AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

# FEDERAL REGISTER

Vol. 76 Wednesday,
No. 249 December 28, 2011

Pages 81359–81786

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.ofr.gov.*

**The seal of the National Archives and Records Administration authenticates the Federal Register** as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.fdsys.gov*, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, 1 (January 2, 1994) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Printing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpo@custhelp.com.*

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

**How To Cite This Publication:** Use the volume number and the page number. Example: 76 FR 12345.

**Postmaster:** Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

## SUBSCRIPTIONS AND COPIES

**PUBLIC**

**Subscriptions:**

| | |
|---|---|
| Paper or fiche | **202–512–1800** |
| Assistance with public subscriptions | **202–512–1806** |

**General online information** **202–512–1530; 1–888–293–6498**

**Single copies/back copies:**

| | |
|---|---|
| Paper or fiche | **202–512–1800** |
| Assistance with public single copies | **1–866–512–1800 (Toll-Free)** |

**FEDERAL AGENCIES**

**Subscriptions:**

| | |
|---|---|
| Paper or fiche | **202–741–6005** |
| Assistance with Federal agency subscriptions | **202–741–6005** |

Printed on recycled paper.

# Contents

**Federal Register**

Vol. 76, No. 249

Wednesday, December 28, 2011

**Actuaries, Joint Board for Enrollment**
*See* Joint Board for Enrollment of Actuaries

**Agriculture Department**
*See* Animal and Plant Health Inspection Service
*See* Food and Nutrition Service
*See* Food Safety and Inspection Service
*See* Forest Service
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 81465–81466

**Animal and Plant Health Inspection Service**
**RULES**
European Larch Canker; Expansion of Regulated Areas, 81359–81360
**PROPOSED RULES**
Importation of Litchi Fruit from Australia, 81401–81404
Information from Foreign Regions Applying for Recognition of Animal Health Status, 81404–81408
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Importation of Baby Corn and Baby Carrots From Zambia, 81467
Importation of Small Lots of Seed, 81466
Environmental Assessments; Availability, etc.:
Field Testing of Swine Influenza Vaccine, RNA, 81467–81468
Importation Authorizations:
Fresh Litchi From the Republic of South Africa, 81469–81471
Shredded Lettuce From Egypt, 81468–81469

**Antitrust Division**
**NOTICES**
Proposed Final Judgments and Competitive Impact Statements:
U.S. v. Exelon Corp., et al., 81528–81541

**Army Department**
*See* Engineers Corps

**Arts and Humanities, National Foundation**
*See* National Foundation on the Arts and the Humanities

**Census Bureau**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
The American Community Survey 2013 Content Changes and Internet Response Mode, 81474–81475

**Centers for Medicare & Medicaid Services**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 81503–81504

**Children and Families Administration**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 81504–81505
Statement of Organization, Functions, and Delegations of Authority:
Administration on Children, Youth and Families, 81505–81508

**Coast Guard**
**RULES**
Safety Zones:
San Francisco New Year's Eve Fireworks Display, San Francisco, CA, 81371

**Commerce Department**
*See* Census Bureau
*See* Foreign-Trade Zones Board
*See* National Institute of Standards and Technology
*See* National Oceanic and Atmospheric Administration
*See* Patent and Trademark Office
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 81472–81474

**Commodity Futures Trading Commission**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Large Trader Reports, 81481–81482

**Corporation for National and Community Service**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 81482

**Defense Department**
*See* Engineers Corps
**RULES**
National Security Personnel System, 81359
TRICARE:
Changes Included in the National Defense Authorization Act for Fiscal Year 2010; Enhancement of Transitional Dental Care for Members of the Reserve Component, etc., 81366–81368
Elimination of Co-payments for Authorized Preventive Services for Certain TRICARE Standard Beneficiaries, 81368–81370
**NOTICES**
Arms Sales, 81482–81485
Meetings:
Defense Business Board, 81485

**Department of Transportation**
*See* Pipeline and Hazardous Materials Safety Administration

**Education Department**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 81486–81487

**Energy Department**
*See* Western Area Power Administration
**PROPOSED RULES**
Contractor Legal Management Requirements; Acquisition Regulations, 81408–81421

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 81487
Meetings:
Environmental Management Site-Specific Advisory Board, Savannah River Site, 81487

**Engineers Corps**
NOTICES
Meetings:
Chief of Engineers Environmental Advisory Board, 81485–81486

**Environmental Protection Agency**
RULES
Approval and Disapproval and Promulgation of Implementation Plans; Texas:
Infrastructure and Interstate Transport Requirements for the 1997 Ozone and the 1997 and 2006 PM2.5 NAAQS, 81371–81393
Approvals and Promulgations of Implementation Plans:
Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility, etc., 81728–81759
Tolerances for Emergency Exemptions (Multiple Chemicals); Extensions, 81393–81396
PROPOSED RULES
Significant New Use Rule for Phenol, 2,4–dimethyl–6–(1–methylpentadecyl)–, 81437–81441
Significant New Use Rules on Certain Chemical Substances, 81441–81462
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals
National Pollutant Discharge Elimination System Program, 81488–81490
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Contractor Cumulative Claim and Reconciliation Renewal, 81490–81491
NESHAP for Gasoline Distribution Bulk Terminals, Bulk Plants, Pipeline Facilities and Gasoline Dispensing Facilities, 81495–81496
NESHAP for Iron and Steel Foundry Area Sources, 81493–81495
Reporting Requirements Under EPA's Green Power Partnership and Combined Heat and Power Partnership, 81491–81493
Product Cancellation Order for Certain Pesticide Registrations, 81496–81503

**Executive Office of the President**
*See* Trade Representative, Office of United States

**Federal Aviation Administration**
RULES
Special Conditions:
Gulfstream Aerospace LP Model G280 Airplanes, Operation Without Normal Electrical Power, 81360–81362
PROPOSED RULES
Airworthiness Directives:
Eurocopter France Helicopters, 81430–81432

**Federal Communications Commission**
RULES
Connect America Fund; A National Broadband Plan for Our Future:
Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support, 81562–81664
PROPOSED RULES
Preliminary Plan for Retrospective Analysis of Existing Rules, 81462–81463

**Federal Motor Carrier Safety Administration**
PROPOSED RULES
Hours of Service of Motorcoach Drivers, 81463–81464

**Fish and Wildlife Service**
RULES
Endangered and Threatened Wildlife and Plants:
Revising the Listing of the Gray Wolf (Canis lupus) in the Western Great Lakes, 81666–81726

**Food and Drug Administration**
RULES
Temperature-Indicating Devices:
Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers; Correction, 81363
NOTICES
Communications and Activities:
Off-Label Uses of Marketed Products and Use of Products Not Yet Legally Marketed, 81508–81510
Draft Guidances for Industry and Staff; Availability:
510(k) Program, Evaluating Substantial Equivalence in Premarket Notifications; Availability, 81510–81511
Center for Devices and Radiological Health Appeals Processes, 81511–81513
Guidance for Industry:
Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation; Availability, 81513
Meetings:
Cellular, Tissue, and Gene Therapies Advisory Committee, 81513–81514

**Food and Nutrition Service**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Special Supplemental Nutrition Program for Women, Infants and Children, 81471–81472

**Food Safety and Inspection Service**
RULES
Cooperative Inspection Programs:
Interstate Shipment of Meat and Poultry Products; Correction, 81360

**Foreign-Trade Zones Board**
NOTICES
Applications for Subzone Authority:
Foreign Trade Zones 140 and 78 — Dow Corning Corp., Hemlock Semiconductor Corp., and Hemlock Semiconductor, LLC, 81475
Expansion of Manufacturing Authority:
Epson Portland Inc., Hillsboro, OR, Foreign-Trade Zone 45, Portland, OR, 81475–81476
Reorganizations under Alternative Site Framework:
Foreign-Trade Zone 215, Sebring, FL, 81476

**Forest Service**
NOTICES
Meetings:
National Urban and Community Forestry Advisory Council, 81472

**Government Accountability Office**
NOTICES
Medicare Payment Advisory Commission Nomination Letters, 81503

**Health and Human Services Department**
*See* Centers for Medicare & Medicaid Services
*See* Children and Families Administration
*See* Food and Drug Administration
*See* Health Resources and Services Administration
*See* National Institutes of Health

**Health Resources and Services Administration**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 81514–81515
Meetings:
National Advisory Council on the National Health Service Corps, 81515

**Homeland Security Department**
*See* Coast Guard
*See* U.S. Citizenship and Immigration Services
*See* U.S. Customs and Border Protection
NOTICES
Meetings:
Homeland Security Advisory Council, 81516–81517
The Menlo Report: Ethical Principles Guiding Information and Communication Technology Research, 81517

**Housing and Urban Development Department**
RULES
Exemptions:
Property Flipping; Extension, 81363–81365
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Continuum of Care Homeless Assistance Program Registration, 81520
Rural Housing Stability Program Registration, 81520–81521

**Indian Affairs Bureau**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Native Employment Training Grant Program, 81521–81523

**Interior Department**
*See* Fish and Wildlife Service
*See* Indian Affairs Bureau
*See* Land Management Bureau
*See* National Indian Gaming Commission
NOTICES
Workshops:
Vendor Outreach for Historically Underutilized Business Zone Small Businesses, 81521

**International Trade Commission**
NOTICES
Investigations; Terminations, Modifications and Rulings:
Certain Wireless Devices With 3g Capabilities And Components Thereof, 81527–81528

**Joint Board for Enrollment of Actuaries**
RULES
Regulations Governing the Performance of Actuarial Services; Corrections, 81362–81363

**Justice Department**
*See* Antitrust Division

**Labor Department**
NOTICES
Request for Comments under E.O. 12898, 81541–81542

**Land Management Bureau**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Federal Advisory Committee Background Information Nomination Form, 81523–81524
Alaska Native Claims Selection, 81524
Public Land Orders:
Montana, 81524–81525
Utah; Public Meeting, 81525
Realty Actions:
Conveyance of Federally Owned Mineral Interests in Pinal County, AZ, 81525–81526
Recreation and Public Purposes Act Classification of Public Land, Comanche County, OK, 81526–81527

**National Credit Union Administration**
PROPOSED RULES
Eligible Obligations, Charitable Contributions, Nonmember Deposits, Fixed Assets, Investments, etc., 81421–81429

**National Foundation on the Arts and the Humanities**
NOTICES
Meetings:
Arts Advisory Panel, 81542

**National Indian Gaming Commission**
NOTICES
Tribal Consultations; Schedule Update, 81527

**National Institute of Standards and Technology**
NOTICES
Meetings:
Information Security and Privacy Advisory Board, 81477
National Conference on Weights and Measures, 81477–81479

**National Institutes of Health**
NOTICES
Meetings:
Center for Scientific Review, 81515–81516

**National Oceanic and Atmospheric Administration**
NOTICES
Fisheries of the South Atlantic and Gulf of Mexico:
Southeast Data, Assessment, and Review; Spanish Mackerel and Cobia, 81479–81480
Meetings:
Gulf of Mexico Fishery Management Council, 81480–81481

New England Fishery Management Council, 81480
South Atlantic Fishery Management Council, 81480

**Nuclear Regulatory Commission**
**NOTICES**
Meetings; Sunshine Act, 81542
Orders Modifying Licenses:
ZionSolutions, LLC, Zion Nuclear Power Station, Independent Spent Fuel Storage Installation, 81542–81547
Staff Guidances; Availability:
Section 13.5.1.1, Revision 1 on Administrative Procedures – General, 81547–81548

**Office of United States Trade Representative**
*See* Trade Representative, Office of United States

**Patent and Trademark Office**
**PROPOSED RULES**
Revision of Patent Term Adjustment Provisions Relating to Appellate Review, 81432–81437

**Personnel Management Office**
**RULES**
National Security Personnel System, 81359

**Pipeline and Hazardous Materials Safety Administration**
**RULES**
Hazardous Materials:
Miscellaneous Amendments; Response to Appeals; Corrections, 81396–81400

**Postal Regulatory Commission**
**NOTICES**
Post Office Closings, 81548–81549

**Securities and Exchange Commission**
**RULES**
Mine Safety Disclosure, 81762–81785
**NOTICES**
Self-Regulatory Organizations; Proposed Rule Changes:
Financial Industry Regulatory Authority, Inc., 81549–81552
NASDAQ OMX PHLX LLC, 81552–81553

**Small Business Administration**
**PROPOSED RULES**
Early Stage Small Business Investment Companies:
Small Business Investment Companies; Public Webinars, 81430
**NOTICES**
Disaster Declarations:
New Mexico; Amendment 1, 81553–81554

**State Department**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Department of State Acquisition Regulation, 81554–81555
Special Immigrant Visa Biodata, 81554

**Surface Transportation Board**
**NOTICES**
Release of Waybill Data, 81557

**Trade Representative, Office of United States**
**NOTICES**
Identification of Countries under Section 182 of the Trade Act, 81555–81556

**Transportation Department**
*See* Federal Aviation Administration
*See* Federal Motor Carrier Safety Administration
*See* Pipeline and Hazardous Materials Safety Administration
*See* Surface Transportation Board

**Treasury Department**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 81557–81559

**U.S. Citizenship and Immigration Services**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Travel Document, 81517–81518

**U.S. Customs and Border Protection**
**NOTICES**
Final Determination Concerning Laser-Based Multi-Function Office Machines, 81518–81520

**Western Area Power Administration**
**NOTICES**
Energy Planning and Management Program Power Marketing Initiative; Withdrawal:
Boulder Canyon Project Post-2017 Remarketing, 81487–81488

---

**Separate Parts In This Issue**

**Part II**
Federal Communications Commission, 81562–81664

**Part III**
Interior Department, Fish and Wildlife Service, 81666–81726

**Part IV**
Environmental Protection Agency, 81728–81759

**Part V**
Securities and Exchange Commission, 81762–81785

---

**Reader Aids**

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

## CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.


**5 CFR**
Ch. XCIX.....81359

**7 CFR**
301.....81359
**Proposed Rules:**
319.....81401

**9 CFR**
332.....81360
381.....81360
**Proposed Rules:**
92.....81404

**10 CFR**
**Proposed Rules:**
719.....81408

**12 CFR**
**Proposed Rules:**
701.....81421
703.....81421
723.....81421
742.....81421

**13 CFR**
**Proposed Rules:**
107.....81430

**14 CFR**
25.....81360
**Proposed Rules:**
39.....81430

**17 CFR**
229.....81762
239.....81762
249.....81762

**20 CFR**
901 (2 documents) .....81362

**21 CFR**
113.....81363

**24 CFR**
203.....81363

**32 CFR**
199 (2 documents) .....81366, 81368

**33 CFR**
165.....81371

**37 CFR**
**Proposed Rules:**
1.....81432

**40 CFR**
52 (2 documents) .....81371, 81728
180.....81393
**Proposed Rules:**
721 (3 documents) .....81437, 81441, 81447

**47 CFR**
0.....81562
1.....81562
20.....81562
36.....81562
51.....81562
54.....81562
61.....81562
64.....81562
69.....81562
**Proposed Rules:**
Ch. I.....81462

**48 CFR**
**Proposed Rules:**
931.....81408
952.....81408
970.....81408

**49 CFR**
172.....81396
173.....81396
**Proposed Rules:**
385.....81463
386.....81463
390.....81463
395.....81463

**50 CFR**
17.....81666

# Rules and Regulations

Federal Register

Vol. 76, No. 249

Wednesday, December 28, 2011

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

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

## DEPARTMENT OF DEFENSE

## OFFICE OF PERSONNEL MANAGEMENT

## 5 CFR Chapter XCIX

**RIN 3206–AM 53**

## National Security Personnel System

**AGENCY:** Department of Defense; Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** This final rule removes the Department of Defense and Office of Personnel Management regulations concerning the National Security Personnel System (NSPS). Section 1113 of the National Defense Authorization Act for Fiscal Year 2010 repealed the legal authority for NSPS and provided that any existing NSPS regulations would cease to be effective on January 1, 2012.

**DATES:** Effective January 1, 2012.

**FOR FURTHER INFORMATION CONTACT:** Paula Shipe, (703) 696–5376.

**SUPPLEMENTARY INFORMATION:** Section 1101 of Public Law 108–36 (November 24, 2003) codified at 5 U.S.C. 9902, gave the Department of Defense (DOD) authority to establish a National Security Personnel System (NSPS) in regulations jointly prescribed by DOD and OPM (Office of Personnel Management). The original regulations were issued on November 1, 2005 (70 FR 66116).

The NSPS law was subsequently amended by section 1106 of Public Law 110–181 (January 28, 2008) and section 1106 of Public Law 110–417 (October 14, 2008). These amendments resulted in revised DOD/OPM regulations, which were issued on September 26, 2008 (73 FR 56344) and January 16, 2009 (74 FR 2757).

Section 1113 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111–84, October 28, 2009, repealed the legal authority for NSPS and provided that any existing NSPS regulations would cease to be effective on January 1, 2012. Accordingly, we are removing the NSPS regulations found in chapter XCIX of title 5 of the Code of Federal Regulations effective on January 1, 2012.

Office of Personnel Management.

**John Berry,**

*Director, Office of Personnel Management,* Department of Defense.

**Jo Ann Rooney,**

*Under Secretary of Defense for Personnel and Readiness.*

### CHAPTER XCIX—[REMOVED]

Accordingly, by the authority of section 1113(b) of Public Law 111–84, the Department of Defense and the Office of Personnel Management are amending title 5 of the Code of Federal Regulations by removing chapter XCIX (consisting of part 9901).

[FR Doc. 2011–33235 Filed 12–27–11; 8:45 am]

BILLING CODE 6325–39–P

## DEPARTMENT OF AGRICULTURE

## Animal and Plant Health Inspection Service

## 7 CFR Part 301

**[Docket No. APHIS–2011–0029]**

## European Larch Canker; Expansion of Regulated Areas

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Affirmation of interim rule as final rule.

