	0.62
	Two 8-foot slimline lamps	0.06	0.12	0.06	0.12
	2—PS ballasts that operate:				
	Two 4-foot MBP lamps	0.53	1.04	0.31	0.58
	Four 4-foot MBP lamps	1.15	2.50	0.71	1.45
	Two 4-foot MiniBP SO lamps	1.31	3.42	0.88	2.07
	Two 4-foot MiniBP HO lamps	0.25	0.63	0.25	0.63
	3—IS and RS ballasts that operate:				
	Two 8-foot HO lamps	0.03	0.04	0.03	0.04
	5—Ballasts that operate:				
	Four 8-foot HO lamps in cold temperature outdoor signs.	2.72	5.12	2.33	4.27
	Total	11.43	24.71	8.13	16.49

a. Impacts on Employment

DOE develops estimates of the indirect employment impacts of potential standards on the economy in general. As discussed above, DOE expects energy conservation standards for ballasts to reduce energy bills for ballast customers and the resulting net savings to be redirected to other forms of economic activity. These shifts in spending and economic activity could affect the demand for labor. As described in section 0 above, DOE used an input/output model of the U.S. economy to estimate these effects.

The input/output model suggests that today's proposed standards are likely to increase the net demand for labor in the economy. However, the gains would most likely be very small relative to total national employment, and neither the BLS data nor the input/output model DOE uses includes the quality or wage level of the jobs. As discussed in section 0 above, the major manufacturers interviewed for this rulemaking indicate they have no domestic ballast production. DOE

believes, therefore, that new and amended standards for ballasts will not have a significant impact on the limited number of production workers directly employed by ballast manufacturers in the U.S.

Table VIII.33 presents the estimated net indirect employment impacts from the TSLs that DOE considered in this rulemaking. *See* NOPR TSD chapter 15 for more detailed results.

TABLE VIII.33—NET CHANGE IN JOBS FROM INDIRECT EMPLOYMENT EFFECTS UNDER BALLAST TSLS

XX. Analysis period year	XXI. Trial standard level	Net national change in jobs (thousands)	
		Existing technologies, shift	Emerging technologies, roll-up
2020	1	12.64	3.67
	2	2.89	2.59
	3	3.63	3.31
2043	1	123.75	31.79
	2	63.21	37.07
	3	89.47	51.06

1. Impact on Utility or Performance of Products

As presented in section 0 of this notice, DOE concluded that none of the TSLs considered in this notice would reduce the utility or performance of the products under consideration in this rulemaking. Furthermore, manufacturers of these products currently offer ballasts that meet or exceed the proposed standards. (42 U.S.C. 6295(o)(2)(B)(i)(IV))

2. Impact of Any Lessening of Competition

DOE has also considered any lessening of competition that is likely to result from new and amended standards. The Attorney General determines the impact, if any, of any lessening of competition likely to result from a proposed standard, and transmits such determination to the Secretary, together with an analysis of the nature and extent of such impact. (42 U.S.C. 6295(o)(2)(B)(i)(V) and (B)(ii))

To assist the Attorney General in making such determination, DOE has provided DOJ with copies of this notice and the TSD for review. DOE will consider DOJ's comments on the proposed rule in preparing the final rule, and DOE will publish and respond to DOJ's comments in that document.

3. Need of the Nation To Conserve Energy

An improvement in the energy efficiency of the products subject to today's rule is likely to improve the security of the nation's energy system by reducing overall demand for energy. Reduced electricity demand may also improve the reliability of the electricity system. As a measure of this reduced demand, Table VIII.34 presents the estimated reduction in generating capacity in 2043 for the TSLs that DOE considered in this rulemaking.

TABLE VIII.34—REDUCTION IN ELECTRIC GENERATING CAPACITY IN 2043 UNDER BALLAST TSLS

XXII. Trial standard level	Reduction in electric generating capacity (gigawatts)	
	Existing technologies, shift	Emerging technologies, roll-up
1	4.17	1.51
2	5.20	2.99
3	7.22	4.37

Energy savings from amended standards for ballasts could also produce environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases associated with electricity production. Table VIII.35 provides DOE's estimate of cumulative CO_2, NO_X, and Hg emissions reductions projected to result from the TSLs considered in this rulemaking. DOE reports annual CO_2, NO_X, and Hg emissions reductions for each TSL in the environmental assessment in chapter 16 of the NOPR TSD.

TABLE VIII.35—SUMMARY OF EMISSIONS REDUCTION ESTIMATED FOR BALLAST TSLS

[Cumulative for 2014 through 2043]

XXIII. Trial standard level	Cumulative reduction in emissions (2014 through 2043)					
	Existing technologies, shift			Emerging technologies, roll-up		
	CO_2 MMt	NO_X kt	Hg t	CO_2 MMt	NO_X kt	Hg t
1	70	26	0.96	14	11	0.20
2	87	32	1.20	27	22	0.40

TABLE VIII.35—SUMMARY OF EMISSIONS REDUCTION ESTIMATED FOR BALLAST TSLS—Continued
[Cumulative for 2014 through 2043]

XXIII. Trial standard level	Cumulative reduction in emissions (2014 through 2043)					
	Existing technologies, shift			Emerging technologies, roll-up		
	CO_2 MMt	NO_X kt	Hg t	CO_2 MMt	NO_X kt	Hg t
3	121	44	1.67	40	32	0.59

As discussed in section 0, DOE did not report sulfur dioxide (SO_2) emissions reductions from power plants because there is uncertainty about the effect of energy conservation standards on the overall level of SO_2 emissions in the United States due to SO_2 emissions caps. DOE also did not include NO_X emissions reduction from power plants in States subject to CAIR because an energy conservation standard would not affect the overall level of NO_X emissions in those States due to the emissions caps mandated by CAIR.

As part the analysis for this proposed rule, DOE estimated monetary benefits likely to result from the reduced emissions of CO_2 and NO_X that DOE estimated for each of the TSLs considered. As discussed in section 0, DOE used values for the SCC developed by an interagency process. The four values for CO_2 emissions reductions resulting from that process (expressed in 2007$) are $4.7/ton (the average value from a distribution that uses a 5-percent discount rate), $21.4/ton (the average value from a distribution that uses a 3-percent discount rate), $35.1/ton (the average value from a distribution that uses a 2.5-percent discount rate), and $64.9/ton (the 95th-percentile value from a distribution that uses a 3-percent discount rate). These values correspond to the value of emission reductions in 2010; the values for later years are higher due to increasing damages as the magnitude of climate change increases. For each TSL, DOE calculated the global present values of CO_2 emissions reductions, using the same discount rate as was used in the studies upon which the dollar-per-ton values are based. DOE calculated domestic values as a range from 7 percent to 23 percent of the global values.

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other GHG emissions to changes in the future global climate and the potential resulting damages to the world economy continues to evolve rapidly. Thus, any value placed in this rulemaking on reducing CO_2 emissions is subject to change. DOE, together with other Federal agencies, will continue to review various methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. However, consistent with DOE's legal obligations, and taking into account the uncertainty involved with this particular issue, DOE has included in this NOPR the most recent values and analyses resulting from the ongoing interagency review process.

DOE also estimated a range for the cumulative monetary value of the economic benefits associated with NO_X and Hg emissions reductions anticipated to result from amended ballast standards. Estimated monetary benefits for CO_2, NO_X and Hg emission reductions are detailed in chapter 16 of the NOPR TSD.

The NPV of the monetized benefits associated with emissions reductions can be viewed as a complement to the NPV of the consumer savings calculated for each TSL considered in this rulemaking. Table VIII.36 shows an example of the calculation of the combined NPV including benefits from emissions reductions for the case of TSL 3 for ballasts. The CO_2 values used in the table correspond to the four scenarios for the valuation of CO_2 emission reductions presented in section 0.

TABLE VIII.36—ADDING NET PRESENT VALUE OF CONSUMER SAVINGS TO PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TSL 3 FOR BALLASTS (EXISTING TECHNOLOGIES, SHIFT)

Category	Present value million 2009$	Discount rate (%)
Benefits		
Operating Cost Savings	16,858	7
	35,284	3
CO_2 Reduction Monetized Value (at $4.7/Metric Ton)*	429	5
CO_2 Reduction Monetized Value (at $21.4/Metric Ton)*	2,185	3
CO_2 Reduction Monetized Value (at $35.1/Metric Ton)*	3,699	2.5
CO_2 Reduction Monetized Value (at $64.9/Metric Ton)*	6,668	3
NO_X Reduction Monetized Value (at $2,519/Ton)*	35	7
	65	3
Total Monetary Benefits **	19,078	7
	37,534	3
Costs		
Total Incremental Installed Costs	5,425	7
	10,573	3

TABLE VIII.36—ADDING NET PRESENT VALUE OF CONSUMER SAVINGS TO PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TSL 3 FOR BALLASTS (EXISTING TECHNOLOGIES, SHIFT)—Continued

Category	Present value million 2009$	Discount rate (%)
Net Benefits/Costs		
Including CO_2 and NO_X**	13,653 26,961	7 3

*These values represent global values (in 2007$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.7, $21.4, and $35.1 per ton are the averages of SCC distributions calculated using 5 percent, 3 percent, and 2.5 percent discount rates, respectively. The value of $64.9 per ton represents the 95th percentile of the SCC distribution calculated using a 3 percent discount rate. See section 0 for details.

**Total Monetary Benefits for both the 3 percent and 7 percent cases utilize the central estimate of social cost of CO_2 emissions calculated at a 3 percent discount rate (averaged across three IAMs), which is equal to $21.4/ton in 2010 (in 2007$).

Although adding the value of consumer savings to the values of emission reductions provides a valuable perspective, the following should be considered: (1) The national consumer savings are domestic U.S. consumer monetary savings found in market transactions, while the values of emissions reductions are based on estimates of marginal social costs, which, in the case of CO_2, are based on a global value; and (2) the assessments of consumer savings and emission-related benefits are performed with different computer models, leading to different timeframes for analysis. For ballasts, the present value of national consumer savings is measured for the period in which units shipped (2014–2043) continue to operate. However, the time frames of the benefits associated with the emission reductions differ. For example, the value of CO_2 emissions reductions reflects the present value of all future climate-related impacts due to emitting a ton of CO_2 in that year, out to 2300.

Chapter 16 of the NOPR TSD presents calculations of the combined NPV including benefits from emissions reductions for each TSL.

A. Proposed Standards

DOE recognizes that when it considers proposed standards, it is subject to the EPCA requirement that any new or amended energy conservation standard for any type (or class) of covered product be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens to the greatest extent practicable, in light of the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in a significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

DOE considered the impacts of standards at each trial standard level, beginning with the maximum technologically feasible level, to determine whether that level met the evaluation criteria. If the max tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

DOE discusses the benefits and/or burdens of each trial standard level in the following sections. DOE bases its discussion on quantitative analytical results for each trial standard level (presented in section 0) such as national energy savings, net present value (discounted at 7 and 3 percent), emissions reductions, industry net present value, life-cycle cost, and consumers' installed price increases. Beyond the quantitative results, DOE also considers other burdens and benefits that affect economic justification, including how technological feasibility, manufacturer costs, and impacts on competition may affect the economic results presented.

To aid the reader as DOE discusses the benefits and burdens of each trial standard level, DOE has included tables below that present a summary of the results of DOE's quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. Section 0 presents the estimated impacts of each TSL for these subgroups.

TABLE VIII.37—SUMMARY OF RESULTS FOR BALLASTS

[Existing Technologies, Shift]

Category	TSL 1	TSL 2	TSL 3
National Energy Savings (quads)	3.74	4.39	6.25.
NPV of Consumer Benefits (2009$ billion)			
3% discount rate	18.58	19.62	24.71.
7% discount rate	8.93	9.31	11.43.
Industry Impacts			
Industry NPV (2009$ million)	1,221	1,189	1,145.
Industry NPV (% change)	−1.6%	−4.2%	−7.7%.

TABLE VIII.37—SUMMARY OF RESULTS FOR BALLASTS—Continued

[Existing Technologies, Shift]

Category	TSL 1	TSL 2	TSL 3
Cumulative Emissions Reduction			
CO_2 (MMt)	70	87	121.
NO_X (kt)	26	32	44.
Hg (t)	0.96	1.20	1.67.
Value of Cumulative Emissions Reduction			
CO_2 (2009$ billion) *	0.25 to 3.85	0.31 to 4.80	0.43 to 6.67.
NO_X—3% discount rate (2009$ million)	37	47	65.
NO_X—7% discount rate (2009$ million)	20	25	35.
Mean LCC Savings (replacement event) ** (2009$)			
Product Class 1			
IS and RS ballasts that operate:			
Two 4-foot MBP lamps (commercial)	17.54 to 19.29	−2.11 to 25.00	−2.11 to 42.41.
Two 4-foot MBP lamps (residential).			
Four 4-foot MBP lamps.			
Two 8-foot slimline lamps.			
Product Class 2			
PS ballasts that operate:			
Two 4-foot MBP lamps	0.08 to 19.21	7.52 to 22.57	1.83 to 20.68.
Four 4-foot MBP lamps.			
Two 4-foot MiniBP SO lamps.			
Two 4-foot MiniBP HO lamps.			
Product Class 3			
Ballasts that operate:			
Two 8-foot HO lamps	69.82	234.45	2.33 to 236.77.
Product Class 5			
Ballasts that operate:			
Four 8-foot HO lamps in cold-temperature outdoor signs	389.91	389.91	389.91.
Median PBP (replacement event) * (years)**			
Product Class 1	−8.99 to −7.60	−6.99 to N/A	−6.99 to N/A.
Product Class 2	0.06 to 11.27	0.61 to 5.09	1.22 to 7.19.
Product Class 3	−0.57	−0.67	−0.52 to 4.57.
Product Class 5	−0.16	−0.16	−0.16.
Distribution of Consumer LCC Impacts (see Table VIII.16 through Table VIII.25 above)			
Generation Capacity Reduction (GW) †	4.17	5.20	7.22.
Employment Impacts			
Indirect Domestic Jobs (thousands) †	123.75	63.21	89.47.

* Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
** For LCCs, a negative value means an increase in LCC by the amount indicated.
*** For PBPs, negative values indicate standards that reduce operating costs and installed costs; "N/A" indicates standard levels that do not reduce operating costs.
† Changes in 2043.

TABLE VIII.38—SUMMARY OF RESULTS FOR BALLASTS

[Emerging Technologies, Roll-up]

Category	TSL 1	TSL 2	TSL 3
National Energy Savings (quads)	1.38	2.59	3.70.
NPV of Consumer Benefits (2009$ billion)			
3% discount rate	7.91	12.88	16.49.
7% discount rate	4.21	6.51	8.13.
Industry Impacts			
Industry NPV (2009$ million)	740	635	557.
Industry NPV (% change)	−13.2%	−25.5%	−34.7%.

TABLE VIII.38—SUMMARY OF RESULTS FOR BALLASTS—Continued

[Emerging Technologies, Roll-up]

Category	TSL 1	TSL 2	TSL 3
Cumulative Emissions Reduction			
CO_2 (MMt)	14	27	40.
NO_X (kt)	11	22	32.
Hg (t)	0.20	0.40	0.59.
Value of Cumulative Emissions Reduction			
CO_2 (2009$ billion) *	0.06 to 0.90	0.13 to 1.79	0.18 to 2.62.
NO_X—3% discount rate (2009$ million)	14	29	42.
NO_X—7% discount rate (2009$ million)	7	13	19.
Mean LCC Savings (replacement event) ** (2009$)			
Product Class 1			
IS and RS ballasts that operate:			
Two 4-foot MBP lamps (commercial)	17.54 to 19.29	−2.11 to 25.00	−2.11 to 42.41.
Two 4-foot MBP lamps (residential).			
Four 4-foot MBP lamps.			
Two 8-foot slimline lamps.			
Product Class 2			
PS ballasts that operate:			
Two 4-foot MBP lamps	0.08 to 19.21	7.52 to 22.57	1.83 to 20.68.
Four 4-foot MBP lamps.			
Two 4-foot MiniBP SO lamps.			
Two 4-foot MiniBP HO lamps.			
Product Class 3			
Ballasts that operate:			
Two 8-foot HO lamps	69.82	234.45	2.33 to 236.77.
Product Class 5			
Ballasts that operate:			
Four 8-foot HO lamps in cold-temperature outdoor signs	389.91	389.91	389.91.
Median PBP (replacement event) * (years)**			
Product Class 1	−8.99 to −7.60	−6.99 to N/A	−6.99 to N/A.
Product Class 2	0.06 to 11.27	0.61 to 5.09	1.22 to 7.19.
Product Class 3	−0.57	−0.67	−0.52 to 4.57.
Product Class 5	−0.16	−0.16	−0.16.
Distribution of Consumer LCC Impacts (see Table VIII.16 through Table VIII.25 above)			
Generation Capacity Reduction (GW)†	1.51	2.99	4.37.
Employment Impacts			
Indirect Domestic Jobs (thousands)†	31.79	37.07	51.06.

* Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
** For LCCs, a negative value means an increase in LCC by the amount indicated.
*** For PBPs, negative values indicate standards that reduce operating costs and installed costs; "N/A" indicates standard levels that do not reduce operating costs.
† Changes in 2043.

As discussed in previous DOE standards rulemakings and a recent Notice of Data Availability (76 FR 9696, Feb. 22, 2011), DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. This undervaluation suggests that regulation that promotes energy efficiency can produce significant net private gains (as well as producing social gains by, for example, reducing pollution). There is evidence that consumers undervalue future energy savings as a result of (1) a lack of information, (2) a lack of sufficient savings to warrant delaying or altering purchases (*e.g.,* an inefficient ventilation fan in a new building or the delayed replacement of a water pump), (3) inconsistent (*e.g.,* excessive short-term) weighting of future energy cost savings relative to available returns on other investments, (4) computational or other difficulties associated with the evaluation of relevant tradeoffs, and (5) a divergence in incentives (*e.g.,* renter versus owner; builder vs. purchaser). Other literature indicates that with less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher than expected rate between current consumption and uncertain future energy cost savings. In the abstract, it may be difficult to say how a welfare gain from correcting under-investment compares in magnitude to the potential welfare losses associated with no longer purchasing a machine or switching to an

imperfect substitute, both of which still exist in this framework.

Other literature indicates that with less than perfect foresight and uncertainty about the future, consumers may trade off these types of investments at a higher than expected rate between current consumption and uncertain future energy cost savings. Some studies suggest that this seeming undervaluation may be explained in certain circumstances by differences between tested and actual energy savings, or by uncertainty and irreversibility of energy investments.

The mix of evidence in the empirical literature suggests that if feasible, analysis of regulations mandating energy efficiency improvements should explore the potential for both welfare gains and losses and move toward fuller economic framework where all relevant changes can be quantified.[49] While DOE is not prepared at present to provide a fuller quantifiable framework for this discussion, DOE seeks comments on how to assess these possibilities.[50]

1. Trial Standard Level 3

DOE first considered the most efficient level, TSL 3, which would save an estimated total of 3.7 to 6.3 quads of energy through 2043—a significant amount of energy. For the nation as a whole, TSL 3 would have a net savings of $8.1 billion–$11.4 billion at a 7-percent discount rate, and $16.5 billion–24.7 billion at a 3-percent discount rate. The emissions reductions at TSL 3 are estimated at 40–121 MMt of CO_2, 32–44 kilotons (kt) of NO_X, and 0.59–1.67 tons of Hg. Total generating capacity in 2043 is estimated to decrease compared to the reference case by 4.37–7.22 gigawatts under TSL 3. As seen in section 0, for almost all representative ballast types, consumers have available ballast designs which result in positive LCC savings, ranging from $1.83–$389.91, at TSL 3. The consumers that experience negative LCC savings at TSL 3 are those that currently have a 2-lamp 8-foot HO T8 ballast (for the new construction/renovation event only) or a 2-lamp 4-foot MBP T8 ballast in the residential sector (for the replacement event only). The projected change in industry value would range from a decrease of $95.3 million to a decrease of $296.2 million, or a net loss of 7.7 percent to a net loss of 34.7 percent in INPV.

DOE based TSL 3 on the most efficient commercially available products for each representative ballast type analyzed. This TSL represents the highest efficiency level that is technologically feasible for a sufficient diversity of products (spanning several ballast factors, number of lamps per ballast, and types of lamps operated) within each product class. Although consumers that currently have a 2-lamp 8-foot HO T8 ballast or a 2-lamp 4-foot MBP T8 ballast in the residential sector experience negative LCC savings of −$0.22 and −$2.11 respectively, overall LCC savings for consumers of these ballast types are positive.

After considering the analysis, comments on the preliminary analysis, and the benefits and burdens of TSL 3, the Secretary has reached the following tentative conclusion: TSL 3 offers the maximum improvement in efficiency that is technologically feasible and economically justified, and will result in significant conservation of energy. The Secretary has reached the initial conclusion that the benefits of energy savings, emissions reductions (both in physical reductions and the monetized value of those reductions), the positive net economic savings to the nation, and positive life-cycle cost savings would outweigh the potentially large reduction in INPV for manufacturers and increased LCC for a small subset of consumers. Therefore, DOE today proposes to adopt the energy conservation standards for ballasts at TSL 3. DOE seeks comment on its proposal of TSL 3. DOE will consider the comments and information received in determining the final energy conservation standards.

B. Backsliding

As discussed in section 0, EPCA contains what is commonly known as an "anti-backsliding" provision, which mandates that the Secretary not prescribe any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Because DOE is evaluating amended standards in terms of ballast luminous efficiency, DOE converted the existing BEF standards to BLE to verify that the proposed standards did not constitute backsliding. The following describes how DOE completed this comparison.

Ballast efficacy factor is defined as ballast factor divided by input power times 100. Ballast factor, in turn, is currently defined as the test system light output divided by a reference system light output. As mentioned in section 0, the active mode test procedure SNOPR proposed a new method for calculating ballast factor. 75 FR 71570, 71577–8 (November 24, 2010). The new methodology entails measuring the lamp arc power of the test system and dividing it by the lamp arc power of the reference system. Because this new method calculates a ballast factor equivalent to the existing method, DOE believes this definition can be incorporated into the equation for BEF. After this substitution, BEF can be converted to BLE by dividing by 100 and multiplying by the appropriate reference arc power. Table VIII.39 below contains the existing standard in terms of BEF, the existing standard in terms of BLE, and the proposed standard in terms of BLE.

TABLE VIII.39—EXISTING FEDERAL BEF STANDARDS AND THE CORRESPONDING BLE

Application for operation of	BEF standard	Equivalent BLE		Proposed BLE standard *
		Low freq	High freq	
One F40T12 lamp	2.29	80.4	83.2	89.9
Two F40T12 lamps	1.17	82.1	85.0	91.0
Two F96T12 lamps	0.63	85.1	89.7	92.2
Two F96T12/HO lamps	0.39	74.4	78.0	90.4
One F34T12 lamp	2.61	75.2	77.8	89.4
Two F34T12 lamps	1.35	77.8	80.5	90.6
Two F96T12/ES lamps	0.77	83.9	88.4	91.8

[49] A good review of the literature related to this issue can be found in Gillingham, K., R. Newell, K. Palmer. (2009). "Energy Efficiency Economics and Policy," *Annual Review of Resource Economics,* 1: 597–619; and Tietenberg, T. (2009). "Energy Efficiency Policy: Pipe Dream or Pipeline to the Future?" *Review of Environmental Economics and Policy*. Vol. 3, No. 2: 304–320.

[50] A draft paper, "Notes on the Economics of Household Energy Consumption and Technology Choice," proposes a broad theoretical framework on which an empirical model might be based and is posted on the DOE Web site along with this notice at *http://www.eere.energy.gov/buildings/appliance_standards.*

TABLE VIII.39—EXISTING FEDERAL BEF STANDARDS AND THE CORRESPONDING BLE—Continued

Application for operation of	BEF standard	Equivalent BLE		Proposed BLE standard *
		Low freq	High freq	
Two F96T12/HO/ES lamps	0.42	68.0	71.3	90.1

* For ballast types that could be in more than one product class, this table presents the lowest standard the ballast would be required to meet. For example, 8-foot HO ballasts can have a PS starting method in addition to IS or RS. Therefore, DOE presents the standard for the PS product class as it is the lowest. The proposed BLE standard includes a 0.8 percent reduction for lab to lab variation and compliance requirements.

As seen in the table above, the standards proposed in this NOPR are higher than the existing standards, regardless of low or high frequency operation. As such, the proposed standards do not decrease the minimum required energy efficiency of the covered products and therefore do not violate the anti-backsliding provision in EPCA.

XXIV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Section 1(b)(1) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993), requires each agency to identify the problem that it intends to address, including, where applicable, the failures of private markets or public institutions that warrant new agency action, as well as to assess the significance of that problem. The problems that today's standards address are as follows:

(1) There is a lack of consumer information and/or information processing capability about energy efficiency opportunities in the lighting market.

(2) There is asymmetric information (one party to a transaction has more and better information than the other) and/or high transactions costs (costs of gathering information and effecting exchanges of goods and services).

(3) There are external benefits resulting from improved energy efficiency of ballasts that are not captured by the users of such equipment. These benefits include externalities related to environmental protection and energy security that are not reflected in energy prices, such as reduced emissions of greenhouse gases.

In addition, DOE has determined that today's regulatory action is an "economically significant regulatory action" under section 3(f)(1) of Executive Order 12866. Accordingly, section 6(a)(3) of the Executive Order requires that DOE prepare a regulatory impact analysis (RIA) on today's rule and that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) review this rule. DOE presented to OIRA for review the draft rule and other documents prepared for this rulemaking, including the RIA, and has included these documents in the rulemaking record. The assessments prepared pursuant to Executive Order 12866 can be found in the technical support document (Chapter 17) for this rulemaking. They are available for public review in the Resource Room of DOE's Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281, Jan. 21, 2011). EO 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by these Executive Orders to, among other things: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. For the reasons stated in the preamble, DOE believes that today's proposed rule is consistent with these principles.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (*http://www.gc.doe.gov*). DOE reviewed the potential standard levels considered in today's NOPR under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

As a result of this review, DOE has prepared an IRFA for fluorescent lamp ballasts, a copy of which DOE will transmit to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b). As presented and discussed below, the IFRA describes potential impacts on small ballast manufacturers associated with the required capital and product conversion costs at each TSL and discusses alternatives that could minimize these impacts.

A statement of the reasons for the proposed rule, and the objectives of, and legal basis for, the proposed rule, are set forth elsewhere in the preamble and not repeated here.

1. Description and Estimated Number of Small Entities Regulated

a. Methodology for Estimating the Number of Small Entities

For manufacturers of fluorescent lamp ballasts, the Small Business

Administration (SBA) has set a size threshold, which defines those entities classified as "small businesses" for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30850 (May 15, 2000), as amended at 65 FR 53533, 53545 (Sept. 5, 2000) and codified at 13 CFR part 121.The size standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.* Fluorescent lamp ballast manufacturing is classified under NAICS 335311, "Power, Distribution and Specialty Transformer Manufacturing." The SBA sets a threshold of 750 employees or less for an entity to be considered as a small business for this category.

To estimate the number of companies that could be small business manufacturers of products covered by this rulemaking, DOE conducted a market survey using all available public information to identify potential small manufacturers. DOE's research involved industry trade association membership directories (including NEMA), product databases (*e.g.,* CEC and CEE databases), individual company Web sites, and market research tools (*e.g.,* Dun and Bradstreet reports) to create a list of every company that manufactures or sells fluorescent lamp ballasts covered by this rulemaking. DOE also asked stakeholders and industry representatives if they were aware of any other small manufacturers during manufacturer interviews and at previous DOE public meetings. DOE contacted select companies on its list, as necessary, to determine whether they met the SBA's definition of a small business manufacturer of covered fluorescent lamp ballasts. DOE screened out companies that did not offer products covered by this rulemaking, did not meet the definition of a "small business," or are foreign owned and operated.

DOE initially identified at least 54 potential manufacturers of fluorescent lamp ballasts sold in the U.S. DOE reviewed publically available information on these 54 potential manufacturers and determined 30 were large manufacturers, manufacturers that are foreign owned and operated or did not manufacture ballasts covered by this rulemaking. DOE then attempted to contact the remaining 24 companies that were potential small business manufacturers. Though many companies were unresponsive, DOE was able to determine that approximately 10 meet the SBA's definition of a small business and likely manufacture ballasts covered by this rulemaking.

b. Manufacturer Participation

Before issuing this NOPR, DOE attempted to contact the small business manufacturers of fluorescent lamp ballasts it had identified. Two of the small businesses consented to being interviewed during the MIA interviews, and DOE received feedback from one additional small business through a survey response. DOE also obtained information about small business impacts while interviewing large manufacturers.

c. Fluorescent Lamp Ballast Industry Structure

Four major manufacturers with non-domestic production supply the vast majority of the marketplace. None of the four major manufacturers is considered a small business. The remaining market share is held by foreign manufacturers and several smaller domestic companies with relatively negligible market share. Even for these U.S.-operated firms, most production is outsourced to overseas vendors or captive overseas manufacturing facilities. Some very limited production takes place in the United States—mostly magnetic ballasts for specialty applications. DOE is unaware of any fluorescent lamp ballast companies, small or large, that produce only domestically. *See* chapter 3 of the TSD for further details on the fluorescent lamp ballast market.

d. Comparison Between Large and Small Entities

The four large manufacturers typically offer a much wider range of designs of covered ballasts than small manufacturers. Ballasts can be designed, or optimized, to operate different lamp lengths and numbers of lamps under various start methods, often in combination with various additional features. Large manufacturers typically offer many SKUs per product line to meet this wide range of potential specifications. Generally, one product family shares some fundamental characteristic (i.e., lamp diameter, number of lamps, etc.) and hosts a large number of SKUs that are manufactured with minor variations on the same product line. Some product lines, such as the 4-foot MBP IS ballast, are manufactured in high volumes, while other products may be produced in much lower volumes but can help manufacturers meet their customers' specific needs and provide higher margin opportunities. For their part, small manufacturers generally do not have the volume to support as wide a range of products.

Beyond variations in ballast types and features, the large manufacturers also offer multiple tiers of efficiency, typically including a baseline efficiency product and a high-efficiency product within the same family. On the other hand, some small manufacturers frequently only offer one efficiency level in a given product class to reduce the number of SKUs and parts they must maintain. This strategy is important to small-scale manufacturers because many product development costs (*e.g.,* testing, certification, and marketing) are relatively fixed per product line.

Small manufacturers are able to compete in the fluorescent lamp ballast industry despite the dominance of the four major manufacturers due, in large part, to the fragmented nature of the fixture industry. The largest four fixture manufacturers compose about 60 percent of the industry, while as many as 200 smaller fixture manufacturers hold the remaining share. Many small ballast manufacturers have developed relationships with these small fixture manufacturers, whose production volumes may not be attractive to the larger players. The same structure applies to the electrical distributor market—while small ballast manufacturers often cannot compete for the business of the largest distributors, they are able to successfully target small distributors, often on a regional basis.

Lastly, like the major manufacturers, small manufacturers usually offer products in addition to those fluorescent lamp ballasts covered by this rulemaking, such as additional dimming ballasts, LED drivers, and compact fluorescent ballasts.

2. Description and Estimate of Compliance Requirements

At TSL 3, the level proposed in today's notice, DOE estimates capital conversion costs of $0.3 million and product conversion costs of $1.3 million for a typical small manufacturer, compared to capital and product conversion costs of $7.6 million and $12.7 million, respectively, for a typical large manufacturer. These costs and their impacts are described in detail below.

a. Capital Conversion Costs

Those small manufacturers DOE interviewed did not expect increased capital conversion costs to be a major concern because most of them source all or the majority of their products from Asia. Those that source their products would likely not make the direct capital

investments themselves. Small manufacturers experience the impact of sourcing their products through a higher cost of goods sold, and thus a lower operating margin, as compared to large manufacturers. The capital costs estimated are largely associated with those small manufacturers producing magnetic ballasts. DOE estimates capital costs of approximately $340,000 for a typical small manufacturer at TSL 3, based on the cost of converting magnetic production lines, such as sign ballasts, to electronic production lines.

Another challenge facing the industry is the component shortage discussed in the section 0. As with large manufacturers, the component shortage is a significant issue for small manufacturers, but some small manufacturers stated that the shortage does not differentially impact them. At times, they actually can obtain components more easily than large manufacturers: because their volumes are lower, they generally pay higher prices for parts than their larger competitors, which incentivizes suppliers to fill small manufacturers' orders relatively quickly. The lower-volume orders also allow small manufacturers to piggyback off the orders for certain components that are used throughout the consumer electronics industry.

b. Product Conversion Costs

While capital conversion costs were not a large concern to the small manufacturers DOE interviewed, product conversion costs could adversely impact small manufacturers at TSL 3, the level proposed in today's notice. To estimate the differential impacts of the proposed standard on small manufacturers, DOE compared their cost of compliance with that of the major manufacturers. First, DOE examined the number of basic models and SKUs available from each manufacturer to determine an estimate for overall compliance costs. The number of basic models and SKUs attributed to each manufacturer is based on information obtained during manufacturer interviews and an examination of the different models advertised by each on company Web sites. DOE assumed that the product conversion costs required to redesign basic models and test and certify all SKUs to meet the standard levels presented in today's notice would be lower per model and per SKU for small manufacturers, as detailed below. (A full description of DOE's methodology for developing product conversion costs is found in section 0 above and in chapter 13 of the NOPR TSD.) The table below compares the estimated product conversion costs of a typical small manufacturer as a percentage of annual R&D expense to those of a typical large manufacturer.

TABLE XXIV.1—COMPARISON OF A TYPICAL SMALL AND LARGE MANUFACTURER'S PRODUCT CONVERSION COSTS TO ANNUAL R&D EXPENSE

XXV.	Large manufacturer		Small manufacturer	
	Product conversion costs for a typical large manufacturer (2009$ millions)	Product conversion costs as a percentage of annual R&D expense (%)	Product conversion costs for a typical small manufacturer (2009$ millions)	Product conversion costs as a percentage of annual R&D expense (%)
Baseline	$0.00	0	$0.00	0
TSL 1	1.48	17	0.15	39
TSL 2	10.19	116	1.05	269
TSL 3	12.73	145	1.31	336

Based on discussions with manufacturers, DOE estimated that the cost to fully redesign every ballast model for large manufacturers is approximately $120,000 per model and the cost to test and certify every SKU is approximately $20,000 per SKU. A typical major manufacturer offers approximately 80 basic covered models and 300 SKUs. Based on DOE's GRIM analysis, a typical major manufacturer has an annual R&D expense of $8.6 million. Because not all products would need to be redesigned at TSL 3, DOE estimates $12.7 million in product conversion costs for a typical major manufacturer at TSL 3 (compared to $15.5 million if all products had to be fully redesigned), which represents 145 percent of its annual R&D expense. This means that a typical major manufacturer could redesign its products in under a year and a half if it were to devote its entire R&D budget for fluorescent lamp ballasts to product redesign and could retain the engineering resources.

On the other hand, DOE's research indicated that a typical small manufacturer offers approximately 50 basic covered models and 100 SKUs. However, based on manufacturer interviews, DOE does not believe that small manufacturers would incur the same level of costs per model and SKU as large manufacturers. Small manufacturers would not be as likely to redesign models in-house as large manufacturers. Instead, they would source and rebrand products from the Asian manufacturers who supply their ballasts. As a result, DOE assumed a lower R&D investment, in absolute dollars, per model. Because this design is effectively sourced, DOE believes smaller manufacturers would face a higher level of cost of goods sold (i.e. a higher MPC). Therefore, in a competitive environment, small manufacturers would earn a lower markup than their larger peers and consequently operate at lower margins. Small manufacturers would also have to test and certify every SKU they offer, but they would not conduct the same extent of pilot runs and internal testing as large manufacturers because less production takes place in internal factories. As such, DOE estimates that their testing and certification costs are expected to be $10,000 per SKU for UL and other certifications. Thus, the product conversion costs for a typical small manufacturer could total $1.6 million, but because not all products would need to be fully redesigned at TSL 3, DOE estimates product conversion costs of $1.3 million at TSL 3. Based on scaling GRIM results to an average small-manufacturer market share of 1.0 percent, DOE assumed that a small manufacturer has an annual R&D expense of $0.4 million, so the estimated product conversion costs at TSL 3 would represent 336 percent of its annual R&D expense. This means that a typical small manufacturer could redesign its products in a little over the three year compliance period if it were to devote its entire R&D budget for fluorescent lamp ballasts to product redesign and could retain the engineering resources.

a. Summary of Compliance Impacts

Although the conversion costs required can be considered substantial for all companies, the impacts could be relatively greater for a typical small manufacturer because of much lower production volumes and the relatively fixed nature of the R&D resources required per model. The table below compares the total conversion costs of a typical small manufacturer as a percentage of annual revenue and earnings before taxes and interest (EBIT) to those of a typical large manufacturer.

TABLE XXIV.2—COMPARISON OF A TYPICAL SMALL AND LARGE MANUFACTURER'S TOTAL CONVERSION COSTS TO ANNUAL REVENUE AND EBIT

XXVI.	Large manufacturer			Small manufacturer		
	Total conversion costs for a typical large mfr. (2009$ millions)	Total conversion costs as a percentage of annual revenue (%)	Total conversion costs as a percentage of annual EBIT (%)	Total conversion costs for a typical small mfr. (2009$ millions)	Total conversion costs as a percentage of annual revenue (%)	Total conversion costs as a percentage of annual EBIT (%)
Baseline	$0.00	0	0	$0.00	0	0
TSL 1	4.06	2	21	0.27	3	38
TSL 2	15.85	7	81	1.30	12	184
TSL 3	20.33	9	104	1.65	16	233

As seen in the table above, the impacts for a typical small manufacturer are relatively greater than for a large manufacturer at TSL 3. Total conversion costs represent 233 percent of annual EBIT for a typical small manufacturer compared to 104 percent of annual EBIT for a typical large manufacturer. DOE believes these estimates reflect a worst-case scenario because they assume small manufacturers would redesign all proprietary models immediately, and not take advantage of the industry's supply chain dynamics or take other steps to mitigate the impacts. However, DOE anticipates that small manufacturers would take several steps to mitigate the costs required to meet new and amended energy conservation standards.

At TSL 3, it is more likely that ballast manufacturers may temporarily reduce the number of SKUs they offer as in-house designs to keep their product conversion costs at manageable levels in the year preceding the compliance date. As noted above, the typical small manufacturer business model is not predicated on the supply of a wide range of models and specifications. They frequently either focus on a few niche markets or on customers seeking only basic, low-cost solutions. They therefore can satisfy the needs of their customers with a smaller product portfolio than large manufacturers who often compete on brand reputation and the ability to offer a full product offering. As such, DOE believes that under the proposed standards small businesses would likely selectively upgrade existing product lines to offer products that are in high demand or offer strategic advantage. Small manufacturers could then spread out further investments over a longer time period by upgrading some product lines prior to the compliance date while sourcing others until resources allow—and the market supports—in-house design. Furthermore, while the initial redesign costs are relatively large, the estimates assume small manufacturers would bring compliant designs to market in concert with large manufacturers. In reality, there is a possibility some small manufacturers would conserve resources by selectively upgrading certain products until new baseline designs become commonplace to the point where their in-house development is less resource-intensive. The commonality of many consumer electronics components, designs, and products fosters considerable sharing of experience throughout the electronics supply chain, particularly when unrestricted by proprietary technologies. DOE did not find any intellectual property restrictions that would prevent small manufacturers from achieving the technologies necessary to meet today's proposed levels.

DOE seeks comment on the potential impacts of amended standards on the small fluorescent lamp ballast manufacturers. (See Issue 0 under "Issues on Which DOE Seeks Comment" in section 0 of this NOPR.)

1. Duplication, Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the rule being considered today.

2. Significant Alternatives to the Proposed Rule

The Manufacturer Impact Analysis discussion in Section VI.B.2 analyzes impacts on small businesses that would result from the other TSLs DOE considered. Though TSLs lower than the proposed TSLs are expected to reduce the impacts on small entities, DOE is required by EPCA to establish standards that achieve the maximum improvement in energy efficiency that are technically feasible and economically justified, and result in a significant conservation of energy. As discussed in Section VI.C, DOE has weighed the costs and benefits of the TSLs considered in today's proposed rule and rejected the lower TSLs based on the criteria set forth in EPCA and set forth in Section II.A.

In addition to the other TSLs being considered, the NOPR TSD includes a regulatory impact analysis in chapter 17. For fluorescent lamp ballasts, this report discusses the following policy alternatives: (1) No standard, (2) consumer rebates, (3) consumer tax credits, (4) manufacturer tax credits, and (5) early replacement. DOE does not intend to consider these alternatives further because they are either not feasible to implement, or not expected to result in energy savings as large as those that would be achieved by the standard levels under consideration.

DOE continues to seek input from businesses that would be affected by this rulemaking and will consider comments received in the development of any final rule.

B. Review Under the Paperwork Reduction Act

Manufacturers of fluorescent lamp ballasts must certify to DOE that their product complies with any applicable energy conservation standard. In certifying compliance, manufacturers must test their product according to the DOE test procedure for fluorescent lamp ballasts, including any amendments adopted for that test procedure. DOE has

proposed regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including ballasts. 75 FR 56796 (Sept. 16, 2010). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to Dr. Tina Kaarsberg (*see* **ADDRESSES**) and by e-mail to *Christine_J._Kymn@omb.eop.gov.*

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

C. Review Under the National Environmental Policy Act of 1969

DOE has prepared a draft environmental assessment (EA) of the impacts of the proposed rule pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and DOE's regulations for compliance with the National Environmental Policy Act of 1969 (10 CFR part 1021). This assessment includes an examination of the potential effects of emission reductions likely to result from the rule in the context of global climate change, as well as other types of environmental impacts. The draft EA has been incorporated into the NOPR TSD as chapter 16. Before issuing a final rule for fluorescent lamp ballasts, DOE will consider public comments and, as appropriate, determine whether to issue a finding of no significant impact (FONSI) as part of a final EA or to prepare an environmental impact statement (EIS) for this rulemaking.

D. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 10, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) No further action is required by Executive Order 13132.

E. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

F. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, section 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://www.gc.doe.gov.*

Although today's proposed rule does not contain a Federal intergovernmental mandate, it may impose expenditures of $100 million or more on the private sector. Specifically, the proposed rule will likely result in a final rule that could impose expenditures of $100 million or more. Such expenditures may include (1) investment in research and development and in capital expenditures by fluorescent lamp ballast manufacturers in the years between the final rule and the compliance date for the new standard, and (2) incremental additional expenditures by consumers to purchase higher-efficiency ballasts, starting in 2014.

Section 202 of UMRA authorizes an agency to respond to the content

requirements of UMRA in any other statement or analysis that accompanies the proposed rule. 2 U.S.C. 1532(c). The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of the notice of proposed rulemaking and the "Regulatory Impact Analysis" section of the TSD for this proposed rule respond to those requirements.

Under section 205 of UMRA, the Department is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. 2 U.S.C. 1535(a). DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise or the selection of such an alternative is inconsistent with law. As required by 42 U.S.C. 6295(h) and (o), 6313(e), and 6316(a), today's proposed rule would establish energy conservation standards for fluorescent lamp ballasts that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified. A full discussion of the alternatives considered by DOE is presented in the "Regulatory Impact Analysis" section of the TSD for today's proposed rule.

G. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

H. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights" 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

I. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's NOPR under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has tentatively concluded that today's regulatory action, which sets forth energy conservation standards for fluorescent lamp ballasts, is not a significant energy action because the proposed standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on the proposed rule.

K. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are "influential scientific information," which the Bulletin defines as "scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The "Energy Conservation Standards Rulemaking Peer Review Report" dated February 2007 has been disseminated and is available at the following Web site: *http://www1.eere.energy.gov/buildings/appliance_standards/peer_review.html.*

XXVII. Public Participation

A. Attendance at Public Meeting

The time, date and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this document. If you plan to attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945 or *Brenda.Edwards@ee.doe.gov.* As explained in the **ADDRESSES** section, foreign nationals visiting DOE Headquarters are subject to advance security screening procedures.

In addition, you can attend the public meeting via webinar. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's Web site (*http://www1.eere.energy.gov/buildings/appliance_standards/residential/fluorescent_lamp_ballasts.html*). Participants are responsible for ensuring

their systems are compatible with the webinar software.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **ADDRESSES** section at the beginning of this NOPR. The request and advance copy of statements must be received at least one week before the public meeting and may be e-mailed, hand-delivered, or sent by mail. DOE prefers to receive requests and advance copies via e-mail. Please include a telephone number to enable DOE staff to make a follow-up contact, if needed.

C. Conduct of Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

A transcript of the public meeting will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this notice. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via regulations.gov. The regulations.gov Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via e-mail, hand delivery, or mail. Comments and documents submitted via e-mail, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, e-mail address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. E-mail submissions are preferred. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via e-mail, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the

information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via e-mail or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

The Department is particularly interested in receiving comments and views of interested parties concerning:

(1) The appropriateness of creating an exemption for T8 magnetic ballasts as a solution to the problems caused by excessive EMI from electronic ballasts in EMI sensitive environments;

(2) The appropriateness of establishing efficiency standards using an equation dependent on lamp-arc power;

(3) The appropriateness of combining several product classes from the preliminary TSD. In particular, DOE requests feedback on the decision to include several IS and RS ballasts (IS and RS ballasts that operate 4-foot MBP and 8-foot slimline lamps) and PS ballasts in the same product class (PS ballasts that operate 4-foot MBP and 4-foot T5 lamps);

(4) The appropriateness of including residential ballasts in the same product class as those that operate in the commercial sector;

(5) The appropriateness of establishing a separate product class for ballasts that operate 8-foot HO lamps;

(6) The methodology DOE used to calculate manufacturer selling prices;

(7) The efficiency levels DOE considered for fluorescent ballasts, in particular the efficiency level identified for sign ballasts.

(8) The selection of the maximum technologically feasible level and whether it is technologically feasible to attain such higher efficiencies for the full range of instant start ballast applications. Specifically, DOE seeks quantitative information regarding the potential change in efficiency, the design options employed, and the associated change in cost. Any design option that DOE considers to improve efficiency must meet the four criteria outlined in the screening analysis: technological feasibility; practicability to manufacture, install, and service; adverse impacts on product or equipment utility to consumers or availability; and adverse impacts on health or safety. DOE also requests comments on any technological barriers to an improvement in efficiency above TSL 3 for all or certain types of ballasts.

(9) Typical markups, as well as ballast pricing data, that it could use to verify the price markups it developed for the proposed rule;

(10) The appropriateness of including T12 ballasts in the baseline analysis for life cycle costs.

(11) The magnitude and timing of its forecasted ballast shipment trends (*e.g.,* rising and declining shipments, plateaus, etc.) as well as the impacts of current regulatory initiatives on future ballast shipments;

(12) The methodology and inputs DOE used for the manufacturer impact analysis—specifically, DOE's assumptions regarding markups, capital costs, and conversion costs;

(13) The potential impacts of amended standards on the small fluorescent lamp ballast manufacturers.

(14) The appropriateness of the TSLs DOE considered for fluorescent ballasts, in particular the combinations of efficiency levels for each product class;

(15) The proposed standard level for fluorescent ballasts;

(16) Potential approaches to maximize energy savings while mitigating impacts to certain fluorescent ballast consumer subgroups;

XXVIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's proposed rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on March 24, 2011.

Henry Kelly,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE proposes to amend chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

2. Section 430.2 is amended by adding the definition of "Ballast luminous efficiency" in alphabetical order to read as follows:

§ 430.2 Definitions.

* * * * *

Ballast luminous efficiency means the total fluorescent lamp arc power divided by the fluorescent lamp ballast input power multiplied by the appropriate frequency adjustment factor.

* * * * *

3. Section 430.32 is amended by:

a. Revising paragraph (m)(1) introductory text.

b. Adding paragraphs (m)(8), (m)(9), and m(10).

These revisions and additions read as follows:

§ 430.32 Energy and water conservation standards and their effective dates.

* * * * *

(m)(1) *Fluorescent lamp ballasts (other than specialty application mercury vapor lamp ballasts).* Except as provided in paragraphs (m)(2), (m)(3), (m)(4), (m)(5), (m)(6), (m)(7), (m)(8), (m)(9), and (m)(10) of this section, each fluorescent lamp ballast—

* * * * *

(8) Except as provided in paragraph (m)(9) of this section, each fluorescent lamp ballast—

(i) Manufactured on or after [date 3 years after publication of the Fluorescent Lamp—Ballast Energy Conservation Standard final rule];

(ii) Designed—

(A) To operate at nominal input voltages of 120 or 277 volts;

(B) To operate with an input current frequency of 60 Hertz; and

(C) For use in connection with fluorescent lamps (as defined in § 430.2)

(iii) Shall have—

(A) A power factor of 0.9 or greater except for those ballasts defined in paragraph (m)(8)(iii)(B) of this section;

(B) A power factor of 0.5 or greater for residential ballasts, which meet FCC consumer limits as set forth in 47 CFR part 18 and are designed and labeled for use only in residential applications;

(C) A ballast luminous efficiency of not less than the following:

Description	Shall have a minimum ballast luminous efficiency of—
Instant start and rapid start ballasts that are designed to operate:	
4-foot linear or 2-foot U-shaped medium bipin lamps ..... 8-foot slimline lamps.	1.32 * ln (total lamp arc power) + 86.11.
Programmed start ballasts that are designed to operate:	
4-foot linear or 2-foot U-shaped medium bipin lamps ..... 4-foot miniature bipin standard output lamps. 4-foot miniature bipin high output lamps.	1.79 * ln (total lamp arc power) + 83.33.
Instant start and rapid start ballasts that are designed to operate:	
8-foot HO lamps	1.49 * ln (total lamp arc power) + 84.32.
Programmed start ballasts that are designed to operate:	
8-foot HO lamps	1.46 * ln (total lamp arc power) + 82.63.
Ballasts that are designed to operate:	
8-foot high output lamps at ambient temperatures of −20 °F or less that are used in outdoor signs.	1.49 * ln (total lamp arc power) + 81.34.

(9) The standards described in paragraph (m)(8) of this section do not apply to:

(i) A ballast that is designed for dimming to 50 percent or less of the maximum output of the ballast except for those specified in m(10); and

(ii) A low frequency ballast that:

(A) Is designed to operate T8 diameter lamps;

(B) Is designed and labeled for use in EMI-sensitive environments only;

(C) Is shipped by the manufacturer in packages containing not more than 10 ballasts.

(10) Each fluorescent lamp ballast—

(i) Manufactured on or after [Date 3 Years after publication of the Fluorescent Lamp Ballast Energy Conservation Standard final rule];

(ii) Designed—

(A) To operate at nominal input voltages of 120 or 277 volts;

(B) To operate with an input current frequency of 60 Hertz; and

(C) For use in connection with fluorescent lamps (as defined in § 430.2);

(D) For dimming to 50 percent or less of the maximum output of the ballast

(iii) Shall have—

(A) A power factor of 0.9 or greater except for those ballasts defined in paragraph (m)(8)(iii)(B) of this section;

(B) A power factor of 0.5 or greater for residential ballasts, which meet FCC Part B consumer limits and are designed and labeled for use only in residential applications;

(C) A ballast luminous efficiency of not less than the following:

Designed for the operation of	Ballast input voltage	Total nominal lamp watts	Ballast luminous efficiency	
			Low frequency ballasts	High frequency ballasts
One F34T12 lamp	120/277	34	75.2	77.8
Two F34T12 lamps	120/277	68	77.8	80.5
Two F96T12/ES lamps	120/277	120	83.9	88.4
Two F96T12HO/ES lamps	120/277	190	68.0	71.3

* * * * *

[FR Doc. 2011–7592 Filed 4–8–11; 8:45 am]

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 226
Endangered and Threatened Species: Designation of Critical Habitat for Cook Inlet Beluga Whale; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 090224232–0457–04]

RIN 0648–AX50

Endangered and Threatened Species: Designation of Critical Habitat for Cook Inlet Beluga Whale

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

ACTION: Final rule.

SUMMARY: We, the National Marine Fisheries Service (NMFS), designate critical habitat for the Cook Inlet beluga whale (*Delphinapterus leucas*) distinct population segment (DPS) under the Endangered Species Act (ESA). Two areas are designated, comprising 7,800 square kilometers (3,013 square miles) of marine habitat. In developing this final rule we considered public and peer review comments, as well as economic impacts and impacts to national security. We have decided in the final rule to exclude the Port of Anchorage (POA) in consideration of national security interest. Additionally, consistent with the proposed rule, portions of military lands were determined to be ineligible for designation as critical habitat. We solicited comments from the public on all aspects of the proposed rule, and conducted four public hearings on the action. Along with the proposed rule, we published a draft economic impacts analysis, entitled "Draft RIR/4(b)(2) Preparatory Assessment/IFRA for the Critical Habitat Designation of Cook Inlet Beluga Whale." This economic analysis has been completed to support the final designation. See "Final RIR/4(b)(2) Preparatory Assessment/FRFA for the Critical Habitat Designation of Cook Inlet Beluga Whale" for a discussion of these topics.

DATES: This rule will become effective on May 11, 2011.

ADDRESSES: The final rule, maps, status reviews, and other materials supporting this final rule can be found on our Web site at: *http://www.fakr.noaa.gov/.*

FOR FURTHER INFORMATION CONTACT: Brad Smith (907–271–3023), Kaja Brix (907–586–7235), or Marta Nammack (301–713–1401).

SUPPLEMENTARY INFORMATION:

Rulemaking Background

We are responsible for determining whether species, subspecies, or distinct population segments (DPSs) are threatened or endangered and for designating critical habitat for these species under the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*). On October 22, 2008, we published a Final Rule to list the Cook Inlet beluga whale as an endangered species (73 FR 62919). At the time of listing, we announced our intent to propose critical habitat for the Cook Inlet beluga whales. This critical habitat was subsequently proposed on December 2, 2009 (74 FR 63080). The proposed rule's critical habitat for the Cook Inlet beluga whale was determined by considering information received in response to our Advance Notice of Proposed Rulemaking, sighting reports, satellite telemetry data, The Traditional and Ecological Knowledge of Alaska Natives (TEK), scientific papers and other research, the biology and ecology of the Cook Inlet DPS of beluga whales, and information indicating the presence of one or more of the identified primary constituent elements (PCEs) within certain areas of their range. The proposed rule identified "specific areas" within the geographical area occupied by the Cook Inlet beluga whale to be proposed as critical habitat.

We considered various alternatives to the critical habitat designation for the Cook Inlet beluga whale. The alternative of not designating critical habitat for the Cook Inlet beluga whale would impose no economic, national security, or other relevant impacts, but would not provide any conservation benefit to the species. This alternative was rejected because such an approach does not meet the legal requirements of the ESA and would not provide for the conservation of Cook Inlet beluga whale. The alternative of designating all eligible occupied habitat areas also was considered and rejected, because some areas within the occupied range were not considered to be critical habitat, and did not contain the identified physical or biological features that are essential to the conservation of the Cook Inlet beluga.

An alternative to designating critical habitat within all eligible occupied areas is the designation of critical habitat within a subset of these areas. Under section 4(b)(2) of the ESA, we must consider the economic impacts, impacts to national security, and other relevant impacts of designating any particular area as critical habitat. We have the discretion to exclude any particular area from designation as critical habitat if the benefits of exclusion (*i.e.,* the impacts that would be avoided if an area were excluded from the designation) outweigh the benefits of designation (*i.e.,* the benefits to the Cook Inlet beluga whale if an area were designated), so long as exclusion of the area will not result in extinction of the species. Exclusion under section 4(b)(2) of the ESA of one or more of the areas considered for designation would reduce the total impacts of designation. The determination to exclude any particular areas depends on our ESA 4(b)(2) analysis, which is described in detail in the ESA 4(b)(2) analysis report.

This final rule includes several small changes to the areas proposed as critical habitat and, importantly, excludes under Section 4(b)(2) the Port of Anchorage (POA) from designated critical habitat for reasons relating to national security. We corrected errors within the proposed rule's descriptions of the boundaries for this critical habitat so that the final rule utilizes the coordinate system of degrees, decimal-minutes. We have also changed the sentence structure of the PCEs concerning noise and toxins in the final rule to improve clarity.

The total quantifiable economic impact associated with this final rule is estimated to be between $157,000 to $472,000 (discounted at 7 percent) or $187,000 to $571,000 (discounted at 3 percent). While we have excluded a small portion of the area originally proposed as critical habitat for national security reasons (the POA), that exclusion does not affect the economic impact analysis because the small size of the area indicates that the potential cost-savings are likely nominal (*i.e.,* consultations will continue to occur to ensure proposed activities in those areas do not jeopardize the species or adversely modify or destroy adjacent areas of critical habitat). Additional economic impacts, both costs and benefits, that were not amenable to quantification, but nonetheless important to a complete evaluation of this action, were identified and analyzed qualitatively. Both the quantitative and qualitative economic effects of the final rule are presented, in detail, in the Final Regulatory Impact Review/4(b)(2) Preparatory Assessment/Final Regulatory Flexibility Analysis. We promulgate this final rule because it results in a critical habitat designation that provides for the conservation of the Cook Inlet beluga whale, without economic effects of sufficient significance to warrant an exclusion from designation on that basis alone. Other areas within the species' range did not contain the identified physical or biological features that are essential

to the conservation of the Cook Inlet beluga. This alternative also meets the requirements under the ESA and our joint NMFS–USFWS regulations concerning critical habitat.

Cook Inlet Beluga Whale Biology and Habitat Use

The beluga whale is a small, toothed whale in the family Monodontidae, a family it shares with only the narwhal. Belugas are also known as "white whales" because of the white coloration of the adults. The beluga whale is a northern hemisphere species that inhabits fjords, estuaries, and shallow waters of the Arctic and subarctic oceans. Five distinct stocks of beluga whales are currently recognized in Alaska: Beaufort Sea, eastern Chukchi Sea, eastern Bering Sea, Bristol Bay, and Cook Inlet. The Cook Inlet population is numerically the smallest of these, and is the only one of the five Alaskan stocks occurring south of the Alaska Peninsula in waters of the Gulf of Alaska.