**SUMMARY:** We are adopting as a final rule, without change, an interim rule that amended the domestic quarantine regulations by expanding the regulated area for European larch canker to include additional areas in Maine and by correcting some misidentifications of previously listed regulated areas. The interim rule was necessary to prevent human-assisted transmission of European larch canker from infested areas to noninfested areas.

**DATES:** Effective on December 28, 2011, we are adopting as a final rule the interim rule published at 76 FR 52543–52544 on August 23, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul Chaloux, National Program Manager, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road, Unit 26, Riverdale, MD 20737; (301) 734–0917.

**SUPPLEMENTARY INFORMATION:**

### Background

European larch canker (ELC), *Lachnellula willkommi* (Dasycypha), is a serious plant disease caused by a fungus that can kill mature and immature species of the genus *Larix* (larch) and *Pseudolarix* (Golden larch).

Under the regulations in ''Subpart–European Larch Canker'' (7 CFR 301.91 through 301.91–9, referred to below as the regulations), we restrict the interstate movement of certain regulated articles from regulated areas to prevent the spread of ELC. These regulations, which were established in May 1984, list parts of several counties in Maine as regulated areas.

In an interim rule [1] effective and published in the **Federal Register** on August 23, 2011 (76 FR 52543–52544, Docket No. APHIS–2011–0029), we amended the regulations to expand the regulated area for ELC to include additional areas in Maine. We also corrected some misidentifications of previously listed regulated areas.

Comments on the interim rule were required to be received on or before October 24, 2011.

We did not receive any comments. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule without change.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

### List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

[1] To view the interim rule, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0029.*

## PART 301—DOMESTIC QUARANTINE NOTICES

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 301 and that was published at 76 FR 52543–52544 on August 23, 2011.

Done in Washington, DC, this 19th day of December 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–33204 Filed 12–27–11; 8:45 am]

BILLING CODE 3410–34–P

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

### 9 CFR Parts 332 and 381

**[Docket No. FSIS–2008–0039]**

**RIN 0583–AD37**

### Cooperative Inspection Programs: Interstate Shipment of Meat and Poultry Products; Correction

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Correcting amendments.

**SUMMARY:** This document corrects typographical errors in the final regulations establishing a new voluntary cooperative program under which certain very small and small State–inspected establishments will be eligible to ship meat and poultry products in interstate commerce. The final rule was published in the **Federal Register** on May 2, 2011, and became effective on July 1, 2011.

**DATES:** December 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Charles Williams, Acting Director, Policy Issuance Division, Office of Policy and Program Development, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250; (202) 720–5627; Fax (202) 690–0486.

**SUPPLEMENTARY INFORMATION:**

### Background

On May 2, 2011, FSIS published in the **Federal Register,** the final rule, ''Cooperative Inspection Programs; Interstate Shipment of Meat and Poultry Products'' (76 FR 24714). The final rule amended the Federal meat and poultry products inspection regulations to establish a new cooperative inspection program under which State-inspected establishments with 25 or fewer employees on average will be permitted ship meat and poultry products in interstate commerce. Two of the instructions for amending the regulations created typographical errors in the resulting regulatory language. The amendments in this document correct those errors.

### List of Subjects

*9 CFR Part 332*

Grant programs-agriculture, Intergovernmental relations, Meat inspection.

*9 CFR Part 381*

Grant programs-agriculture, Intergovernmental relations, Poultry and poultry products.

Accordingly, 9 CFR parts 332 and 381 are corrected by making the following correcting amendments:

## PART 332—SELECTED ESTABLISHMENTS; COOPERATIVE PROGRAM FOR INTERSTATE SHIPMENT OF CARCASSES, PARTS OF CARCASSES, MEAT, AND MEAT FOOD PRODUCTS

■ 1. The authority citation for part 332 continues to read as follows:

**Authority:** 21 U.S.C. 601–695; 7 U.S.C. 138–138i, 450, 1901–1906; 7 CFR 2.7, 2.18, 2.53.

**§ 332.3 [Amended]**

■ 2. Amend § 332.3 as follows:

■ a. In paragraph (c)(7) remove ''and'' after the semicolon.

■ b. In paragraph (c)(8) remove the period at the end of the paragraph and add ''; and'' in its place.

## PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

■ 3. The authority citation for part 381 continues to read:

**Authority:** 21 U.S.C. 451–472; 7 CFR 2.18, 2.53.

**§ 381.513 [Amended]**

■ 4. Amend § 381.513 as follows:

■ a. In paragraph (c)(7) remove ''and'' after the semicolon.

■ b. In paragraph (c)(8) remove the period at the end of the paragraph and add ''; and'' in its place.

Done in Washington, DC, on: December 19, 2011.

**Alfred V. Almanza,**

*Administrator.*

[FR Doc. 2011–32877 Filed 12–27–11; 8:45 am]

BILLING CODE 3410–DM–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 25

**[Docket No. FAA–2011–1172: Special Conditions No. 25–453–SC]**

### Special Conditions: Gulfstream Aerospace LP (GALP) Model G280 Airplane, Operation Without Normal Electrical Power

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

**ACTION:** Final special conditions.

**SUMMARY:** These special conditions are issued for the Gulfstream Aerospace LP (GALP) Model G280 airplane. This airplane will have a novel or unusual design feature associated with operation without normal electrical power. 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:** *Effective Date:* The effective date of these special conditions is December 20, 2011.

**FOR FURTHER INFORMATION CONTACT:** Nazih Khaouly, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2432; facsimile (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

### Background

On March 30, 2006, GALP applied for a type certificate for their new Model G280 airplane. The Model G280 will have a novel or unusual design feature associated with operation without normal electrical power.

### Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.17, GALP must show that the Model G280 airplane meets the applicable provisions of part 25 as amended by Amendments 25–1 through 25–117.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model G280 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

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, the special conditions would also apply to the other model.

In addition to the applicable airworthiness regulations and special conditions, the Model G280 airplane must comply with the fuel-vent and exhaust-emission requirements of part 34 and the noise-certification requirements of part 36; and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

**Novel or Unusual Design Features**

The Model G280 airplane will incorporate the following novel or unusual design features:

The Model G280 airplane is equipped with electrical and electronic systems that control critical functions and systems. Examples of these include the electronic displays, rudder, brakes, spoilers, flaps, and electronic engine controls. The Model G280 electrical-power generation and distribution architecture is equipped with an auxiliary power unit (APU) and is not equipped with a Ram Air Turbine (RAT) generator. The loss of all electrical power to certain functions and systems impacts the airplane's ability to land safely. Therefore, these special conditions are issued to retain the level of safety intended by the current § 25.1351(d).

**Discussion**

The Model G280 airplane requires a continuous source of electrical power for continued safe flight and landing. The current regulation in § 25.1351(d), ''Operation without normal electrical power,'' states that the airplane must be operated safely in visual-flight-rules conditions, for a period of not less than five minutes, with the normal electrical power (electrical power sources excluding the battery) inoperative. This rule was structured around a traditional design utilizing mechanical controls for flight systems while the crew took time to sort out the electrical failure, start engine(s) if necessary, and re-establish some of the electrical-power-generation capability.

To maintain the same level of safety associated with traditional designs, the Model G280 airplane electrical-system design must not be time-limited in its operation. It should be noted that service experience has shown that the loss of all electrical power, which is generated by the airplane's engine generators or APU is not extremely improbable. Thus, it must be demonstrated that the airplane can continue through safe flight and landing (including steering and braking on ground for airplanes using steer/brake-by-wire) with the use of its emergency electrical-power systems. These emergency electrical-power systems must be able to power loads that are required for continued safe flight and landing.

**Discussion of Comments**

Notice of proposed special conditions no. 25–11–17–SC for the GALP Model G280 airplanes was published in the **Federal Register** on October 27, 2011 (76 FR 66660). No comments were received, and the special conditions are adopted as proposed.

**Applicability**

As discussed above, these special conditions are applicable to the GALP Model G280 airplane. Should GALP 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.

Under standard practice, the effective date of final special conditions would be 30 days after the date of publication in the **Federal Register;** however, as the certification date for the GALP Model G280 airplane is imminent, the FAA finds good cause to make these special conditions effective upon issuance.

**Conclusion**

This action affects only certain novel or unusual design features on the GALP Model G280 airplane. 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.

**List of Subjects in 14 CFR Part 25**

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

**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 GALP Model G280 airplanes. The special conditions are issued in lieu of 14 CFR 25.1351(d) and are required to ensure that the airplane has sufficient electrical power for continued safe flight and landing.

1. The applicant must show by test or a combination of test and analysis that the airplane is capable of continued safe flight and landing with all normal electrical power sources inoperative, as prescribed by paragraphs (1)(a) and (1)(b) below.

For purposes of this special condition, normal sources of electrical-power generation do not include any alternate power sources such as a battery, ram-air turbine (RAT), or independent power systems such as the flight-control permanent-magnet generating system.

In showing capability for continued safe flight and landing, consideration must be given to systems capability, effects on crew workload and operating conditions, and the physiological needs of the flightcrew and passengers for the longest diversion time for which approval is sought.

a. Common-cause failures, cascading failures, and zonal physical threats must be considered in showing compliance with this requirement.

b. The ability to restore operation of portions of the electrical-power generation and distribution system may be considered if it can be shown that unrecoverable loss of those portions of the system is extremely improbable. An alternative source of electrical power must be provided for the time required to restore the minimum electrical-power-generation capability required for safe flight and landing. Unrecoverable loss of all engines may be excluded when showing that unrecoverable loss of critical portions of the electrical system is extremely improbable. Unrecoverable loss of all engines is covered in special condition 2, below, and thus may be excluded when showing compliance with this requirement.

2. Regardless of any electrical-generation and distribution-system recovery capability shown under special condition 1, above, sufficient electrical-system capability must be provided to:

a. Allow time to descend, with all engines inoperative, at the speed that provides the best glide slope, from the maximum operating altitude to the altitude at which the soonest possible engine restart could be accomplished, and

b. Subsequently allow multiple start attempts of the engines and APU. This capability must be provided in addition to the electrical capability required by existing part 25 requirements related to operation with all engines inoperative.

3. The airplane emergency electrical-power system must be designed to supply:

a. Electrical power required for immediate safety, which must continue to operate without the need for crew action following the loss of the normal electrical power, for a duration sufficient to allow reconfiguration to provide a non-time-limited source of electrical power.

b. Electrical power required for continued safe flight and landing for the maximum diversion time.

4. If APU-generated electrical power is used in satisfying the requirements of these special conditions, and if reaching a suitable runway upon which to land is beyond the capacity of the battery systems, then the APU must be able to be started under any foreseeable flight condition prior to the depletion of the battery or the restoration of normal electrical power, whichever occurs first. Flight tests must demonstrate this capability at the most critical condition.

a. It must be shown that the APU will provide adequate electrical power for continued safe flight and landing.

b. The Airplane Flight Manual (AFM) must incorporate non-normal procedures that direct the pilot to take appropriate actions to activate the APU after loss of normal engine-driven generated electrical power.

As a part of showing compliance with these special conditions, the tests by which loss of all normal electrical power is demonstrated must also take into account the following:

1. The failure condition should be assumed to occur during night instrument meteorological conditions (IMC), at the most critical phase of the flight, relative to the worst possible electrical-power distribution and equipment-loads-demand condition.

2. After the un-restorable loss of normal engine generator power, the airplane-engine-restart capability must be provided and operations continued in IMC.

3. It should be demonstrated that the aircraft is capable of continued safe flight and landing. The length of time must be computed based on the maximum diversion-time capability for which the airplane is being certified. Consideration for airspeed reductions resulting from the associated failure or failures must be made.

4. The airplane must provide adequate indication of loss of normal electrical power to direct the pilot to the non-normal procedures, and the AFM must incorporate non-normal procedures that will direct the pilot to take appropriate actions.

Issued in Renton, Washington, on December 20, 2011.

**K.C. Yanamura,**

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

[FR Doc. 2011–33281 Filed 12–27–11; 8:45 am]

**BILLING CODE 4910–13–P**

## JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

## 20 CFR Part 901

**[TD 9517]**

**RIN 1545–BC82**

## Regulations Governing the Performance of Actuarial Services Under the Employee Retirement Income Security Act of 1974; Correction

**AGENCY:** Joint Board for the Enrollment of Actuaries.

**ACTION:** Correction to final regulations.

**SUMMARY:** This document contains corrections to final regulations (TD 9517) that were published in the **Federal Register** on Thursday, March 31, 2011 (76 FR 17762) relating to the enrollment of actuaries.

**DATES:** This correction is effective on December 28, 2011, and is applicable on March 31, 2011.

**FOR FURTHER INFORMATION CONTACT:** Patrick McDonough, Executive Director, Joint Board for the Enrollment of Actuaries, at (202) 622–8229 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### Background

The final regulations (TD 9517) that are the subject of this correction are under section 3042 of the Employee Retirement Income Security Act of 1974 (88 Stat. 829), Public Law 93–406 (ERISA).

### Need for Correction

As published, final regulations (TD 9517) contain errors that may prove to be misleading and are in need of clarification.

### Correction of Publication

Accordingly, the publication of the final regulations (TD 9517) which were the subject of FR Doc. 2011–7573 is corrected as follows:

On page 17762, column 1, in the preamble, under the paragraph heading ''Paperwork Reduction Act'', last paragraph of the column, fourth line, the language ''901.11(f)(2)(D), 901.11(f)(2)(G) and (H),'' is corrected to read ''901.11(f)(2)(i)(D), 901.11(f)(2)(i)(G) and (H),''.

**Guy R. Traynor,**

*Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).*

[FR Doc. 2011–33197 Filed 12–27–11; 8:45 am]

**BILLING CODE 4810–25–P**

## JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

## 20 CFR Part 901

**[TD 9517]**

**RIN 1545–BC82**

## Regulations Governing the Performance of Actuarial Services Under the Employee Retirement Income Security Act of 1974; Correction

**AGENCY:** Joint Board for the Enrollment of Actuaries.

**ACTION:** Correcting amendment.

**SUMMARY:** This document describes correcting amendments to final regulations (TD 9517) relating to the enrollment of actuaries. These regulations were published in the **Federal Register** on Thursday, March 31, 2011 (76 FR 17762).

**DATES:** This correction is effective on December 28, 2011, and is applicable on March 31, 2011.

**FOR FURTHER INFORMATION CONTACT:** Patrick McDonough, Executive Director, Joint Board for the Enrollment of Actuaries, at (202) 622–8229 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### Background

The final regulations (TD 9517) that are the subject of this correction are under section 3042 of the Employee Retirement Income Security Act of 1974 (88 Stat. 829), Public Law 93–406 (ERISA).

### Need for Correction

As published, final regulations (TD 9517) contain errors that may prove to be misleading and are in need of clarification.

### List of Subjects in 20 CFR Part 901

Administrative practice and procedure, Pensions.

### Correction of Publication

Accordingly, 20 CFR part 901 is corrected by making the following correcting amendments:

## PART 901—REGULATIONS GOVERNING THE PERFORMANCE OF ACTUARIAL SERVICES UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

■ **Paragraph 1.** The authority citation for part 901 continues to read in part as follows:

**Authority:** These rules are issued under authority of 88 Stat.1002; 29 U.S.C. 1241, 1242.

*See also* 5 U.S.C. 301; 31 U.S.C. 330; and 31 U.S.C. 321.

■ **Par. 2.** Section 901.11 is amended by:

■ 1. Revising the first sentence of paragraph (f)(1)(i).

■ 2. Revising paragraph (l)(4)(ii).

■ 3. Revising the last sentence of paragraph (o) *Example 4.* (i), and paragraphs (o) *Example 6.* (iii) and (o) *Example 7.* (ii).

The revisions read as follows:

**§ 901.11 Enrollment procedures.**

* * * * *

(f) * * *

(1) * * *

(i) Core subject matter is program content and knowledge that is integral and necessary to the satisfactory performance of pension actuarial services and actuarial certifications under ERISA and the Internal Revenue Code. * * *

* * * * *

(l) * * *

(4) * * *

(ii) *Placement on the inactive roster after notice and right to respond.* The Executive Director will move an enrolled actuary who does not submit a timely application of renewal that shows timely completion of the required continuing professional education to the inactive roster only after giving the enrolled actuary 60 days to respond as described in paragraph (l)(1) of this section.

* * * * *

(o) * * *

*Example 4.* (i) * * * Accordingly, effective April 1, 2014, H is placed on the roster of inactive enrolled actuaries and is ineligible to perform pension actuarial services as an enrolled actuary under ERISA and the Internal Revenue Code.

* * * * *

*Example 6.* * * *

(iii) Note that the total of 15 hours of continuing professional education credit that H completes between January 1, 2011, and December 31, 2013, as well as the 10 hours of continuing professional education credit between January 1, 2014, and December 31, 2016, are not counted toward H's return to active status and are not taken into account toward the additional hours of continuing professional education credit that H must complete between January 1, 2020, and December 31, 2022, in order to be eligible to file an application for renewal of enrollment active status effective April 1, 2023.

*Example 7.* * * *

(ii) J completes 5 hours of core continuing professional education credit and 4 hours of non-core continuing professional education credit between January 1, 2014, and October 6, 2014. Because J did not complete the required 12 hours of continuing professional education (of which at least 6 hours must consist of core subject matter) during J's initial enrollment cycle, J is not eligible to file an application for a return to active enrollment on October 6, 2014, notwithstanding the fact that had J completed such hours between January 1, 2012, and December 31, 2013, J would have satisfied the requirements for renewed enrollment effective April 1, 2014.

* * * * *

**Guy R. Traynor,**

*Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. 2011–33200 Filed 12–27–11; 8:45 am]

BILLING CODE 4810–25–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 113

**[Docket No. FDA–2007–N–0265] (formerly 2007N–0026)**

### Temperature-Indicating Devices; Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers; Correction

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule; correction.