A detailed description of the biology of the Cook Inlet beluga whale may be found in the Proposed Listing Rule (72 FR 19854; April 20, 2007).

Summary of Comments and Responses

We requested comments on the proposed rule to designate critical habitat for Cook Inlet beluga whales and supporting documents (74 FR 63080; December 2, 2009). To facilitate public participation, the proposed rule was made available on our regional web page, and comments were accepted via standard mail, e-mail, and through the Federal eRulemaking portal. In addition to the proposed rule, several draft documents supporting the proposal, including an economic report, were posted. In response to comments, the original 60-day comment period was extended an additional 30 days, ending on March 3, 2010. Public hearings were held in Kenai, Soldotna, Wasilla, and Anchorage, Alaska.

We received 135,463 individual submissions in response to the proposed rule (including public testimony during the four hearings). This included 134,959 form letter submissions and 504 unique submissions. The majority of comments concerned economic and other impacts for consideration for exclusions, the regulatory process for critical habitat designation, legal issues, essential features or PCEs, additions to critical habitat, and biological issues.

We have considered all public comments, and provide responses to all significant issues raised by commenters. We have not responded to comments outside the scope of this rulemaking, such as whether NMFS' prior decision to list the Cook Inlet beluga whale as endangered was proper. We have categorized comments by issue and, where appropriate, combined similar comments.

General Comments on Critical Habitat

Comment 1: In the proposed rule's discussions at 74 FR at 63084, NMFS has not listed activities that will deter use of or access to Area 1 by beluga whales.

Response: In the referenced paragraph, we simply endeavored to provide a description of the habitat values and associations within the proposed areas, along with a discussion of why these areas may be sensitive or vulnerable to various stressors. Later in the proposed rule, we provided a brief description of those activities that may adversely modify critical habitat, or that may be affected by the designation. *See* 74 FR at 63089. Examples of activities that may deter use or access could include causeways, dams, bridges, or tidal generation projects.

Comment 2: Cook Inlet anadromous fish runs are healthy and appropriately protected under existing regulatory mechanisms.

Response: We recognize and acknowledge that the current management structure of the salmon fisheries has generally provided for the sustained harvest and productivity of salmon in Cook Inlet. However, it should also be noted that there are problems inherent with any management system. The size of several king (Chinook) salmon returns in 2009 and 2010 was substantially below average, resulting in closures of sport and commercial fisheries in the Inlet. The Deshka River king salmon runs were extremely low in 2008 and 2009, resulting in closures. The Susitna River sockeye salmon runs failed to meet minimum escapement goals for 5 of 7 years between 2001 and 2007. Sockeye commercial harvests for the Northern District of Cook Inlet fell from an average of 180,000 fish in the 1980s to an average of 26,000 since 2002. The Alaska Department of Fish and Game forecasts Kenai River sockeye runs to be below average for 2010, citing management decisions leading to over-escapement as a contributing factor.

Comment 3: The final rule should acknowledge the riparian protections under the State's forest practices, as well as other regulations that protect water quality and other protections.

Response: While there exist myriad environmental and conservation laws, restrictions, and practices at State and local levels, these are not pertinent to this designation unless they concern whether the identified essential features of that habitat "may require special management or protection." The fact that the State and local governments have instituted such measures is some evidence that these essential features do in fact require special management.

Comment 4: NMFS should provide supporting evidence for its identification of the tendency for belugas to occur in high concentrations, predisposing them to harm from events such as oil spills, as reason for designation of Area 1. The statement is speculative. This commenter also challenged our evidence that oil spills are a threat to beluga whales or predisposes them to harm, that these areas are susceptible to oil spills, or that spills are likely to occur here.

Response: We had not proposed this fact to be a "reason" for designating critical habitat. We disagree this statement is speculative, as there are multiple lines of evidence, including NMFS' 2008 Conservation Plan for Cook Inlet Beluga Whale and many peer reviewed studies, that beluga whales occur seasonally in high densities within specific areas of the upper Inlet. Our purpose in these statements was not to provide an exhaustive assessment or analysis of oil spills, but to indicate the ecological attributes of Area 1 to Cook Inlet belugas and to recognize the sensitivities imposed by their habit of occupying relatively small, enclosed areas for feeding and other purposes during the open water months. The occurrence of these whales in high densities here not only predisposes them to potential harm from hazardous material releases, but also disease outbreaks, harassment, poaching, and other factors.

Comment 5: Additional research is needed to support proper management of the Cook Inlet beluga whales including this critical habitat designation.

Response: We agree generally that additional research is needed, and we identified in the 2008 Conservation Plan the need to "improve our understanding of the biology of Cook Inlet beluga whales and the factors limiting the population's growth." *See:* Conservation Plan for the Cook Inlet Beluga Whale (Oct. 2008) at 63. We disagree, however, that additional research is needed to support the designation of critical habitat. The ESA requires NMFS to designate critical habitat concurrently with the listing decision, 16 U.S.C. 1533(a)(3)(A)(i), and to base that decision on the "best scientific data available," *id.,* section 1533(b)(2). We have used the best scientific data available in designating critical habitat

for the Cook Inlet beluga whale. We are not required to conduct field research prior to designating critical habitat.

Comment 6: NMFS must link its critical habitat determinations to credible threats, and must fully explain its rationale for designating Area 2 as critical habitat.

Response: There is no requirement to link designation of critical habitat with threats. We are required to base critical habitat designations on physical or biological features essential to the conservation of the species and which may require special management considerations or protection, as we have done in this rule. Our discussion of potential threats to critical habitat was provided so the reader might better understand the proposed designation in context of the biology of the Cook Inlet beluga whales and the various stressors that may occur in these areas. Such a discussion also assists in the description and evaluation of those activities which may adversely modify the critical habitat or otherwise be affected by the designation. We believe the Proposed Rule presented the best scientific data and information available which justify the inclusion of Area 2 as critical habitat. We described the known or probable habitat attributes of this area, including use for fall and winter feeding, and discussed distribution and dive behavior of these whales within the area, which also support the feeding and overwintering habitat values here. We identified several essential physical and biological features of critical habitat for Cook Inlet beluga whales, established that those features were found within Area 2, and confirmed that they may require special management or protections, as required by the ESA. We agree that present knowledge of the habitat characteristics of Area 2 is less than that of Area 1, and that it is desirable to gather additional data to better understand the habitat needs of beluga whales here. However, we do not find that the existing information, nor the discussion and analysis of the area within the Proposed Rule, were insufficient. Further, none of the commenters provided data or information contradicting the data on which the proposed rule relied.

Physical or Biological Features Essential for Conservation (PCEs)

Comment 7: We received many comments concerning the PCEs, or essential features, indicating some confusion and uncertainty regarding their function and significance. Others felt that our identification of PCEs was flawed because these are not presently impeding the recovery of Cook Inlet beluga whales, or that the PCE thresholds are set unreasonably. Still others believe that a PCE equates to adverse modification or other objectionable standard by which various activities and projects would be prohibited.

Response: The ESA defines critical habitat in terms of essential physical or biological features, and Federal regulations require us to focus on these features in the designation process. It is not necessary that a feature be presently impaired or limiting, only that it provide an essential service or function to the conservation of the listed species and may require special management considerations or protection. Also, a PCE is not meant to describe a threshold condition beyond which critical habitat would be adversely modified or destroyed. Rather, potential threats to the PCEs will often be the factors evaluated in making determinations regarding whether a proposed Federal action will adversely modify or destroy critical habitat. For example, we believe an essential physical feature to be the unrestricted passage and movement of beluga whales among critical habitat sites. A project, such as a dam, could potentially isolate parts of the whales' critical habitat and prevent movement among the sites. In evaluating the effects of such a project under section 7 of the ESA, we would consider whether this isolation would impact beluga whales to a degree that critical habitat was no longer functional to the conservation of the species. If it caused the loss of either of these functional values, we would consider this adverse modification. However, the mere fact that the project may isolate parts of the critical habitat or prevent movement among those sites would not, in itself, constitute adverse modification or destruction of critical habitat. Similarly, a project that caused whales to abandon critical habitat may not necessarily result in a determination of adverse modification or destruction of critical habitat, unless such abandonment would preclude the conservation of these whales.

Comment 8: The essential features identified in the proposed rule are important for beluga survival, but NMFS has not demonstrated these features are limiting the production or recovery of these whales.

Response: The ESA defines critical habitat in terms of those physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. The ESA does not define the word "essential." We agree with the commenter that the identified features are important for beluga conservation, and believe this importance is such that they may be considered "essential." We disagree, however, that the features must be found to be limiting to the species before they may be considered essential. A limiting factor may be described as one that controls a system or species (such as air), or one that is present in the smallest supply relative to the demands of the system/species (perhaps a prey species). In either case, the ESA contains no requirement that essential features are restricted to those that may be limiting. Our approach will vary to fit the circumstances of a particular species.

Comment 9: The identified PCEs lack specificity (*e.g.,* "The absence of toxins or other agents of a type or amount harmful to beluga whales"). NMFS should identify threshold values for all PCEs as it has for in-water noise.

Response: The ESA requires that we premise the designation of critical habitat on essential features, and the regulations at 50 CFR 424.12(b) describe the PCEs as including, but not limited to, roost sites, nesting grounds, spawning sites, water quality or quantity, tides, and vegetation types. Clearly, these descriptions are general in nature and, we believe, far less descriptive than those presented in the proposed rule. We relied on the best scientific data available to provide as much specificity as possible. None of the commenters have provided data allowing us to further refine our description of the PCEs. The condition of adverse modification will be determined, in part, on whether an activity impairs the functional value of the essential features to the point that they cannot provide for the conservation of the species. In adding as much description to these features as permitted by the best scientific data available (*e.g.,* not just "pollutants," but the "absence of toxins or other agents of a type or amount harmful to beluga whales") it is our intent to avoid the situation where any activity that may be associated with one or more essential feature would be considered as causing the adverse modification or destruction of critical habitat. We have also modified the wording of this PCE in the final rule to improve clarity.

Comment 10: NMFS needs to present data to support its explanation for equating "mudflats" with "shallow and nearshore waters proximate to certain tributary streams." NMFS should defend its rationale for delimiting this feature to waters within the 30-foot (9.1 m) depth contour. NMFS has arbitrarily expanded this PCE beyond that described in Goetz *et al.* (2007).

Response: Relying on the best scientific data available, the proposed rule explains the habitat attributes and importance of nearshore areas to Cook Inlet beluga whales. These whales selectively occupy these areas during the ice-free months, and may display year-round association with the nearshore zones of Cook Inlet. We believe this affinity is due to feeding strategies and perhaps breeding, calving, molting, and predator avoidance. Research on beluga whales elsewhere has found beluga distribution may be associated with depth and bottom structure, as well as prey abundance. Using these data, we next considered the results of Goetz *et al.* (2007) which found significant associations between summer distributions of Cook Inlet belugas, mudflats, and flow accumulation. The Goetz *et al.* (2007) paper is important in that it provides the first spatial representation of this habitat attribute, and supports the observations of other research as well as the TEK of Alaskan Natives. The paper does not incorporate data on other factors potentially relevant to beluga distribution in Cook Inlet such as water temperatures, turbidities, salinities, or the fish species and strength of fish runs for these waters. That paper states "The occurrence of beluga whales near stream mouths may reflect a feeding strategy whereby belugas take advantage of highly-concentrated fish runs in shallow channels where they are easy to catch", and found the majority of sightings were within 11.5 km of medium flow accumulation inlets. The Goetz *et al.* (2007) paper, however, is not the sole scientific basis for our determination, nor is it necessarily the most significant. It is clear that many of the areas identified as in the Goetz *et al.* (2007) paper as "mudflats," are rarely associated with beluga sightings. In reviewing the best scientific data available, we found that whereas the Goetz *et al.* (2007) paper's use of "mudflats" implies a condition of the seafloor material, this feature is best described by its tidal exposure. Therefore, in identifying the PCE, we used the qualifier of waters less than 30 feet (9.1 m) in depth to clarify what was described as "mudflats" by Goetz *et al.* (2007). We also felt that, while this feature covers a range of over 7 miles (11.5 km) in which most whales have been found, a radial distance of 5 miles (8.0 km) from the high and medium flow distribution inlets is more descriptive of the actual distribution of these whales and the essential feature, in consideration of the best aerial and satellite data available.

Comment 11: NMFS relied too heavily on Goetz *et al.* (2007), a paper with serious flaws. NMFS should have incorporated fish runs into its models, and has arbitrarily ignored this important element.

Response: We relied on the best scientific data and information available, including models such as the one developed by Goetz *et al.* (2007), in preparing the proposed rule. We did not develop new models as part of the rulemaking, and the ESA does not require us to do so or to conduct field research. Rather, we are required to designate critical habitat on the basis of the best scientific data available. Goetz *et al.* (2007)'s research and paper were not conducted to define critical habitat. Goetz *et al.* (2007) exists as one of several sources we considered during this rulemaking. Both NMFS and the paper itself recognize the paper's limitations from not including various physical and biological variants, most notably anadromous fish species and run strengths. Despite this information, the list of high and medium flow accumulation waters reported in the paper indicate that all such rivers are anadromous fish waters and that flow accumulation has some association, and may be a reasonable proxy, for anadromous fish. The inclusion of fish species or numbers of anadromous fish utilizing these waters would not change the list, but could only add another descriptive layer to this essential feature. The utility of such additional description is unclear and probably non-existent.

Comment 12: NMFS has incorrectly used Goetz *et al.* (2007) to identify PCEs within Area 2, particularly for winter periods for which this paper did not include data. Applying this model to winter has resulted in NMFS incorrectly identifying habitats that are impossible or highly improbable for belugas to inhabit.

Response: While we included the Goetz *et al.* (2007) paper in our consideration of scientific research and literature related to critical habitat and adopted its conclusions as representative and supportive of our proposed designation, we are not necessarily in agreement with every statement made within the paper. This is particularly true for the paper's assertion that sea ice in winter makes inhabiting shallow waters too hazardous for marine mammals. While the paper does not define what depths were considered to be "shallow," there is ample evidence that beluga whales occur in such areas during winter. Indeed, beluga whales are variously described as "ice associated" or "ice dependent" species, and we know of no beluga population that is not found within areas subject to seasonal ice formation. Satellite tagging data (*see* NMFS' 2008 NMFS Conservation Plan for the Cook Inlet Beluga Whale) from Cook Inlet beluga whales indicates that these whales are found in nearshore areas during winter; in fact these data show whales occupying the heads of Turnagain and Knik Arms during periods in which maximum ice coverage would be expected.

While Goetz *et al.* (2007) did not include (or have access to) distribution data for winter months, Goetz *et al.* (2007) presents other information demonstrating the importance of nearshore areas proximate to anadromous fish streams as an essential habitat attribute. This attribute within Area 2 exists during the late summer and fall months, as whales move west and south transitioning from summer habitat in the upper Inlet to winter habitats. During this time, we believe the whales take advantage of the late coho runs along the west side of Cook Inlet. This behavior occurs well before seasonal ice formation (sea ice is much less prevalent in the lower Inlet), and we believe it is reasonable to assume the physical qualities of nearshore feeding habitat near salmon streams in July are similar to those for nearshore feeding habitat near salmon streams in October. The 2008 NMFS Conservation Plan for the Cook Inlet Beluga Whale includes sighting data of beluga whales in the lower Inlet, and suggests these areas were important habitat sites when the beluga whales were more abundant.

Finally, we emphasize the critical habitat boundaries are not drawn around the essential features/PCEs. Rather, these features delineate critical habitat from non-critical habitat. The best scientific data available indicates that the critical habitat area referred to as Area 2 contains anywhere from one to all of the identified physical or biological features essential to the whales' conservation.

Comment 13: NMFS should list all the waters it considers to be high and medium flow accumulation rivers for purposes of describing the PCEs.

Response: We have included this list on our Regional website (*see* **ADDRESSES** above).

Comment 14: NMFS should include pink salmon, Pacific herring, and long-finned smelt as PCEs.

Response: We identified important prey species as essential biological features or PCEs based on the results of research on fatty acid signatures and stable isotope analysis from beluga whale tissue, stomach samples from

Cook Inlet belugas, and traditional knowledge. We did not find the proposed species were well-supported by these sources and cannot determine that they are essential based on current knowledge.

Comment 15: NMFS' proposed PCE "The absence of toxins or other agents of a type or amount harmful to beluga whales" is too vague. There are readily available data defining the types and amounts of contaminants that would be harmful to beluga whales, but NMFS has not used this information.

Response: Please see our earlier response to comment #9 regarding specificity within the definitions of essential features and PCEs. We relied on the best scientific data available in designating critical habitat for the Cook Inlet beluga whale. We are not aware of any existing data that would allow for greater specificity concerning harmful contaminant levels in beluga whales, and none of the commenters provided any or indicated a specific source of such data. We recently contracted for an assessment of risks to beluga whales from chemical exposures (URS, 2010), that found "reliable and quantitative information that related measured body burdens to observed adverse effects is lacking, especially within a dose-response context." Information relating to the presence of persistent organics, measured primarily in the whales' blubber, exists, and there are some studies on the presence of methylmercury and other metals, but very little or no toxicity information is available for beluga whales and other marine mammals regarding the majority of harmful chemicals. The assessment report goes on to state that, even for those few studies in which some threshold values are presented for other species, such studies are fraught with uncertainty and should be viewed only as a preliminary comparison to determine whether further evaluation is warranted.

We believe that, had we employed threshold values of chemicals which arguably cause "harm" to other species, we would have created an assessment methodology for adverse modification of critical habitat that could be both insufficiently protective of these whales and unnecessarily restrictive. The toxin PCE as promulgated provides the best level of specificity possible in light of the best scientific data available. This PCE does not simply include all pollutants; it includes only those of a type and quantity/concentration harmful to beluga whales. Moreover, it is important to note that the introduction of any pollutants that are harmful to beluga whales would require the evaluation of the effect of such pollutants on the PCE, but it would not necessarily equate to adverse modification. We would evaluate the proposal by considering the implications of the harmful pollutants to the PCEs and to the conservation of Cook Inlet beluga whales.

Comment 16: Unrestricted passage between habitat areas is consistent with the knowledge of the spatial and temporal dynamics of the primary beluga prey species, yet NMFS has shown no evidence that passage is being restricted to the extent of limiting productivity or recovery.

Response: Please refer to our earlier response to comment #7 concerning limiting aspects of habitat and their relation to essential features and PCEs. We agree that no evidence currently exists indicating that passage among critical habitat areas is impeded to the extent of preventing recovery. The validity of this condition as a PCE is not dependent on whether it is limiting to the population. The Conservation Plan includes discussion of various threats to these whales, many of which could impede access among critical habitat sites. An action that would result in restricted passage would not necessarily result in a finding of adverse modification. Under section 7 of the ESA, we will evaluate a proposed Federal action's potential to destroy or adversely modify critical habitat by considering the implications of any restriction on the movement among critical habitat sites to the conservation of Cook Inlet beluga whales.

Comment 17: NMFS's proposed PCE "The absence of in-water noise at levels resulting in the abandonment of habitat by Cook Inlet whales" is too vague. NMFS should provide an objective, measurable noise level in the definition of this PCE.

Response: We developed each PCE based on the best scientific data available. Because empirical data exist to help us understand the noise levels at which beluga whales may react behaviorally or become injured, it is reasonable to assume quantified standards could be developed in the future for this PCE. Existing data, however, are based on relatively few animals held in captivity and the qualitative results of various field observations and research. We currently recognize in-water noise exceeding 120 dB re 1 μPa as the threshold for harassment of marine mammals presented with a continuous noise source, and 160 dB re 1 μPa for impulsive noise. However, ambient (background) in-water noise levels in lower Knik Arm presently exceed 120 dB, and we felt it unnecessarily restrictive to describe this standard as a PCE. Similarly, the 160 dB threshold relates to harassment. We do not have a standard value for the level of noise above which beluga whales may permanently abandon habitat. From research and monitoring of in-water work in Cook Inlet, it is apparent that beluga whales have not abandoned habitat areas due to temporary exposures to noise at this level. Therefore, this numeric standard may also be too restrictive. There exists considerable variability in the reaction of whales to noise, depending on the nature of the noise, life history, behavior, sex, context, tolerance, and adaptation. The science of marine mammal acoustics is very complex and made more difficult within the dynamic setting of Cook Inlet. As a result, we can only assign a qualitative standard to this PCE unless and until data become available allowing us to assign a quantitative standard.

Comment 18: NMFS should describe the PCE addressing in-water noise as "the absence of in-water noise that results in adverse impacts to the species' survival and recovery." The commenter points out that noise below levels that may cause whales to abandon habitat areas could still have severe impacts on these animals.

Response: The commenter's proposed PCE is not that functionally different from the one proposed in one important respect. When we evaluate a Federal action under section 7 of the ESA, we will consider whether the action will introduce noise that will result in the abandonment of critical habitat and whether such abandonment will, in turn, affect the whales' conservation. We will also consider whether the noise would affect the whales' survival because section 7 directs Federal agencies to ensure that their actions do not (a) result in the destruction or adverse modification of critical habitat or (b) jeopardize the continued existence of the species. The commenter's proposed PCE combines these two standards (and conflates them, a formulation which the Ninth Circuit struck down in *Gifford Pinchot Task Force* v. *U.S. Fish & Wildlife Serv.,* 378 F.3d 1059 (9th Cir. 2004)).

Comment 19: The PCE concerning noise should be re-worded to reduce the noise levels permitted to 120 dB or lower, reduce the duration of allowable noise, and reduce the frequency of anthropogenic noise.

Response: The identified essential features or PCEs are not intended to be limitations or stipulations. They describe various features of the

environment that we consider essential to the conservation of these whales. We do not believe in-water noise levels below 120 dB re 1 μPa are necessary to conserve these whales in all cases. In fact, ambient noise in areas in which these whales occur, such as lower Knik Arm, often exceeds 120 dB. Similarly, behavioral reaction and other consequences of noise exposure (duration and frequency) are difficult to predict. For this reason, we describe this PCE in terms of its effect (abandonment of habitat) rather than a finite quantity or level.

Comment 20: NMFS fails to identify the existing empirical data, or explain the science and rationale used in establishing the noise PCE, and must provide this information along with an additional public comment period.

Response: See previous response. The proposed rule stated that empirical data exist on the reaction of beluga whales to in-water noise for harassment and injury, but are lacking regarding reactions such as avoiding certain areas. The NMFS' 2008 Conservation Plan (pp. 58–60, 66–67) provides a detailed description of the issue of noise and Cook Inlet belugas, and includes references to applicable research and traditional knowledge accounts which support the proposed rule's assessment of the importance of sound to beluga whales.

Comment 21: NMFS needs to acknowledge that beluga whales have co-existed with anthropogenic noise in Cook Inlet for decades and that there is no information or data to indicate noise is a threat or contributing factor to their abundance.

Response: Our discussion on the effects of noise in the proposed rule is consistent with the 2008 Conservation Plan, which identified noise as a potential threat. That plan presents several reasons why noise may be considered a threat, including the facts that noise is known to cause injury or behavioral changes to beluga whales, and that TEK observations associate diminished presence of belugas with in-water noise. The commenter is correct in stating that no data currently exist to place in-water noise as a contributing factor in the decline of the Cook Inlet belugas.

Comment 22: NMFS needs to provide further specificity and thresholds in its description of the PCEs for this critical habitat.

Response: As discussed above, we defined each PCE as specifically as we could, in light of the best scientific data available. Specific, quantitative threshold values would be useful in the formulation of any PCE (*e.g.,* a PCE is gravel between 3.0cm and 7.0cm in diameter, as opposed to spawning material). We are not aware, and none of the commenters provided sources, of any existing data that would allow for greater specificity in the formation of the PCEs for the Cook Inlet beluga whales than that which we used. The ESA does not require us to conduct field research to obtain such data. In light of the time lines for the designation of critical habitat, such research was not feasible.

Comment 23: NMFS has taken a simplistic approach to designating critical habitat by drawing a line around the primary, currently occupied habitat. NMFS should develop a more discrete approach based on the actual presence of PCEs.

Response: The critical habitat identified in the proposed rule was not developed by drawing lines around the Cook Inlet beluga whales' currently occupied habitat. To the contrary, large portions of the occupied habitat were not included with the designation because we concluded that those areas do not contain features essential to the Cook Inlet beluga whales' conservation which may require special management considerations or protection. We determined the critical habitat boundaries by confirming the presence of one or more of the identified PCEs/essential features within the critical habitat area, as required by the ESA. We are not required to designate as critical habitat all areas in which a PCE may occur, only that those critical habitat areas contain one or more of the PCEs.

Comment 24: The presence of the identified PCEs is not uniform throughout Cook Inlet, and NMFS should identify those specific areas that actually contain the important habitat features as critical habitat, rather than the areas in their entirety.

Response: We included in the designation of critical habitat only those critical habitat areas that contain one or more of the PCEs. The distribution of the identified PCEs is not uniform. However, we believe the ESA provides some latitude to the designating agency here. The implementing regulations at 50 CFR 424.12 discuss the criteria for designating critical habitat. Part 424.12(d) states that "When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat." Many of the identified PCEs occur throughout Cook Inlet and the proposed critical habitat. Other PCEs, such as shallow areas near median and high flow waters that may be more discretely distributed, are also so numerous as to be nearly a continuous feature. It simply would not be practical or effective in the conservation of the Cook Inlet beluga whale to designate its critical habitat by circumscribing discrete, individual areas around the PCEs.

Comment 25: The list of PCEs NMFS has identified implies other elements are not necessary for the conservation and recovery of Cook Inlet beluga whales, leaving important gaps that are critical to these whales. NMFS should include as a PCE waters deeper than 30 feet (9.1m) in depth, or demonstrate these are not "essential."

Response: While we acknowledge beluga whales are distributed throughout the Inlet, we believe discrete habitat areas exist that are, in fact, "critical" in the sense that they meet the ESA definition and provide an essential feature (*e.g.,* feeding or calving sites) not necessarily found throughout the occupied range of this species/DPS. Further, scientific data, surveys, and TEK provide support for the identification of such discrete areas, but data are lacking which would support the inclusion of all waters of Cook Inlet. The addition of a PCE of waters deeper than 30 feet (9.1m) would likely not result in the inclusion of any additional areas as critical habitat; rather, it would merely confirm the designation of the existing areas. Future revisions to this critical habitat may be made as new scientific data become available that may alter the list of PCEs or the boundaries of this critical habitat.

Comment 26: NMFS has not provided sufficient rationale to support designation of critical habitat in the nearshore area along the west coast of the lower Inlet nor Kachemak Bay. NMFS should only designate those areas along the west side of the Inlet and in Kachemak Bay that actually contain the habitat features important for belugas.

Response: We disagree. The west side of the Inlet and Kachemak Bay contain one or more of the identified PCEs, and the habitat value and importance of Area 2, which includes these areas, are described in the rule. The offshore boundary for Area 2 of 2 nautical miles (3.2km) reflects the data gathered in Goetz *et al.* (2007), which found the majority of whale locations to be within 2.7 km of mudflats and 11.5 km of medium flow rivers. While the 11.5 km zone around medium flow rivers would argue for an offset similar to that used in the PCE to describe nearshore waters proximate to certain anadromous waters (5 miles, or 8km), we felt that a distance of 2 nautical miles (3.7 km) was more reflective of the actual habitat use based upon the Goetz *et al.* (2007) model,

expertise and observations of NMFS researchers, and the reports and observations of whales in this area by the Alaska Department of Fish and Game, National Park Service, and private parties. Please note also that the 5-mile (8km) distance around these (high and medium flow) anadromous waters describes the PCE, and not the boundary of the critical habitat.

Comment 27: There are discrepancies between the depiction and boundaries of critical habitat within the proposed rule, in that there are differing definitions of Areas 1 and 2 in different sections. The map accompanying the rule was not at sufficient resolution to be useful.

Response: The proposed rule contained several discrepancies in the coordinates and mapping conventions used to describe the boundaries of the critical habitat. Corrections have been made within the final rule. A higher resolution map of this critical habitat will be added to our regional Web site at *http://www.fakr.noaa.gov.*

Comment 28: NMFS' statement that "there remain additional and unmet management needs owing to the fact that none of these management regimes is directed at the conservation and recovery needs of Cook Inlet beluga whales" is objectionable. There is no evidence that supports a lack of effectiveness of any of the management regimes in place in Cook Inlet or that any management or regulatory gap contributed to the endangered listing of Cook Inlet beluga whales, or limits its recovery.

Response: The quoted statement does not assert that the lack of effective management in Cook Inlet contributed to the whale's listing or limits its recovery. As explained in the proposed rule, the ESA defines critical habitat as areas on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. For each essential feature we identified, we determined that it may require special management considerations or protection. One of the reasons for this finding is the lack of any existing laws, regulations, or practices that provide for the management or protection of these features for the conservation of Cook Inlet beluga whales. It is therefore foreseeable, if not likely, that through the ESA section 7 consultation process, we will offer recommendations to protect the essential features, which would otherwise remain without such protection, in order to ensure the conservation of the beluga whale. We agree that existing laws and regulations provide some benefit to these whales and to their conservation. We disagree with the statement that the endangered status of these whales is unrelated to a lack of effective management. In fact, we believe much of the decline in this DPS is attributable to unregulated subsistence harvest practices prior to regulation and management of these hunts.

Comment 29: Those areas that do not require special management consideration or protections are not critical habitat and are not to be designated as such under the ESA. Existing state and Federal environmental management and regulatory regimes already protect habitat for beluga whales, justifying a more narrow identification of areas as critical habitat.

Response: We disagree. The definition of critical habitat (16 U.S.C. 1532(5)(A)) requires that the physical or biological essential features may require special management considerations or protection, rather than that the area require such protections. Any area may be designated as critical habitat provided it contains one or more of these features, and provided that those features may require special management or protection.

Comment 30: NMFS unjustifiably disregarded comments made during proposed rulemaking identifying the many existing refuges, sanctuaries, state critical habitat areas, legal protections, and mitigative requirements that provide protection to beluga whales and their habitat.

Response: We recognize that many conservation and environmental actions occur through the efforts of the State of Alaska, local governments, and private concerns. These all contribute to a conservation ethic, undoubtedly benefit the Cook Inlet region environment, and can be beneficial to Cook Inlet beluga whales and their habitat. The ESA provides that, when considering a species for listing as a threatened or endangered species, consideration be given to efforts by any State, or any political subdivision of a state, to protect such species. Generally, a species that would otherwise qualify for listing may be excluded from listing if there are formalized conservation efforts that are sufficiently certain to be implemented and effective so as to have contributed to the elimination or adequate reduction of one or more threats to the species identified through a threats analysis conducted pursuant to section 4(a)(1) of the ESA. However, no such provision exists for the designation of critical habitat. If such provisions existed, it would still be difficult to demonstrate they were effective in providing for the conservation of the Cook Inlet beluga whales, as many of these efforts were in place during the periods in which these whales experienced significant declines, leading to the 2008 listing.

The ESA allows for critical habitat not to be designated if such designation would not benefit the species. Congress intended, however, that in most situations NMFS will designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species. *See* H.R. Rep. No. 95–1625 at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467. In this instance, we have determined that the designation of critical habitat for the Cook Inlet beluga whale would be beneficial to the species by providing specific protections against Federal actions that would otherwise destroy or adversely modify that habitat. We also identify other benefits, as discussed in the following comment.

Comment 31: Contrary to statements in the Proposed Rule, section 7 consultations are not a benefit accruing from the action, but will only add additional layers of administrative process without additional effective protections for beluga whales or their habitat.

Response: As our analysis of economic impacts from the proposed designation indicates, many, if not most, of the future consultations on Federal actions pursuant to section 7 of the ESA would otherwise be required because of section 7's requirement that Federal agencies not take actions that jeopardize the continued existence of the species (the jeopardy standard). However, the characterization of this designation as an additional layer of process ignores the tangible benefits that will accrue from it.

The designation of critical habitat and identification of essential physical and biological features will provide procedural and substantive protections, thereby promoting the conservation of the Cook Inlet beluga whale. Procedurally, the designation of critical habitat will focus future consultations on key habitat attributes and avoid unnecessary attention to other, non-essential habitat features. Designation of critical habitat will also provide clarity to the process by alerting Federal agencies to the specific areas and features that should be considered and addressed during these consultations. The designation also educates the public as well as State and local

governments, and affords them the opportunity to participate in the designation. Substantively, the designation of critical habitat for the Cook Inlet beluga whale establishes a uniform protection plan prior to consultation. In the absence of such designation, the determination of the importance of the whale's environment would be made piecemeal.

Comment 32: Education and outreach are not justifiable benefits accruing from the proposed designation. In fact, there is concern that this designation will result in a backlash that will undermine conservation efforts generally. NMFS should provide the references for statements regarding the benefits of critical habitat designation as described in the proposed rule, otherwise the list is speculative and should be removed from the final rule.

Response: Education and outreach are qualitative benefits of designation. It is almost certain, however, that the process to date has greatly added to the knowledge of Cook Inlet beluga whales and their critical habitat needs within Southcentral Alaska, and probably extending to much larger geographical and societal divisions. We do not believe such education and awareness has been or will be destructive or undermine conservation efforts. Moreover, courts have recognized the education and outreach benefits accruing from the designation of critical habitat. *See, e.g., Conservation Council for Hawaii* v. *Babbitt,* 2 F.Supp.2d 1280 (D. Haw. 1998).

Comment 33: One commenter strongly objects to the stated benefit of reduced levels of pollution in Cook Inlet, with associated benefits accruing to a suite of ecological services, culminating in an improved quality of life (in the Cook Inlet region). This statement mischaracterizes Cook Inlet, whose waters offer pristine habitat for beluga whales.

Response: We agree that water quality within Cook Inlet is generally high, and that approximately 98 per cent of the shoreline remains undeveloped. However, any characterization of these waters as pristine might be tempered by the facts that the largest communities in the State exist along its shore, municipal wastes and other effluents from these communities are often discharged into the receiving waters of Cook Inlet, numerous fish plants discharge processing wastes into the Inlet, minor and major fuel spills have occurred here, and offshore oil platforms regularly discharge drilling muds, cuttings, and produced waters into the Inlet. We believe it is reasonable to project improvements in pollution as a benefit of critical habitat designation even though a portion of such benefits may be realized in the future.

Comment 34: NMFS should adopt minimum escapement goals for eulachon and salmon. A minimum density of prey is relevant to the intent of designating critical habitat.

Response: While the importance of these prey species to Cook Inlet belugas is supported by stomach analysis of stranded and harvested whales, TEK, fatty acids, and stable isotope analysis, we do not believe sufficient information exists to determine the energetic requirements of Cook Inlet belugas or to adopt escapement levels, and any attempt to do so would be speculative. We anticipate future research will add to our knowledge of the energetic requirements of these whales and allow some insight into prey selectivity, caloric requirements, feeding behavior and speciation, and run strength within tributary waters that may support a determination of prey requirements. At this time we have no information to suggest prey availability is or has been a factor in the decline or is in need of improvement to promote the recovery of the Cook Inlet beluga whale. We hope to continue to work with the State of Alaska to ensure these whales are considered in fish management planning for Cook Inlet.

Comment 35: NMFS should delete the term "absence of toxins and other agents" in its PCE concerning toxins, which implies that a pristine environment is essential to the conservation of these whales. NMFS should continue to rely on State and Federal water quality standards until specific agents are identified to be detrimental to beluga whales.

Response: We qualify these terms in the definition of the PCE with the clause "of a type or amount harmful to beluga whales," which we believe avoids creating the implication described by the commenter. The commenter correctly points out that the current exposure of these whales to various pollutants and tissue analysis have not indicated that Cook Inlet beluga whales carry significant body burdens of many common contaminants and toxins. But beluga whales are top level predators with potential to bio-accumulate toxic substances. Further, the juxtaposition of high densities of Cook Inlet belugas and Alaska's most populated and industrialized region raises a concern for the introduction of pollutants into the Inlet. We believe a PCE that addresses the essential feature of water quality is appropriate here, and the qualification we added to it will avoid unnecessary restrictions on most approved discharges. Existing water quality standards may or may not be protective of marine mammals, including small whales. Also, many pollutants with the potential to harm these animals are not currently regulated or addressed under these standards.

Comment 36: The PCE for toxins should reflect concern for the type and amount of a constituent, rather than for a type or amount. One commenter suggests re-wording this PCE as "The absence of non-naturally-occurring toxins or other agents of a type and amount that would kill or injure Cook Inlet beluga whales or cause prolonged abandonment of their critical habitat areas," providing the rationale that these changes would clarify that Federal agencies are not required to eliminate naturally-occurring harmful substances and replace the vague standard of harm with the effects-based language from PCE number 5 (in-water noise).

Response: While many compounds and agents may be of a type harmful to animals, the actual threat or significance of any exposure is also dependent on their concentrations. We agree with the comment and have changed the wording of the final rule to reflect this. We disagree with the suggested changes to the remainder of this PCE because these qualities or thresholds are more appropriate in defining the condition of this PCE that equates to adverse modification of the critical habitat. That is, while the PCE is generally defined as waters free of harmful substances, adverse modification will occur when an action results in the addition of substances of a type and amount that causes mortality or other consequences impeding the conservation of the whale. Also, some substances occur naturally in the environment (*e.g.,* mercury), but are also a concern regarding anthropogenic introduction into Cook Inlet. Therefore, we chose not to exclude naturally occurring toxins or other agents, as suggested.

Comment 37: The PCE for in-water noise should be changed to read "The absence of in-water noise that results in adverse impacts to the species survival and recovery" because many noise impacts may adversely affect the species but not result in abandonment of habitat.

Response: The commenter's proposed language attempts to set the threshold for this essential feature or PCE at a level defining adverse modification or destruction of the critical habitat. We disagree with this approach. A PCE describes an essential feature, such as water within a certain temperature range. During a section 7 consultation,

we would consider the effects of an action with regard to this PCE and evaluate if those changes would appreciably reduce the conservation value for the species. Defining the PCE to equate to adverse modification would be circular and by-pass this analytical approach. Moreover, the definition espoused by the commenter conflates the standards for jeopardy and adverse modification, a formulation the Ninth Circuit struck down in *Gifford Pinchot Task Force* v. *U.S. Fish & Wildlife Serv.,* 378 F.3d 1059 (9th Cir. 2004). We have modified the description of this PCE in the final rule to improve clarity.

Comment 38: The PCE for in-water noise should be removed. This finding is inconsistent with that made in the final rule to designate critical habitat for the southern resident killer whale (71 FR 69054; November 29, 2006) which found that noise is an effect to the animal and not to its habitat.

Response: In our final rule to designate critical habitat for the southern resident killer whale, we lacked sufficient information to include noise as a PCE, but noted that we would continue to consider sound in any future revisions of that critical habitat (71 FR 69054; November 29, 2006). We consider in-water noise to be both an effect on these endangered whales and a habitat attribute. It is clear that noise has the potential to alter behavior in whales in a manner that may have biological significance (*i.e.,* to result in a "take" by harassment or injury). We find that noise (or its absence) is also an important characteristic of the habitat within which these whales exist, and is appropriately identified here as an essential feature. We also agree with our previous rule for the southern resident killer whale that current scientific information is not sufficient to quantify the noise levels that may alter habitat to the extent that whales would abandon such areas. However, neither the ESA nor regulations require quantifiable thresholds to be known before any habitat attribute may be considered an essential feature. Rather, the ESA requires that we designate critical habitat based on the best scientific data available, which we have done. Indeed, the regulations (50 CFR 424.12) describe essential physical and biological features to include generically "Food, water, air, light, minerals" without further quantification.

Comment 39: The proposed "noise" PCE does not define or explain what constitutes "abandonment of habitat" and "continuous noise."

Response: We use these terms with their ordinary meaning in mind and offer no specialized descriptions for these terms. Our intent is to avoid having the mere presence of noise, or even noise which might cause harassment, be deemed adverse modification. While we do not believe it is "essential" that the acoustic environment of these whales be free of noise, even noise at levels which might harass whales, we consider it essential for the whales' conservation that they are not presented with noise that may preclude their use of key habitat areas, particularly those that are important for feeding, breeding, or calving.

Continuous or non-impulsive noise is differentiated from impulsive noises, which are typically transient, brief, broadband, and consist of a rapid rise time. Impulsive noises may be a single event or repetitive. Examples of impulsive noises are explosions, sonic booms, seismic airgun arrays, and impact pile driving. Non-impulsive sources include vessels, aircraft, and vibratory pile driving.

Comments for Exclusions

We received many comments requesting exclusion from critical habitat. These requests concerned excluding navigation corridors, portions of the west and east sides of Cook Inlet, the site of the Knik Arm bridge, the POA, Port Mackenzie, commercial fishing areas, the City of Kenai, Kachemak Bay, and State legislatively-created sites (see below). We prepared an analysis to assess, among other things, the economic impacts attributable to the designation of critical habitat for the Cook Inlet beluga whale. We have determined that, based upon economic impact considerations, there are no proposed critical habitat areas or sites for which the benefits from excluding the area or site outweigh the benefits from designating that area or site. As a result, we have not proposed to exclude any sites on economic grounds. We have not provided a specific response to each individual request that was received and considered here, but we have included responses to all significant issues raised in the comments. We also considered requests for exclusion based on national security and other relevant impacts, and as discussed below, we are excluding a small area connected with the POA from the designation. In light of the impacts to national security, we determined that the benefits of excluding that small area outweigh the benefits of including it.

Comment 40: Critical habitat should be reduced to areas where the beluga whales are most concentrated and should not include areas of historical use.

Response: Generally, critical habitat includes those areas necessary to conserve the beluga whale, which broadly means those areas that will promote its recovery. To determine the boundaries of critical habitat, we identified the specific areas within the geographical area occupied by the whale at the time it was listed on which are found those physical or biological features essential to the conservation of the whale and which may require special management considerations or protection. This process resulted in a proposed designation and, through the notice-and-comment procedure, we refined the critical habitat designation. Our analysis indicates that the inclusion of areas only where the whales are most concentrated would be too narrow. The critical habitat designation does not include areas outside the geographical area occupied by the species as of 2008 because we do not believe that any such area is essential for the whale's conservation.

Comment 41: The POA should be excluded from designation in recognition of it being one of nineteen National Strategic Ports whose functions include the mobilization and embarkation of military vessels for quick deployment around the world.

Response: We have considered this request and find that, in light of the impacts to national security, the benefits of exclusion outweigh the benefits of designating the POA and a small area adjacent to it as critical habitat. The POA supports certain military functions and requirements which cannot be met elsewhere in the State. While air shipment of goods and materials present some alternatives as far as supply lines to military interests in Alaska, many other demands cannot be met without the support of large supply ships calling at this port facility. The POA also serves as the conduit for all of the jet JP–8 fuel now used at Elmendorf Air Force Base.

We believe that the POA's function in military readiness and role as a National Strategic Port could be negatively affected by designation it and surrounding waters as critical habitat. Therefore, in keeping with the provisions of the ESA, the POA and waters of Knik Arm in front of the Port (*i.e.,* the navigation channels and turning basin) are not designated as critical habitat. We have determined this exclusion will not result in the whale's extinction.

Comment 42: Any exclusion of the POA for reasons of national security should be strictly limited to military activities, and not extend to non-military activities.

Response: Section 4(b)(2) of the ESA provides that the Secretary of Commerce may exclude "any area" from designation as critical habitat for reasons of national security. We did not find any authority to limit these exclusions to a particular activity or entity. Also, certain non-military functions which support the operational readiness of the port, such as maintenance dredging, could impact military operations if they were delayed or otherwise impacted by designation.

Comment 43: Port MacKenzie is significant to national security in providing the ability to efficiently transfer military units, munitions, and general cargo between land and marine modes, and should be excluded from designation.

Response: Port MacKenzie is not currently identified as a strategic port, nor is it adjacent to military lands, accessed by a major road system, utilized for munitions transfers, or serviced by rail. We received no supporting recommendations for this exemption from the Department of Defense (DOD), and did not find reasonable evidence of the need to exclude Port MacKenzie based on national security interests.

Comment 44: The Department of Defense (DOD) reminds us that Congress has mandated that Fort Richardson and Elmendorf Air Force Base be combined into a single facility by October 2010, and that the proposed landward boundary of critical habitat (Mean Higher High Water) would overlay the seaward military boundaries for these lands, which have been established as Mean High Water. They request clarification on this boundary issue.

Response: Because the areas between mean higher high water (MHHW) and mean high water (MHW) are predominately unvegetated mudflats, and because all lands of Fort Richardson and Elmendorf AFB (now combined, Joint Base Elmendorf-Richardson) are administered under an Integrated Natural Resources Management Plan (INRMP) which we found to provide benefit to Cook Inlet beluga whales, these areas are ineligible for designation as critical habitat. Modifications have been made within the final rule to reflect this change.

Comment 45: The commercial and subsistence fisheries for the Native Village of Tyonek (NVT) should be excluded from critical habitat designation.

Response: We believe the commenter is requesting exclusion of those waters which support commercial and subsistence fisheries in and surrounding the Chuitna River, near the NVT under section 4(b)(2) of the ESA. We have considered economic impacts, impacts to national security, and other relevant impacts, including impacts to tribal interests. We conclude that the benefits of excluding any particular area do not outweigh the benefits of specifying such area as critical habitat, except for a small area associated with the POA which we excluded in light of impacts to national security. We emphasize that where no Federal authorization, permit, or funding is required (*i.e.,* no Federal action exists), the activity is not subject to section 7 of the ESA. Therefore, there would be no section 7 consultations costs associated with that activity. Further, we do not believe impacts to tribal interests indicate that the benefits of excluding the areas that cover the NVT subsistence and commercial fisheries outweigh the benefits of specifying these areas as critical habitat. We have not received comments that indicate tribal interests would be harmed by this action.

Comment 46: The State of Alaska requests exclusion under section 4(b)(2) of the ESA for all legislatively-designated areas, such as refuges, sanctuaries, and critical habitat areas.

Response: We have considered this request. The Secretary of Commerce may use his discretion to exclude areas from critical habitat if the Secretary determines the benefits of such exclusion outweigh the benefits of designation of the area, provided the exclusion would not result in the extinction of the species. The areas in question include the Goose Bay and Anchorage Coastal Refuges, and the Redoubt Bay, Kalgin Island, and Kachemak Bay State Critical Habitat Areas. As stated in an earlier response to comment, we recognize the contribution of such sites to the conservation of the Cook Inlet region, and the direct and indirect benefits they provide to Cook Inlet beluga whales and their habitat. In this case, the State is arguing the benefits we place on including in the designation these legislatively-designated areas be reduced by their existing benefit/value owing to their function in conserving these whales. All of these areas include important ecological and environmental attributes, especially for fish and wildlife. Also, several of these sites include important beluga whale habitats and may have large numbers of beluga whales within their boundaries at various times of the year. Despite the ecological values of these areas and the presence of beluga whales and their habitat, we know of no such State area whose purpose specifically includes the conservation of beluga whales or their habitat. Moreover, neither the Cook Inlet beluga whale nor its habitat is included on the State of Alaska's endangered species list. We believe that the benefits from designation, described in this final rule, will accrue to the conservation of the Cook Inlet beluga whale, even in those areas currently protected for other purposes by the State of Alaska, such as refuges and sanctuaries.

We also considered the economic impacts associated with the designation as critical habitat of the State legislatively-designated areas. Our economic analysis indicates that the majority of those impacts are associated with the requirement to consult on Federal actions under section 7 of the ESA. Often times, however, such costs are minimal, because the consultation would already be required because the proposed Federal action has the potential to affect beluga whales. Any Federal action that "may affect" an endangered or threatened species requires consultation, regardless of the existence of critical habitat. Because land use and management plans exist for these sites, and many of these areas are remote, there are fewer Federal actions occurring or proposed here than may be expected outside of these refuges, sanctuaries, and critical habitat areas. We, therefore, do not expect the demand for Federal actions in these sites to increase markedly in the future. Additionally, any costs that may be attributable to critical habitat designation would be unlikely to be borne by the State of Alaska, but rather by the Federal action agency or any private entity proposing work here that requires Federal authorization, permits, or funding. Also, any "costs" such as increased consultation on actions that may impair the function of habitat (critical habitat for beluga whales) in these areas may be viewed as a benefit, rather than a cost, in that it may add to the values for which these areas were established.

Therefore, after considering the economic impacts and other relevant impacts described above, we have determined that the benefits of designation of critical habitat outweigh the benefits of excluding those areas currently designated by the State of Alaska as refuges, sanctuaries, and critical habitat areas from this designation.

Comment 47: NMFS can exclude areas to preserve partnerships and existing protections if the designation risks losing important protection for beluga whales.

Response: The ESA requires that the designation process take into consideration the economic impact "and

any other relevant impact" of specifying an area as critical habitat, but neither the ESA nor the implementing regulations provide clarity on the provisions for the Secretary of Commerce to exclude from designation any areas for which the benefits of exclusion outweigh the benefits from designation. We are not entirely clear as to what is meant by the comment's reference to critical habitat designation posing risks to existing protective measures. Nonetheless, we believe that the designation will result in an increase in protection or conservation measures.

Comment 48: Electric energy for the Anchorage area is supplied by undersea cables from a generating plant near Beluga, Alaska. The cable field and overlying waters should be excluded from critical habitat as any delays in maintenance or repairs would present significant economic costs and threat to the reliability of the region's electrical system. The possible requirement to stop water operations if a whale is sighted closer than 2,000 feet would have very negative impacts on cable laying. Similarly, barge operations in support of power generation could be negatively impacted by this designation, and these barge landing areas should also be excluded.

Response: After preparing an economic impact analysis and considering those economic impacts and the ones raised in public comments on the proposed rule, we have determined that the benefits of exclusion do not outweigh the benefits of including any particular area. The economic analysis assesses power generation projects and general commercial activities in the upper Inlet. Thus, we believe the findings in the economic analysis are applicable to this comment. Whenever practicable, the analysis sought to identify the incremental costs unique to critical habitat designation. The analysis found that the impacts from a designation decision will often be co-extensive with the ones from the listing decision. That is, in many instances, costs arising from the need to consult because of the potential to destroy or adversely modify critical habitat will be co-extensive with the costs arising from the need to consult because of the potential to jeopardize the species.

In the specific example the commenter provides (stopping operations when a whale was near the work boat), consultation costs would be entirely attributable to ESA jeopardy considerations stemming from the listing, not critical habitat designation, because the hypothetical scenario involves the direct interaction between a whale and the work activity referenced (*i.e.,* a potential "take"). This interaction is, in no way, influenced by the designation of critical habitat. In other instances, for example, actively laying submarine cable in Cook Inlet, the incremental cost of evaluating the potential of a proposed action to "destroy or adversely modify" critical habitat during a consultation would be largely indistinguishable from the costs attributable to evaluating that activity's potential to jeopardize the species.

Moreover, the commenter provided no specific information indicating that this work would even require Federal authorization, permits, or funding (*i.e.,* Federal action). Absent a Federal action, the critical habitat designation would not impose section 7 consultation obligations on the commenter's hypothetical activity. We are aware of no Federal permit requirements to maintain or repair submarine cable, or to operate a barge. Based upon the information provided, we did not find a compelling reason to exclude these areas from critical habitat.

Comment 49: NMFS has not presented sufficient information to justify the inclusion of the lower Inlet areas as critical habitat. Hobbs *et al.* (2005) is cited as describing dive behavior in winter, yet no such data are reported in that paper. Winter behavior and habitat use may differ from that of summer months, and NMFS habitat models are primarily based on observations during June.

Response: The Proposed Rule incorrectly referenced Hobbs *et al.* in describing dive behavior; that paper did not include analysis of dive patterns. That work did, however, establish the distribution of tagged beluga whales during winter months as including offshore waters of the mid Inlet which are consistently deeper than those areas typically occupied by whales during the summer. At this time, we do not have a complete understanding of the specific attributes that support winter beluga habitat within Cook Inlet. Because we are required to consider the best scientific data available in designating critical habitat, we reviewed non-systematic sighting reports from State and private sources, aerial surveys of winter beluga distribution, and TEK in assessing the value of the lower Inlet as critical habitat. Also, we believe the use of the southwest Inlet during late summer and fall may be an extension of the feeding behavior (and distribution) which occurs in the upper Inlet as whales move south to take advantage of late spawning returns of coho salmon. This habitat use and behavior would support the use of the results in Goetz *et al.* (2007) as descriptive of habitat values in the southwest Inlet. While there is some evidence that beluga whales may be overwintering in an offshore area south of Kalgin Island, these areas were not included as critical habitat because we felt information was not adequate to describe this use or identify any essential features.

Comments for Inclusion

We received many comments recommending additional areas be included in the critical habitat designation. These include all of Cook Inlet, corridors connecting habitat areas, upper and lower Cook Inlet, historically-used areas, Iniskin Bay, the mouths of tributary streams entering the Inlet, the Eagle River Flats firing range, the POA, and Hudson Bay near Churchill, Canada. We have considered all such comments and respond below to the significant issues they raise.

Comment 50: The critical habitat should include important feeding areas at the mouths of the Matanuska River, Knik River, and Cottonwood Creek.

Response: The described boundaries for this critical habitat generally include areas such as these. While there is often a poorly-defined division between Cook Inlet and a tributary stream or river, our proposed river boundaries would extend critical habitat into the lower reaches of many streams. Tidal influence may extend a considerable distance up these tributary waters, but represents areas in which we have very few observations or reports of belugas. We identified several waters where beluga whales are known or suspected to utilize such up-river areas for feeding, and specifically extend critical habitat into these reaches.

Comment 51: Critical habitat must include the habitat of prey species of beluga whales, such as the Susitna River system and other waters above tidal influence.

Response: The ESA requires that critical habitat be located within the geographic area occupied by a species, or within specific areas outside of occupied habitat determined to be essential to the conservation of the species. The areas described are outside the geographic areas occupied by the species at the time of its listing, and in light of the areas we are designating and the best scientific data available, we have determined that the unoccupied areas are not essential to the whale's conservation. We agree that habitat for prey species such as salmon and eulachon is a necessary component to their existence in the wild, but we do not have adequate scientific information

to identify specific areas that would be essential to the conservation of these beluga whales with respect to habitat values of prey species.

Comment 52: Critical habitat boundaries should be extended to incorporate all of the described range of these whales. Both the nearshore and offshore areas of lower Cook Inlet should be designated as critical habitat.

Response: We carefully considered designation of these areas as critical habitat, but we did not find sufficient justification to do so. These areas have been used by beluga whales in the past, during periods in which their abundance was much higher than today, and beluga whales are still observed in these areas. However, both the current and historical accounts of beluga whales in these areas do not indicate they supported important numbers/concentrations of whales, or that they served important habitat functions. Existing habitat models describe open water values that are likely very important attributes to feeding and, perhaps, calving habitat needs and preference. Such modeling does not indicate high habitat values are present in the areas in the lower Inlet that are not included in the designation. We acknowledge more information is needed to understand the winter habitat needs of the Cook Inlet belugas, and that other areas may be found to be important as new data arrive. But presently, we do not find sufficient support for inclusion of these areas.

Comments To Extend Public Comment

Comment 53: NMFS received several comments and requests to extend or re-open the comment period for this action, or to conduct additional hearings in the State.

Response: On consideration, we believe the public process, which has included the publication of an Advance Notice of Proposed Rulemaking with a 30-day public comment period (74 FR 17131; April 14, 2009), publication of a proposed rule with 60-day public comment period (74 FR 63080; December 2, 2009), a 30-day extension of the comment period for the proposed rule, and four public hearings held in the major population centers in the Cook Inlet region (Kenai, Soldotna, Wasilla, and Anchorage), was sufficient and proper. Therefore, we have determined not to extend or re-open the comment period, or to hold additional hearings for this final rulemaking.

Comments on the Need To Designate Critical Habitat

Comment 54: Designation of critical habitat was unnecessary, and will not add any meaningful protection to these whales. The regulations at 50 CFR 424.12 provide that critical habitat may not be prudent, and therefore would not be designated, when that designation would not be beneficial to the species. The consultation provisions of the ESA provide reasonable protection to these whales under the jeopardy standard. NMFS has used circular logic in saying the benefit of designating critical habitat is that it will require (Federal agencies) to ensure their actions do not destroy or adversely modify critical habitat. The remaining functional benefit of public education and outreach would be more effectively met through a dedicated public education program rather than the less direct means of designating critical habitat.

Response: We disagree. The ESA provides that critical habitat shall be designated "to the maximum extent prudent and determinable." 16 U.S.C. 1533(a)(3)(A). The ESA does not define "prudent." NMFS/USFWS regulations, however, provide that a designation of critical habitat is not prudent when the "designation of critical habitat would not be beneficial to the species." 50 CFR 424.12(a)(1)(ii). This means that in the rare situation where there is zero benefit from designation, we need not designate. If there is any benefit, we must designate. Congress intended that in most situations the Secretary will designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species. *See* H.R.Rep. No. 95–1625 at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467. *See also Enos* v. *Marsh,* 769 F.2d 1363, 1371 (9th Cir.1985) (holding that the Secretary "may only fail to designate a critical habitat under rare circumstances"); *Northern Spotted Owl* v. *Lujan,* 758 F.Supp. 621, 626 (W.D.Wash.1991) ("This legislative history leaves little room for doubt regarding the intent of Congress: The designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances.").