**SUMMARY:** The Food and Drug Administration (FDA) is correcting a final rule that appeared in the **Federal Register** of Thursday, March 3, 2011 (76 FR 11892). The final rule amended FDA's regulations for thermally processed low-acid foods packaged in hermetically sealed containers to allow for use of other temperature-indicating devices, in addition to mercury-in-glass thermometers, during processing. The final rule was published with one error. This document corrects that error.

**DATES:** Effective March 5, 2012.

**FOR FURTHER INFORMATION CONTACT:** Mischelle B. Ledet, Center for Food Safety and Applied Nutrition (HFS–625), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, (240) 205–1165.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 2011–4475, appearing on page 11892, in the **Federal Register** of Thursday, March 3, 2011, the following correction is made:

**§ 113.40 [Corrected]**

On page 11921, in the third column, seventh line from the bottom, in § 113.40(g)(2)(i)(A), the word ''implemented'' is corrected to read ''instrumented''.

Dated: December 21, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–33183 Filed 12–27–11; 8:45 am]

BILLING CODE 4160–01–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Part 203

**[Docket No. FR–5397–N–04]**

**RIN 2502–ZA05**

### Federal Housing Administration (FHA): Temporary Exemption From Compliance With FHA's Regulation on Property Flipping Extension of Exemption

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

**ACTION:** Notice of waiver extension.

**SUMMARY:** This notice announces that FHA is extending the availability of the temporary waiver of its regulation that prohibits the use of FHA financing to purchase single family properties that are being resold within 90 days of the previous acquisition, until December 31, 2012. This waiver, which was first issued in January 2010, took effect for all sales contracts executed on or after February 1, 2010, and was extended in February 2011. The waiver is set to expire on December 31, 2011, and therefore HUD is extending the waiver for another calendar year. Prior to the waiver, a mortgage was not eligible for FHA insurance if the contract of sale for the purchase of the property that is the subject of the mortgage is executed within 90 days of the prior acquisition by the seller and the seller does not come under any of the exemptions to this 90-day period that are specified in the regulation. As a result of the high foreclosures that have been taking place across the nation, FHA, through the regulatory waiver, encourages investors that specialize in acquiring and renovating properties to renovate foreclosed and abandoned homes with the objective of increasing the availability of affordable homes for first-time and other purchasers and helping

to stabilize real estate prices as well as neighborhoods and communities where foreclosure activity has been high. While the waiver is available for the purpose of stimulating rehabilitation of foreclosed and abandoned homes, the waiver is applicable to all single family properties being resold within the 90-day period after prior acquisition, and was not limited to foreclosed properties. Additionally, the waiver is subject to certain conditions, and eligible mortgages must meet these conditions to take advantage of the waiver. The waiver is not applicable to mortgages insured under HUD's Home Equity Conversion Mortgage (HECM) Program.

**DATES:** *Effective Date:* January 1, 2012, through December 31, 2012.

**FOR FURTHER INFORMATION CONTACT:** Karin B. Hill, Director, Office of Single Family Program Development, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410–8000; telephone number (202) 708–2121 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Section 203.37a(b)(2) of HUD's regulations (24 CFR 203.37a(b)(2)) establishes FHA's rule on property flipping and this regulatory section provides that FHA will not insure a mortgage for a single family property if the contract of sale is executed within 90 days of the acquisition of the property by the seller. Section 203.37a(c) lists the sales transactions that are exempt from this rule. The exempt transactions include, for example, sales by HUD of real estate-owned (REO) properties under HUD's regulations in 24 CFR part 291, sales by another federal agency of REO properties, sales of properties by nonprofit organizations that have been approved to purchase and resell HUD REO properties, and sales by state- and federally-charted financial institutions and government sponsored enterprises, to name a few.

Property ''flipping'' refers to the practice whereby a property recently acquired is resold for a considerable profit with an artificially inflated value, often the result of a lender's collusion with the appraiser. Most property flipping occurs within a matter of days after acquisition, and usually with only minor cosmetic improvements, if any. In an effort to preclude this predatory lending practice with respect to mortgages insured by FHA, HUD issued a final rule on May 1, 2003 (68 FR 23370) that provides in 24 CFR 203.37a that FHA will not insure a mortgage if the contract of sale for the purchase of the property that is the subject of the mortgage is executed within 90 days of the prior acquisition by the seller and the seller does not come under any of the exemptions to this 90-day period that are specified in § 203.37a(c).

In a final rule published on June 7, 2006 (71 FR 33138), HUD expanded the exceptions contained in § 203.37a(c) to the 90-day time restrictions to include such transactions as sales of single family properties by government-sponsored enterprises (GSEs), state- and federally-chartered financial institutions, nonprofits organizations approved to purchase HUD Real Estate-Owned (REO) single family properties at a discount with resale restrictions, local and state governments and their instrumentalities, and, upon announcement by HUD through issuance of a notice, sales of properties in areas designated by the President as federal disaster areas.

The downturn in the housing market over the past few years has led to a rapid rise of homeowners defaulting on mortgages, and consequently an increase in foreclosed homes. A variety of measures to avoid foreclosures have been initiated at the federal, state and local level, most notably the Administration's Home Affordable Modification Program. Despite these efforts to keep families in their homes, foreclosures continue to remain high and not only do foreclosures affect the families that lost their homes, but they affect neighborhoods and communities. While HUD continues its efforts to help homeowners remain in their homes, through waiver of its regulation on property flipping, HUD seeks to help stabilize neighborhoods and communities.

HUD undertook similar waiver action in a narrower context in 2009, regarding HUD's Neighborhood Stabilization Program (NSP). NSP, a temporary program authorized by the Housing and Economic Recovery Act 2008 (Public Law 110–289, approved July 30, 2008), was established for the purpose of stabilizing communities that have suffered from foreclosures and abandonment, by allocating funds through a formula to States and units of general local government, for the purchase and redevelopment of foreclosed and abandoned homes and residential properties. HUD's waiver of its regulation on property flipping for NSP removed an impediment to the purchase of affordable homes that had been rehabilitated and sold under this program.

With the home foreclosure rate remaining high across the nation, HUD determined, early in 2010, that a temporary waiver of this regulation on a nationwide basis, subject to certain conditions, may contribute to stabilizing real estate prices and neighborhoods that have been heavily impacted by foreclosures, and may facilitate the sale and occupancy of foreclosed homes that have been rehabilitated by making the mortgages of such homes eligible for FHA mortgage insurance. The original waiver granted in 2010 was discussed in a HUD **Federal Register** notice published on May 21, 2010 (75 FR 28633), which solicited public comment. HUD addressed the public comments in the extension of the original waiver published on February 3, 2011 (76 FR 6149). Given that the housing market, although improving, remains in a vulnerable states, and the foreclosure rate, while lower than previously, nevertheless remains high, HUD is extending the waiver for another calendar year. The conditions for the waiver set forth in both the May 10, 2010, and February 3, 2011, **Federal Register** notices remain applicable and are set out in this notice for the convenience of the reader.

While the waiver remains available for the purpose of stimulating rehabilitation of foreclosed and abandoned homes for another calendar year, the waiver continues to remain applicable to all properties being resold within the 90-day period after prior acquisition. The waiver is not limited to the resale of foreclosed properties.

## II. Eligibility for Waiver of 24 CFR 203.37a(b)(2)

To be eligible for the waiver of the Property Flipping Rule, an FHA-approved mortgagee must meet the following conditions:

1. All transactions must be arms-length, with no identity of interest between the buyer and seller or other parties participating in the sales transaction. Some ways that the lender can ensure that there is no inappropriate collusion or agreement between parties, are to assess and determine the following:

a. The seller holds title to the property;

b. Limited liability companies, corporations, or trusts that are serving as sellers were established and are operated in accordance with applicable state and federal law;

c. No pattern of previous flipping activity exists for the subject property as evidenced by multiple title transfers

within a 12 month time frame (chain of title information for the subject property can be found in the appraisal report);

d. The property was marketed openly and fairly, through a multiple listing service (MLS), auction, for sale by owner offering, or developer marketing (any sales contracts that refer to an ''assignment of contract of sale,'' which represents a special arrangement between seller and buyer may be a red flag).

2. In cases in which the sales of the property is greater than 20 percent above the seller's acquisition cost, an FHA-approved mortgagee is eligible for the waiver only if the mortgagee:

a. Justifies the increase in value by retaining in the loan file supporting documentation and/or a second appraisal, which verifies that the seller has completed sufficient legitimate renovation, repair, and rehabilitation work on the subject property to substantiate the increase in value or, in cases where no such work is performed, the appraiser provides appropriate explanation of the increase in property value since the prior title transfer; and

b. Orders a property inspection and provides the inspection report to the purchaser before closing. The mortgagee may charge the borrower for this inspection. The use of FHA-approved inspectors or 203(k) consultants is not required. The inspector must have no interest in the property or relationship with the seller, and must not receive compensation for the inspection for any party other than the mortgagee. Additionally, the inspector may not: compensate anyone for the referral of the inspection; receive any compensation for referring or recommending contractors to perform any repairs recommended by the inspection; or be involved with performing any repairs recommended by the inspection. At a minimum, the inspection must include:

i. The property structure, including the foundation, floor, ceiling, walls and roof;

ii. The exterior, including siding, doors, windows, appurtenant structures such as decks and balconies, walkways and driveways;

iii. The roofing, plumbing systems, electrical systems, heating and air conditioning systems;

iv. All interiors; and

v. All insulation and ventilation systems, as well as fireplaces and solid fuel-burning appliances.

3. Only forward mortgages are eligible for the waiver. Mortgages insured under HUD's HECM program are ineligible for the waiver.

## III. Guidance on the Conditions for Waiver Eligibility

### *A. Seller's Acquisition Cost*

The seller's acquisition cost is the purchase price which the seller paid for the property, and the following costs (if paid by the seller):

- Closing costs, plus
- Prepaid costs, including commissions.

The seller's acquisition cost does not include the cost of repairs that the seller makes to the property.

### *B. Justification and Documentation of Increase in Value*

If the resale price of the property is greater than 20 percent above the seller's acquisition cost, the property will be eligible for an FHA-insured mortgage only if the Mortgagee justifies the increase in value. The Mortgagee must verify that the seller has completed sufficient legitimate renovation, repair, or rehabilitation work on the subject property to substantiate the increase in value by retaining supporting documentation in the loan file or by providing a second appraisal.

- If the Mortgagee uses a second appraisal:
  - An FHA roster appraiser must perform the appraisal in compliance with all FHA appraisal reporting requirements.
  - The Mortgagee may not use an appraisal done for a conventional loan even if it was completed by an FHA roster appraiser.
  - The Mortgagee may not charge the cost of the second appraisal to the homebuyer.

If the Mortgagee has ordered a second appraisal to document the increase in value, the Mortgagee must not use this appraisal for case processing and must not enter it into FHA Connection.

### *C. Property Inspection Report*

If the resale price of the property is greater than 20 percent above the seller's acquisition cost, the property will be eligible for an FHA-insured mortgage only if the Mortgagee obtains a property inspection and provides the inspection report to the buyer before closing. The borrower, lender, or mortgage broker (if one is involved in the transaction) may order the property inspection. The lender or mortgage broker may charge the borrower for this inspection.

### *D. Repairs*

If the inspection report notes that repairs are required because of structural or ''health and safety'' issues, those repairs must be completed prior to closing. After completion of repairs to address structural or ''health and safety'' issues, the inspector must conduct a final inspection to determine if the repairs have been completed satisfactorily and eliminated the structural or ''health and safety'' issues. The borrower, lender, or mortgage broker may order the final inspection.

## IV. Compliance With the Paperwork Reduction Act

The information collection requirements applicable to this waiver have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB Control No. 2502–0059. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

## V. Period of Waiver Eligibility

The waiver that is the subject of this notice remains effective through December 31, 2012, for all sales contracts executed on or after February 1, 2010, the availability date provided by the issuance of the waiver in January 2010, unless extended or withdrawn by HUD.

By notice, HUD shall notify the public of any extension or withdrawal of this waiver. If as a result of this waiver, there is a significant increase in defaults on FHA-insured mortgages and an increase in mortgage insurance claims that are attributable to mortgages insured as a result of exercise of this waiver authority, HUD may withdraw this waiver immediately.

Dated: December 22, 2011.

**Carol J. Galante,**

*Acting Assistant Secretary for Housing—Federal Housing Commissioner.*

[FR Doc. 2011–33411 Filed 12–27–11; 8:45 am]

BILLING CODE 4210–67–P

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 199**

**[Docket ID: DOD–2010–HA–0113]**

**RIN 0720–AB46**

# TRICARE: Changes Included in the National Defense Authorization Act for Fiscal Year 2010; Enhancement of Transitional Dental Care for Members of the Reserve Component on Active Duty for More Than 30 Days in Support of a Contingency Operation

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

**ACTION:** Final rule.

**SUMMARY:** The Department is publishing this final rule to implement section 703 of the National Defense Authorization Act for Fiscal Year 2010 (NDAA for FY10). Specifically, that legislation amends the transitional health care dental benefits for Reserve Component members on active duty for more than 30 days in support of a contingency operation. The legislation entitles these Reserve Component members to dental care in the same manner as a member of the uniformed services on active duty for more than 30 days, thus providing care to the Reserve member in both military dental treatment facilities and authorized private sector dental care. This final rule does not eliminate any medical or dental care that is currently covered as transitional health care for the member.

**DATES:** Effective January 27, 2012.

**FOR FURTHER INFORMATION CONTACT:** COL Jeffrey Chaffin, TRICARE Management Activity, telephone (703) 681–0039.

**SUPPLEMENTARY INFORMATION:** Section 703 of the National Defense Authorization Act for Fiscal Year 2010 (NDAA for FY10), Public Law 111–84, amends the transitional health care dental benefits for Reserve Component members on active duty for more than 30 days in support of a contingency operation. The legislation entitles these Reserve Component members to dental care in the same manner as a member of the uniformed services on active duty for more than 30 days, thus providing care to the Reserve member in both military dental treatment facilities and authorized private sector dental care. This final rule does not eliminate any medical or dental care that is currently covered as transitional health care for the member. However the member's dependents are not entitled to this enhanced benefit.

At present, the transitional health care dental benefits for Reserve Component members include space available care in military dental treatment facilities and eligibility for the TRICARE Dental Program (TDP). The implementation of section 703 of NDAA for FY10 will enhance the dental benefit to include space required care in military dental treatment facilities; military dental treatment facility referred care to the private sector; and authorized remote dental care in the private sector during the 180 day transitional health care period. Both dental treatment facility referred care and remote care will be administered by TRICARE's Active Duty Dental Program (ADDP). TDP eligibility will begin after the transitional health care period ends.

Reserve Component family members are also eligible for the TRICARE Dental Program (TDP). These family members pay 100% of the premiums while their sponsor is in Reserve status. If their sponsor is activated for more than 30 days, the TDP enrolled Reserve Component family members obtain the same benefits as any other TDP enrolled active duty family members with the Government subsidizing 60 percent of the premium cost for enrolled active duty family members. This change in status and subsidy occurs automatically. Upon the sponsor's deactivation, the family members automatically revert to Reserve Component family member TDP status and pay 100% of the TDP premium cost. With the final rule, there is no change to status or eligibility for family members.

## I. Background

Currently, Reserve Component members who separate from active duty after serving for more than 30 days in support of a contingency operation are entitled to dental care under the transitional assistance medical program in the same manner as a dependent. This consists of only space-available dental care in a military dental treatment facility and is very limited.

This final rule amends the transitional health care dental benefit for Reserve Component members who were on active duty for more than 30 days in support of a contingency operation by providing those members' dental care is the same as that for a member of the uniformed services on active duty for more than 30 days. This enhanced benefit does not apply to member's dependents.

As mentioned, the transitional health care dental benefits for Reserve Component members include space available care in military dental treatment facilities. Additionally, Reserve Component members are eligible for the TRICARE Dental Program (TDP). The TDP provides comprehensive dental care insurance and requires premium and cost-share payments but includes an annual maximum per enrollee per contract year for non-orthodontic services. This means that the total payments for covered dental services (except orthodontic services) for each enrolled member will not exceed the annual maximum amount in any contract year. The Government subsidizes 60 percent of the premium cost for enrolled Reserve Component members. If activated for more than 30 days in support of a contingency operation, a TDP enrolled Reserve Component member is automatically disenrolled from the TDP and automatically re-enrolled upon deactivation.

Under the final rule, a TDP enrolled Reserve Component member activated for more than 30 days is still automatically disenrolled from the TDP; however, the Reserve Component member will not be automatically re-enrolled upon deactivation because the member will be entitled to the same dental benefits as an active duty member. The Reserve Component member will be TDP eligible and automatically re-enrolled in the TDP after the Transitional Health Care period is completed.

Reserve Component family members are also eligible for the TRICARE Dental Program (TDP). These family members pay 100% of the premiums while their sponsor is in Reserve status. If their sponsor is activated for more than 30 days, the TDP enrolled Reserve Component family members obtain the same benefits as any other TDP enrolled active duty family members with the Government subsidizing 60 percent of the premium cost for enrolled active duty family members. This change in status and subsidy occurs automatically. Upon the sponsor's deactivation, the family members automatically revert to Reserve Component family member TDP status and pay 100% of the TDP premium cost. With the final rule, there is no change to status or eligibility for family members.

## II. Public Comments

The proposed rule was published in the **Federal Register** on January 13, 2011 (76 FR 2288) for a 60-day comment period. We received only two comments on the proposed rule. Both comments were supportive of the rule and the enhanced dental benefits offered. No changes have been made to the final rule as a result of these comments.

## III. Regulatory Procedures

*Executive Order 12866, ''Regulatory Planning and Review''; Executive Order 13563, ''Improving Regulation and Regulatory Review''; and Regulatory Flexibility Act*

Executive Orders 12866 and 12563 require that a comprehensive regulatory impact analysis be performed on any economically significant regulatory action, defined as one that would result in an annual effect of $100 million or more on the national economy or which would have other substantial impacts. The Regulatory Flexibility Act (RFA) requires that each Federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This rule is not a significant regulatory action and will not have a significant impact on a substantial number of small entities for purposes of the RFA, thus this final rule is not subject to any of these requirements.

*Paperwork Reduction Act*

This rule will not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3511).

*Unfunded Mandates*

This rule does not contain unfunded mandates. It does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

*Federalism*

We have examined the impact(s) of the final rule under Executive Order 13132 and it does not have policies that have federalism implications that would have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, therefore, consultation with State and local officials is not required.

**List of Subjects in 32 CFR Part 199**

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR part 199 is amended as follows:

## PART 199—CIVILIAN HEALTH AND MEDICAL PROGRAM OF THE UNIFORMED SERVICES (CHAMPUS)

■ 1. The authority citation for Part 199 continues to read as follows:

**Authority:** 5 U.S.C. 301; 10 U.S.C. chapter 55.

■ 2. § 199.3 is amended by revising paragraph (e)(3) to read as follows:

### § 199.3 Eligibility.

* * * * *

(e) * * *

(3) TAMP benefits under TRICARE begin on the day after the member is separated from active duty, and, if such separation occurred on or after November 6, 2003, end 180 days after such date. TRICARE benefits available to both the member and eligible family members are generally those available to family members of members of the uniformed services under this Part. However, during TAMP eligibility, a member of a Reserve Component as described in paragraph (e)(1)(ii) of this section, is entitled to dental care to which a member of the uniformed services on active duty for more than 30 days is entitled. Each branch of service will determine eligibility for its members and eligible family members and provide data to DEERS.

* * * * *

■ 3. § 199.13 is amended by revising paragraph (c)(3)(ii)(E)(*1*) to read as follows:

### § 199.13 TRICARE Dental Program.

* * * * *

(c) * * *

(3) * * *

(ii) * * *

(E) Changes in and termination of enrollment.

(*1*) *Changes in status of active duty, Selected Reserve or Individual Ready Reserve member.* When the active duty, Selected Reserve or Individual Ready Reserve member is separated, discharged, retired, transferred to the Standby or Retired Reserve, his or her enrolled dependents and/or the enrolled Selected Reserve or Individual Ready Reserve member loses eligibility and enrollment as of 11:59 p.m. on the last day of the month in which the change in status takes place. When the Selected Reserve or Individual Ready Reserve member is ordered to active duty for a period of more than 30 days without a break in service, the member loses eligibility and is disenrolled, if previously enrolled; however, their enrolled dependents maintain their eligibility and previous enrollment subject to eligibility, enrollment and disenrollment provisions described in this section and in the TDP contract.

(*i*) *Reserve component members separated from active duty in support of a contingency operation.* When a member of a reserve component who is separated from active duty to which called or ordered in support of a contingency operation if the active duty is for more than 30 days, the member becomes eligible for Transitional Health Care pursuant to 10 U.S.C. 1145(a) and the member is entitled to dental care to which a member of the uniformed services on active duty for more than 30 days is entitled. Thus the member has no requirement for the TDP and is not eligible to purchase the TDP. Upon the termination of Transitional Health Care eligibility, the member regains TDP eligibility and is reenrolled, if previously enrolled.

(*ii*) *Dependents of members separated from active duty in support of a contingency operation.* Dependents of a member of a reserve component who is separated from active duty to which called or ordered in support of a contingency operation if the active duty is active for more than 30 days maintain their eligibility and previous enrollment, subject to eligibility, enrollment and disenrollment provisions described in this section and in the TDP contract. During the member's Transitional Health Care eligibility, the dependents are considered family members of Reserve Component members.

(*iii*) *Members separated from active duty and not covered by 10 U.S.C. 1145(a)(2)(B).* When the previously enrolled active duty member is transferred back to the Selected Reserve or Individual Ready Reserve, and is not covered by 10 U.S.C. 1145(a)(2)(B), without a break in service, the member regains TDP eligibility and is reenrolled; however, enrolled dependents maintain their eligibility and previous enrollment subject to eligibility, enrollment and disenrollment provisions described in this section and in the TDP contract.

(*iv*) Eligible dependents of an active duty, Selected Reserve or Individual Ready Reserve member serving a sentence of confinement in conjunction with a sentence of punitive discharge are still eligible for the TDP until such time as the active duty, Selected Reserve or Individual Ready Reserve member's discharge is executed.

* * * * *

Dated: December 21, 2011.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2011–33175 Filed 12–27–11; 8:45 am]

**BILLING CODE 5001–06–P**

---

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### 32 CFR Part 199

**[DOD–2009–HA–0175]**

**RIN 0720–AB38**

## TRICARE; Elimination of Co-payments for Authorized Preventive Services for Certain TRICARE Standard Beneficiaries

**AGENCY:** Office of the Secretary, Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** The Department of Defense is publishing this final rule to implement section 711 of the National Defense Authorization Act (NDAA) for Fiscal Year 2009 (FY 2009), Public Law 110–417. Section 711 eliminates copayments for authorized preventive services for TRICARE Standard beneficiaries other than Medicare-eligible beneficiaries. This rule also realigns the covered preventive services listed in the Exclusions section of the regulation to the Special Benefits section in the regulation.

**DATES:** *Effective Date:* This final rule is effective January 27, 2012. *Applicability Date:* 32 CFR 199.4(f)(12) applies for dates of service on or after October 14, 2008, for preventive services listed in paragraph (e) (28) of this section.

**FOR FURTHER INFORMATION CONTACT:** Ann Fazzini, Medical Benefits and Reimbursement Branch, TRICARE Management Activity, telephone (303) 676–3803. Questions regarding payment of specific claims should be addressed to the appropriate TRICARE contractor.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Sections 1079(b) and 1086(b) of Title 10, United States Code (U.S.C.), as amended by Section 711 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 (Pub. L. 110–417), required the Department of Defense to eliminate copayments for those authorized preventive services named in the law for TRICARE Standard beneficiaries other than Medicare-eligible beneficiaries.

This language requires all copayments to be eliminated for authorized preventive services for certain TRICARE Standard beneficiaries who would otherwise pay copayments and that certain TRICARE Standard beneficiaries pay nothing for the preventive services during a year even if the beneficiary has not paid the amount necessary to cover the beneficiary's deductible for the year. The language does not expand coverage of preventive services not otherwise authorized by law under the TRICARE preventive care benefit.

The proposed rule published in the **Federal Register** on September 27, 2010, (75 FR 59173) clarified and realigned the preventive services currently listed in the Exclusions section of the TRICARE regulation to the Special Benefits section in the regulation. This realignment does not remove from coverage any preventive services currently covered under the program nor does it create a new entitlement to preventive or other services not otherwise authorized in title 10, Chapter 55, United States Code. We performed this realignment because Title 32 Code of Federal Regulations (CFR) § 199.4(g), ''Exclusions and limitations,'' states in subparagraph (37) that preventive care is excluded, and then lists those services that are not excluded. We believe including covered preventive services in the Exclusions section created confusion for those seeking information about preventive services under the TRICARE program. A person seeking information about what preventive services are covered would most likely not look for that information in a section labeled ''Exclusions.'' We remedied this confusion by removing the list of covered preventive services from this section and placing the list in the ''Special Benefit Information'' section of 32 CFR 199.4(e). We also realigned those services currently in the ''Exclusions'' section that are not truly preventive but are more evaluative in nature in the ''Special Benefit Information'' section of 32 CFR 199.4(e) and added a definition of ''evaluative'' services in 32 CFR 199.2. However, based upon public comments received, we have removed the evaluative services definition and label from the Final Rule language, instead opting to simply list separately those covered benefits that while preventive in nature are authorized independently from the statutory lists of specifically authorized preventive services contained in Chapter 55 of title 10, United States Code. See Section III. Public Comments below.

### II. Section 711 of the Duncan Hunter NDAA for FY 2009

Section 711 of the NDAA 2009 waives certain copayments for authorized preventive services for TRICARE Standard beneficiaries by amending subparagraphs 1079(b) and 1086(b) of Title 10, United States Code.

It is important to note that the language in Section 711 includes in the list of preventive services for which a cost share is not applicable an ''annual physical exam.'' By law, only well-child visits for beneficiaries under 6 years of age are covered, as are physical examinations for beneficiaries 6 years of age or older if conducted as part of health promotion and disease prevention visits when provided in connection with otherwise authorized immunizations and or cancer screenings, resulting in elimination of copayments for these specific physical examinations for TRICARE Standard beneficiaries. *See* Title 10, U.S.C. 1079(a)(2). Routine annual examinations, other than as described above, are not covered by the TRICARE program.

### III. Public Comments

The proposed rule was published in the **Federal Register** (75 FR 59173) on September 27, 2010 for a 60-day public comment period. We received seven comments from six respondents on the proposed rule.

Five respondents expressed support of this rule change because it will provide better overall coverage for beneficiaries, will increase awareness of disease states and prevention, is a step toward healthier lifestyles and better health choices, and in the long run will save the government money. We agree, and are pleased to promulgate this rule.

One respondent stated agreement that a military beneficiary seeking information about what preventive services are covered would most likely not look for that information in a section labeled ''Exclusions.'' We agree and are pleased we are able to remedy this confusion.

Two respondents requested minimal changes to make the regulation better understood and to eliminate confusing verbiage. We appreciate the comments and believe that the new evaluative services category may have been misleading. Adding the new evaluative services language in 32 CFR 199.4, the ''Special Benefit Information'' section, may have had the unintended result of implying that we were expanding benefit coverage of preventive services beyond what was otherwise authorized by law or otherwise creating a new type

of benefit that did not previously exist. We have carefully reviewed the preventive services provision from a historical perspective. In general, the TRICARE program has been and continues to be a benefit program based upon medical necessity. At the time the current regulation at 32 CFR 199.4(g)(37) was written, certain services, when not medically necessary and not designed to treat a specific illness or injury, were commonly referred to as preventive in nature. The term ''preventive care'' was used rather broadly and not limited to those preventive services specifically authorized in statute. The regulation at 32 CFR 199.4(g)(37) was thus written to exclude from coverage care which fell under this broad type of definition and was not deemed to be medically necessary. A number of exceptions were then listed under the exemption to indicate situations when the services were no longer considered preventive in nature but rather covered as medically necessary (e.g., tetanus shots following an accidental injury) or otherwise authorized by statute (e.g., physical examinations for beneficiaries ages 5–11 that are required in connection with school enrollment). The TRICARE program has evolved over time as has the practice of medicine. Certain preventive health care services are now specifically authorized by statute. As a result, we believe it is necessary to distinguish the statutorily authorized preventive health care services from the broader category of services, which are based upon a medical necessity determination or are otherwise authorized by statute. Continuing to utilize the term ''preventive care'' in the historically broad sense as well as to refer to specific statutorily covered preventive services is certain to lead to confusion. As a result, this rule realigns statutorily authorized preventive care as well as care otherwise authorized by statute from the Exclusions section to the Special Benefits section. We have eliminated reference to the specific examples of medically necessary care that were highlighted under the exceptions to the general preventive care exclusion in 32 CFR 199.4(g)(37)(iii)–(vi) as realigning these specific routine types of medically necessary care to the special benefits section is confusing and unnecessary. Eliminating the individual reference to these medically necessary services in no way conveys a change in TRICARE benefit coverage. We are modifying the remaining regulatory text in 32 CFR 199.4 (e) (28) to include preventive services and in paragraph (e)(29) including those other special services that are otherwise authorized by law. We believe these changes will clarify our intent regarding preventive and other special benefits, which will be further clarified in the TRICARE Policy Manual.

One respondent suggested that we expand this service/coverage to include other health insurance providers and Medicare-eligible patients. We appreciate this comment and want to assure the respondent the changes we are implementing do not add to or subtract from the covered preventive services beneficiaries are now receiving, but are primarily to address the elimination of copayments for certain preventive services. We are not certain what the respondent means by ''other health insurance providers,'' but we believe this refers to other payers. This law is specific to the Department of Defense TRICARE Program and has no effect on other payers. TRICARE beneficiaries who are also eligible for Medicare are specifically excluded from the elimination of copayments under this provision. In these situations, Medicare is the primary payer and TRICARE is the secondary payer for services, and in most cases, TRICARE pays the Medicare copayments or cost-shares so that the beneficiary has no out-of-pocket expenses for these services. We would also note that to the extent our Medicare-eligible beneficiaries have no copayments or cost-shares for covered preventive services under Medicare, there are no out-of-pocket expenses for TRICARE to reimburse. We will ensure this is clarified in the TRICARE Policy Manual.

Two respondents recommended waiving any co-pays for preventive office visits. We appreciate this comment and the opportunity to clarify that the regulation lists health promotion and disease prevention visits as a covered preventive care benefit (32 CFR 199.4(e) (28) (iv)), for which there is no copayment, when a beneficiary receives at least one of the preventive services listed (e.g., immunizations or cancer screening examinations) during the office visit. We will ensure this is clarified in the TRICARE Policy Manual.

One respondent stated support for the elimination of cost-sharing for TRICARE beneficiaries for secondary prevention, such as eye examinations for those with diabetes, as this would be an important extension of the health enhancement and cost containment goals of the FY2009 NDAA. The respondent stated that FY2009 was retroactive, meaning that beneficiaries did not necessarily know that their co-pays would be eliminated when they received a qualifying preventive service, and that it should be done prospectively, ideally for more than one fiscal year at a time. We appreciate the respondent's support to expand this benefit to secondary prevention. However, we cannot address this as it is outside the scope of the law. Benefits may not be implemented until granted by Congress. We have attempted to alleviate the financial burden for those services already received by including a provision in the regulation that allows requests for reimbursement of copayments paid by beneficiaries on or after the applicability date of October 14, 2008. The elimination of copayments for these preventive services is effective October 14, 2008, and will continue for successive years until it is revised or eliminated by law.

One respondent stated this rule provides an important opportunity to review TRICARE's coverage policies for pediatric health promotion and disease prevention services to ensure that cost-sharing is not imposed for any of these vital services. While we appreciate the respondent's suggestion regarding review of our coverage policies for pediatric preventive services, we cannot address this as it is outside the scope of the law. As to the comment relating to the reimbursement to providers of these preventive services, they will be eligible to be paid 100% of the TRICARE allowed amount, and will see no reduction in their payment levels for these services.

## IV. Regulatory Procedures

*Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''*

It has been certified that this amendment to 32 CFR part 199 does not:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

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

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

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

It has been certified that this rule is not economically significant, and has been reviewed by the Office of Management and Budget as required under the provisions of E.O. 12866.

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

It has been certified that this rule does not contain a Federal mandate that may result in the expenditure by State, local and Tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

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

The Regulatory Flexibility Act (RFA) requires each Federal agency to prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This rule will not significantly affect a substantial number of small entities for purposes of the RFA.

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

This rule will not impose significant additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3511). Existing information collection requirements of the TRICARE and Medicare programs will be utilized.

*Executive Order 13132, ''Federalism''*

This rule has been examined for its impact under E.O. 13132, and does not contain policies that have federalism implications that would have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government; therefore, consultation with State and local officials is not required.

**List of Subjects in 32 CFR Part 199**

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR part 199 is amended as follows:

## PART 199—[AMENDED]

■ 1. The authority citation for part 199 continues to read as follows:

**Authority:** 5 U.S.C. 301; 10 U.S.C. Chapter 55.

■ 2. Section 199.4 is amended by adding paragraphs (e)(28), (e)(29), and (f)(12), and revising paragraph (g)(37) to read as follows.

**§ 199.4 Basic program benefits.**

* * * * *

(e) * * *

(28) *Preventive care.* The following preventive services are covered:

(i) Cervical, breast, colon and prostate cancer screenings according to standards issued by the Director, TRICARE Management Activity, based on guidelines from the U.S. Department of Health and Human Services. The standards may establish a specific schedule that includes frequency, age specifications, and gender of the beneficiary, as appropriate.

(ii) Immunizations as recommended by the Centers for Disease Control and Prevention (CDC).

(iii) Well-child visits for children under 6 years of age as described in paragraph (c)(3)(xi) of this section.

(iv) Health promotion and disease prevention visits (which may include all of the services provided pursuant to § 199.18(b)(2)) for beneficiaries 6 years of age or older may be provided in connection with immunizations and cancer screening examinations authorized by paragraphs (e)(28)(i) and (ii) of this section.

(29) *Physical examinations.* In addition to the health promotion and disease prevention visits authorized in paragraph (e)(28)(iv) of this section, the following physical examinations are specifically authorized:

(i) Physical examinations for dependents of Active Duty military personnel who are traveling outside the United States. The examination must be required because of an Active Duty member's assignment and the travel is being performed under orders issued by a Uniformed Service. Any immunizations required for a dependent of an Active Duty member to travel outside of the United States is covered as a preventive service under paragraph (e)(28) of this section.

(ii) Physical examinations for beneficiaries ages 5–11 that are required for school enrollment and that are provided on or after October 30, 2000.

(iii) Other types of physical examinations not listed above are excluded including routine, annual, or employment-requested physical examinations and routine screening procedures that are not part of medically necessary care or treatment or otherwise specifically authorized by statute.

(f) * * *

(12) *Elimination of cost-sharing for certain preventive services.*

(i) Effective for dates of service on or after October 14, 2008, beneficiaries, subject to the limitation in paragraph (f)(12)(iii) of this section, shall not pay any cost-share for preventive services listed in paragraph (e)(28)(i) through (iv) of this section. The beneficiary shall not be required to pay any portion of the cost of these preventive services even if the beneficiary has not satisfied the deductible for that year.