In short, if there will be any benefit from the designation, we must designate. Even if many consultations will occur because of the combined potentialities that proposed Federal actions will adversely modify critical habitat and jeopardize the species, if some will occur only because of the potential for adverse modification, there still is benefit to the species (see response to comment 54). Further, courts have recognized benefits beyond the need to consult. *See Conservation Council for Haw.* v. *Babbitt,* 2 F.Supp.2d 1280, 1288 (D. Haw. 1998) (substantively, the designation establishes a uniform protection plan prior to consultation, and procedurally, the designation educates the public as well as state and local governments, and affords them the opportunity to participate in the designation). We do not believe this situation is the rare one allowing us to avoid the ESA's strong mandate to designate critical habitat.

As for the arguments that the Marine Mammal Protection Act (MMPA) protection is enough, critical habitat must be designated regardless of whether other laws or provisions arguably provide adequate protection. *See Natural Resources Defense Council* v. *U.S. Dep't of the Interior,* 113 F.3d 1121, 1127 (9th Cir. 1991) ("Neither the Act nor the implementing regulations sanctions nondesignation of habitat when designation would be merely *less* beneficial to the species than another type of protection"). Lastly, while the term "take" includes harm, and USFWS' definition of harm includes habitat modification, it applies only when such modification "actually kills or injures" the species (50 CFR 17.3). Under section 7 of the ESA, we may find that an action will adversely modify critical habitat and propose reasonable and prudent alternatives without having to also make the higher evidentiary determination that the adverse modification will kill or directly injure the species.

Legal and Regulatory Comments

Comment 55: Existing State and Federal regulation and associated mitigation measures are adequate to protect Cook Inlet beluga whales and the critical habitat designation is not necessary. One commenter also asserts that NMFS has disregarded the information it submitted concerning existing laws and regulations that protect Cook Inlet beluga whales and their habitat. One commenter also asserts that there is no evidence that a lack of effectiveness of any of the management regimes in place in Cook Inlet or that any management or regulatory gap contributed to the endangered listing of Cook Inlet beluga whales or limits its recovery.

Response: The ESA defines critical habitat, in part, as "the specific areas * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). The phrase "may require" indicates that critical habitat includes features that

may now, or at some point in the future, be in need of special management considerations or protection.

As explained in the proposed rule, we determined that each PCE may require special management considerations or protection. The commenter is correct that certain laws and regulatory regimes already protect, to different degrees and for various purposes, the waters of Cook Inlet and, therefore, to a certain extent, the physical or biological features identified as essential to the conservation of the species. The fact that there are relevant state and Federal regulations which aim to protect these waters and features from a variety of sources and actions indicates that each feature currently is in need of special management considerations or protection. The existing laws and regulations do not, however, ensure that current and proposed actions will not adversely modify or destroy beluga whale critical habitat in Cook Inlet. It is therefore probable, if not likely, that the PCEs essential to the conservation of the Cook Inlet beluga whale will require special management considerations or protection in the future. The consultation process is one mechanism through which we can ensure that those features are afforded such consideration or protection.

With regard to the comment that we disregarded information submitted on existing laws and regulations, we disagree with the commenter because we have considered this information in the proposed rule and in this final rule. Finally, with regard to the comment about whether the lack of effectiveness of any of the current management regimes contributed to the endangered listing, the designation of critical habitat for any listed species does not necessarily indicate that existing laws are responsible for the species' decline. Similarly, the fact that there are existing laws that protect different aspects of a listed species' critical habitat does not, per se, preclude the designation of critical habitat. The inquiry is whether there are physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. Congress envisioned that, except in extraordinary circumstances, the Secretary would designate critical habitat. There are no extraordinary circumstances that would allow us to avoid the designation of critical habitat for the Cook Inlet beluga whale.

Comment 56: The critical habitat designation should not be finalized until pending legal rulings on the status of the Cook Inlet beluga whales are made.

Response: We disagree. The ESA requires us to designate critical habitat concurrently with the listing decision to the maximum extent prudent and determinable (16 U.S.C. 1533(a)(3)(A)(i)). If such designation is not determinable, we may extend the deadline by one year. In the extraordinary situation where the designation of critical habitat is not prudent, we may decide not to do so. See response to comment 54 above. Section 424.12(a)(1) of 50 CFR presents two circumstances when a designation is not prudent, but neither one is applicable here. Accordingly, whichever "pending legal rulings on the status of Cook Inlet beluga whales" the commenter is referring to, they do not constitute cognizable grounds under the ESA for delaying the designation of critical habitat. If the State of Alaska prevails in its lawsuit challenging our decision to list the Cook Inlet beluga whale, we will determine at that time what effect such a ruling has on this final rule.

Comment 57: Because NMFS has not yet complied with all of the applicable directives, such as the National Environmental Policy Act, Executive Order 13211, and Public Law 108–199, the proposed rule is unlawful.

Response: We disagree. We have complied with Executive Orders 13211 and 13175, as modified by Public Law 108–199 (74 FR 63,080, 63,093–94; Dec. 2, 2009). NEPA does not apply to decisions to designate critical habitat. *See Douglas County* v. *Babbitt,* 48 F.3d 1495, 1501–08 (9th Cir. 1995).

Comment 58: NMFS must provide justification for the designation of critical habitat inconsistent with comments provided to it by the State of Alaska and its political sub-divisions.

Response: Section 4(i) of the ESA provides that if the Secretary issues a final regulation which is in conflict with the comments of a State agency, the Secretary must provide a written justification for his failure to adopt regulations consistent with the agency's comments. We have complied with this section by submitting a letter to the Alaska Department of Fish & Game and the Governor's Office.

Comment 59: There is a direct Federal nexus with the critical habitat designation through the Magnuson-Stevens Act to anadromous species. These anadromous species include hooligan, smelt, and salmon.

Response: We are uncertain as to what this commenter means by "direct Federal nexus with the critical habitat designation." To the extent that this commenter is referring to potential ESA section 7 consultations, we note that section 7 of the ESA requires each Federal agency, in consultation with NMFS, to ensure that "any action authorized, funded, or carried out" by the agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of the species' habitat (16 U.S.C. 1536(a)(2)). Our regulations provide that action "means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas" (50 CFR 402.02). Accordingly, if or when there is a Federal action that may affect a listed species or its habitat, the Federal action agency must consult with NMFS. At this time, we are unaware of any proposed Federal actions pertaining generally to hooligan, smelt, or salmon that would require consultation.

Economic Comment

Comment 60: Many comments suggest that the Draft RIR/4(b)(2)PA/IRFA did not consider changes to development projects stemming from the critical habitat designation, such as added costs and operational and permitting delays to projects resulting from the ESA section 7 consultation process, and the attendant economic consequences. Some comments, such as those by Chugach Electric Association and ConocoPhillips, also estimated the costs associated with these modifications and delays. According to these comments, in addition to the ESA process, project delays could also be caused by environmental lawsuits, once the critical habitat is designated.

Response: The Cook Inlet beluga whale was listed as endangered in October 2008. Since the listing, all Federal agencies have had the obligation to consult with NMFS to ensure that any action authorized, funded, or carried out by them (*i.e.,* Federal action) is not likely to jeopardize the continued existence of the species. Consultations in accordance with this obligation must be conducted in the future, regardless of whether critical habitat is designated. The statute contains timelines for section 7 consultations, and Federal agencies should plan their activities accordingly to avoid delay. Non-Federal entities that require Federal permits for development projects should also be aware of the consultation requirement, and factor the time needed for consultations into their plans and schedules. As consultations are already required under the jeopardy standard, the additional consultation standard of destruction or adverse modification of critical habitat is not anticipated to result in significant, additional project

delays. With respect to project modifications, there presently is no detailed empirical information (*e.g.,* engineering, materials, and structural design; project scheduling, temporal sequencing of construction, and duration; associated costs and financing) pertaining to future projects or any project modifications that might be proposed for areas within or immediately adjacent to Cook Inlet beluga whale critical habitat, making quantitative estimation of directly attributable economic costs purely speculative. In other words, since the precise nature of any future project modification is unknown, we cannot speculate whether such a potential modification ultimately increases or decreases project costs and by how much. Qualitatively, based on past experience and the best scientific and commercial data available, we do not expect project modifications to add significant monetary costs, especially since most of these modifications would likely be required pursuant to consultations arising under the jeopardy standard.

Finally, whether any project is delayed because of a lawsuit will depend on whether a court determines that NMFS has violated Federal law and injunctive relief is appropriate. Costs associated with project delays due to such lawsuits are extremely speculative.

Comment 61: A comment by ConocoPhillips asserts that a critical habitat designation will result in increased administrative costs to the company, and has the potential to result in operational and permitting delays and/or lead to other new costs. The independent economic analysis conducted by the company conservatively estimates the impacts to ConocoPhillips alone in the range of $698,000 to $796,000 over 20 years. According to the company, these costs could rapidly escalate, if NMFS imposed even minor restrictions on ConocoPhillips' operations in connection with the critical habitat designation.

Response: See response to comment 60.

Comment 62: Some comments request the exclusion of the POA and Port Mackenzie from the final critical habitat designation, based on national security, as well as economic reasons.

Response: After considering impacts to national security and weighing the benefits of exclusion with those of specifying as critical habitat the POA and a small, adjacent area extending to the turning basin, we have determined to exclude those areas from the critical habitat designation. The exclusion does not, however, include Port Mackenzie. We have determined that its inclusion as critical habitat does not implicate significant impacts to national security, supported by the fact that DOD has not asserted that there would be any. After considering the economic impacts of the designation, we determined that the benefits of excluding Port Mackenzie do not outweigh the benefits of specifying the area as critical habitat. The decision to exclude the POA is based principally on impacts to national security, which have been described in this rule and were identified in comments responding directly to our public notice requesting information on this issue. See detailed discussion below.

Comment 63: A number of comments assert that, contrary to some perspectives in Alaska, the critical habitat designation will not hamper responsible development. Based on tens of thousands of reviews across the nation on development projects in areas containing endangered species, less than one percent of projects are significantly curtailed, because responsible development and endangered species protection can and do go hand in hand. The vast majority of projects entering the consultation process are resolved informally with a determination that no listed species will be impacted, nor designated critical habitat destroyed or adversely modified. Even where a formal consultation is required in instances of an identified potential threat, the agencies more often than not conclude that no such threat exists, or work with the action agency to design project alternatives. Only in extremely rare instances are projects terminated because of probable impacts on listed species.

The comments further state that critical habitat designation does not affect private activities that do not require Federal permits. Nor is it undertaken in a vacuum: Federal agencies are already required to consult under section 7 of the ESA if their action could jeopardize the continued existence of an endangered or threatened species. Critical habitat designation simply adds another question for the agency to consider as part of the consultation: Whether the Federal agency action could result in the destruction or adverse modification of critical habitat. Any incremental cost of critical habitat designation is, therefore, small and limited.

Response: We agree with the commenters. The economic analysis conducted in support of the Final RIR/4(b)(2)PA/FRFA is based on the same premise as that outlined in these comments.

Comment 64: A number of comments demand a more robust economic analysis before the critical habitat designation is finalized. Further, these comments expressed concern with the methodology used to estimate the cost of the proposed designation. According to these comments, the current analysis is inadequate and a more comprehensive economic analysis needs to be conducted.

Response: The economic analysis conducted in support of the Final RIR/4(b)(2)PA/FRFA employed the appropriate methods and used the best scientific data available to consider all relevant economic impacts and develop cost and benefit estimates. As required under the ESA, Regulatory Flexibility Act, Executive Order 12866, and other applicable law, the analysis considered all costs and all benefits relevant to assessing the net welfare changes attributable to the final action. These changes were monetized to the fullest extent useful estimates could be made or treated qualitatively when monetization was not practicable. These component welfare effects were then integrated in order to reach conclusions about the expected "net benefit to the Nation" attributable to the final critical habitat designation. While the commenters demand a more robust economic analysis, they do not provide any new or additional data. A few comments mention certain "costs" that are asserted to be incremental to the critical habitat designation. However, many of the values identified within these comments are not "economic costs," but instead, "impact" measures (*e.g.,* input-output multipliers) that reflect, for example, localized commercial activity. As such, they do not represent economic benefits or economic costs, as these concepts are employed in traditional "benefit/cost" analysis. Commercial activity impacts, while important distributional indicators, are "transfers" within a National Accounting analytical framework mandated under applicable Federal law. Distributional impacts are treated separately from economic costs and benefits in the analytical documents. Those economic costs that are correctly identified in these comments would, based upon NMFS' economic analysis, likely be incurred regardless of whether critical habitat is designated (also see response to earlier comments). Furthermore, there are fundamental and important distinctions between economic "benefits and costs" and economic "impacts." The former are crucial in evaluating "net welfare" changes; that is, do the benefits exceed

the costs, resulting in a net gain to society. Impact measures (*e.g.,* income and employment multipliers) reflect relative economic "activity" in a specified locale, relative to a baseline condition.

The commenters have confused these crucial economic concepts. With, for example, specific reference to comments on the FRFA, the purported "costs" identified there are not relevant to the traditional cost-benefit analysis. And, with respect to the ESA, we considered the economic impacts cited in these comments, but do not believe that they change the conclusion that the benefits of exclusion (principally monetary) do not outweigh the benefits (economic, ecological, educational, biological) of specifying the areas as critical habitat.

Comment 65: A few comments point out that the proposed critical habitat area overlaps geographically with Alaska's highest human population density and its primary economic base. Yet, the economic analysis conducted in support of the Draft RIR/4(b)(2)PA/IRFA cites the added costs for evaluating future projects in the proposed critical habitat at a mere $187,000 to $571,000.

Response: Some commenters have expressed concern about the designation of critical habitat in areas of high population density and human activities. The concerns are related to the perceived potential economic costs that may be imposed by critical habitat designation. The Final RIR/4(b)(2)PA/FRFA concludes that the economic cost of critical habitat designation that can be reasonably "monetized," at present, is estimated to have a discounted net present value of approximately $187,000 to $571,000, assuming a 3 percent real discount rate and 10-year planning horizon; and about $157,000 to $472,000, using a 7 percent real discount rate and 10-year period. "Applicants" associated with section 7 consultations on the various activities that could be potentially impacted are only expected to bear $900 to $3,500 per consultation in administrative costs related to the incremental costs of critical habitat designation for formal consultations, while they are not responsible for any incremental costs related to informal consultation. It is important to recall that section 7(a)(2) of the ESA applies only to Federal actions (*i.e.,* actions authorized, funded, or carried out by a Federal agency). Absent such Federal action, activities undertaken in or adjacent to Cook Inlet are not subject to the provisions of section 7 consultation on critical habitat and will incur no attributable or quantifiable costs or other encumbrances due to the designation of critical habitat. Even for proposed Federal actions, "applicants" associated with consultations on activities such as oil and gas exploration and development, power projects, mining, water quality, port expansion and development, transportation and other infrastructure projects are not expected to bear any significant costs uniquely attributable (*i.e.,* incremental) to the designation of critical habitat for the Cook Inlet beluga whale. Every Federal agency must consult under section 7 of the ESA to ensure that its action will not jeopardize the continued existence of the whale. Formal consultation is required if the proposed action "may affect" the whale (50 CFR 402.14(a)). Whether the consultation may proceed informally, as opposed to formal consultation, will depend on whether the action is likely to adversely affect the species (50 CFR 402.14(b)).

Comment 66: Some commenters point out that the period employed for the analysis, 2009 to 2018, may be insufficient, particularly when dealing with significant resource and community infrastructure operations and development. Firms in these industrial sectors must balance disparate time horizons for capital life, field life, field extension, and field depletion rates that are rarely as short as 10 years.

Response: As mentioned in Section 3.4 of the Final RIR/4(b)(2)PA/FRFA, an interval of 10 years is widely employed in the policy analysis arena. This time-frame allows sufficient scope over which longer-cycle trends may be observed (*e.g.,* progress towards population recovery for the Cook Inlet beluga whale), yet is short enough to allow "reasonable" projections of changes in use patterns in an area, as well as shifts in exogenous factors (*e.g.,* world supply and demand for petroleum, U.S. inflation rate trends) that may be influential.

Comment 67: An independent study commissioned by the Resource Development Council (RDC) asserts that the Cook Inlet beluga whale critical habitat designation has the potential to result in economic impacts on RDC's members ranging from $39.9 million and $399 million, annually. Over a 10-year period (the length of time utilized by the Draft RIR/4(b)(2)PA/IRFA) the present value of that lost production at a three percent discount rate is claimed to be $340.3 million to $3.4 billion, and at a seven percent discount rate is $280.2 million to $2.8 billion. These numbers are asserted to be conservative and do not take into account, for example, the $400 million-$600 million that the Anchorage Water and Wastewater Utility (AWWU) may be required to spend to upgrade its facilities. According to RDC, even the most conservative estimate of $280.2 million over 10 years, representing an impact of only a one percent reduction in Cook Inlet region output, is sufficiently significant to warrant broad exclusions.

Response: The independent study commissioned by RDC considers potential "impacts" of the proposed critical habitat designation to five key industries: oil and gas, mining, POA, commercial fishing, and sport fishing. Further, qualitative discussions of impacts on other projects/sectors/entities are also provided, though not quantified. These include tourism, Knik Arm Bridge and Toll Authority, community development projects, Anchorage Water and Wastewater Authority (AWWU) discharges, Port McKenzie, vessel traffic, and energy infrastructure.

We reviewed and considered this report. While the RDC's Economic Analysis states that it "monetizes, quantifies, or qualitatively assesses the incremental costs and benefits to entities directly attributable to the CHD," it is unclear if the analysis excludes the conservation measures already underway or which may be taken due to the listing of the Cook Inlet beluga whale. Economic impacts from these measures are not attributable to the designation of critical habitat. Further, given the time periods when most of the six studies relied upon in the RDC Economic Analysis for identifying the range of reductions were conducted, the impacts identified are likely co-extensive, not incremental. Therefore, the RDC Economic Analysis appears to significantly over-estimate the economic costs that are attributable to the designation of critical habitat.

In terms of specific study outcomes, the impacts to mining in the RDC Economic Analysis are based on the premise that both the Chuitna Coal Project and the Pebble Project will likely be completed. While this may be true for the Chuitna Coal Project, the Pebble Mine project is in the planning/pre-permitting/pre-development stage, and does not have an approved project description. At this time, there is reasonable uncertainty regarding the likelihood of this project (Pebble Project) occurring at all, let alone within the next 10 years. Also, many AWWU facilities may be required to upgrade for Clean Water Act (CWA) compliance, regardless of the designation of critical habitat for the Cook Inlet beluga whale. These costs, if incurred, are not

attributable to the critical habitat designation.

As noted in response to a previous comment, the misunderstanding and resulting confounding of fundamental concepts of "economic costs and benefits" with "measures of economic activity" (*e.g.,* employment multipliers) has led the commenters to derive vastly inflated projections of the attributable "economic costs" of critical habitat designation. Input/output multipliers do not reflect, and are not equivalent to, economic costs or economic benefits. They are correctly interpreted as location-specific "activity measures" reflecting the rate of turnover and the path of exchange, for example, of a dollar created within the identified economic unit (*e.g.,* county, region, state), before it leaks out into the wider economy. Emphasizing that such relative economic activity impacts are not relevant to the assessment of "net benefits to the Nation," we did describe and evaluate the temporal and geographical impacts that may accrue to localized economic activity, to the extent practicable.

Comment 68: One commenter has provided suggestions to improve the presentation of results in the Draft RIR/4(b)(2)PA/IRFA as follows:

Regarding the analysis of costs, the overriding conclusion from the [economic] analysis is that impacts on the private sector will be minimal. This point should be highlighted and the public sector costs should be clarified. In particular, Table 7.1 outlining the total costs (all based on "consultation" costs) is misleading. The numbers indicated are for a 10-year period total and that should be represented in the table itself.

Footnote 374 is crucial to the analysis and yet unfortunately is buried. It should be part of the main text. The only discount rate is 3 percent as the "social discount rate," because this is a public/social policy choice. This is accepted practice in the economics profession. If total costs are averaged over the 10-year period, they only come out to between $18,700 to $57,000 per year.

In Section 7 of the Draft RIR/4(b)(2)PA/IRFA, there is no statement of the methods used to calculate costs. Once more, these are national averages only.

Response: We appreciate the suggested improvements, and considered them when we completed the Final RIR/4(b)(2)PA/FRFA.

Comment 69: A handful of comments assert that lost development opportunities resulting from the critical habitat designation will result in declines in both State and local tax revenue, and reduce the number of jobs. An example cited is that of Alaska's already struggling oil and gas operations, where hundreds of oil field workers and professionals have been laid off in recent months. The comment asserts that critical habitat designation will have a further crippling effect on such industries.

Response: As stated in more detail in response to an earlier comment and in the Final RIR/4(b)(2)PA/FRFA, the designation of critical habitat is not anticipated to hamper development in the vicinity of Cook Inlet, and thus would not result in declines in State and local tax revenues nor lost jobs. The additional costs incurred by industry that can be reasonably monetized at present and are uniquely attributable to the critical habitat designation, would be the negligible third party costs of section 7 consultations (*i.e.,* $900 to $3,500 per consultation in administrative costs related to the incremental costs of critical habitat designation for formal consultations; no costs to industry are incurred for informal consultations). The project modifications and associated costs that may be requested, expressly due to consultation over potential destruction or adverse modification of critical habitat, are anticipated to be minimal and rare, given that most of any such modifications would already be required under ESA section 7's jeopardy standard. Moreover, the nature of any such modification is speculative and, as a result, whether the modification ultimately increases or decreases project costs (and, by how much) cannot be determined at this time.

Comment 70: Comments by the Chugach Electric Association, Inc. and the Resource Development Council of Alaska, Inc. point out that the Draft RIR/4(b)(2)PA/IRFA does not mention the existing high voltage submarine cable fields that cross Knik Arm, connecting the Anchorage area, as well as the Kenai Peninsula, to Chugach's existing generation plant near the Beluga gas fields. These cables must be maintained and occasionally replaced. Chugach spelled out for NMFS the potential economic impact of any delays in maintaining and repairing those cables, explaining that these delay-related costs are in addition to any administrative costs associated with ESA consultation, and any increased costs incurred by Chugach in altering its projects to benefit the whales.

Response: As discussed in more detail in response to previous comments regarding exclusion of cable fields and overlaying waters from the critical habitat designation, we are not aware of any Federal actions in connection with the maintenance or repair of submarine cables, and the commenters have not indicated the existence of such Federal action. Therefore, absent Federal action, the proposed critical habitat designation would impose no compliance requirements (*e.g.,* no delays, direct or indirect costs) on maintaining, repairing, or occasionally replacing submarine cables in Cook Inlet.

Comment 71: One comment states that while the Draft RIR/4(b)(2)PA/IRFA analyzed cost impacts of critical habitat designation for two other tidal energy projects, it should be revised to include the potential costs of critical habitat designation to the Turnagain Arm Tidal Energy Generation project, as well. The Turnagain Arm Tidal Energy Corporation filed an application with the Federal Energy Regulatory Commission (FERC) on November 17, 2009, for a preliminary permit to study the feasibility of a tidal energy generation system on the Turnagain Arm of Cook Inlet.

Response: The Final RIR/4(b)(2)PA/FRFA analyzed economic impacts of critical habitat designation on projects that are reasonably likely to occur during the 10-year period of analysis. In November 2009, the Turnagain Arm Tidal Energy Corporation filed for a preliminary permit pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Turnagain Arm Tidal Energy Generation project. According to the December 4, 2009, **Federal Register** document, "the sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land disturbing activities or otherwise enter upon lands or water owned by others without the owners' express permission." Therefore, while it appears from the proposed project description that the project, if approved, may affect the whale's critical habitat, the project is still sufficiently ill-defined, presumably undergoing design and feasibility assessments, that further progress towards development and submission of the next series of applications remain in pre-permitting stages. Absent more definitive design, siting, and construction information, it would be impossible to do more than offer uninformed speculation on the interaction, if any, between this potential development and designated critical habitat and whether the project may also affect the whale, requiring a consultation under section 7 due to the listing of the whale as an endangered

species. As such, it is not considered among the impacts contained in the Final RIR/4(b)(2)PA/FRFA's analysis.

Comment 72: One comment states that Section 7.7 of the Draft RIR/4(b)(2)PA/IRFA did not analyze the Mt. Spur Geothermal Power Plant because a decision to go forward with the plant has not been made. Further, Table 6–28 of the Draft RIR/4(b)(2)PA/IRFA describes the status of the project as "pre-decisional, geothermal lease in place, no permits have been requested." The comment further states that given Ormat Technologies' (the major lease holder for the Mt. Spur Geothermal development) better record of success than any of the tidal energy companies whose projects were analyzed in the Draft RIR/4(b)(2)PA/IRFA, Section 7.7 should be revised to include the potential costs of critical habitat designation to the project.

Response: As per Sections 6.4.7 and 7.7 of the Final RIR/4(b)(2)PA/FRFA, based on the best scientific data available and research conducted by NMFS, Ormat Technologies is in the early development/initial exploration stage of the Mt. Spurr Geothermal Power Plant, and no permits have been requested. Additionally, given that no specific preferred plan or route for the transmission line(s) have been identified, it is unclear whether this potential project may affect the Cook Inlet beluga whale and/or its critical habitat. In light of the fact that Ormat Technologies will have to submit a site design and transmission line corridor proposal, apply for and get the necessary permits, and secure funding to develop this project, any analysis of economic impacts to the potential project arising exclusively from the designation of critical habitat would be highly speculative.

Comment 73: A commenter notes that Section 6.4.7 of the Draft RIR/4(b)(2)PA/IRFA states that the Chakachamna Hydropower Plant project was reviewed, but determined to not have a connection with the critical habitat designation, due to its inland location and lack of physical connection with Cook Inlet. However, the project description clearly describes the project's planned measures to protect salmon, which are designated as a PCE of the critical habitat. The project would discharge water flow from the facility into the MacArthur River near its confluence with Cook Inlet. The power transmission lines may need to cross the MacArthur River, and potentially Cook Inlet, to reach Anchorage or the Kenai Peninsula. Chakachamna Power has identified the North Forelands Dock and Industrial Area as its logistics base for construction and operation of this project, which would result in an increase in vessel traffic through this area. A preliminary permit application for this project was filed with FERC on December 10, 2009. Because this project may affect a small portion of Cook Inlet beluga whales' habitat, but is highly unlikely to jeopardize the existence of the whales, project modification costs should be estimated. Section 7.7 of the Draft RIR/4(b)(2)PA/IRFA should be revised to include the potential costs of critical habitat designation to the Chakachamna Hydropower Plant project.

Response: Based on the project description provided in the preliminary permit application for this project, filed with the Federal Energy Regulatory Commission (FERC) on December 10, 2009, the Chakachamna Hydropower Plant project is located inland of Cook Inlet, including the proposed transmission lines that would connect to the Chugach Electric Association's Beluga substation, which is also inland of Cook Inlet. The commenter has not provided any supporting information or empirical documentation to indicate a clear physical connection of the project with the waters of Cook Inlet, the beluga whale, or its critical habitat. If, as the commenter asserts, the North Forelands Dock and Industrial Area is proposed as the construction staging site and permit authorizations are sought for that activity, a section 7 consultation may be required. Given currently available information, however, no conclusive determination can be made; thus, the potential economic impact to the potential Chakachamna Hydropower Plant project is not analyzed in the Final RIR/4(b)(2)PAFIRFA.

Comment 74: One comment by Chugach Electric Association notes that the Draft RIR/4(b)(2)PA/IRFA acknowledges NMFS' obligation under Executive Order 13211, regarding "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use," to evaluate the impact of critical habitat designation on energy supply. However, the Draft RIR/4(b)(2)PA/IRFA appears to be devoid of any such analysis.

Response: Section 10.2 of the Final RIR/4(b)(2)PA/FRFA presents the "Statement of Energy Effects" pursuant to Executive Order No. 13211, "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use," issued May 18, 2001.

Comment 75: Two comments state that the proposed designation of critical habitat to protect beluga whales in the Cook Inlet does not describe the economic impacts of the designation on the North Slope to Lower 48 through Canada gas pipeline project (also referred to as Alaska natural gas transportation project), nor how impacts of the designation on the economic, environmental, energy, and national security interests of the nation, relative to this project, which Congress has endorsed, were taken into consideration and balanced in accordance with Section 4 of the ESA.

Response: Research conducted by NMFS through the development of the Final RIR/4(b)(2)PA/FRFA revealed that the proposed North Slope to Lower 48 through Canada gas pipeline project, if permitted, would not affect the Cook Inlet beluga whales' critical habitat. No new information or empirical documentation has been provided by the commenter with which to evaluate how the project would impact the critical habitat or vice versa.

Comment 76: A commenter notes that the Draft RIR/4(b)(2)PA/IRFA should analyze the Alaska Natural Gas Development Authority (ANGDA) spur pipeline to Cook Inlet. ANGDA is planning a $2 billion pipeline to divert a portion of the gas from the North Slope to Lower 48 through Canada pipeline project to Cook Inlet, to replace dwindling local reserves and provide processed natural gas liquids for export from a to-be-developed facility, through Cook Inlet. This pipeline would run from Delta, through Glennallen, to the Beluga gas facility near Wasilla.

Response: Section 6.4.1 of the Final RIR/4(b)(2)PA/FRFA discusses the subject proposed pipeline, referred to as Beluga to Fairbanks Natural Gas Pipeline Project. Potential impacts to this project are included in Table 6–28.

Comment 77: Two comments state that Escopeta Oil's Kitchen Lights Unit project to bring a jack-up rig to the Cook Inlet this spring and drill the #1 Kitchen Lights Unit well was put on hold indefinitely because of the proposed critical habitat designation for Cook Inlet beluga whale. According to the commenters, to date Escopeta Oil has spent over $20 million on the project (estimate by the second commenter is $50 million), and this proposed designation has deterred this initial investment away from Cook Inlet. If Ecopeta Oil is not allowed to drill the Kitchen Lights Unit by the Federal Government, it will lose its significant investment in Alaska, and the State of Alaska and its people will also lose a long-term supply of natural gas and the jobs and revenues created from the Kitchen Lights Unit development program. Further, should an oil and gas company desire to perform the costly

proposition of drilling an offshore well in the Cook Inlet with this designation, it will have to budget millions of dollars for additional consultations, duplicative permits, delays, legal fees, and litigation—without any guarantee of drilling the first well.

Response: Section 6.4.1 and 7.1.1 and Table 6–28 of the Final RIR/4(b)(2)PA/FRFA discuss the status and impacts to Escopeta Oil's Kitchen Lights Unit. Additional research conducted by NMFS reveals that the Kitchen Lights Unit program has a history of delays due to the company not being able to fulfill several commitments required not only for technically exploring its prospects, but also for meeting the legal terms of the State of Alaska's oil and gas leases. The latest available information suggests that, as part of its agreement with the State of Alaska to hold onto its Kitchen Lights leases, Escopeta Oil has to drill an exploration well in the unit by the end of 2010. However, following the proposed designation, the company asked the State of Alaska in a December 16, 2009, letter to guarantee no Federal interference in the company's Cook Inlet oil and gas drilling activities planned for 2010 (Petroleum News, December 20, 2009). The State did not offer such a guarantee (Petroleum News, December 27, 2009). It is anticipated that, while the project's potential to affect critical habitat could trigger the section 7 consultation process and may result in project modifications, there is no evidence suggesting that the potential loss of initial investment in Cook Inlet activities by the company due to the project being put on hold is attributable to the designation. Future economic impacts may arise from the need to consult under section 7 to avoid jeopardy and/or to avoid destroying or adversely modifying critical habitat. However, the commenter did not present any evidence indicating that there would be impacts attributable only to the critical habitat designation, nor when in the future such renewed activity might be expected.

Comment 78: One commenter notes that impacts to the $4 billion Enstar bullet pipeline should be considered. The proposed pipeline would connect Alaska North Slope gas fields through Fairbanks to the Beluga gas facility. This project is competing with the ANGDA spur line project to supply both local consumption and liquid products export. According to the commenter, Enstar is currently pursuing Alaska environmental permits for this project.

Response: Research conducted by NMFS suggests that Enstar bullet pipeline, now referred to as Alaska Stand Alone Pipeline (ASAP), is in the preliminary planning and engineering stage. The plan, initiated originally by Enstar Natural Gas, is now being coordinated by the Alaska Governor's office. The preparation of an Environmental Impact Statement has been initiated. Given that the project alternatives have not been finalized yet, it is unclear whether the pipeline itself will reach the waters of Cook Inlet; however, it is possible that some associated facilities may be located in the vicinity. Because the project is in such preliminary stages, what activities it may stimulate in Cook Inlet and how those activities would be impacted by the designation of the beluga whales' critical habitat is too speculative for consideration in the economic analysis.

Comment 79: The Tyonek Native Corporation states that impacts of the proposed critical habitat designation on the following two projects should be considered in the analysis:

The Corporation is developing plans to mine and export high quality aggregate from its North Forelands Dock and Industrial Area using the existing adjacent pier, which would require modification (*see http://www.tyonek.com/Presentations/tnc-wci08.pdf*). According to the commenter, the project would result in increased vessel traffic through this area. This project is expected to have a total construction cost of approximately $20 million.

Alaska Natural Resources to Liquids recently completed a $1.5 million preliminary feasibility study with the help of the Alaska Industrial Development and Export Authority (*see http://www.aidea.org/PDF%20files/BelugaCTLoverview9-20-06.pdf*) on the Beluga Coal to Liquids Plant. Plans call for using coal from the Chuitna coal fields to produce 80,000 barrels per day of diesel and naphtha for U.S. West Coast markets. In addition, the facility would produce jet fuel and petrochemical feedstocks. This fuel would be shipped out of the existing North Forelands Dock, which would require modification, and result in increased vessel traffic through this area. This project is expected to have a total construction cost, including supporting infrastructure, of approximately $12 billion.

Because these projects may affect a small portion of Cook Inlet beluga whale habitat, but are highly unlikely to jeopardize the existence of the whales, project modification costs should be estimated. The Corporation has requested that Sections 6.4.2, 7–2, and 9–2–1.1 and Table 6–28 of the Draft RIR/4(b)(2)PA/IRFA be revised to include the potential cost impacts of critical habitat designation to these projects.

Response: The commenter has not provided sufficient information regarding the current stages of the projects, or the likelihood of these occurring in the next 10 years, with which to conduct an evaluation of the economic impacts on these project proposals from the designation of critical habitat. Even if the projects were reasonably likely to occur during the time period under analysis, the modification of the North Forelands Dock would require a Federal permit, likely from the U.S. Army Corps of Engineers (ACOE), which would likely trigger a section 7 consultation (possibly two—one for each project). The consultation could be formal if the dock modification requires pile driving or informal otherwise. However, the costs associated with the consultation to ensure that the project does not destroy or adversely modify critical habitat would be co-extensive with those arising from the consultation to ensure that the project does not jeopardize the whales' existence. Such consultation is required if a Federal action may affect the endangered Cook Inlet beluga whale (50 CFR 402.14).

As for the increase in vessel traffic, it would be considered an indirect, interrelated, or interdependent action under the consultation. Given that it is unclear at this point if the increase in vessel traffic associated with the projects would create enough noise to cause abandonment of habitat, the increased vessel traffic would likely raise questions concerning whether the action would result in takings of the whale. Accordingly, economic impacts associated with the consultation over that action would be co-extensive between the jeopardy and destruction/adverse modification of critical habitat standards.

Comment 80: A commenter notes that the proposed critical habitat designation is likely to have a significant impact on exploration for and production of natural gas in the Cook Inlet region, which could directly affect the cost of electricity to Chugach Electric Association's customers. Chugach generates most of its electricity from natural gas produced in the Cook Inlet region. Designating the upper half of Cook Inlet, South to below Kalgin Island, as beluga whale critical habitat sweeps in all of the existing offshore oil and gas fields in the Inlet. This is likely to have an impact on all future oil and gas exploration in the region. The Draft RIR/4(b)(2)PA/IRFA contains no meaningful discussion of the impact this will have on future oil and gas

exploration and development in Cook Inlet, and no discussion of the resulting impact on the cost of electricity in the Railbelt region, where most of Alaska's population is located. These economic impacts should have been part of the Draft RIR/4(b)(2)PA/IRFA. When these costs are given their proper weight, it should be readily apparent that the potential benefits to the whales of an unfocused and overly broad critical habitat designation are outweighed by the resulting economic impacts.

Response: As has been explained in more detail in responses to other similar comments above, oil and gas exploration activities are already required to comply with ESA section 7's jeopardy standard due to the listing of Cook Inlet beluga whale. It is the additional economic impacts that stem from the designation of critical habitat that comprise the economic impacts of section 7 consultations analyzed pursuant to section 4(b)(2) of the ESA.

The comment suggests that future oil and gas exploration in Cook Inlet will be adversely impacted by the critical habitat designation, with resulting costs imposed on electricity users throughout the Railbelt region of Alaska, in the form of (implicitly) higher costs. We do not agree with these assertions for the following reasons. First, the incremental cost uniquely attributable to the critical habitat designation as it pertains to project review within Cook Inlet has been demonstrated to be very small. Economic impacts arising from the need to consult under section 7's jeopardy standard are not considered to be economic impacts arising from the designation of critical habitat. After review of the best scientific data available regarding the status of the beluga whale and the nature of the reasonably foreseeable Federal actions in and around Cook Inlet, we concluded that a substantial portion of the economic impacts associated with the designation of critical habitat are co-extensive with those arising from the listing decision. Second, the empirical data and commercial information (much of which is cited by numerous commenters referenced above) suggest that supplies of gas in Cook Inlet are nearing exhaustion. This conclusion is also evidenced in the marketplace by the several competing proposals to supply North Slope gas to the Cook Inlet region via pipeline. If, as asserted by the region's oil and gas industry sector representatives (see submitted comments on gas pipelines and critical habitat designation, above), tens of millions to hundreds of millions of dollars have been invested by several competing interests in efforts to build a gas delivery system to "move available gas into the Cook Inlet region" in response to dwindling local supplies, it appears that the marketplace and nature of supply and demand are having, and will continue to have, significant economic impacts on future Cook Inlet gas exploration.

Comment 81: Several comments state that the proposed designation of the entire Cook Inlet as critical habitat for the beluga whale creates an additional stigma towards future exploration and development in the Cook Inlet region. The negative impact created by this designation creates an anti-development stigma that is contrary to the national energy policy and prejudices Alaska's ability to responsibly explore and develop its natural resources for the benefit of all Alaskans.

Potential investors may withdraw their support for projects in the Cook Inlet region because of increased project costs. The additional costs include: compliance costs, litigation costs related to suits initiated by NGOs, and perhaps the greatest of all, lost opportunity costs resulting from loss of investment. The evaluation of the economic costs of critical habitat must include a complete evaluation of these factors by independent investigators from outside the agencies involved in the listing and habitat designation process.

Response: While substantial areas of Cook Inlet are proposed for inclusion in this designation action, critical habitat does not extend to the entire inlet. Indeed, the vast majority of the lower inlet is not proposed for inclusion. We cannot speculate on "stigma" or "loss of investor interest" as no empirical evidence or analysis of such effects for Cook Inlet exists. Moreover, as our economic impact analysis indicates, most of the economic impacts on future natural resource exploration and development in Cook Inlet arising from ESA compliance requirements would exist even without the designation of critical habitat.

Comment 82: A number of commenters note that the proposed critical habitat designation may affect barge and vessel activity in Cook Inlet, resulting in impacts to their projects. Critical habitat designations could increase costs by requiring observers on board, decrease efficiency by setting speed limits or time and area restrictions, and ultimately raise the cost of all goods, and subsequent services, paid for by Alaskans. Any shipping delays will have particularly significant consequences for this area, because shipping schedules are affected by tides, and delays are compounded by the fact that Anchorage has minimal storage capacity for goods and must carefully coordinate shipping schedules. Certain planned projects are anticipated to significantly increase vessel traffic, and commenters request these impacts be included in the Draft RIR/4(b)(2)PA/IRFA.

Response: Section 7 of the ESA does not apply generically to vessel movement or activity. As explained previously, section 7's consultation requirements apply only when there is a Federal action (actions authorized, funded, or carried out by a Federal agency). The designation of critical habitat for the Cook Inlet beluga whale is not anticipated to require any additional restrictions on barge and vessel movement, above and beyond any such restrictions already being imposed following section 7 consultations to avoid jeopardy. Generally, where a proposed Federal action will result in increases in vessel traffic, such increases are considered indirect effects or arising from interrelated or interdependent actions under section 7 consultation regulations (50 CFR 402.02). Given that it is unclear at this point if the potential increases in vessel traffic associated with projects in Cook Inlet could create enough noise to result in the abandonment of critical habitat areas, the increased vessel traffic, if it were to represent a concern, would likely be considered a take issue. Accordingly, the economic impacts from that consultation would be attributable to the listing of the whale as an endangered species.

Comment 83: Some comments suggest that in order to conform to the critical habitat designation, the Anchorage Water and Wastewater Authority (AWWU) must upgrade its sewage treatment plant, which would cost between $400 million and $1 billion. This could potentially triple Anchorage residents' wastewater bills. Nowhere is this reflected or accounted for in the Draft RIR/4(b)(2)PA/IRFA, which is clearly contrary to the requirements of the ESA.

Response: Sections 6.4.6 and 7.6 and Table 6–28 of the Final RIR/4(b)(2)PA/FRFA describe the potential costs of the proposed critical habitat designation to AWWU. The costs that can appropriately be attributed to critical habitat designation are anticipated to stem solely from a formal section 7 consultation. It is expected that in compliance with the CWA, AWWU may be required by the Environmental Protection Agency (EPA) to upgrade its John Asplund Wastewater Treatment Plant (WWTP), to meet national waste water discharge standards. The compliance exemption for the facility

has expired and EPA is currently reviewing the facility's operating permit. Therefore, any resulting cost associated with the upgrade or improvement of the plant to meet CWA mandates would not be attributable to the designation of Cook Inlet beluga whale critical habitat.

Comment 84: One comment notes that the City of Kenai operates a wastewater treatment plant at the mouth of the Kenai River. The permitted discharge is into Cook Inlet. We expect, but cannot confirm, that the City will have to comply with new effluent standards, as a result of the designation. The cost of plant upgrades could range from $250,000 to $50,000,000.

Response: The Final RIR/4(b)(2)PA/FRFA discusses the Kenai Wastewater Treatment Facility in Section 6.4.6. The facility is considered a major discharger under EPA standards. As discussed in the response to the previous comment regarding John Asplund WWTP, any required upgrades to the facility in order to comply with CWA standards would not be attributable to the critical habitat designation.

Comment 85: One commenter states that there is increasing demand for coal in Pacific Rim countries. After many years of lackluster demand in the export coal market, prospects are looking better for development of a coal export business, and Cook Inlet could play a key role in that development. Critical habitat designation in the Port Mackenzie area and for the shipping lanes through upper Cook Inlet could be a serious impediment to coal and other export opportunities. Clearly, there are many opponents to coal development, and critical habitat designation would provide them with a powerful tool to hamper and potentially stop coal and other bulk commodity exports, with no corresponding benefit to the beluga whales.

Response: As explained above, the designation of critical habitat for the Cook Inlet beluga whale is not anticipated to require any additional restrictions on barge and vessel movement in Cook Inlet, above and beyond those already being imposed following section 7 consultations to avoid jeopardy.

Comment 86: Several comments suggest that the proposed critical habitat designation could affect tourism in Southcentral Alaska. Holland America Cruise Lines is planning to bring numerous cruise ships into the POA and Homer. Future moorings by the industry could be decreased or eliminated as a result of a critical habitat designation. Subsequently, decrease in the number of visitors to Southcentral Alaska could transpire as limitations are placed on sport fishing, sightseeing cruises, and other operations. Local communities will be significantly impacted through decreased bed and rental taxes.

Response: As discussed in an earlier response, the POA is not included in the proposed critical habitat designation because of impacts to national security. Therefore, future moorings at POA are not likely to be affected by the designation of critical habitat for the Cook Inlet beluga whale.

Comment 87: A large number of comments provided both through written letters and orally during the public hearings assert they place a very great value upon, and derive substantial personal utility and enjoyment from, watching Cook Inlet beluga whales and having the opportunity to interact with the species in a wild environment. Further, some commenters made special note of the need to preserve this experience for future generations.

Response: We acknowledge these comments on the benefits accruing to area residents, tourists, and other visitors to Cook Inlet, and the value experienced by those interested in maintaining for future generations the opportunity to encounter the Cook Inlet beluga whale in its native habitat in such close proximity to a large population center. We provided an extensive treatment of the theoretical foundations, technical considerations, and empirical methodologies that have been developed and applied to quantitatively measure and evaluate economic benefits attributable to non-market use and passive-use values, as reflected in these comments. We believe that the designation of critical habitat will play a major role in ensuring the conservation of the Cook Inlet beluga whale to the benefit of current and future generations.

Comment 88: Several comments question the benefits of the proposed critical habitat designation (due to preserving the natural beauty of Cook Inlet) in attracting and retaining workers, and in adding value to visitors who recreate in the area. Concern is expressed that benefits in retaining workers are hypothetical and that Cook Inlet is one of the most pristine areas of the United States, such that workers would not reasonably be affected by the proposed critical habitat designation in their location decision. One commenter also suggested that these benefits can only be realized if there are jobs present that enable people to live and work in the Cook Inlet area.

Response: It is well documented that quality of life factors, including environmental quality and recreation opportunities, enter into employee and business location decisions (see Love and Crompton, 1999; Florida, R, 2000; Granger and Blomquist, 1999). To the extent that the proposed critical habitat designation preserves the environmental quality, natural resource amenities, and recreation opportunities in Cook Inlet, visitors and residents alike will benefit. It is not known how the incremental improvement in environmental quality, due to the proposed critical habitat designation, will affect the ability of any particular business or industry to attract and retain employees; hence, the Final RIR/4(b)(2)PA/FRFA notes that these benefits are likely to be "relatively small" and are not quantified in the analysis. Regarding job growth, recreation and tourism industries depend on aesthetic amenities, environmental quality, access to fish and wildlife (*e.g.,* fishing, hunting, viewing, photographing), etc., and it is precisely these aspects and attributes that are expected to benefit due to the proposed critical habitat designation in Cook Inlet.

Comment 89: Several comments expressed concern about the lack of quantification of benefits of the proposed critical habitat designation. According to some comments, this leads to an overstatement of speculative or hypothetical benefits, and an arbitrary and biased conclusion that the proposed critical habitat designation results in a net benefit to the Nation. Additional concern is expressed that the net benefit finding is not replicable, and that there is no evidence or factual basis for these benefits. One comment also notes that well-being, as a measure of benefit, is ill-defined, and questions what 'goods and services' would be provided to the public due to the proposed critical habitat designation that would increase well-being. Other comments assert that, by not quantifying benefits, the analysis understates the benefits of the proposed critical habitat designation.

Response: The principal benefit of the proposed critical habitat designation is the avoidance of destruction or adverse modification of the critical habitat of the Cook Inlet beluga whale, supporting the conservation and recovery of this endangered species, as provided for under the ESA. These benefits are biological. Ancillary economic, socioeconomic, cultural, educational, and procedural benefits are also expected to accrue, associated with the designation and related preservation and possible incremental improvement of the inlet's environmental quality. Quantifying economic benefits requires identifying the net change in environmental amenities and service

flows, such as air quality, water quality, or fish and wildlife populations (among others), specifically attributable to, in this instance, the proposed Cook Inlet beluga whale critical habitat designation. While the degree of biological, environmental, and economic benefit is not readily amenable to quantification, it is known that relatively small changes in environmental quality and wildlife abundance can provide significant economic benefits (also referred to as increased well-being or utility) through both use and non-use values. Evidence of these types of values is documented in the Final RIR/4(b)(2)PA/FRFA. Thus, while it is not possible to monetize, or even quantify these benefits, the best economic data available provide substantial evidence that the magnitude of anticipated benefits outweigh the anticipated costs. This is supported by the fact that we have determined, based upon the best scientific data available, the incremental cost attributable to the proposed critical habitat designation is likely small, relative to the expected benefits.

Comment 90: Several comments note that NMFS has stated it has little specific empirical information with which to predict how consultations initiated by critical habitat considerations might lead to any particular project modification, yet the stated primary benefit in the Draft RIR/4(b)(2)PA/IRFA of critical habitat is the requirement for consultations to ensure that action agency actions do not modify or destroy critical habitat. These comments assert that NMFS has not shown how the measurable improvement would be attributable to the proposed critical habitat designation and, thus, lacks a factual basis for estimating benefits. Similarly, several comments note that it is important to distinguish the incremental benefits of the proposed critical habitat designation from the baseline benefits of listing the Cook Inlet beluga whale, as well as other existing management and regulatory requirements.

Response: The commenters are correct that we have stated that the primary benefit of critical habitat designation is the biological benefit that will accrue from consultations that result in avoiding or minimizing adverse modification or destruction of critical habitat. As stated in the Final RIR/4(b)(2)PA/FRFA, "The primary driver for benefits from [the critical habitat designation] is a potential change in the quality or condition of the critical habitat absent [the critical habitat designation]." Critical habitat designation is, fundamentally, an action to promote the conservation of the species. Ancillary economic, socioeconomic, educational, procedural, cultural, and aesthetic benefits (among others) also accrue from the critical habitat designation, contributing to the aggregate benefit measure. While the exact number of affected projects and the precise types of project modifications that may be uniquely attributable to the critical habitat designation (and not the listing of the Cook Inlet beluga whale) cannot be known, we reasonably assume that whatever modifications occur, they will contribute to the conservation of Cook Inlet beluga whales and generate biological benefits that yield associated economic value.

We agree that, in assessing the benefits arising from the designation of critical habitat, we must focus on those incremental benefits that are uniquely attributable to the designation and not to the endangered listing. Our analysis endeavored to distinguish between such incremental and co-extensive benefits.

Comment 91: Numerous comments emphasize the social and cultural importance of the beluga whale to the region, as indicated by the naming of places, such as Beluga Lake, in the region and the traditional ways that are centered on the Cook Inlet beluga whale. Several comments indicate that the dollar value of the social and cultural benefits is very high.

Response: The Final RIR/4(b)(2)PA/FRFA discusses the cultural use and passive use importance of the Cook Inlet beluga whale and notes such examples as the traditional subsistence and cultural harvesting by Alaska Native groups, the naming of places, public educational displays, numerous technical and popular books, and the utility accruing to individuals from the knowledge that Cook Inlet beluga whales persist within their natural habitat in Cook Inlet. Cultural use values are recognized as real and potentially significant benefits deriving from the proposed critical habitat designation, but have not been estimated in dollar terms, owing to the complexity, high cost, and controversy associated with estimation of such values. Cultural values have been asserted by some to be unique to each group of people and, as such, do not readily lend themselves to monetary approximation. Similarly, cultural passive use values are not quantified, as there are not appropriate studies available upon which to base rigorous, quantitative estimates.

Comment 92: A number of comments question the potential of the proposed critical habitat designation to increase fish stocks and benefit commercial and sport fisheries. Some comments cite baseline requirements to maintain the reproductive capacity of fish stocks as indicating that critical habitat will not increase stocks, while other comments note that, to the extent that critical habitat increases the Cook Inlet beluga whale population, consumption of fish by beluga whales will result in a net decrease in available fish for commercial and sport anglers. One comment also asserts that fishing will be limited in the proposed critical habitat designation if it is found to have potential adverse effects on the environment, while other comments note that the analysis should further assess the benefits of enhanced commercial and sport fisheries attributable to the proposed critical habitat designation.

Response: As noted in the Final RIR/4(b)(2)PA/FRFA, it is possible that commercial and sport fisheries will experience small, indirect benefits attributable to the proposed critical habitat designation, as fish stocks share habitat with Cook Inlet beluga whales and benefit from avoidance of destruction or adverse modification of that (*i.e.,* their common) habitat. Effects of the proposed critical habitat designation on fishing activity are likely to be limited, because most of the fisheries in Cook Inlet occur in state waters and are managed by the State of Alaska. Though speculative, were a Federal action to occur that implicated those fisheries, effects from their management would likely be considered in the cumulative effects section of the biological opinion (*See* 50 CFR 402.02). At this time, however, it is impossible to speculate as to what that Federal action would be and how the state-managed fisheries would be analyzed. As described in the Final Draft RIR/4(b)(2)PA/FRFA, it is anticipated that there will be an informal consultation, approximately every 5 years, over Federal management of Cook Inlet commercial groundfish fisheries, attributable to the designation of the beluga whales' critical habitat.

Comment 93: Several comments question the benefit of education and outreach associated with the proposed critical habitat designation, and assert that this is a baseline benefit that accrues due to the 2008 Conservation Plan for the Beluga Whale.

Response: The volume of public comments received on the Draft RIR/4(b)(2)PA/IRFA indicates the level of public awareness of this process and the potential for education and outreach benefits. Furthermore, the consultation process, itself, serves to increase

awareness and sensitivity in design, execution, and operation of proposed projects.

Comment 94: Several comments note that the Alaska tourism industry, including activities such as whale watching, are important to the Alaskan economy and may benefit from the proposed critical habitat designation. These comments note that tourists are attracted to Alaska because of the scenic beauty and wildlife viewing opportunities, and protecting these assets has direct economic benefit.

Response: As noted in the Final RIR/4(b)(2)PA/FRFA, leisure activities, such as fishing, whale watching, and other wildlife viewing may be enhanced by the proposed critical habitat designation, insofar as the designation prevents or mitigates degradation, destruction, or adverse modification of critical habitat areas. While the recreation-related economic benefits of the proposed critical habitat designation are real, and potentially significant, these benefits have not been estimated in dollar terms because empirical data and relevant research are not currently available. It is reasonable to assume, nonetheless, that designation of critical habitat in Cook Inlet for the beluga whale will benefit recreation and tourism, and the businesses that depend upon and support these user groups.

Comment 95: Several comments were provided regarding the comparison of market-based, monetary estimates of economic cost, to non-market benefits measured through willingness-to-pay studies and other methods. Some comments questioned the reliability and validity of estimates of non-market values, while other comments noted that there are inherent values to the proposed critical habitat designation that are not measured in the marketplace with dollar values.

Response: Non-market valuation of species, habitats, and environmental amenities is an accepted and standard practice in the economics profession and endorsed for use by Federal agencies, when and where market prices do not exist. According to Office of Management and Budget guidelines for economic analysis of Federal regulations under Executive Order 12866, all benefits to society should be measured in cost-benefit analyses of Federal regulations, including non-market benefits that are not traded directly in the marketplace. The Executive Order stipulates that estimation of the monetary value of goods or services indirectly traded in the marketplace (such as whale watching trips and scenic views from residential homes) should be based on willingness-to-pay valuation methodology, using actual market transactions where possible. For goods that are not traded directly or indirectly in the marketplace, the Executive Order recommends the use of contingent-valuation methods to estimate economic value. At present, no such empirical studies have been completed for the Cook Inlet beluga whale or its critical habitat. We have, however, initiated just such an analysis. Its results are not expected to be available for several years. Until that time, it must suffice to observe that non-market, non-use, and passive-use economic values represent relevant, and very often significant, aspects of the benefits deriving from Federal actions pertaining to ESA listings and critical habitat designation. These estimation techniques, such as the contingent valuation method, have been reviewed and approved by peer review scientific panels and sanctioned by Federal courts.

Comment 96: A few comments cite additional economic studies that could be used to develop value estimates of the proposed critical habitat designation, including studies from Japan, regarding the value of beluga whales, a study on the benefits of expanding California's sea otter population, and a study of the benefits of designating critical habitat for the lynx. Another comment asserted that "benefits transfer" estimation techniques can be applied to the estimation of non-market values attributable to Cook Inlet beluga whale critical habitat designation, using a value function.

Response: There are numerous peer-reviewed studies, such as those referred to in the comments, which provide estimates that provide nonmarket value of species and habitat. As discussed in Appendix A of the Final RIR/4(b)(2)PA/FRFA, we have determined that the values from these studies are not directly applicable to the Cook Inlet beluga whale, beyond confirming that non-market and passive-use values exist with respect to the designation of critical habitat for the Cook Inlet beluga whale.

There are approaches to quantitatively estimating the value of critical habitat designation, such as outlined in Kroeger (2004), a study referenced in the comments. Kroeger outlined a meta-analysis approach (which is regression analysis of several studies' results) for determining the per-acre net benefits for critical habitat conservation for lynx habitat conservation areas. Kroeger points out that generating benefit transfer estimates through meta-analysis could be error prone, if the studies used in the meta-analysis differ from the study site in perceived resource quality.

Another study recommended in the comments used a meta-analysis approach to derive the benefits to California households of an increased southern sea otter population. Based on existing valuation literature on the species (and other rare and endangered species), this study estimates the non-market benefits of the species itself. This study thus values species based on population increases, rather than habitat designation. This differs from the policy context for estimating benefits of beluga whale proposed critical habitat designation, as there are no quantitative estimates available for how the proposed critical habitat designation will affect Cook Inlet beluga whale population estimates.

Cultural values of species habitat conservation inherently differ by culture. Values derived in Japan, while an indicator of potential value, are not used in this analysis.

Comment 97: Several comments concern the assumptions regarding the current environmental conditions in Cook Inlet, or regarding the effect of the proposed critical habitat designation on environmental conditions. Specifically, some comments assert that the analysis erroneously assumes that degradation of habitat is inevitable in the absence of the proposed critical habitat designation, while others allege that the analysis mistakenly assumes that the proposed critical habitat designation will improve the quality of the natural environment in Cook Inlet, above current levels. One commenter was concerned that the analysis implies that Cook Inlet is currently polluted.

Response: The Final RIR/4(b)(2)PA/FRFA recognizes that the current state of Cook Inlet is suitable for the conservation and recovery of the species. The aim of the critical habitat designation is to bring about the conservation of the Cook Inlet beluga whale through the creation of the benefits described above. The analysis does assume that, in the absence of the designation, the risk of degradation is unacceptably high and that through consultations the risk of degradation otherwise occurring in connection with Federal actions in Cook Inlet will be reduced.