(ii) Beneficiaries who paid a cost-share for preventive services listed in paragraph (e)(28)(i) through (iv) of this section on or after October 14, 2008, may request reimbursement until January 28, 2013 according to procedures established by the Director, TRICARE Management Activity.

(iii) This elimination of cost-sharing for preventive services does not apply to any beneficiary who is a Medicare-eligible beneficiary. For purposes of this section, the term ''Medicare-eligible'' beneficiary is defined in 10 U.S.C. 1111(b) and refers to a person eligible for Medicare Part A.

(iv) Appropriate copayments and deductibles will apply for all services not listed in paragraph (e)(28) of this section, whether considered preventive in nature or not.

(g) * * *

(37) *Preventive care.* Except as stated in paragraph (e)(28) of this section, preventive care, such as routine, annual, or employment-requested physical examinations and routine screening procedures.

* * * * *

■ 4. Section 199.17 is amended by adding paragraphs (m)(1)(ii)(D) and (m)(2)(iii) to read as follows:

**§ 199.17 TRICARE program.**

* * * * *

(m) * * *

(1) * * *

(ii) * * *

(D) As stated in § 199.4(f)(12), TRICARE Standard beneficiaries who are not Medicare-eligible beneficiaries, shall have no cost sharing requirements for preventive care listed under § 199.4 (e)(28)(i) through (iv).

* * * * *

(2) * * *

(iii) As stated in § 199.4(f)(12), TRICARE Standard beneficiaries who are not Medicare-eligible beneficiaries, shall have no cost sharing requirements for preventive care listed under § 199.4 (e)(28)(i) through (iv).

* * * * *

Dated: December 21, 2011.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2011–33105 Filed 12–27–11; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG 2011–1038]**

## Safety Zone; San Francisco New Year's Eve Fireworks Display, San Francisco, CA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of enforcement of regulation.

**SUMMARY:** The Coast Guard will enforce the safety zone for the annual San Francisco New Year's Eve Fireworks Display in the Captain of the Port, San Francisco area of responsibility during the dates and times noted below. This action is necessary to protect life and property of the maritime public from the hazards associated with the fireworks display. During the enforcement period, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the safety zone, unless authorized by the Patrol Commander (PATCOM).

**DATES:** The regulations in 33 CFR 165.1191 will be enforced from 11 a.m. on December 31, 2011 to 12:30 a.m. on January 1, 2012.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this notice, call or email Ensign William Hawn, U.S. Coast Guard Sector San Francisco; telephone (415) 399–7442 or email at *D11-PF-MarineEvents@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

The Coast Guard will enforce a 100 foot safety zone in the navigable waters around the fireworks barge off of Pier 50 in position 37°46′28″ N., 122°23′06″ W. (NAD 83) from 11 a.m. on December 31, 2011 until 11:55 p.m. on December 31, 2011 during the loading, transit, and arrival of the fireworks barge to the display location off of Pier 2 in position 37°47′42.6″ N. 122°23′19.1″ W. (NAD83). Upon the commencement of the fireworks display, scheduled to take place from 11:55 p.m. on December 31, 2011 to 12:15 a.m. on January 1, 2012, the safety zone will increase in size and encompass the navigable waters 1,000 feet around the display location near Pier 2 in position 37°47′42.6″ N. 122°23′19.1″ W. (NAD83) for the annual San Francisco New Year's Eve Fireworks Display in 33 CFR 165.1191.

Under the provisions of 33 CFR 165.1191, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the safety zone during all applicable effective dates and times, unless authorized to do so by the PATCOM. Additionally, each person who receives notice of a lawful order or direction issued by an official patrol vessel shall obey the order or direction.

The PATCOM is empowered to forbid entry into and control the regulated area. The PATCOM shall be designated by the Commander, Coast Guard Sector San Francisco. The PATCOM may, upon request, allow the transit of commercial vessels through regulated areas when it is safe to do so.

This notice is issued under authority of 33 CFR 165.1191 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with extensive advance notification of the safety zone and its enforcement period via the Local Notice to Mariners.

If the Captain of the Port determines that the regulated area need not be enforced for the full duration stated in this notice, a Broadcast Notice to Mariners may be used to grant general permission to enter the regulated area.

Dated: December 8, 2011.

**Cynthia L. Stowe,**

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

[FR Doc. 2011–33234 Filed 12–27–11; 8:45 am]

BILLING CODE 9110–04–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R06–OAR–2008–0638; FRL–9613–7]**

## Approval and Disapproval and Promulgation of Implementation Plans; Texas; Infrastructure and Interstate Transport Requirements for the 1997 Ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS

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

**ACTION:** Final rule.

**SUMMARY:** The EPA is partially approving and partially disapproving submittals from the state of Texas pursuant to the Clean Air Act (CAA or Act) that address the infrastructure elements specified in the CAA section 110(a)(2), necessary to implement, maintain, and enforce the 1997 8-hour ozone and 1997 and 2006 fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or standards). We are determining that the current Texas State Implementation Plan (SIP) meets the infrastructure requirements for the 1997 8-hour ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS at 110(a)(2)(A), (B), (E), (F), (G), (H), (K), (L), (M), and portions of (C), (D)(ii) and (J). We are determining that the current Texas SIP does not meet the infrastructure requirements for the 1997 8-hour ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS at 110(a)(2) for portions of (C), (D)(ii) and (J). The EPA is also partially approving and partially disapproving SIP revisions submitted by the state of Texas for the purpose of addressing the provisions of CAA section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS. These SIP revisions address the requirement that the Texas SIP have adequate provisions to prohibit air emissions from adversely affecting another state's air quality through interstate transport. The EPA is partially approving and partially disapproving the provisions of these SIP submissions that emissions from sources in Texas do not interfere with measures required in the SIP of any other state under part C of the CAA to prevent significant deterioration of air quality, with regard to the 1997 8-hour ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS. The partial disapprovals herein are because Texas has stated it cannot issue permits for and does not intend to regulate greenhouse gas (GHG) emissions. The EPA is also approving SIP revisions that modify the Texas SIP for Prevention of Significant Deterioration (PSD) to include nitrogen oxides ($NO_X$) as an ozone precursor. This action is being taken under section 110 and part C of the Act.

**DATES:** This rule is effective on January 27, 2012.

**ADDRESSES:** The EPA established a docket for this action under Docket ID No. EPA–R06–OAR–2008–0638. All documents in the docket are listed at *www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 Freedom of Information Act (FOIA) Review Room between the hours of 8:30 a.m. and 4:30

p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at (214) 665–7253 to make an appointment. Please make the appointment at least two working days in advance of your visit. There is a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Paige, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733; telephone (214) 665–6521; fax number (214) 665–7263; email address *paige.carrie@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document, ''we,'' ''us,'' and ''our'' means the EPA.

## Table of Contents

I. Background
II. What action is the EPA taking?
A. What is the EPA approving in this action?
B. What is the EPA disapproving in this action?
III. Comments
A. What comments did the EPA receive on the September 22, 2011 action for Texas?
B. General Format
C. Comments That Address the Consideration of Existing SIP Provisions
D. Comments That Address Implementation Issues
E. Comments That Address Greenhouse Gases (GHGs)
F. Comments That Address Section 110(a)(2)(E)
G. Comments That Address Sections 110(a)(2)(B) and 110(a)(2)(J)
H. Comments That Address Best Available Control Technology (BACT)
I. Comments That Address Regulation of $PM_{2.5}$
J. Comments That Address Single Source Ozone Modeling
K. Comments That Address Cumulative Air Quality Impacts
IV. Final Action
V. Statutory and Executive Order Reviews

## I. Background

The background for today's action is discussed in detail in our September 22, 2011 proposal to partially approve and partially disapprove revisions [1] to the Texas SIP (76 FR 58748). In that action, we proposed to partially approve and partially disapprove the current Texas SIP for meeting the provisions of the CAA sections 110(a)(1) and 110(a)(2) (i.e., 110(a)(2)(A)–(C), (D)(ii), (E)–(H), and (J)–(M)) for the 1997 ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS. We also proposed to approve severable [2] portions of revisions to the Texas PSD SIP that address $NO_X$ as a precursor to ozone, submitted by the TCEQ to the EPA on March 11, 2011 and May 26, 2011.

Our September 22, 2011 proposal provides a detailed description of the revisions and the rationale for the EPA's proposed actions, together with a discussion of the opportunity to comment. The public comment period for these actions closed on October 24, 2011. See the Technical Support Document (TSD) and our proposed rulemaking at 76 FR 58748 for more information.

## II. What action is the EPA taking?

The EPA is partially approving and partially disapproving submittals from the state of Texas pursuant to the CAA that address the infrastructure elements specified in section 110(a)(2) of the Act, necessary to implement, maintain, and enforce the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ standards.

### *A. What is the EPA approving in this action?*

The EPA is approving portions of the December 12, 2007; March 11, 2008; April 4, 2008; and November 23, 2009 submissions from Texas, determining that the following section 110(a)(2) elements are contained in the current Texas SIP and provide the infrastructure for implementing the 1997 ozone and 1997 and 2006 $PM_{2.5}$ standards: Emission limits and other control measures (section 110(a)(2)(A)); ambient air quality monitoring/data system (section 110(a)(2)(B)); the program for enforcement of control measures, except for the portion that addresses GHGs (section 110(a)(2)(C)); international and interstate pollution abatement, except for the portion that addresses GHGs (section 110(a)(2)(D)(ii)); adequate resources (section 110(a)(2)(E)); stationary source monitoring system (section 110(a)(2)(F)); emergency power (section 110(a)(2)(G)); future SIP revisions (section 110(a)(2)(H)); consultation with government officials (section 110(a)(2)(J)); public notification (section 110(a)(2)(J)); PSD and visibility protection, except for the PSD portion that addresses GHGs (section 110(a)(2)(J)); air quality modeling/data (section 110(a)(2)(K)); permitting fees (section 110(a)(2)(L)); and consultation/participation by affected local entities (section 110(a)(2)(M)).

We are also approving portions of the May 1, 2008 (Texas Interstate Transport SIP) and the November 23, 2009 submissions from Texas, demonstrating that Texas has adequately addressed one of the four required elements (or prongs) of the CAA section 110(a)(2)(D)(i), the element that requires that the SIP prohibit air emissions from sources within a state from interfering with measures required to prevent significant deterioration of air quality in any other state.[3] We are determining that emissions from sources in Texas do not interfere with measures to prevent significant deterioration of air quality in any other state for the 1997 8-hour ozone NAAQS or the 1997 and 2006 $PM_{2.5}$ NAAQS (CAA section 110(a)(2)(D)(i)(II)), except for the portions that address GHGs. We are not addressing the three remaining prongs of section 110(a)(2)(D)(i) for the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS, that pertain to prohibiting air emissions within Texas from: (1) Significantly contributing to nonattainment in any other state, (2) interfering with maintenance of the relevant NAAQS in any other state and (3) interfering with measures required to protect visibility in any other state. We will take action on the three remaining prongs of section 110(a)(2)(D)(i) for these three NAAQS, which addresses interstate transport, in separate rulemakings.

In conjunction with our finding that the Texas SIP meets the section 110(a)(1) and (2) infrastructure and interstate transport SIP elements listed above for the three NAAQS, we are also approving severable portions of the SIP revisions submitted by the TCEQ to the EPA on March 11, 2011 and a correction submitted on May 26, 2011. These portions address revisions to 30 TAC sections 101.1 and 116.12. The revisions to 116.12 add PSD to the title of the section, such that the section will address *Nonattainment* and *Prevention of Significant Deterioration* Review Definitions and thus provide that $NO_X$ is an ozone precursor for the PSD program; and add the definition of *Federally Regulated NSR Pollutant,* which identifies volatile organic compounds (VOCs) and $NO_X$ as

[1] The specific submittals and our actions are detailed in Section II of this rulemaking.

[2] By severable, we mean that the portions of the SIP revision that address $NO_X$ as a precursor can be implemented independently of the remaining portions of the submittal, without affecting the stringency of the submitted rules. In addition, the remaining portions of the submittal are not necessary for approval of the provisions addressing $NO_X$ as a precursor.

[3] As noted in the proposed rulemaking for this action, the May 1, 2008 submittal addresses the 1997 ozone and $PM_{2.5}$ standards; it does not address the 2006 $PM_{2.5}$ standard. The November 23, 2009 submittal addresses the 110(a)(2) infrastructure and interstate transport elements for the 2006 $PM_{2.5}$ NAAQS.

precursors in all attainment and unclassifiable areas. Thus, the definitions for *Major stationary source, Major modification,* and the table identifying the *Significant Level* for emission thresholds for major sources and major modifications apply under PSD. These revisions addressing PSD also specify that a major source that is major for VOCs or $NO_X$ shall be considered major for ozone and provide that the significant emission threshold for ozone (identified as VOC, $NO_X$) is 40 tons per year (tpy). The EPA intends to act on the remaining Texas New Source Review (NSR) SIP revisions at a later date. The inclusion of these requirements in the SIP means that Texas has met the requirement to treat $NO_X$ as a precursor for ozone as necessary to implement the 1997 ozone standard.

*B. What is the EPA Disapproving in this Action?*

We are determining that portions of three section 110(a)(2) elements are not contained in the current Texas SIP and thus do not provide the infrastructure for implementing the 1997 ozone and 1997 and 2006 $PM_{2.5}$ standards. We are therefore disapproving portions of the December 12, 2007; March 11, 2008; April 4, 2008; and November 23, 2009 submissions from Texas, and determining that the current Texas SIP does not meet the infrastructure requirements for the 1997 8-hour ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS at 110(a)(2) for portions of (C), (D)(ii) and (J) because Texas has stated it cannot issue permits for and does not intend to regulate greenhouse gas (GHG) emissions.

We are also disapproving the portion of the Texas Interstate Transport SIP element that prohibits GHG emissions from sources within Texas from interfering with measures required to prevent significant deterioration of air quality in any other state (section 110(a)(2)(D)(i)).

For the disapproved infrastructure elements (the portions of section 110(a)(2)(C), section 110(a)(2)(D)(ii), and section 110(a)(2)(J) described in this section), the EPA remains obligated to implement a FIP at the same time the disapproval is finalized. The EPA's disapproval here, however, does not engender an additional statutory obligation, because the EPA has already promulgated a FIP for the Texas PSD program to address permitting GHGs at or above the Tailoring Rule thresholds (76 FR 25178). As noted earlier, we will take action on the remaining three prongs of section 110(a)(2)(D)(i), which addresses interstate transport, in a separate rulemaking.

**III. Comments**

*A. What comments did the EPA receive on the September 22, 2011 action for Texas?*

We received five comment letters on the proposed rulemaking. These comments are available for review in the docket for this rulemaking. The comment letters came from the following sources:

1. October 24, 2011 letter from Gabriel Clark-Leach, for Environmental Integrity Project and on behalf of Public Citizen and the Sustainable Energy and Economic Development (SEED) Coalition.
2. October 24, 2011 letter from Tangela Niemann, Texas Commission on Environmental Quality.
3. October 24, 2011 letter from Matthew G. Paulson, Baker Botts for the BCCA Appeal Group.
4. October 24, 2011 letter from Matthew G. Paulson, Baker Botts for the Texas Industry Project.
5. October 24, 2011 letter from Elena Saxonhouse, for Sierra Club and on behalf of its members in Texas and states downwind of Texas, such as Arkansas, Louisiana and Oklahoma.

*B. General Format*

Our responses to comments (RTCs) received follow a general format of summarizing the comment or group of similar comments, and then providing our response to that particular summary of comments. Thus the general format provided herein is ''Comment'' and then ''Response.'' The RTCs in Sections III–C and D however, do not follow the general format, but still provide a summary of the comments with our responses.

*C. Comments That Address the Consideration of Existing SIP Provisions*

Two commenters objected generally to the EPA's statements in the proposal concerning substantive issues the Agency considers outside the scope of actions on infrastructure SIP submissions. In the proposal, the EPA explained that in the context of acting upon the infrastructure SIP submissions required by section 110(a)(1) and (2), the Agency must determine what substantive issues states and the EPA need to address in this specific type of SIP submission. In particular, the EPA noted four substantive issues that may exist in the previously existing SIPs that the Agency wanted to be clear were not among the issues that states and the EPA are addressing in actions on infrastructure SIPs: (i) Start-up, shut-down, malfunction (SSM) provisions; (ii) director's discretion provisions; (iii) minor source NSR provisions; and (iv) NSR Reform related provisions.[4]

One commenter expressed that it was ''not sympathetic'' to the EPA's assertion that an action on an infrastructure SIP is ''not the appropriate time and place to address all potential existing SIP problems.'' Instead, the commenter argued that the EPA's position that it could act on ''deficient'' portions of the existing SIP at another time through more appropriate statutory mechanisms is inconsistent with the requirements of section 110(a)(2), and with section 110(k)(3). The commenter noted that the latter provision of the CAA only contemplates a partial EPA approval of a state's SIP submission if that part ''meets all the applicable requirements.''

The EPA disagrees with the premise of the commenter that the Agency must address all possible substantive issues in existing SIPs in the context of acting on an infrastructure SIP submission, whether in a full or partial approval. As explained in the proposal, the EPA considers action on the infrastructure SIP submissions required by section 110(a)(1) and (2) to be an exercise to assure that a state's SIP meets the basic structural requirements for the new or revised NAAQS, not a time to address all potential defects in existing SIP provisions. The EPA believes this approach is permissible under the statute because the individual provisions of section 110(a)(2) are worded in ways that require interpretation and do not explicitly require that the EPA address certain issues in existing SIPs that the EPA identified in the proposal.

Moreover, the commenter's reference to section 110(k)(3) as permitting a partial approval only when the part approved ''meets all applicable requirements'' suggests that the commenter believes either that the EPA is deferring action on issues that are integral to action on an infrastructure SIP, or alternatively that the EPA is approving the infrastructure SIP with respect to the substantive issues in the existing SIP that the EPA explicitly indicated it was not acting upon. In either case, the EPA believes that the commenter is mistaken on this point. As explained in more detail in the proposal, the EPA specifically noted certain issues that it considers outside the scope of an action on an infrastructure SIP as required by section 110(a)(1) and (2), and explained the

[4] See 76 FR 58750–53.

statutory basis for this position. Therefore, the EPA does not agree that it is deferring action on substantive issues that are integral to acting on an infrastructure SIP, e.g., the EPA does not agree that it is necessary to address existing SSM provisions already in the SIP in the context of acting on an infrastructure SIP submission. As the EPA also explained in the proposal, the agency intentionally highlighted specific substantive issues that it considers outside the scope of an action on an infrastructure SIP because it did ''not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a reapproval of certain types of provisions that might exist buried in the larger existing SIP for such state.'' 76 FR 58750. In other words, the EPA's approval of the state's infrastructure SIP should not be viewed as approving an existing deficient provision in the state's SIP, such as an exemption for excess emissions during SSM events that does not meet CAA requirements. To the contrary, the EPA explicitly noted that if there were problematic provisions in the state's existing SIP with respect to the four issues identified as outside the scope of action on an infrastructure SIP, the EPA may elect to deal with those issues separately in another action.

The other commenter likewise objected in general to the EPA's view that certain substantive issues are beyond the scope of an action on an infrastructure SIP, but also critiqued the specific explanations and rationale provided by the EPA for its position in the proposal. The commenter raised four specific arguments in response to the EPA's reasoning: (1) The existence of other tools to rectify SIP deficiencies does not make an infrastructure SIP approvable; (2) a SIP cannot meet ''basic structure'' requirements if it contains known deficiencies; (3) it may not be possible to review every provision of a SIP in acting on an infrastructure SIP, but the EPA has to consider any issues that commenters bring to the EPA's attention; and (4) the EPA action on a state SIP submission that relies on existing SIP provisions combined with the Agency's decision not to examine certain types of deficiencies in the existing SIP provisions ''deprives the public of any opportunity to comment upon or challenge the submissions.'' We will address these concerns in turn.

First, the commenter argued that the mere existence of other statutory tools, such as a section 110(k)(5) SIP call, to address SIP deficiencies ''has no bearing'' on the fundamental question of whether the EPA should approve a state's infrastructure SIP submission if the underlying SIP contains any deficiencies. The commenter reasoned that the ability of the EPA to use section 110(k)(5) to rectify a problem does not mean that the EPA should not address the problem when acting on an infrastructure SIP for a new or revised NAAQS. Indeed, the commenter asserts that if the existing provisions in a SIP could be the basis for a section 110(k)(5) SIP call, then those issues ''should be addressed during the SIP approval process for the new NAAQS.''

The EPA agrees that the mere existence of other statutory tools to address SIP deficiencies, such as a section 110(k)(5) SIP call, does not per se answer the question of whether the EPA must address all potential existing SIP deficiencies in the context of acting on a state's infrastructure SIP submission. However, the EPA did not make such an argument in the proposal. The EPA's point in noting the existence of other statutory tools to address existing SIP deficiencies was merely that the availability of these tools supported the EPA's reasonable reading of section 110(a)(2) as not requiring that any and all possible issues in the existing SIP be addressed in the context of acting on an infrastructure SIP submittal, when those issues are not explicitly among those that must be addressed in this context. As explained in more detail in the proposal, the EPA believes that the provisions of section 110(a)(2) are in some cases ambiguous and it is necessary to interpret what they require in the specific context of the infrastructure SIP as contemplated in section 110(a)(1). The EPA pointed to other statutory tools such as a section 110(k)(5) SIP call as support for its reading of the statute that permits the EPA to address existing SIP deficiencies outside of an action on an infrastructure SIP, because Congress provided other mechanisms for the EPA to use as appropriate for such problems. To reiterate, the EPA believes that even though it is not necessary to address a particular issue while acting on an infrastructure SIP submission, it should not be viewed as precluding the EPA from separately exercising other authority such as section 110(k)(5) to address any existing deficiency in the SIP. Thus the EPA indicated that it may take steps to address such problems via a SIP call or other means.

Second, the commenter disagreed with the EPA's view that a state could meet basic structural requirements for a SIP even if there may be potential deficiencies in the existing SIP. The commenter focused in particular on the description of the deficiencies as merely ''potential'' deficiencies and asserted that the EPA cannot acknowledge deficiencies and nevertheless approve the infrastructure SIP submission as meeting the requirements of section 110(a). According to the commenter, there is ''no 'basic structure' requirement in Section 110(a)'' and that if there were such a requirement the EPA must evaluate the basic structure of the state's SIP ''as it actually exists.''

With respect to this point, the EPA disagrees with the commenter's view that the specific SIP submission required in section 110(a)(1) and (2) within three years after the promulgation of a new or revised NAAQS is not intended to be a submission directed at basic structural requirements for a SIP. The commenter can take issue with the EPA's characterization or terminology when the agency refers to ''basic structure'' requirements, but the fact remains that the agency has to evaluate whether the SIP submission in question meets the various requirements of section 110(a)(2), as applicable, in this specific type of SIP submission.

As the EPA articulated in the proposal, the various elements of section 110(a)(2) address a host of different issues, some of which entail legal authority requirements, some of which entail substantive requirements, and some of which entail both. Many of the elements of section 110(a)(2) are ambiguous with respect to what they require in the context of an infrastructure SIP. In order to act on the infrastructure SIP, the EPA has to interpret the provisions of section 110(a)(2) to ascertain which of those provisions apply to this specific type of SIP submission, and how they apply. The commenter objected to the EPA's approach, but did not support its contentions with specific arguments based upon the actual wording of section 110(a)(2), nor did the commenter explain how or why it disagreed with the interpretation of the statutory language provided by the EPA in the proposal. Having had to determine which issues are properly within the scope of an action on an infrastructure SIP, for informational purposes the EPA sought to make clear that its action should not be construed as reapproving existing provisions of certain types because the EPA considers those issues that may be dealt with separately. The EPA did not, therefore, determine definitively whether the state's existing SIP contained any of these types of provisions that may be deficiencies, hence the agency referred

to any such provisions as ''potential'' deficiencies. Contrary to the commenter's view, the EPA believes it is appropriate to refer to any such provisions as potential deficiencies, until such time that the EPA can undertake the requisite analysis and undergo the proper procedures to establish that any such provisions are in fact inconsistent with the requirements of the CAA.

Third, the commenter objected to the EPA's statement that it is reasonable to defer action on a deficient provision in an existing SIP because it is not possible ''for [the] EPA to consider whether every provision of every SIP in every state meets the current requirements of the federal Clean Air Act.'' The commenter asserted that it was not asking the EPA ''to evaluate every word of the Texas SIP,'' but rather that it believes that the EPA must evaluate the SIP for the four substantive issues that the Agency concluded were outside the scope of infrastructure SIP actions as well as any other substantive issue that the commenter brings to the EPA's attention in this rulemaking context.

With respect to this point, the EPA believes that the commenter misunderstood the reason that the Agency stated that it is not required to review SIPs for all possible existing deficiencies when evaluating an infrastructure SIP submission, including any related to the four issues specifically identified in the proposal. The EPA noted this practical point as part of explaining its view that where the specific requirements of the provisions of section 110(a)(2) are ambiguous, it is appropriate for the EPA to interpret the statute in a way that makes logical and feasible sense. Thus, for example, because the provisions of section 110(a)(2) do not explicitly provide that the SIP submission required by section 110(a)(1) after the promulgation of a new or revised NAAQS must rectify any and all potential substantive issues concerning any pre-existing SSM provisions in the state's SIP, the EPA concluded that it was reasonable to interpret the statute as not requiring the EPA to address that issue in this specific action on an infrastructure SIP submission. The SSM issue in and of itself is complex and could take substantial time and resources by both the state and EPA to identify, evaluate, and address as necessary any such provisions.

Rather than a basic structural SIP requirement for a new or revised NAAQS, such as having state law authority to carry out the SIP, an overarching permitting program in place, or a monitoring network deployed, such an SSM issue might arise in the context of an individual existing emission limit that might apply only to a small number of sources of a certain type as part of the nonattainment area plan for a particular geographic area within the state. The EPA does not disagree that such a provision might be problematic in and of itself and that once examined through the appropriate mechanisms could prove to be inconsistent with the CAA and EPA's policy guidance on excess emissions. However, such a provision could be but one substantive issue among many in the existing SIP for which in depth analysis as part of the action on an infrastructure SIP is not practicable. To attempt to do such an analysis in this action would detract from the larger exercise to assure that the state SIP meets basic structural requirements for a new or revised NAAQS.

The EPA agrees that where the specific provisions of section 110(a)(2) clearly indicate that the EPA should evaluate a state's infrastructure SIP submission with respect to a given issue, the EPA must do so. Thus, the EPA has evaluated the state's submission on an element by element basis in the proposal, and explained why the agency believes that the state has or has not met the various individual requirements of section 110(a)(2), as applicable and as the EPA interprets them. For example, the EPA explained in detail why the agency believes that the state has adequately complied with section 110(a)(2)(A) concerning enforceable emissions limits and other control measures; section 110(a)(2)(B) concerning air quality monitoring. By contrast, the EPA explained in detail why the agency believes that the state has not met the requirements of a component of section 110(a)(2)(C) with respect to permitting new or modified sources for all federally regulated pollutants including GHGs. It does not follow, however, that the specific provisions of section 110(a)(2) require the EPA to address any and all issues within the existing SIP in the context of acting on an infrastructure SIP submission, and the EPA has noted four such substantive issues that it believes are outside the scope of this exercise as explained in more detail in the proposal.

Where commenters raise concerns with a state's compliance with an element of section 110(a)(2) that the EPA agrees is germane to the infrastructure SIP, the EPA is responding to those comments separately in this action.

Fourth, the commenter opposed the EPA's view that some substantive issues should be addressed separately from action on the infrastructure SIP on the grounds that this approach would deprive the public from any opportunity to comment upon or challenge the state's submission. The commenter evidently believes that because the state's infrastructure SIP submission did not include new provisions and merely confirmed how the existing SIP meets the applicable requirements of section 110(a)(2) that this precluded any comment on the merits of the state's submission.

The EPA shares the commenter's concern with adequate public process and opportunity to comment on a state's infrastructure SIP submission. In this context, however, the EPA disagrees with the commenter's implication that the EPA should address any and all possible issues relating to the existing SIP in any action on a pending SIP submittal. First, the mere fact that the state's infrastructure SIP submission does not include actual revisions to the existing EPA-approved SIP does not alter the fact that it is a SIP submission and therefore its contents are subject to notice and comment, to the extent that the issues raised are germane to the action in question. To the extent that an issue is applicable in the context of the infrastructure SIP submission, the EPA itself is scrutinizing the content of the submission for compliance with the CAA, and when the Agency proposes action on the submission it is providing notice and inviting public comment on its proposed action. This does not automatically mean, however, that it is appropriate for the EPA to address, and for the public to comment upon, all possible substantive issues relating to the existing SIP beyond those that the EPA interprets as applicable for evaluation in the context of this specific type of SIP submission. The same principle, applied more precisely to the actual submission at hand, suggests that it is reasonable for the EPA to determine that certain substantive issues are outside the scope of the infrastructure SIP process and may be assessed separately in another context. This decision does not foreclose public comment on such issues, it merely indicates that public comment on such issues should occur at the point when the EPA is taking an action that more appropriately addresses the specific issue.

Additionally, the EPA notes that although the Texas infrastructure SIP submission was comprised of the state's explanations of why the state believes its existing SIP meets the applicable requirements of section 110(a)(2), that approach has not precluded public

comment on the relevant issues. The commenter's own comments illustrate that this process affords the public an opportunity to comment on the EPA's proposed action on the infrastructure SIP submission. Where those comments raise concerns about issues properly within the scope of an action on an infrastructure SIP, the EPA is evaluating those comments as part of this action.

Finally, one commenter more specifically objects to the EPA's evaluation of the state's infrastructure SIP submissions with respect to the minor NSR permitting program in Texas. The commenter expresses concern that the state has ''failed to implement its minor source NSR program in a way that complies with federal requirements'' and claims that ''because Texas's failures undermine its ability to implement, maintain, and enforce the new NAAQS, [the] EPA's action on Texas's submissions fails to comply with the clear and unambiguous requirements of section 110(a)(2)(C).'' As further explanation of its concerns, the commenter contends in more detailed comments that the ''Permit by Rule'' (PBR) provisions in the Texas SIP must be limited to narrowly defined source categories and include a mechanism for pre-construction application and agency review. Another commenter echoes these statements, and additionally contends the PBR provisions do not allow for adequate public participation. According to the commenters, these concerns preclude the EPA approving the state's infrastructure SIP submissions. Additionally, the commenters contend another component of Texas's SIP-approved minor NSR program, permit ''alterations,'' fails to meet the requirements of section 110(a)(2). One commenter states the alterations rules interfere with NAAQS attainment strategies, fail to prevent circumvention of NSR permitting requirements for major stationary sources, and undermine public participation in the permitting process. Another commenter also states the alteration provisions violate 40 CFR part 51 notice requirements, fail to provide adequate mechanisms for denial for cause, and fail to protect the NAAQS.

The EPA disagrees with the commenter's view that concerns with certain components of the minor NSR program in the Texas SIP preclude approval of the state's infrastructure SIP submissions for the ozone and $PM_{2.5}$ NAAQS. In the case of the minor NSR permitting requirements for a SIP, the EPA agrees that section 110(a)(2)(C) provides the general statutory basis for this program and for the agency's regulations that govern such programs. However, in the proposal and in this response, the EPA explains that the EPA considers action on the infrastructure SIP submissions required by section 110(a)(1) and (2) to be an exercise to assure that a state's SIP meets the basic structural requirements for the new or revised NAAQS, not a time to address all potential substantive defects, or alleged defects, in existing SIP provisions Therefore, EPA considers an evaluation of any component of a state's existing minor NSR program to be outside the scope of an infrastructure SIP review rather than an unambiguous requirement of the EPA's action on an infrastructure SIP with regard to section 110(a)(2)(C). The specific concerns the commenters raise are over the PBR and alterations rules, which were approved into the Texas SIP as components of the minor NSR program.[5] Because an action upon an infrastructure SIP is not the correct place to evaluate the commenter's specific substantive concerns about existing components of the state's minor NSR program that the commenters consider defective, the EPA will not address those concerns at this time. As with the other substantive issues that the EPA determined to be outside the scope of infrastructure SIP actions, the EPA notes that the CAA provides other mechanisms to address existing substantive deficiencies in SIPs, including potential deficiencies with a state's minor NSR program.

*D. Comments That Address Implementation Issues*

*Comment:* One commenter states that if provisions in Texas's existing SIP are facially deficient, or if the EPA is aware of the state's inadequate implementation of facially sufficient SIP-approved provisions, then the submitted infrastructure SIP is also deficient with respect to section 110(a)(2) requirements for the relevant NAAQS. The commenter states the EPA is aware of Texas's inadequate implementation of the SIP, and posits the EPA does not have discretion to approve Texas's infrastructure SIP if there is improper implementation of the existing SIP or deficiencies in the existing SIP.

*Response:* The EPA agrees with the commenter that facial deficiencies in SIP provisions could preclude the EPA from approving an infrastructure SIP submittal that relies on those provisions. The commenter's statements highlight an important issue concerning the distinction between a state's SIP meeting the requirements of the CAA on its face (i.e., facial sufficiency of the SIP) and a state's actual compliance with those SIP requirements (i.e., adequacy of implementation of the SIP), and the question of when implementation concerns should be considered an issue in the context of acting on a state's infrastructure SIP.

However, it is important to note as explained in our previous response to comment under B, the EPA is not evaluating potential deficiencies for substantive issues it has determined to be outside the scope of action on an infrastructure SIP. Because the EPA has determined certain substantive issues to be outside the scope of action on an infrastructure SIP, the EPA accordingly is not evaluating those provisions for facial sufficiency. For the EPA's action on submitted provisions it has determined to appropriately be within the scope of an infrastructure SIP, the EPA has evaluated whether the SIP provisions identified or submitted by the state as part of that submission are facially sufficient to meet the applicable requirements of section 110(a)(2) of the CAA. In its analysis of the state's infrastructure SIP submission, the EPA evaluated the provisions submitted within the scope of the infrastructure SIP for facial sufficiency against the relevant elements of section 110(a)(2). In the proposal, the EPA explicitly evaluated the state's submission on a requirement by requirement basis and explained its views on the adequacy of the state's SIP for purposes of meeting the infrastructure SIP requirements. Where the EPA had concerns about the facial adequacy of the state's infrastructure SIP submission, the Agency proposed disapproval of the submission (e.g., deficiencies concerning adequate regulation of GHGs in the PSD permitting program that are inconsistent with the requirements of section 110(a)(2)(C)). Aside from the GHG component of the PSD element of section 110(a)(2)(C), the EPA believes that the other portions of the infrastructure SIP submission facially meet the applicable requirements of section 110(a)(2).

The commenter also contends that a state's failure to implement an otherwise facially sufficient SIP, in contravention of statutory requirements, could also preclude the EPA's approval of a state's infrastructure SIP. First, the EPA does not believe that any concerns whatsoever regarding adequate implementation of the SIP should be the basis for a disapproval of an infrastructure SIP.

[5] The PBR rules were approved into the Texas SIP at 68 FR 64543, November 14, 2003. The alterations rules were approved into the Texas SIP at 67 FR 58697, September 18, 2002.