Critical Habitat

4(b)(2) of the ESA requires us to designate critical habitat for threatened and endangered species "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant

impact, of specifying any particular area as critical habitat." This section also grants the Secretary of Commerce (Secretary) discretion to exclude any area from critical habitat if he determines "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." The Secretary's discretion is limited, as he may not exclude areas that "will result in the extinction of the species."

The ESA defines critical habitat under section 3(5)(A) as: "(i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species."

Once critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure they do not fund, authorize, or carry out any actions that will destroy or adversely modify that habitat. This requirement applies along with the section 7 requirement that Federal agencies ensure their actions do not jeopardize the continued existence of listed species.

Physical and Biological Features Essential for Conservation

ESA section 3(5)(A)(i) defines critical habitat to include those "specific areas within the geographical area occupied by the species at the time it is listed * * * on which are found those physical or biological features * * * (I) essential to the conservation of the species and (II) which may require special management considerations or protection." Joint NMFS/FWS regulations for listing endangered and threatened species and designating critical habitat at section 50 CFR 424.12(b) state that the agency "shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection" (also referred to as "Essential Features" or "Primary Constituent Elements"). Pursuant to the regulations, such requirements include, but are not limited to, the following: (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, rearing of offspring, germination, or seed dispersal; and (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. These regulations go on to emphasize that the agency shall focus on essential features within the specific areas considered for designation. These features "may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, geological formation, vegetation type, tide, and specific soil types."

Scientific research, direct observation, and TEK indicate fish are the primary prey species of the Cook Inlet beluga whale, and that certain species are especially important. This importance may be due to feeding strategies of the whales, physical attributes of the prey (*e.g.,* size), the caloric value of the prey, the availability of the prey, and the life-history aspects of the whales, among other considerations. Two fish species that are highly utilized by Cook Inlet beluga whales are king (Chinook) salmon and Pacific eulachon (hooligan). Both of these species are characterized as having very high fat content, returning to the upper Inlet early in the spring, and having adult (spawning) returns which occupy relatively narrow timeframes during which large concentrations of fish may be present at or near the mouths of tributary streams.

Analysis of stomach contents and research of fatty acid signatures within beluga blubber indicate the importance of other species of fishes and invertebrates to the diets of these whales. The most prominent of these are other Pacific salmon (sockeye, chum, and coho), Pacific cod, walleye pollock, saffron cod, and yellowfin sole. Beluga whales are also known to feed on a wide variety of vertebrate and invertebrate prey species. However, the aforementioned fish species occupy a prominent role in their foraging and energetic budgets and are considered essential to the beluga whales' conservation.

NMFS research has considered the distribution of the Cook Inlet beluga whale and its correlations with behavior, habitat function, and physical parameters (Goetz *et al.,* 2007). While these whales are highly mobile and capable of ranging over a large portion of Cook Inlet on a daily basis, in fact they commonly occupy very discrete areas of the Inlet, particularly during summer months. These areas are important feeding habitats, whose value is due to the presence of certain species of prey within the site, the numbers of prey species within the site, and the physical aspects of the site which may act to concentrate prey or otherwise facilitate feeding strategy. In upper Cook Inlet, beluga whales concentrate offshore from several important salmon streams and appear to use a feeding strategy which takes advantage of the bathymetry in the area. The channels formed by the river mouths and the shallow waters act as a funnel for salmon as they move past waiting belugas. Dense concentrations of prey may be essential to beluga whale foraging. Hazard (1988) hypothesized that beluga whales were more successful feeding in rivers where prey were concentrated than in bays where prey were dispersed. Fried *et al.* (1979) noted that beluga whales in Bristol Bay fed at the mouth of the Snake River, where salmon runs are smaller than in other rivers in Bristol Bay. However, the mouth of the Snake River is shallower, and hence may concentrate prey. Research on beluga whales in Bristol Bay suggests these whales preferred certain streams for feeding based on the configuration of the stream channel (Frost *et al.,* 1983). This study theorized beluga whales' feeding efficiencies improve in relatively shallow channels where fish are confined or concentrated. Bathymetry and fish density may be more important than sheer numbers of fish in beluga whale feeding success. Although beluga whales do not always feed at the streams with the highest runs of fish, proximity to medium to high flow river systems is also an important descriptor in assigning importance to feeding habitats. Research has found beluga whale distribution in Cook Inlet is significantly greater near mudflats and medium and high flow accumulation rivers. (These waters were categorized in Goetz *et al.* (2007) using a digital elevation model, similar to drainage basins. A complete list of these waters may be found on our Web site *http://www.fakr.noaa.gov/*). Beluga whales are seldom observed near small flow tributaries.

Cook Inlet beluga whales are preyed upon by killer whales, their only known natural predator. We have received reports of killer whales throughout Cook Inlet, and have responded to several instances of predation within Turnagain Arm, near Anchorage.

Given the small population size of the Cook Inlet beluga whale, predation may have a significant effect on beluga whale recovery. In addition to directly reducing the beluga whale population, the presence of killer whales in Cook Inlet may also increase stranding events. We consider killer whale predation to

be a potentially significant threat to the conservation and recovery of these whales. Beluga whales may employ several defense strategies against killer whale predation. One strategy is to retreat to shallow estuaries too shallow for the larger killer whales. These areas might also provide acoustical camouflage due to their shallow depths, silt loads, and multiple channels.

Because of their importance in the Cook Inlet beluga whales' feeding strategy, as predator escape terrain, and in providing other habitat values, we consider "mudflats," identified here as shallow and nearshore waters proximate to certain tributary streams, to be a physical feature essential to the conservation of the Cook Inlet beluga whale.

For purposes of describing and locating this feature, and after consultation with the author of the model presented in Goetz *et al.* (2007), we determined spatial extent of this feature may best be described as being within the 30-foot (9.1-m) depth contour and within 5 miles (8.0 km) of medium and high flow accumulation rivers. These accumulation rivers are also waters with populations of anadromous fish that are important prey to Cook Inlet belugas.

It appears Cook Inlet beluga whales have lower levels of contaminants stored in their bodies than other populations of belugas. Because these whales occupy the most populated and developed region of the state, they must compete with various anthropogenic stressors, including pollution. These whales often occur in dense aggregations within small nearshore areas, where they are predisposed to adverse effects of pollution. Beluga whales are apex predators, occupying the upper levels of the food chain. This predisposes them to illness and injury by biomagnification of certain pollutants. Another population of beluga whales found in the Gulf of St. Lawrence in Canada is characterized by very high body burdens of contaminants. There, high levels of PCBs, DDT, Mirex, mercury, lead, and indicators of hydrocarbon exposure have been detected in beluga whales. These substances are well-known for their toxic effects on animal life and for interfering with reproduction and resistance to disease. Many of these contaminants are transferred from mother to calf through nursing.

Given present abundance levels, the impact of any additional mortalities to the extinction risk for this DPS, the sensitivity of beluga whales to certain pollutants, their trophic position and biomagnifications, the fact that large numbers of Cook Inlet beluga whales typically occupy very small habitats, and that their range includes the most populated and industrialized area of the state, we consider water quality to be an important aspect of their ecology, and essential to their conservation within both areas 1 and 2.

Cook Inlet beluga whales do not occupy an extensive range, and are not known to undertake migrations. Within their occupied range, however, these whales move freely and continuously. The range of the Cook Inlet beluga whale is neither biologically nor physically uniform. It ranges between shallow mudflats, glacial fjords, deep waters with marine salinities, vegetated shallows of predominantly freshwaters, and areas of the upper Inlet in which heavy ice scour, extreme tidal fluctuations, high silt content, low temperatures, and high turbidity work to limit any intertidal or persistent nearshore organisms. Beluga whales have adapted here by utilizing certain areas over time and space to meet their ecological needs. While much remains to be understood of their ecology and basic life history, it is apparent a large part of their movement and distribution is associated with feeding. Feeding habitat occurs near the mouths of anadromous fish streams, coinciding with the spawning runs of returning adult salmon. These habitats may change quickly as each species of salmon, and often each particular river, is characterized as having its individual run timing. Calving habitat is poorly described, but may depend on such factors as temperatures, depths, and salinities. Predator avoidance may be a very important habitat attribute, and is likely to exist only in shallows within Turnagain and Knik Arms of the upper Inlet. Causeways, dams, and non-physical effects (*e.g.,* noise) can interfere with whale movements. It is essential to the conservation of Cook Inlet beluga whales that they have unrestricted access within and between the critical habitat areas.

Beluga whales are known to be among the most adept users of sound of all marine mammals, using sound rather than sight for many important functions, especially in the highly turbid waters of upper Cook Inlet. Beluga whales use sound to communicate, locate prey, and navigate, and may make different sounds in response to different stimuli. Beluga whales produce high frequency sounds which they use as a type of sonar for finding and pursuing prey, and likely for navigating through ice-laden waters. In Cook Inlet, beluga whales must compete acoustically with natural and anthropogenic sounds. Man-made sources of noise in Cook Inlet include large and small vessels, aircraft, oil and gas drilling, marine seismic surveys, pile driving, and dredging.

Anthropogenic noise above ambient levels may cause behavioral reactions in whales (harassment) or mask communication between these animals. The effects of harassment may also include abandonment of habitat. At louder levels, noise may result in temporary or permanent damage to the whales' hearing. Empirical data exist on the reaction of beluga whales to in-water noise (harassment and injury thresholds) but are lacking regarding levels that might elicit more subtle reactions such as avoiding certain areas. Noise capable of killing or injuring beluga whales, or that might cause the abandonment of important habitats, would be expected to have consequences to this DPS in terms of survival and recovery. We consider "quiet" areas in which noise levels do not interfere with important life history functions and behavior of these whales to be a necessity. Therefore, we consider the assurance of in-water noise levels that do not cause beluga whales to abandon or fail to access important critical habitat areas, such as foraging sites at river mouths, to be an essential feature. This feature is found in both areas 1 and 2.

Based on the best scientific data available of the ecology and natural history of Cook Inlet beluga whales and their conservation needs, we have determined the following physical or biological features are essential to the conservation of this species:

(1) Intertidal and subtidal waters of Cook Inlet with depths less than 30 feet (MLLW)(9.1 m) and within 5 miles (8 km) of high and medium flow anadromous fish streams.

(2) Primary prey species consisting of four species of Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye pollock, saffron cod, and yellowfin sole.

(3) Waters free of toxins or other agents of a type and amount harmful to Cook Inlet beluga whales.

(4) Unrestricted passage within or between the critical habitat areas.

(5) Waters with in-water noise below levels resulting in the abandonment of critical habitat areas by Cook Inlet beluga whales.

One or more of these features is found or identified within the designated critical habitat.

Special Management Considerations or Protection

An occupied area may be designated as critical habitat only if it contains

physical and biological features that "may require special management considerations or protection." It is important to note the term "may require special management considerations or protection" refers to the physical or biological features, rather than the area proposed as critical habitat. Neither the ESA nor NMFS regulations define the "may require" standard. We interpret it to mean that a feature may presently or in the future require special management considerations or protection. 50 CFR 424.02(j) defines "special management considerations or protection" to mean "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species." We considered whether the PCEs indentified for Cook Inlet beluga whales may require special management considerations or protection. In our initial determination, we considered whether there is:

(a) Presently a negative impact on the feature(s);

(b) A possible negative impact on the feature in the future;

(c) Presently a need to manage the feature(s); or

(d) A possible need to manage the feature(s) in the future.

Intertidal and subtidal waters of Cook Inlet with depths less than 30 feet (MLLW)(9.1 m) and within 5 miles (8 km) of high and medium flow anadromous fish streams support important beluga feeding habitat because of their shallow depths and bottom structure which act to concentrate prey and aid in feeding efficiency by belugas. The physical attributes of this PCE could be modified or lost through filling, dredging, channel re-alignment, dikes, and other structures. Within navigable waters, the ACOE has jurisdiction over these actions and structures and administers a permit program under the Rivers and Harbors Act and CWA. In establishing these laws, it was the intent of the U.S. Congress to regulate and manage these activities. The CWA was created to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Section 404 of the CWA regulates the discharge of fill materials into these waters, noting concerns with regard to water supplies, shellfish beds, fishery areas, and spawning and breeding areas. The intent of Congress to protect these features indicates that they may require special management considerations or protection. Further, through the ESA section 7 consultation process, we may identify reasonable and prudent measures to minimize impacts to these features.

Four species of Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye pollock, saffron cod, and yellowfin sole constitute the most important food sources for Cook Inlet beluga whales as identified through research and as held by the traditional wisdom and knowledge of Alaska Natives who have participated in the subsistence hunting of these whales. Stomach analysis of Cook Inlet beluga whales has found these species constitute the majority of consumed prey by weight during summer/ice free periods. All of these species are targeted by commercial fisheries, and some are prized by sport fishermen. The recognition of harm due to overexploitation and the need for continued management underlie the efforts of the state and Federal government to conserve these species. The fisheries in State waters of Cook Inlet are managed under various management plans. In addition to commercial fisheries, State plans manage subsistence, sport, guided sport, and personal use fisheries. Federal fisheries management plans provide for sustainable fishing in Federal waters of lower Cook Inlet. These regulatory efforts indicate that these four fish species may require special management considerations or protection.

Cook Inlet is the most populated and industrialized region of the state. Its waters receive various pollutant loads through activities that include urban runoff, oil and gas activities (*e.g.,* discharges of drilling muds and cuttings, production waters, treated sewage effluent discharge, deck drainage), municipal sewage treatment effluents, oil and other chemical spills, fish processing, and other regulated discharges. The EPA regulates many of these pollutants, and may authorize certain discharges under their National Pollution Discharge Elimination System (section 402 of the CWA). Management of pollutants and toxins is necessary to protect and maintain the biological, ecological, and aesthetic integrity of Cook Inlet's waters. Accordingly, ensuring the absence of toxins or other agents of a type or amount harmful to beluga whales may require special management considerations or protection.

Certain actions may have the effect of reducing or preventing beluga whales from freely accessing the habitat area necessary for their survival. Dams and causeways may create physical barriers, while noise and other disturbance or harassment might cause a behavior barrier, whereby the whales reach these areas with difficulty or, in a worst case, abandon the affected habitat areas altogether due to such stressors. Most in-water structures would be managed under several on-going Federal regulatory programs (*e.g.,* CWA). Regulation for behavior barriers is less clear. Any significant behavioral reaction with the potential to injure whales may be prohibited under the provisions of the ESA and MMPA. However, it is unclear whether these two acts could manage this proposed feature in the absence of designation of critical habitat and recognition of this PCE. The unrestricted passage within or between critical habitat areas may require special management considerations or protection.

We have discussed the importance of sound to beluga whales, and concern for man-made noise in their environment. There exists a large body of information on the effects of noise on beluga whales. Research on captive animals has found noise levels that result in temporary threshold shifts in beluga whale hearing. Based on this research and empirical data from beluga whales in the wild, we have established in-water noise levels that define when these animals are harassed or injured. We consider the threshold for acoustic harassment to be 160 dB re: 1 µPa for impulsive sounds (*e.g.,* pile driving) and 120 dB re: 1 µPa for continuous noise.

No specific mechanisms presently exist to regulate in-water noise, other than secondarily through an associated authorization. Even then, there is some question whether the authorizing state, local, or Federal agency has the authority to regulate noise. Because of the importance of the ability to use sound to Cook Inlet beluga whales, the in-water noise essential feature is clearly one that may require special management considerations or protection.

While these PCEs are currently subject to the aforementioned regulatory management, there remain additional and unmet management needs owing to the fact that none of these management regimes is directed at the conservation and recovery needs of Cook Inlet beluga whales. As a result, through the ESA section 7 consultation process, we may identify reasonable and prudent measures designed to minimize impacts to the PCEs. This supports the finding that each of the identified PCEs "may require special management considerations or protection."

Specific Areas Within the Geographical Area Occupied by the Species

We previously identified the range of Cook Inlet belugas as of the time of listing (74 FR 63080; December 2, 2009)

to be waters of Cook Inlet north of a line from Cape Douglas to Cape Elizabeth. We reviewed all available information on Cook Inlet beluga whale distribution, habitat use and requirements, and features essential to the conservation of these whales. Within the occupied geographical area we identified two specific areas that contain essential physical or biological features (Areas 1 and 2).

Area 1: Area 1 encompasses 1,909 square kilometers (738 sq. mi.) of Cook Inlet northeast of a line from the mouth of Threemile Creek to Point Possession. This area is bounded by the Municipality of Anchorage, the Matanuska-Susitna Borough, and the Kenai Peninsula borough. The area contains shallow tidal flats and river mouths or estuarine areas, and it is important as foraging and calving habitats. Mudflats and shallow areas adjacent to medium and high flow accumulation streams may also provide for other biological needs, such as molting or escape from predators (Shelden *et al.,* 2003). Area 1 also has the highest concentrations of beluga whales from spring through fall as well as the greatest potential for adverse impact from anthropogenic threats.

Many rivers in Area 1 habitat have large eulachon and salmon runs. Two such rivers in Turnagain Arm, Twenty-mile River, and Placer River are visited by beluga whales in early spring, indicating the importance of eulachon runs for beluga whale feeding. Beluga whale use of upper Turnagain Arm decreases in the summer and then increases again in August through the fall, coinciding with the coho salmon run. Early spring (March to May) and fall (August to October) use of Knik Arm is confirmed by studies by Funk *et al.* (2005). Intensive summer feeding by beluga whales occurs in the Susitna delta area, Knik Arm, and Turnagain Arm.

Whales regularly move into and out of Knik Arm and the Susitna delta (Hobbs *et al.,* 2000; Rugh *et al.,* 2004). The combination of satellite telemetry data and long-term aerial survey data demonstrate beluga whales use Knik Arm 12 months of the year, often entering and leaving the Arm on a daily basis (Hobbs *et al.,* 2005; Rugh *et al.,* 2005, 2007). These surveys demonstrate intensive use of the Susitna delta area (from the Little Susitna River to Beluga River) and Chickaloon Bay (Turnagain Arm), with frequent large scale movements between the delta area, Knik Arm, and Turnagain Arm. During annual aerial surveys conducted by the National Marine Mammal Lab in June and July, up to 61 percent of the whales sighted in Cook Inlet were in Knik Arm (Rugh *et al.,* 2000, 2005). The Chickaloon Bay area also appears to be used by beluga whales throughout the year.

Beluga whales are particularly vulnerable to impacts in Area 1 due to their high seasonal densities and the biological importance of the area. Because of their intensive use of this area (*e.g.,* foraging, nursery, predator avoidance), activities that restrict or deter use of or access to Area 1 habitat could reduce beluga whale calving success, impair their ability to secure prey, and increase their susceptibility to predation by killer whales. Activities that reduce anadromous fish runs could also negatively impact beluga whale foraging success, reducing their fitness, survival, and recovery. Furthermore, the tendency for beluga whales to occur in high concentrations in Area 1 habitat predisposes them to harm from such events as oil spills.

Area 2: Area 2 consists of 5,891 square kilometers (2,275 square miles) of less concentrated spring and summer beluga whale use, but known fall and winter use areas. It is located south of Area 1, and includes nearshore areas along the west side of the Inlet and Kachemak Bay on the east side of the lower inlet.

Area 2 is largely based on dispersed fall and winter feeding and transit areas in waters where whales typically occur in smaller densities or deeper waters. It includes both near and offshore areas of the mid and upper Inlet, and nearshore areas of the lower Inlet. Due to the role of this area as probable fall feeding areas, Area 2 includes Tuxedni, Chinitna, and Kamishak Bays on the west coast and a portion of Kachemak Bay on the east coast. Winter aerial surveys (Hansen, 1999) sighted belugas from the forelands south, with many observations around Kalgin Island. Based on tracking data, Hobbs *et al.* (2005) document important winter habitat concentration areas reaching south of Kalgin Island.

Beluga whales have been regularly sighted at the Homer Spit and the head of Kachemak Bay, appearing during spring and fall of some years in groups of 10 to 20 individuals (Speckman and Piatt, 2000). Beluga whales have also been common at Fox River Flats, Muddy Bay, and the northwest shore of Kachemak Bay (NMFS unpubl. data), sometimes remaining in Kachemak Bay all summer (Huntington, 2000).

Deeper mid Inlet habitats may also be important to the winter survival and recovery of Cook Inlet beluga whales.

Unoccupied Areas

Section 3(5)(A)(ii) of the ESA defines critical habitat to include specific areas outside the geographical area occupied by the species at the time of listing only if the Secretary determines them to be essential for the conservation of the species. Section 3(3) of the ESA defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." NMFS' ESA regulations at 50 CFR 424.12(e) state that the agency "shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." We are not including unoccupied areas because there is no information available indicating that any such area may be essential to the conservation of the species.

Activities That May Be Affected

Section 4(b)(8) of the ESA requires that we describe briefly and evaluate, in any proposed or final regulation to designate critical habitat, those activities that may destroy or adversely modify such habitat, or that may be affected by such designation. A wide variety of activities may affect critical habitat and, when carried out, funded, or authorized by a Federal agency, require consultation under section 7 of the ESA. These same activities may also be affected by the designation. Such activities include: Coastal development; pollutant discharge; navigational projects (dredging); bridge construction; marine tidal generation projects; marine geophysical research; oil and gas exploration, development, and production; DOD activities; and hydroelectric development. We do not propose to include in critical habitat any manmade structures and the land on which they rest within the described boundaries that were in existence at the time of designation. While these areas would not be directly affected by designation, they may be affected if a Federal action associated with the area/structure (*e.g.,* a discharge permit from the EPA) might have indirect impacts to critical habitat.

We assessed those actions that may destroy or adversely modify this critical habitat by considering recent agency guidance on conducting adverse modification analyses. Here we apply the statutory provisions of the ESA, including those in section 3 that define "critical habitat" and "conservation," to

determine whether a proposed action might result in the destruction or adverse modification of critical habitat. We have not relied on the regulatory definition of "destruction or adverse modification" at 50 CFR 402.02 because that definition has been struck down by courts. *See Gifford Pinchot Task Force* v. *U.S. Fish & Wildlife Serv.,* 378 F.3d 1059 (9th Cir. 2004). As discussed in our economic report on this designation, each action is reviewed on a case-by-case basis. Without knowledge of, or ability to predict, the specifics of a particular action or activity, it is not possible to list all those that may adversely modify critical habitat. Depending on the specific details of any action, any of the aforementioned activities that may affect critical habitat might also result in its adverse modification.

ESA Section 4(a)(3)(B)(i) Analysis

The ESA was amended by the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) to address the designation of military lands as critical habitat. ESA section 4(a)(3)(B)(i) states: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the DOD, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 670a of this title [section 101 of the Sikes Act], if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

The Eagle River Flats Impact Area (ERFIA), a military live-fire practice range on Joint Base Elmendorf-Richardson, near Anchorage, provides training in artillery such as mortars. While the boundaries for the ERFIA (*i.e.,* the MHHW line) do not overlap with the proposed critical habitat, the firing range includes the lower reaches of Eagle River which could have been included in the designation (similar to the Susitna and Little Susitna Rivers). Research by the DOD has documented beluga whale use, including feeding behavior, within this portion of Eagle River. Having consulted with the U.S. Army Garrison, Alaska, and reviewed its 2007–2011 INRMP, we have determined and set forth in writing here that the plan provides benefit to the Cook Inlet beluga whale. The INRMP establishes coordination and consultation mechanisms with NMFS on issues which may affect Cook Inlet beluga whales, and provides specific means to reduce potential harm due to military actions on the garrison. Some of these benefits include restrictions on access to habitat areas utilized by beluga whales, mitigation measures to reduce potential harassment or injury to beluga whales from activity at the ERFIA, and implementation of research programs regarding the habitat use of Cook Inlet belugas in and adjacent to DOD property at Joint Base Elmendorf-Richardson, Alaska. For the foregoing reasons, we have determined pursuant to section 4(a)(3)(B)(i) that the beluga habitat areas occurring here (specifically; within the ERFIA) do not qualify as critical habitat.

In response to the ANPR, we received a request from the U.S. Air Force to exempt other portions of Joint Base Elmendorf-Richardson from the designated critical habitat. The Air Force sought this exemption based on the existence of an INRMP, consistent with Public Law 108–136.

The landward boundary of critical habitat (MHHW) would overlay the seaward military boundaries for Joint Base Elmendorf-Richardson, which have been established as MHW. Because the areas between MHHW and MHW are predominately unvegetated mudflats at relatively high elevations (or shallow depths) rarely used by beluga whales, and because all lands of Joint Base Elmendorf-Richardson are administered under an INRMP which we found to provide benefit to Cook Inlet beluga whales, these areas were also determined to be ineligible for designation as critical habitat.

ESA Section 4(b)(2) Analysis

Section 4(b)(2) of the ESA states that the Secretary must designate and revise critical habitat on the basis of the best scientific data available after taking into consideration the economic impact, the impact on national security, and other relevant impacts of specifying any particular area as critical habitat. The Secretary of Commerce may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as critical habitat, unless he determines that failure to designate that area would result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factors to use and how much weight to give any factor. Because the authority to exclude is discretionary, exclusion is not required for any area. The section 4(b)(2) considerations are more fully described in the proposed rule. In the following sections, we address the issues relevant to our determinations under this section.

Economic Analysis

We conducted an analysis of the economic impacts of the proposed designation of critical habitat for the Cook Inlet beluga whale, under the mandates of the ESA, Executive Order 12866, Regulatory Flexibility Act, and other applicable law. Each prescribes the analytical frame-of-reference, methodology, interpretive context, and threshold criteria that must be adhered to. These include, but are not limited to, a national accounting stance, use of traditional cost/benefit analytical techniques, emphasis on changes in domestic surplus measures, whether and how impacts accrue to, and distribute across, specific populations of concern (*e.g.,* small entities, minority communities, tribal authorities). The economic analyses were further required to (and, to the fullest extent practicable, do) employ the best scientific data and commercial information available. The analyses underwent a series of systematic technical reviews by agency scientists, attorneys, and administrators, resulting in significant revisions and refinements, both prior to, and after formal public presentation and comment periods. The draft analysis report was made available for public review and comment on our regional Web site. Substantive comments and information received on the analysis are summarized above and are incorporated into the final 4(b)(2) analysis, as appropriate. Taking into account all new and relevant information, we have completed a final economic analysis. That analysis is also available on our Web site (*see* **ADDRESSES** above). NMFS considered the conservation benefits to the Cook Inlet beluga whale of designating two areas; the economic benefits of excluding particular areas within the two areas; and the national security benefits of excluding particular military sites and associated assets owned, heavily utilized, highly depended upon, or controlled by the DOD; and other relevant impacts or benefits, such as impacts to tribal interests, raised through the public comment process.

Benefits of Designation

The primary benefit of designating critical habitat for any endangered species is that, upon designation, section 7 of the ESA requires all Federal agencies to ensure actions they authorize, fund, or undertake are not likely to destroy or adversely modify habitat critical for the conservation and recovery of the listed species. This is in addition to the ESA's requirement that all Federal agencies ensure their actions

are not likely to jeopardize the species' continued existence. Another benefit of designation is that it provides notice of areas, PCEs, and features important to species conservation, and information about the types of activities that may reduce the conservation value of the habitat. Such notice will focus future consultations on key habitat attributes and avoid unnecessary attention to other, non-essential habitat features.

Critical habitat designation may also trigger complementary protections (*i.e.,* benefits) under state or local regulations. In addition to the direct benefits of critical habitat designation accruing to Cook Inlet beluga whales, there are indirect benefits. These benefits may be economic in nature (whether market or non-market, consumptive, non-consumptive, or passive), educational, cultural, and sociological, or they may be expressed through beneficial changes in the ecological functioning and service flows of Cook Inlet, which themselves yield ancillary welfare gains (*e.g.,* improved quality of life) to the region's human population.

All these benefits are also relevant to the evaluation of the "net benefit to the Nation" attributable to critical habitat designation for the Cook Inlet beluga whale. For example, Cook Inlet is one of the "premier tourist destinations" in Alaska, and local economies throughout the inlet and surrounding region provide support services to, and benefit directly from, tourism. Beluga whales are widely identified with Cook Inlet and aggressively promoted as a "unique" and high value component of the Cook Inlet tourism experience. In addition, many local residents express strong affinity for the beluga whales and place significant "value" on the opportunity to encounter this whale in the wild. Federal, state, regional and local governments, Alaska Native peoples, civic groups, non-governmental organizations, and private citizens in the region have invested considerable money, time, and effort to promote, educate, inform, and advocate for the Cook Inlet beluga whale population (*e.g.,* roadside visitor's centers and interpretive sights focusing public attention on, and enjoyment of, the resident beluga whale population). It follows that conservation and recovery of the Cook Inlet beluga whale population, resulting, in part, from designation of its critical habitat, would enhance the "value" tourists (and other travelers) to the inlet receive from visiting the region, and simultaneously benefit the tourism, hospitality, and affiliated services sectors.