The EPA acknowledges, as commenter asserts, there have been instances regarding particular components of the Texas Major NSR PSD SIP permitting program where the EPA itself has raised concerns with the state about implementation issues. The EPA is continuing to evaluate its review of the implementation issues that have arisen at this time but believes that it may move forward with finalizing its proposed approval in the absence of a final EPA determination pursuant to 110(m) and 179(a)(4) that the SIP is not being implemented adequately. EPA has not finalized such a determination. EPA believes that such a determination would undermine the approvability of SIP language that is otherwise facially sufficient.

The EPA is not determining in this action that the implementation concerns that have arisen do not exist, but that the EPA will continue to examine and analyze the implementation concerns we are currently aware of and have already communicated to the state, as well as any others we become aware of in the future. It is important to note that EPA has already taken a number of actions to attempt to correct some issues with SIP implementation, including disapproval of certain proposed SIP packages and objections to individual Title V permits that did not include all applicable SIP requirements. If the EPA determines that outstanding implementation issues are sufficiently serious it will take appropriate action, which could include the use of other regulatory tools, including the issuance of a SIP call, making a finding of failure to implement, or taking measures to address specific permits pursuant to the EPA's case by case permitting oversight. Which action would be appropriate would depend on the nature and extent of the particular implementation problems at issue. The commenters raise additional specific contentions regarding problems with implementation of particular components of the PSD NSR SIP program. The EPA will respond to those comments in the following relevant subsections.

*E. Comments That Address Greenhouse Gases (GHGs)*

*Comment:* The EPA received identically phrased comments from two industry groups on this proposal. These commenters support the EPA's proposal to the extent of the proposed partial approval of Texas's infrastructure SIP, but oppose the proposal to the extent of the proposed partial disapproval of the SIP. The commenters make two objections as the basis of their opposition to the partial disapproval.

The commenters' first objection is that the EPA's proposed disapproval is based on grounds that are outside this rulemaking. They explain that, in their view, this rulemaking relates to the requirements of CAA section 110 for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS, and that the GHG permitting requirements—which were the subject of the EPA's proposed disapproval—are not related to those NAAQS requirements.

*Response:* We disagree with these comments. The premise of these comments seems to be that CAA PSD permitting requirements apply on a pollutant-by-pollutant basis, but that premise is incorrect. Those requirements apply on a source-by-source basis for all pollutants emitted by that source that meet the PSD applicability thresholds. For example, a new source that triggers PSD because of its emissions of ozone precursors or $PM_{2.5}$ is also subject to PSD for any other conventional pollutants that it emits above the applicable significance levels and for GHGs, if it emits those above the Tailoring Rule thresholds. Accordingly, for the ozone and $PM_{2.5}$ NAAQS Texas infrastructure SIP to be fully approvable, that SIP must include the appropriate PSD requirements for all other pollutants, including GHGs. Thus, contrary to the commenters' objections, those PSD requirements are related to—and, in fact, are part and parcel of—the ozone and $PM_{2.5}$ infrastructure SIP. Because the infrastructure SIP fails to include some of those requirements, the EPA must disapprove that SIP to that extent.[6]

*Comment:* The commenters' second objection is that disapproval of the infrastructure SIP is ''redundant'' in light of what we call the GHG PSD SIP Call or, simply, the SIP Call,[7] and what we call the Texas GHG PSD Error Correction Rule, or, simply, the Error Correction Rule.[8] The commenters add that they have ''serious concerns about, among other things, the extent to which the GHG SIP Call and [Error Correction Rule] have a sound basis in the CAA * * *. In light of the highly questionable basis for these past actions, * * * there is no reason for [the] EPA to introduce the legal uncertainty associated with the federal program for GHG permitting at Texas sources to the straightforward and unrelated action'' concerning the infrastructure SIP. The commenters incorporate by reference their comments on the SIP Call and the Error Correction Rule, in which they argue that those rules are not authorized under the CAA.

*Response:* We disagree with these comments. The infrastructure SIP action is not unrelated to or redundant in light of the EPA's past actions regarding GHG permitting. As explained in the proposal for this infrastructure SIP action, the Texas infrastructure SIP submittals do not include revisions to the SIP, but document how the current Texas SIP already includes the required infrastructure elements. Our proposed determination evaluated how section 110(a)(2) elements, including the PSD element of section 110(a)(2)(C), are contained in the current Texas SIP. In the two recent actions cited by commenters, the EPA identified substantial deficiencies in the Texas PSD SIP provisions. In the SIP Call, promulgated under CAA section 110(k)(5) on December 13, 2010, the EPA determined that the Texas PSD SIP is substantially inadequate to meet CAA requirements because it does not apply PSD requirements to GHG-emitting sources. Accordingly, the EPA issued a ''SIP call'' for Texas, which required the state to revise its SIP as necessary to correct the inadequacy. The EPA also established the deadline of December 1, 2011 for Texas to submit the corrective SIP revision. See 75 FR 77698.

In the Error Correction Rule, we stated that Texas's PSD SIP was flawed because it ''failed to address or to include assurances of adequate legal authority * * * for the application of PSD to each newly regulated pollutant, including non-NAAQS pollutants, under the CAA,'' among them GHGs (see 76 FR 25178, 25192). Accordingly, we stated that our approval of the SIP with those flaws was in error. Although our approval took place in 1992, and concerned SIP submittals in the late 1980s, we made clear that Texas had never corrected those flaws and, in fact, in the context of participating in the EPA's CAA rulemakings concerning

[6] As discussed below, the Error Correction Rule identified, and issued a partial disapproval for, flaws in the Texas SIP PSD program that were broader than the lack of application to GHGs.

[7] ''Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule,'' 75 FR 77698 (December 13, 2010).

[8] ''Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program,'' Interim Final Rule, 75 FR 82430 (December 30, 2010) (Interim Final Error Correction Rule); ''Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program,'' Final Rule, 76 FR 25187 (May 3, 2011) (Error Correction Rule).

GHGs in 2010, had made statements that highlighted those flaws. As a result, under CAA section 110(k)(6), we revised our previous approval of the SIP to be a partial approval and partial disapproval. Further, we promulgated a FIP, the scope of which was commensurate with the error that we were correcting. We explained that we were promulgating a FIP to apply appropriate measures to assure that the EPA's PSD regulatory requirements will apply to non-NAAQS pollutants that are newly subject to regulation under the CAA that the Texas PSD program does not already cover. At present, the only pollutant is GHGs. Therefore, the EPA's FIP will apply the EPA regulatory PSD program for the GHG portion of PSD permits for GHG-emitting sources in Texas, and the EPA commits to take whatever steps are appropriate if, in the future, Texas fails to apply PSD to another newly regulated non-NAAQS pollutant. *Id.*

Therefore the SIP Call and the Error Correction Rule are not only inextricable from, but are also important for today's rulemaking. As described in those prior actions, the EPA determined that the Texas PSD SIP provisions have deficiencies. Texas's infrastructure SIP includes those same PSD provisions. Accordingly, the EPA is fully justified in disapproving the Texas infrastructure SIP to the extent those PSD provisions are deficient.

Contrary to the commenters' statements, the fact that the EPA determined the deficiencies in the SIP Call and Error Correction Rule also does not make the current rulemaking ''redundant.'' As we explain in the proposal for this rulemaking, Texas is required to have an infrastructure SIP that meets the applicable requirements of CAA section 110(a)(2). That obligation is not changed by the fact that the EPA conducted previous rulemakings—the SIP Call and Error Correction Rule—that determined that Texas's SIP PSD program has deficiencies.

As noted above, the industry commenters on this infrastructure rulemaking commented on the SIP call and the Error Correction Rule, and we responded to those comments, during the course of those rulemakings. *See* 75 FR 77698, 77705–77716 (SIP Call); Response to Comment on Proposed Rule, ''Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call,'' December 2010; 76 FR 25178, 25192–25205 (Error Correction Rule); ''Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program; Proposed Rule—Response to Comments (April 2011) (response to comments for Error Correction Rule). As of the date of the current rulemaking, Texas has not submitted the corrective SIP revision required by the SIP Call, and has taken no action to remedy the flaws that were the basis for the Error Correction Rule. Texas has challenged both rulemakings in the U.S. Court of Appeals for the DC Circuit.

In addition, contrary to the commenters' statements, their objections to the SIP Call and Error Correction Rule are not relevant in the current rulemaking. As noted above, those rulemakings made determinations that the Texas SIP PSD program has deficiencies. Commenters had the opportunity to, and did, comment on those rulemakings, and have brought challenges to those rulemakings in court. The EPA is not re-opening those determinations in this rulemaking. These determinations apply in this rulemaking to the extent the SIP PSD provisions at issue in the SIP Call and Error Correction rules are the same as the SIP provisions at issue in the current rulemaking. In the alternative, if the comments are relevant, then we respond to them by incorporating by reference our responses to comments in the SIP Call and Error Correction Rule, cited above.

As we noted in the proposal for this rulemaking, Texas did not submit additional SIP provisions to assure that its 1997 $PM_{2.5}$ and ozone, and 2006 $PM_{2.5}$, infrastructure SIPs met the substantive requirements of CAA section 110(a)(2). See 76 FR 58748, 58750. Rather, in 2008 and 2009, Texas took the position that its existing SIP provisions meet the infrastructure SIP requirements, including CAA section 110(a)(2)(C) and (D)(i)(II). *Id.* Among its existing SIP provisions are the PSD provisions that the EPA subsequently, in the 2010 SIP Call and the 2011 Error Correction Rule, determined to have deficiencies. Accordingly, the EPA's determination in the SIP Call that Texas's SIP PSD program is deficient because it does not apply PSD to GHGs, and the EPA's determination in the Error Correction Rule that Texas's SIP PSD program is deficient because it does not address, or provide assurances of adequate legal authority to address, pollutants newly subject to regulation—including non-NAAQS pollutants, among them GHGs—apply as well for purposes of the current rulemaking. In this manner, the SIP Call and Error Correction Rule provide the basis for our disapproval in the current rulemaking of the Texas SIP for failing to meet the infrastructure requirements for the 1997 ozone and $PM_{2.5}$ NAAQS and the 2006 $PM_{2.5}$ NAAQS with respect to the PSD requirements of CAA section 110(a)(2)(C) that concern GHGs and that concern the applicability of PSD to pollutants newly subject to regulation.

The same determinations in the SIP Call and the Error Correction Rule that the Texas SIP PSD program has deficiencies provide a basis for our disapproval in the current rulemaking of the Texas SIP for failing to meet the infrastructure requirements under CAA section 110(a)(2)(D)(i)(II),[9] under which Texas's SIP must contain adequate provisions prohibiting emissions that interfere with any other state's required PSD program; and under CAA section 110(a)(2)(D)(ii), under which Texas's SIP must require new or modified sources to notify neighboring states of potential impacts from such sources. As discussed in the proposal for this rulemaking, Texas's PSD program is the primary measure that must be included to meet the requirements of section 110(a)(2)(D)(i)(II). See 76 FR 58748, 58760. The EPA's determinations in the SIP Call and the Error Correction Rule that the Texas SIP does not meet PSD requirements because it has the deficiencies of failing to apply to GHGs or to address pollutants newly subject to regulation means that the infrastructure SIP fails to meet the requirements of (i) section 110(a)(2)(D)(i)(II) because the PSD program has the same deficiencies, and (ii) section 110(a)(2)(D)(ii) because, by not addressing pollutants newly subject to regulation, the infrastructure SIP does not require new or modifying sources that emit those pollutants to notify neighboring states of potential impacts.

*F. Comments That Address Section 110(a)(2)(E)*

*Comment 1:* The commenter states that Texas does not have adequate authority to enforce the SIP pursuant to section 110(a)(2)(E) specifically because of Article 6 of Senate Bill 12, Texas state legislation passed in 2007. The commenter states the EPA's position is Senate Bill 12 does not disallow the EPA's approval of the infrastructure SIP for section 110(a)(2)(E) in part because the legislation does not alter the enforcement authority ascribed to the EPA, citizens, and other parties other than the TCEQ by the CAA. According to the commenter's assertion, under

[9] As noted above, the EPA is not reopening those determinations in this rulemaking.

section 110(a)(2)(E) the TCEQ may not cede its authority to other parties and must have authority to enforce all infractions and not just repeat infractions, and because Senate Bill 12 partially undermines the state's enforcement authority the Texas infrastructure SIP does not meet section 110(a)(2)(E). The commenter also states that the EPA's separate evaluation of Senate Bill 12 under the Agency's Title V authority does not make the infrastructure SIP any more compliant with section 110 requirements.

*Response:* Regarding the commenter's assertion that under section 110(a)(2)(E) the TCEQ must have authority to enforce all infractions and cannot cede this authority to others, Senate Bill 12 (SB 12) does not preclude the TCEQ from taking certain types of enforcement actions against sources covered under SB12. The TCEQ has authority to impose injunctive relief with respect to all violations from the sources including those for which the legislation altered the TCEQ's enforcement authority (76 FR 58748). Senate Bill 12, codified at TWC Section 7.00251, by its own statutory terms alters the TCEQ's enforcement authority for ''violations based on information [the TCEQ] receives as required by Title V of the Clean Air Act'' upon first infraction. In particular, Senate Bill 12 alters the TCEQ's enforcement authority with respect to particular self-certified[10] violations, further classified as ''Category B'' violations, documented in a Title V deviation report. Under the Title V regulations states must specifically have the authority to collect civil penalties for the violation of any applicable requirement; any permit condition; any fee or filing requirement; any duty to allow or carry out inspection, entry or monitoring activities or, any regulation or orders issued by the permitting authority. This provision is in contrast to the more general requirements for the states to have an enforcement program under Title I. The EPA reads SB 12 to not legislatively impede the TCEQ's enforcement authority to seek injunctive relief for any violations, and as described in the proposal, also does not impede the TCEQ from collecting penalties for repeat infractions. Therefore, the state has the authority to subject all infractions to some level of enforcement. Because the TCEQ has generic enforcement authorities evinced by various state statute provisions described in the proposal, the authority to seek injunctive relief for all violations and authority to seek penalties and injunctive relief for repeat infractions, and SB 12 did not alter the CAA enforcement authority of the EPA or other parties, the EPA determined this state legislation did not bar the EPA's approval and these facts conjunctively supported the EPA's proposal for approval of the infrastructure SIP as meeting section 110(a)(2)(E), as discussed in our proposal.

The EPA's approval is based on the specific facts described in this rulemaking regarding the effects of SB 12. As discussed in our proposal, the EPA is evaluating SB 12 pursuant to its Title V authority as the legislation, by the face of its own terms, alters the TCEQ's enforcement authority with respect to violations based on information the TCEQ receives as required by Title V of the CAA upon first infraction. The EPA reiterates that for the bases described in this response to comment and the proposal for this action, such as generic enforcement authority under state statutory provisions, the EPA finds the Texas SIP meets the infrastructure SIP requirements for section 110(a)(2)(E). As described in the proposal, Title V is subject to statutory and regulatory mechanisms outside the scope of section 110(a), and the scope of this SIP action is limited to determining whether the existing SIP meets certain infrastructure and interstate transport SIP requirements of section 110(a)(2) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS. The reasons for the EPA's proposed determination of approvability under section 110(a)(2)(E) are discussed in this response and in the proposal, and are separate and adequate bases that do not preclude the agency's evaluation of this legislation under Title V.

*Comment 2:* The TCEQ agrees with the EPA's proposed finding for this action that the SIP meets the infrastructure SIP requirements for adequate enforcement authority and resources pursuant to section 110(a)(2)(E). However, the commenter considers the EPA's discussion of Senate Bill 12 as inappropriate for inclusion in the proposal for this rulemaking because the commenter contends the EPA's stated awareness regarding Senate Bill 12, a Title V program, has no bearing on the evaluation of the Texas SIP which is solely a Title I program. The commenter concludes it fails to see the purpose served by the EPA's discussion of Senate Bill 12 in the proposed action.

*Response:* The EPA appreciates the commenter's support for the proposed finding pursuant to section 110(a)(2)(E). Though the EPA's evaluation of SB 12 under Title V ultimately does not factor into the EPA's proposed approval of the infrastructure SIP for reasons explained in the proposal and in our response to Comment 1 under this subsection, the EPA believes it was not inappropriate in this particular matter that involved an overlapping concern—the adequacy of the state's enforcement authority—to put interested parties and the public on notice that the agency is evaluating this matter, albeit under another part of the Act.

*G. Comments That Address Sections 110(a)(2)(B) and 110(a)(2)(J)*

*Comment:* One commenter states that the Texas SIP does not provide for appropriate monitoring of ambient air quality, particularly for ozone. The commenter also states that the EPA's prior approvals of the Texas Statewide Air Quality Surveillance network and the 2010 Annual Air Monitoring Network Plan (AAMNP) do not nullify the EPA's need to evaluate Texas's monitoring program in this rulemaking. The commenter additionally cites to the EPA's raising concerns regarding the 2010 AAMNP with the TCEQ in a separate communication without discussion of those concerns in this rulemaking as negating a basis for approval of the Texas SIP for meeting the requirements of 110(a)(2)(B). The commenter also states that the AAMNP does not discuss ozone monitoring. The commenter also states that many gaps remain in the State's air monitoring network in the Houston area and only a few Houston ozone monitoring stations are equipped with Automated Gas Chromatographs, which measure highly reactive volatile organic compounds (HRVOCs).

*Response:* As the comment indicates, the EPA has approved the Texas Statewide Air Quality Surveillance Network and its 2010 Annual Air Monitoring Network Plan. The EPA conducts a comprehensive annual review to ensure that the state has a monitoring network in place that meets the technical requirements of 40 CFR Part 58 and its appendices. Part 58 minimally provides a 30-day public inspection opportunity for every annual monitoring network plan presented by the States and local agencies that develop the plans; moreover, whenever a plan proposes network modifications, a public comment opportunity is

[10] A self-certified violation is a violation certified by the source. Category B violations are identified in the TCEQ Enforcement Initiation Criteria (EIC); the EIC is in the docket for this rulemaking.

furnished by either the State or EPA.[11] We invite future public participation from this commenter and others when these opportunities are provided. Consistent with the findings of our most recent review, Texas has a monitoring network in place and has no deficiencies in that network that warrant disapproval of the state's monitoring network plan. For the reasons discussed below, we do not agree with the commenter that more is needed to satisfy the requirements of 110(a)(2)(B).