Residents of Cook Inlet communities and surrounding areas who value the beluga whale would also be expected to experience a welfare gain, as conservation of the whale's critical habitat results in an enhanced beluga whale population, in turn, making opportunities for sightings and observation more probable and frequent. With sufficient recovery, subsistence users could benefit from the restoration of their traditional uses of Cook Inlet beluga whales. Another benefit of designation could be the increased abundance and sustained viability of Cook Inlet salmon populations, if the environmental and ecological functions of the inlet upon which they depend are sustained or enhanced by beluga whale critical habitat designation.

Cook Inlet salmon runs support a myriad of uses and users, including: commercial fisheries and associated support sectors; recreational anglers, guides, lodges and lodging, transportation, support and affiliated businesses; subsistence communities; and personal use fishermen. Salmon constitute a critical resource for non-human users, as well. Four of the five Pacific salmon species native to the region are listed as PCEs of Cook Inlet beluga whale critical habitat. At various life stages, salmon support many other marine and terrestrial organisms (*i.e.,* mammals, birds, and fishes) as prey species. Ancillary benefits from Cook Inlet beluga whale critical habitat designation may accrue through protection and enhancement of vital components and characteristics of the critical habitat relied upon and exploited by a vast array of species.

It is not presently feasible to monetize, or even quantify, each and every component part of the comprehensive benefit accruing from designation of critical habitat for the Cook Inlet beluga whale. We augmented the quantitative measurements that have been presented with qualitative and descriptive assessment techniques, as provided for in Executive Order 12866 and OMB Circular A–4.

With respect to the qualitative elements of this impact analysis, we have systematically assessed the expected benefit of designating the two critical habitat areas based upon their individual physical, ecological, and biological features and functions. Each area was evaluated on the basis of frequency, duration, seasonality, and behavioral characteristics (*e.g.,* foraging, predatory avoidance, breeding, calving) of use by the beluga whales. These were (to the extent practicable) correlated with site-specific human activity mappings in each area that, through an assumed need for Federal authorization, permits, or funding, might require one or more future ESA section 7 consultations stemming from this critical habitat designation. Based upon available information pertaining to specific structural design elements, physical attributes, construction materials and techniques, development scheduling and duration, etc., for each such identified federally authorized activity, the likelihood and nature of any substantial physical, design, or schedule modification (or other accommodation) of an anticipated Federally authorized activity were analyzed.

The benefit of a comprehensive designation also depends on the inherent conservation value arising from the complementary contribution each area makes to the whole. The two identified critical habitat areas for the Cook Inlet beluga whales are unique and irreplaceable. It is difficult to isolate the value contributed by one area, as each of the two areas supports a distinct and crucial aspect of the Cook Inlet beluga whales' life history. The designation of each particular area (*i.e.,* Area 1 and Area 2) is essential to the conservation function of the whole. On the collective basis of these assessments, evaluations, and analyses, we conclude that there is substantial and compelling evidence that the aggregate (*i.e.,* monetized, quantifiable, and qualitative) conservation benefits of designating the two particular areas identified as critical habitat for Cook Inlet beluga whales is high. By contrast, the expected costs, including those we could monetize, as well as those that can only be qualitatively characterized at this time, such as unspecified design modifications to potential projects, are relatively modest in comparison. Based on past experience and our professional judgment, we expect design modifications attributable solely to the designation of critical habitat will occur rarely. In the event that such a modification was to occur, it could require substantial costs, but it is also possible that the modification would decrease overall project costs. There is no information available at this time to provide any reasonable estimate of costs for the rare and speculative project modifications attributable solely to the designation of critical habitat.

Economic Benefits of Exclusion

The economic impact analysis and preparatory 4(b)(2) assessment, prepared in connection with the designation of critical habitat, describe: the actions and activities within Cook Inlet that we estimate have some potential to be

impacted by the designation; the potential nature of modifications that might be required to avoid adversely modifying or destroying critical habitat; and the expected economic impacts that may accompany such modifications.

Consideration of Benefits of Exclusion Versus Benefits of Designation of Particular Areas

After directing NMFS to consider the economic impact, the impact to national security, and other relevant impacts of specifying a particular area as critical habitat, section 4(b)(2) of the ESA provides that the Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless such exclusion will result in the extinction of the species. The benefit to the species of designation depends upon the inherent conservation value of the area, the seriousness of the threats to that conservation value, and the extent to which an ESA section 7 consultation or other aspects of designation will ameliorate those threats. If a particular action or activity, which is authorized, funded, or carried out by the Federal Government, may destroy or adverse modify critical habitat (as distinct from the "jeopardy" prohibition under section 7), one may isolate and measure the incremental benefit of designation, beyond those protections also provided by virtue of the listing.

We have endeavored to identify the categories of actions and activities within each of the two proposed designated areas that may have the potential to destroy or adversely modify critical habitat. Based upon these categorical lists, the analysis has, to the extent possible in light of the best scientific data and commercial information available, identified and analyzed project-specific impacts attributable to the proposed designation. With a few notable exceptions identified in the analyses, detailed engineering design, construction methods, materials, and schedules, and financing/investment/cost information are not readily available on a project-by-project basis, particularly for plans that are far off into the future. Notwithstanding these empirical data limitations, we have systematically and objectively evaluated the likely economic impact to future development and use uniquely attributable to the beluga whale critical habitat designation in Cook Inlet.

We have determined that designation of critical habitat will enhance the nation's welfare by augmenting the Federal Government's ability to conserve this endangered species and ensuring Federal actions do not destroy or adversely modify habitat critical to that end. This outcome would be facilitated through ESA section 7 consultations and through ongoing public involvement, outreach, information, and education.

The benefits of exclusion of any particular area, as contemplated under section 4(b)(2), involve many of the same considerations identified in assessing the benefits of designation. Among these would be the likelihood or expectation of a Federal action occurring within the particular area under scrutiny. Should such an action or activity be identified, it could trigger one or more of the ESA section 7 consultation requirements. If any such consultation resulted in the determination that the action would destroy or adversely modify critical habitat (or jeopardize the continued existence of the species), we would attempt to identify reasonable and prudent alternatives that allow the project to go forward but avoid adverse modification/jeopardy by changes to design, construction practices, or scheduling. For the benefit-of-designation side of the equation, it is the incremental cost of designation incurred (or, if exclusion of any particular area is justified, the incremental cost avoided), uniquely attributable to designation, that should, to the extent practicable, be evaluated. By disentangling the sources of section 7 consultation effects, we can more appropriately weigh those incremental costs of designation, distinct from the cost associated with listing and the jeopardy prohibition.

In balancing the potential costs of designation, we considered the nature of the threats to critical habitat and the relevance to these threats of ESA section 7's requirement that Federal actions avoid causing the destruction or adverse modification of critical habitat. Because in the present case the condition of adverse modification is likely to be associated with certain work along the Cook Inlet shoreline (and in-water construction and development), and because some modifications to design, construction practices, or scheduling of such projects are possible as a result of consultation, we gave these costs of designation moderately high weight. Such construction and development has the potential to alter several of the identified PCEs of beluga whale habitat, including, but not limited to, in-water noise levels, access to passage corridors, and access to shallow areas for feeding, breeding, or predator escape use. Further, we recognize that the adverse modification/destruction of critical habitat criterion bears a strong relationship to water quality management (*e.g.,* municipal waste water discharge, oil spills, gas and oil drilling discharges, dredge spoils disposal, bilge and ballast discharges), but we lack sufficient point-source and project-specific data to quantitatively estimate any potential attributable economic impact. Nonetheless, we recognize their significance and qualitatively assigned these costs of critical habitat designation a moderate weight.

However, our analysis found few cases where these costs were not co-extensive. We evaluated these incremental costs (*i.e.,* costs beyond those associated with the jeopardy standard), and concluded that the economic benefits of excluding any particular area do not outweigh the conservation benefits of including each particular area within the critical habitat designation, given the endangered status of the whales, the uniqueness and irreplaceable attributes of the habitat, and the fact that designation will enhance the ability of an ESA section 7 consultation to facilitate cost effective and successful protection of this critical habitat.

Exclusion for National Security Reasons

We received a request from the Port of Anchorage to exclude both the Port of Anchorage and Port MacKenzie from critical habitat designation based on national security considerations. While the DOD itself did not make a request to exclude the POA, DOD has designated the POA as one of nineteen Strategic Ports, which forms the basis for our exclusion. NMFS conferred with the Alaska Command after the request from the POA for the exclusion and the Alaska Command confirmed that the POA is a strategic port that could be excluded from critical habitat designation. Both the Port of Anchorage and Port MacKenzie are within the boundaries we proposed for critical habitat designation and include docking facilities, nearshore areas and structures such as docks, piers, and wharfs, and offshore navigational channels, turning basins, anchorage areas, and areas with security restrictions enforced by the U.S. Coast Guard (USCG).

In making its request for an exclusion, the POA asserts that it is strategically important for military readiness. The DOD did not request the exclusion of the POA, but confirmed, through the Alaskan Command, that the U.S. Army's worldwide deployments from Alaska go through the POA, and that since 2005, over 18,000 pieces of military-related

cargo-combat vehicles, weaponry, and support equipment have passed through the POA on their way to and from the Middle East and training grounds in the Lower 48 and the Western Pacific.

In addition, the POA is one of nineteen ports designated by the DOD as a Strategic Port. There are four military bases located in Alaska (Joint Base Elmendorf-Richardson, Eielson AFB, Ft. Wainwright, and Ft. Greely), and the POA supports the U.S. military in Alaska as its primary source of daily operating supplies. Over 33 million gallons of aviation fuel for the military are offloaded annually at this port.

Thus the U.S. military's ability to deploy to combat theaters around the globe is heavily dependent on sealift through the POA. Particularly in times of active warfare, it is critical that there be no unnecessary delays in deployment or reductions in military readiness. In short, the POA plays a vitally important role in ensuring the readiness of military operations in Alaska.

We have conferred with the Alaskan Command and conclude that the benefits of exclusion outweigh the benefits of inclusion. The principal benefit from excluding the POA is avoiding the risk that the designation might impede the POA's operations or otherwise result in a reduction in military readiness. The costs of including the area as critical habitat generally include the costs (including delays) associated with ESA section 7 consultation under the destruction/adverse modification of critical habitat standard, any change in the POA's activities or functions necessary to avoid adverse modification or destruction of critical habitat, and any concomitant reduction in military readiness. Given that the DOD has stated the POA is critical to military operations in and deploying out of the State of Alaska, any delays in military movements through the POA could reduce the ability of the military to ensure national security.

By contrast, we believe the benefits to the conservation of the Cook Inlet beluga whale from designating the particular area subject to the exclusion as critical habitat are small. Even with the exclusion, Federal agencies would still have to consult to ensure that their activities do not jeopardize the continued existence of the Cook Inlet beluga whale, which would include any direct, indirect, or cumulative effects of the action on critical habitat adjacent to the excluded area. Moreover, any Federal actions at the POA that may adversely affect or destroy critical habitat areas not excluded by this rule would remain subject to all of section 7's consultation requirements. Therefore, most of the conservation benefits will accrue despite the exclusion.

In assessing the impacts of this critical habitat designation on national security, we considered the following factors: (1) The size of the particular area requested for exclusion relative to the area proposed for critical habitat designation; (2) the likelihood of a consultation with the DOD, or of a consultation having direct impact on DOD in this area; (3) the intensity of use of the area by the DOD; (4) the likelihood that DOD activities would destroy or adversely modify the critical habitat; (5) the level of protection provided to one or more PCEs by existing DOD safeguards, and (6) the likelihood that other Federal actions may occur in the particular area that would no longer be subject to the critical habitat provisions if the area were excluded from designation.

Factors 1, 3, 4, and 6 weigh in favor of the exclusion. The area excluded is very small in contrast to the area included—less than 1 percent of the habitat proposed for designation in Cook Inlet. It appears unlikely that most DOD activities associated with the POA would require consultation on critical habitat because cargo loading and ship movement should not affect that habitat or the identified essential features. There appears little probability that DOD activities here would be likely to destroy or adversely modify critical habitat. Finally, there are no other Federal actions expected to occur that would no longer be subject to the critical habitat provisions if the area were excluded from designation. As for the remaining factors, factor 2 is neutral, and factor 5 weighs against granting the exclusion since we are unaware of any existing protections provided by DOD to the PCEs within the excluded area.

We also considered the high priority placed on national security, the potential for designation of critical habitat to impact military readiness, and the total habitat value represented by this area. Based on our assessment of these considerations, we conclude that benefits to national security of exclusion outweigh the conservation benefits of inclusion. We, therefore, are not designating the POA, nor its immediately adjacent offshore operational area, as critical habitat. *See* Figure 1 for the specific areas and excluded area.

While the POA exclusion area contains some of the essential features of this critical habitat, those features exist throughout the designated habitat and are not unique to the POA area. The area of the POA is less than 1 percent of the available habitat within Cook Inlet, and its exclusion would not be likely to result in the extinction of this DPS.

Port MacKenzie is not listed as a Strategic Port, nor is it currently adjacent to military lands, accessible by a major road system, utilized for munitions transfers, or serviced by rail. We received no supporting recommendations for this exemption from the DOD, and did not find substantial evidence of impacts to national security because of Port MacKenzie's inclusion as critical habitat. In light of the conservation benefits described in this rulemaking from its inclusion, we decline to exercise our discretion to exclude Port MacKenzie from the critical habitat designation.

Conclusions

With one exception, we conclude that the benefits from excluding any and each particular area do not outweigh the benefits of designation as critical habitat, upon consideration of: (1) The functional role of critical habitat and its essential features in the conservation of Cook Inlet beluga whales; (2) the benefits of designation to Cook Inlet beluga whales in terms of enhanced ability to protect or conserve this habitat under ESA consultation; and (3) the economic costs borne by any and each particular area's inclusion. We conclude that, based on consideration of the impact to national security, the benefits from excluding the POA from the critical habitat designation outweigh those for its inclusion, and we have determined not to designate this particular area as critical habitat for the Cook Inlet beluga whale.

Critical Habitat Designation

This final rule will designate as critical habitat for the Cook Inlet beluga whale 7,800 square kilometers (3,013 square miles) of marine and estuarine area in Cook Inlet, Alaska, within the geographical area occupied by this species. In determining this critical habitat, we considered comments received in response to the Advance Notice of Proposed Rulemaking (74 FR 17131; April 14, 2009), the proposed rule (74FR 63080; December 2, 2009), peer review, public hearings; sighting reports, satellite telemetry data, TEK, scientific papers and other research; the biology and ecology of the Cook Inlet DPS of beluga whales; and information indicating the presence of one or more of the identified PCEs within certain areas of their range. We designate

critical habitat within two areas of Cook Inlet.

The designated critical habitat does not include two areas for which the military has provided an INRMP that we have determined provides benefits to the Cook Inlet beluga whale pursuant to section 4(a)(3)(B)(i) of the ESA: (1) The Eagle River Flats Range on Fort Richardson; and (2) military lands of Joint Base Elmendorf-Richardson between Mean Higher High Water and Mean High Water. In addition, we have determined that the benefits of excluding the Port of Anchorage and adjacent navigation channel and turning basin outweigh the benefits of including it because of national security reasons, and excluding these areas will not result in the extinction of the Cook Inlet beluga whale. We are not designating any unoccupied geographical areas as critical habitat.

Classification

Regulatory Planning and Review (Executive Order 12866)

This final rule has been determined to be significant for purposes of E.O. 12866. The economic benefits and costs of this critical habitat designation are described in our economic report supporting this rulemaking.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, whenever an agency is required to publish a notice of proposed rulemaking for any proposed rule, it must either certify that the action is not likely to result in significant adverse economic impacts on a substantial number of small entities; or it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). We have prepared a final regulatory flexibility analysis (FRFA), as part of our economic analysis. Responses to comments on this document are provided above in the preamble to the rule, and any necessary changes were made to the FRFA.

The reasons for the action, a statement of the objectives of the action, and the legal basis for the final rule are discussed earlier in the preamble. A summary of the analysis follows.

The small entities that may be directly regulated by this action are those that seek formal approval (*e.g.,* a permit) from, or are otherwise authorized by, a Federal agency to undertake an action or activity that "may affect" critical habitat for the Cook Inlet beluga whale. Submission by a small entity of such a request for a Federal agency's approval would require that agency (*i.e.,* the "action agency") to consult with NMFS (*i.e.,* the "consulting agency").

Consultations vary from simple to highly complex, depending on the specific facts of each action or activity for which application is made. Attributable costs are directly proportionate to complexity. In the majority of instances projected to take place under this critical habitat designation, these costs are expected to accrue solely to the Federal agencies that are party to the consultation. In only the most complex formal consultations, a private sector applicant might incur costs directly attributable to the designation consultation process. For example, if the formal consultation concludes that the proposed activity is likely to destroy or adversely modify critical habitat, the applicant will have to implement modifications to avoid such effects. These modifications have the potential to result in adverse economic impacts, although they need not necessarily do so.

An examination of the Federal agencies with management, enforcement, or other regulatory authority over activities or actions within, or immediately adjacent to, the designated critical habitat area, resulted in the following list: The ACOE, EPA, Minerals Management Service (MMS), Maritime Administration (MARAD), USCG, DOD, NMFS, Federal Highway Administration (FHWA), Federal Energy Regulatory Commission (FERC), and Federal Aviation Administration (FAA). Activities or actions that require Federal authorization, permits, or funding, and which may be expected to require some level of consultation, include: COE permits for structures and work in waters of the United States; EPA permitting of discharges under the National Pollutant Discharge Elimination System; MMS oil and gas exploration and production permitting in Federal waters of Cook Inlet; MARAD permits for the POA expansion; USCG permits for spill response plans; DOD activities at Joint Base Elmendorf-Richardson facilities; NMFS authorizations of commercial fisheries, and review of subsistence harvest allowances; FHWA funding of highway and bridge improvements along Turnagain Arm; FERC permits for turbine electrical generation projects (wind and tidal); and FAA permitting of regional airport expansions and development.

A 10-year "post-critical habitat designation" analytical horizon was adopted, during which time NMFS may reasonably expect to consult on critical habitat-related actions with one or more of the action agencies identified above. The majority of the consultations are expected to be "informal" (we estimate 90 percent of all consultations would be informal). In each of these, no adverse impacts would accrue to the entity or applicant requesting Federal action. The more complex and costly formal consultations are projected to account for, perhaps, ten percent. Here, NMFS and the Federal action agency may develop alternatives that prevent the likelihood that critical habitat will be destroyed or adversely affected. The extent to which these formal consultations will result in more than *de minimus* third party costs, as well as whether such third parties constitute small entities for Regulatory Flexibility Act purposes, cannot be predicted. Often, no consultation will be necessary, as all questions can be resolved through the "technical assistance" process.

We lack sufficient information to estimate precisely the number of consultations that may result in a determination of destruction or adverse modification to critical habitat. However, on the basis of the underlying biological, oceanographic, and ecological science used to identify the PCEs that define critical habitat for the Cook Inlet beluga whale, as well as the foregoing assumptions, empirical data, historical information, and accumulated experience regarding human activity in Cook Inlet, we believe that various federally authorized activities have the potential to "destroy or adversely modify" Cook Inlet beluga whale critical habitat. While we are unable to predict in advance exactly which activities might result in the destruction or adverse modification of the designated critical habitat, we note that such activities are restricted to those actions impacting the identified essential features, or PCEs. Importantly, however, an action that may adversely affect a PCE is not necessarily one that will result in the destruction or adverse modification of the proposed critical habitat.

Executive Order 13211

On May 18, 2001, the President issued an E.O. on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking any action that promulgates or is expected to lead to the promulgation of a final rule or

regulation that (1) is a significant regulatory action under E.O. 12866 and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy.

We have considered the potential impacts of this action on the supply, distribution, or use of energy and finds the designation of critical habitat will not have impacts that exceed the thresholds identified above.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(a) This final rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.)

"Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program." The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the ESA, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above to State governments.

(b) Due to the prohibition against the take of this species both within and outside of the designated areas, we do not anticipate that this final rule will significantly or uniquely affect small governments. As such, a Small Government Agency Plan is not required.

Takings

In accordance with E.O. 12630, the final rule does not have significant takings implications. A takings implication assessment is not required. The designation of critical habitat affects only Federal agency actions. Private lands do not exist within the designated critical habitat and therefore would not be affected by this action.

Federalism

In accordance with E.O. 13132, this final rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of Commerce policies, we have requested information from, and will continue to coordinate this critical habitat designation with appropriate state resource agencies in Alaska. This designation may have some benefit to state and local resource agencies in that the areas essential to the conservation of the species are more clearly defined, and the PCEs of the habitat necessary to the survival of Cook Inlet beluga whale are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case ESA section 7 consultations to occur).

Civil Justice Reform

In accordance with E.O. 12988, the Department of Commerce has determined that this final rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the ESA. This final rule uses standard property descriptions and identifies the PCEs within the designated areas to assist the public in understanding the habitat needs of the Cook Inlet beluga whale.

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

This final rule does not contain new or revised information collection for which the Office of Management and Budget (OMB) approval is required under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

National Environmental Policy Act

NMFS has determined that an environmental analysis as provided for under the National Environmental Policy Act of 1969 for critical habitat designations made pursuant to the ESA is not required. *See Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

Government-to-Government Relationship

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175—Consultation and Coordination with Indian Tribal Governments—outlines the responsibilities of the Federal Government in matters affecting tribal interests. Public Law 108–199 (2004), codified in notes to 25 U.S.C. 450, requires all Federal agencies to consult with Alaska Native corporations on the

same basis as Indian tribes under this Executive Order.

We have determined that designation of critical habitat for the Cook Inlet beluga whale in Cook Inlet, Alaska, would not have tribal implications, nor affect any tribal governments or Native corporations. Although the Cook Inlet beluga whale may be hunted by Alaska Natives for traditional use or subsistence purposes, none of the designated critical habitat areas occurs on tribal lands, affects tribal trust resources, or the exercise of tribal rights.

References Cited

A complete list of all references cited in this rulemaking can be found on our Web site at *http://www.fakr.noaa.gov/* and is available upon request from the NMFS office in Juneau, Alaska (*see* **ADDRESSES** section).

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: April 1, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons stated in the preamble, we amend 50 CFR part 226 as follows:

PART 226—[AMENDED]

■ 1. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 2. Add § 226.220, to read as follows:

§ 226.220 Critical habitat for the Cook Inlet beluga whale (Delphinapterus leucas).

Critical habitat is designated in Cook Inlet, Alaska, for the Cook Inlet beluga whale as described in paragraphs (a) and (b) of this section. The textual description of this critical habitat is the definitive source for determining the critical habitat boundaries. General location maps are provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries. Critical habitat does not include manmade structures and the land on which they rest within the designated boundaries described in paragraphs (a)(1) and (2) of this section that were in existence as of May 11, 2011.

(a) *Critical Habitat Boundaries.* Critical habitat includes two specific marine areas in Cook Inlet, Alaska. These areas are bounded on the upland by Mean High Water (MHW) datum, except for the lower reaches of four tributary rivers. Critical habitat shall not extend into the tidally-influenced channels of tributary waters of Cook Inlet, with the exceptions noted in the descriptions of each critical habitat area.

(1) *Area 1.* All marine waters of Cook Inlet north of a line from the mouth of Threemile Creek (61°08.5′ N., 151°04.4′ W.) connecting to Point Possession (61°02.1′ N., 150°24.3′ W.), including waters of the Susitna River south of 61°20.0′ N., the Little Susitna River south of 61°18.0′ N., and the Chickaloon River north of 60°53.0′ N.

(2) *Area 2.* All marine waters of Cook Inlet south of a line from the mouth of Threemile Creek (61°08.5′ N., 151°04.4′ W.) to Point Possession (61°02.1′ N., 150°24.3′ W.) and north of 60°15.0′N., including waters within 2 nautical miles seaward of MHW along the western shoreline of Cook Inlet between 60°15.0′ N. and the mouth of the Douglas River (59°04.0′ N., 153°46.0′ W.); all waters of Kachemak Bay east of 151°40.0′ W.; and waters of the Kenai River below the Warren Ames bridge at Kenai, Alaska.

(b) A map of the designated critical habitat for Cook Inlet beluga whale follows (Figure 1).

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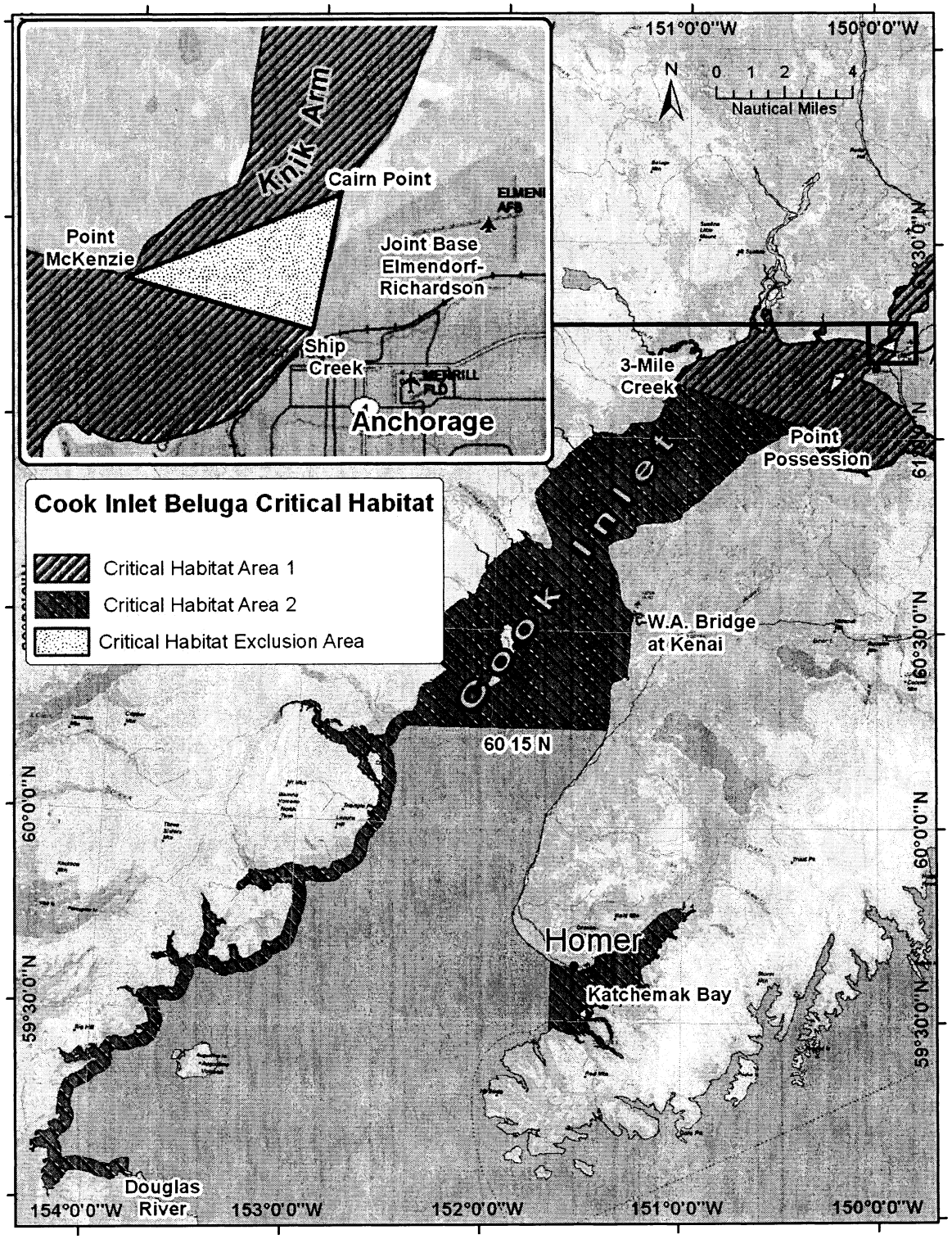

Figure 1. Cook Inlet beluga whale critical habitat.

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(c) *Primary constituent elements.* The primary constituent elements essential to the conservation of the Cook Inlet beluga whale are:

(1) Intertidal and subtidal waters of Cook Inlet with depths <30 feet (MLLW) and within 5 miles of high and medium flow anadromous fish streams.

(2) Primary prey species consisting of four species of Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye pollock, saffron cod, and yellowfin sole.

(3) Waters free of toxins or other agents of a type and amount harmful to Cook Inlet beluga whales.

(4) Unrestricted passage within or between the critical habitat areas.

(5) Waters with in-water noise below levels resulting in the abandonment of critical habitat areas by Cook Inlet beluga whales.

(d) *Sites owned or controlled by the Department of Defense, or of interest to national security.* Critical habitat does not include the following areas owned by the Department of Defense or for which the Secretary has determined to exclude for reasons of national security:

(1) All property and overlying waters of Joint Base Elmendorf-Richardson between Mean Higher High Water and Mean High Water; and

(2) All waters off the Port of Anchorage which are east of a line connecting Cairn Point (61°15.4′ N., 149°52.8′ W.) and Point MacKenzie (61°14.3′ N., 149°59.2′ W.) and north of a line connecting Point MacKenzie and the north bank of the mouth of Ship Creek (61°13.6′ N., 149°53.8′ W.).

[FR Doc. 2011–8361 Filed 4–8–11; 8:45 am]

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