Several of the assertions brought forward by this comment are misplaced or inaccurate. The current air monitoring network for Texas includes, but is not limited to monitoring $PM_{2.5}$, ozone and ozone precursors. The network design criteria for ambient air quality monitoring is found at 40 CFR 58, Appendix D (hereafter referred to as Part 58) [12] and includes the minimum monitoring requirements for state and local air monitoring stations (SLAMS), which measure ozone; Photochemical Assessment Monitoring Stations (PAMS), which measure ozone precursors, including HRVOCs; and $PM_{2.5}$. The minimum number of PAMS required in the Houston area is two and the Texas Commission on Environmental Quality (TCEQ) operates three PAMS in Houston. In addition however, there are seven privately owned PAMS in the Houston area and the TCEQ posts data from these monitors on their Web site (*www.tceq.texas.gov/agency/data/ozone_data.html*). The minimum number of SLAMS for ozone required under Part 58 in the Houston area is four and the TCEQ operates 12 such monitors in Houston.[13] The current TCEQ air monitoring network meets the minimum federal regulatory requirements in Part 58 for SLAMS and PAMS in the Houston area. The air monitoring networks in the Austin, Beaumont, Corpus Christi, Dallas-Fort Worth (DFW), El Paso, Lower Rio Grande Valley, San Antonio, Tyler-Longview, and Waco areas also meet the minimum requirements for number of ozone monitors, pursuant to Part 58.[14] In addition, pursuant to Part 58, in a metropolitan statistical area (MSA) having a population over 350,000, a minimum of one ozone monitoring site is required in areas that have never monitored for ozone. In Texas this has resulted in one new site in the Killeen-Temple-Fort Hood area. A second ozone monitoring site will be added when the 3-year ozone design value is at least 85% of the 2008 ozone NAAQS (64 ppb).[15]

Texas established a State-wide monitoring system in their initial SIP (37 FR 10842, 10895) and while SIP revisions to the monitoring system have not been made since 1978 (43 FR 9275), the TCEQ has made many revisions to the monitoring network. For example, in 1997, there were 23 regulatory ozone monitoring sites in six MSAs [16] and today, there are approximately 72 regulatory ozone monitoring sites in 10 MSAs.[17] The locations of these regulatory monitors have been chosen following the requirements of Part 58, to support the basic monitoring objectives of public data reporting, air quality mapping, compliance, and understanding ozone-related atmospheric processes. To meet these goals the monitoring network includes more sites than the minimum numbers required in Part 58, as we see in the Beaumont, DFW, El Paso, and Houston areas. Data from the State's air quality monitors are collected, evaluated for quality and the quality-assured data are submitted to the EPA's Air Quality System [18] on a quarterly basis. The TCEQ Web site provides the ozone and $PM_{2.5}$ monitor locations and data from as far back as 1999[19] through today. In general, the TCEQ currently operates one of the most extensive and up-to-date air monitoring systems in the United States. Thus, for the Texas air monitoring network, the lack of recent SIP revisions does not support a finding that the SIP does not meet the requirements of section 110(a)(2)(B).

The State's 2010 AAMNP did not address ozone monitoring in its narrative section, but it included for our review an appendix listing all of the air monitors, including those for ozone and PM. The narrative or text portion of the AAMNP addresses proposed changes to the network. The TCEQ did not propose changes to the ozone network, thus the text did not reference ozone. We did not have concerns with the lack of proposed changes to the State's ozone network.

We expressed concerns in our December 23, 2010 letter to the TCEQ regarding their 2010 AAMNP.[20] The TCEQ has addressed all but one of the concerns expressed in our December 23, 2010 letter [21] and is working to resolve our final request to ensure that regulatory ozone monitoring in an identified gap in the eastern Houston area (the Wallisville monitor, which currently is not run by the TCEQ) is completed by July 1, 2012.[22] A monitor at the Wallisville location is not required by Part 58, but has been requested by the Regional Administrator of the EPA's Region 6 office, as it has consistently recorded some of the highest 8-hour ozone concentrations in the Houston area (see footnote 22).[23] See 40 CFR 58, Appendix D, 4.1(a); 40 CFR 58, Appendix D, 1.1.1 *et seq.* Furthermore, because Texas has been responsive to and is taking steps to address the EPA's concerns regarding the air monitoring network there is no basis to determine that the Texas SIP fails to meet section 110(a)(2)(B) of the Act.

The commenter also references an article in the Houston Chronicle dated March 2, 2005, which mentions 20 gaps in the Houston air monitoring network.

[11] The TCEQ provides a 30-day comment period for their AAMNP, but did not receive any comments during the public comment period for their 2010 AAMNP.

[12] The Network Design Criteria for Ambient Air Quality Monitoring was promulgated at 71 FR 61236 (October 17, 2006) and codified at 40 CFR 58, Appendix D. The ozone specific monitoring network design criteria are at part 58, Appendix D, section 4.1.

[13] See the TCEQ Web site air monitoring pages at *www.tceq.texas.gov/agency/data/ozone_data.html.*

[14] Pursuant to Table D–2 of Appendix D to Part 58 (SLAMS Minimum Ozone Monitoring Requirements), the Longview, Tyler and Waco areas each must have a minimum of one SLAMS; the Austin, Beaumont, Corpus Christi, El Paso, the Lower Rio Grande Valley, and San Antonio areas each must have a minimum of two SLAMS and DFW must have a minimum of three SLAMS. These areas have at least the minimum number of required SLAMS. See 71 FR 61236, 61318. See also the TCEQ Web site for a listing of the current SLAMS in these cities: *www.tceq.texas.gov/agency/data/ozone_data.html.*

[15] The Killeen monitor was activated in June 2009, several months after the start of the ozone season. Thus, the first, complete 3-year ozone design value for this site is anticipated with the completion of the 2012 ozone season.

[16] Texas cities with regulatory ozone monitoring sites in 1997: Dallas-Fort Worth, Tyler-Longview-Marshall, Beaumont-Port Arthur, Austin, and Houston-Galveston-Brazoria, and San Antonio.

[17] The TCEQ added regulatory ozone monitoring sites in the following cities: El Paso-Juarez, Corpus Christi-Victoria, Lower Rio Grande Valley (which includes the McAllen-Edinburg-Mission area and Brownsville), and Waco.

[18] The Air Quality System (AQS) is the EPA's repository of ambient air quality data. AQS stores data from over 10,000 monitors, 5,000 of which are currently active.

[19] The TCEQ Web site provides data from as far back as 1997 for 8-hour ozone.

[20] The December 27, 2010 letter and the TCEQ AAMNP for 2010 are in the docket for this rulemaking.

[21] See letter from David W. Bower to Maria L. Martinez, dated January 31, 2011 and letter from Mark R. Vickery to Al Armendariz, dated March 31, 2011, in the docket for this rulemaking.

[22] See letter from Al Armendariz to Mark R. Vickery, dated June 2, 2011, in the docket for this rulemaking.

[23] The Wallisville site would not qualify as a maximum concentration monitor because it does not record the highest 8-hour ozone concentrations in the area. For the last several years, the ozone monitor at the Manvel site has recorded the highest 8-hour ozone concentrations in the Houston area.

The outdated article did not list where the 20 gaps were located, but provided names of several cities within the Houston area that, at the time, lacked ozone monitors. Currently, at least two of those cities have ozone monitors. Neither the commenter nor the article provided any documentation showing where any current gaps might be located.

Our record on the current State-wide air quality network shows that Texas meets the requirements in Part 58. As stated, the air monitoring network review occurs annually, and the state has worked to address the EPA-identified concerns and avoid potential deficiencies in a timely manner. Furthermore, the State and EPA work together to ensure that the air monitoring network meets federal regulatory requirements whether through the demonstration of meeting minimum requirements or by exercising and implementing the Regional Administrator's authority for obtaining any additional information. *Id.* For the 1997 ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS, the Texas SIP provides for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—(i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.

*Comment:* One commenter posits that the lack of ozone monitors in nearly all of the counties that include coal-fired power plants precludes the State from successfully notifying the public if the NAAQS are exceeded and accordingly, the SIP does not meet the notification requirements of section 110(a)(2)(J).

*Response:* As an initial matter, we do not agree that there is a ''lack of ozone monitors in nearly all of the counties that include coal-fired power plants'' because, as described more fully below, a number of counties with coal-fired power plants have ozone monitoring sites and the monitoring network meets the requirements of part 58, Appendix D. We also do not agree that Texas's satisfaction of the requirements of section 110(a)(2)(J) regarding adequacy of public notification measures is in question. Texas has measures in its plan, as required by section 127 of the Act, as well as measures that it implements in practice that are effective to notify the public of instances or areas in which any primary NAAQS is or was exceeded. When the forecast indicates that ozone levels will be above the 8-hour ozone standard, the State notifies the National Weather Service (NWS), who then broadcasts the information across its weather wire. In addition, county residents can subscribe to the State's electronic notification system for ozone forecasts and ozone warnings.[24] Finally, monitored ozone values are posted on the TCEQ Web site and are updated hourly. Thus the State has use of its own Web site, the electronic notification system and the NWS to successfully notify Texas residents when the ozone NAAQS are forecast to be or actually are above the 8-hour standard.

As noted above, we do not agree with this comment's technical assertion regarding a ''lack of ozone monitors.'' The placement of air quality monitors is provided by Part 58, which requires an ozone monitor when the MSA has a population of at least 350,000. In addition however, Part 58 addresses the need to locate monitoring sites to determine the impact of significant sources or source categories on air quality. Ozone is an unstable and highly reactive molecule and it is well known that by increasing the concentration of $NO_X$, the concentration of ozone can be depressed, causing chemical loss of ozone or ''$NO_X$ scavenging.'' Therefore, the TCEQ and EPA have located air quality monitors downwind of significant sources, as monitors placed in closer proximity to $NO_X$ sources can show lower ozone levels. As indicated in Table 1, two of the counties with power plants have a monitor in the same county and eight of the counties with power plants (actual and proposed) have at least one ozone monitor in an adjacent and/or downwind county. The two counties in west Texas (Lamb and Potter) will soon have a monitor in the Palo Duro area of Randall County, which is adjacent to Potter County. Most (10 out of 12) of the counties listed in Table 1 are within or very close to the State's established ozone forecast areas.

TABLE 1—OZONE MONITORING NEAR COAL-FIRED POWER PLANTS

| Facility name and location (county) | Closest monitor (county) | Forecast areas |
|---|---|---|
| Parish (Fort Bend) | (Fort Bend, Brazoria, Harris) | Houston-Galveston-Brazoria (HGB). |
| Big Brown (Freestone) | Corsicana (Navarro), adjacent to Freestone | Dallas-Fort Worth (DFW). |
| Monticello, Welsh (Titus) | Greenville (Hunt), downwind (east) of Titus county | DFW. |
| Martin Lake (Rusk) | Longview (Gregg), Tyler (Smith), both adjacent to Rusk | Tyler-Longview. |
| Pirkey (Harrison) | Karnack (Harrison), Longview (Gregg), Tyler (Smith), Gregg and Smith are downwind | Tyler-Longview. |
| Gibbons Creek (Grimes) | Conroe (Montgomery), adjacent to Grimes | HGB. |
| Twin Oaks (Robertson) | Corsicana (Navarro), downwind from Robertson | DFW. |
| White Stallion (Matagorda) | Danciger and Lake Jackson (Brazoria), adjacent to Matagorda | HGB. |
| Facility is proposed. | | |
| Coleto Creek (Goliad) | Seguin and New Braunfels Airport (Guadalupe), downwind | Forecast: Victoria, HGB and San Antonio. |
| San Miguel (Atascosa) | San Antonio (Bexar), adjacent to Atascosa | San Antonio. |
| Tolk (Lamb) | Palo Duro (Randall).[25] | |
| Harrington (Potter) | Palo Duro (Randall), adjacent to Potter. | |

[24] The ozone warning areas: Austin, DFW, Houston-Galveston-Brazoria, and San Antonio.

[25] This is a Clean Air Status and Trends Network (CASTNET) monitor that includes a continuous ozone monitor. CASTNET is a regional long-term environmental monitoring program administered and operated by the EPA. This monitor will meet Part 58 and data will be submitted into AQS by early 2012. Additional information on CASTNET is in the docket for this rulemaking.

*H. Comments That Address Best Available Control Technology (BACT)*

*Comment 1:* The commenter states that the Texas Commission on Environmental Quality (TCEQ) fails to properly implement Best Available Control Technology (BACT) requirements. The commenter also states that the TCEQ does not require new and modified sources to meet the BACT standard consistent with the federal definition of BACT. The commenter also states that the TCEQ BACT guidance incorporates a three-tier approach, which is at odds with the federal BACT definition. The commenter also states that the TCEQ routinely disregards and misapplies its own BACT guidance and the Commission's implementation of BACT is not guided by any written BACT methodology.

*Response:* Texas's approved SIP is facially sufficient to meet the federal PSD SIP requirements with respect to BACT. Under Texas's approved Prevention of Significant Deterioration (PSD) SIP that EPA approved on September 15, 2010 (75 FR 55978),[26] a source must determine applicable BACT for each PSD permit as required under 40 CFR 52.21(b)(12) and (j). See 30 TAC 116.160(c)(1)(A) and (c)(2)(A).[27] The EPA approved initial revisions to the Texas SIP for its PSD program and BACT provisions on June 24, 1992. See 57 FR 28093. In that action, EPA did not specifically require TCEQ to incorporate EPA's Top-Down BACT review approach into the SIP. Instead, Texas was allowed to use, although not incorporated into the SIP, the State's Spring 1987 BACT guidance document that used a three-tier BACT Analysis approach. After public comment in 2011, TCEQ issued a Reference Guide,[28] that brings forward and updates the Spring 1987 BACT guidance document. It continues to include the three-tier BACT Analysis approach.

While we appreciate commenter's concerns regarding BACT implementation issues, EPA is continuing to evaluate those issues. EPA has not yet made any final determinations regarding BACT implementation issues in this action. Therefore, we believe that we may move forward with finalizing this action and will continue to evaluate the implementation issues raised.

*Comment 2:* The commenter states that the TCEQ guidance and policy regarding BACT demonstrations for PSD permits fail to require compliance with the federal standards and thus, Texas's PSD program fails to ensure the NAAQS will be properly implemented, maintained, and enforced, per sections 110(A)(2)(A) and (C). The commenter also states that the TCEQ refuses to require applicants for PSD permits to consider alternative processes and fuels as expressly required by the federal definition of BACT, which is incorporated by reference into the TCEQ's PSD rules. The commenter also states that EPA letters to TCEQ dated January 24, 2011 and September 29, 2010, regarding permits for White Stallion and Las Brisas, respectively, and EPA's comments dated March 1, 2010, on the proposed revisions to Title 30 of the Texas Administrative Code (TAC), Section 116.160 to the Texas PSD SIP all expressed concern over TCEQ's implementation of BACT requirements.

*Response:* See our response to Comment 1 under this subsection. While we agree that the EPA has expressed concern with the TCEQ's implementation of the BACT analysis requirements in the above-cited comment letters (e.g., integrated gasification combined cycle (IGCC) and alternative fuels), the EPA has not yet made any final determinations regarding BACT implementation issues in this action. Therefore, we believe that we may move forward with finalizing this action and will continue to evaluate the implementation issues raised. If the EPA determines that outstanding implementation issues are sufficiently serious it will take appropriate action, which could include the use of other regulatory tools, including the issuance of a SIP call, making a finding of failure to implement, or taking measures to address specific permits pursuant to the EPA's case by case permitting oversight. Which action would be appropriate would depend on the nature and extent of the particular implementation problems at issue.

*I. Comments That Address Regulation of $PM_{2.5}$*

One commenter objected to the EPA's proposed approval of the state's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS on the grounds that the state ''has not yet incorporated the minimum requirements for controlling and regulating $PM_{2.5}$ through its PSD program.'' The commenter argued that as part of acting on the infrastructure SIPs for the 1997 and 2006 $PM_{2.5}$ NAAQS, the EPA ''must verify that the state has in place enforceable $PM_{2.5}$ significant emissions rates for $NO_X$ and $SO_2$, precursors to $PM_{2.5}$, as well as for direct $PM_{2.5}$'' and that the state has in place the $PM_{2.5}$ increments required by the EPA in another separate rulemaking. In support of this latter point, the commenter referred to the separate rulemaking action by the EPA in October 2010 applicable to the NSR/PSD requirements for the $PM_{2.5}$ NAAQS (the 2010 $PM_{2.5}$ NSR/PSD Rule).[29] In addition, the commenter questioned the adequacy of the separate SIP submission made by the state in May 2011 to meet the requirements of another separate rulemaking action by the EPA in May 2008 (the 2008 $PM_{2.5}$ NSR/PSD Rule).[30]

The commenter's concerns highlight an important overarching question that the EPA had to confront when assessing the infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS: How to proceed when the timing and sequencing of multiple related SIP submissions impact the ability of the state and the agency to address certain substantive issues in the infrastructure SIP submission in a reasonable fashion. In this instance, the state's infrastructure SIP for the 1997 $PM_{2.5}$ NAAQS was, per the explicit terms of the statute, due in the year 2000.

[26] As background, the State's February 1, 2006 SIP submittal of revisions to its state rules removed the reference to the definition of federal PSD BACT in 40 CFR 52.21(b)(12). On September 23, 2009, EPA proposed to disapprove the 2006 submittal due in part to its removal of this definition. See 74 FR 48467. On July 16, 2010, Texas submitted a revision to its state rules that reinstated the federal PSD BACT definition to 52.21(b)(12). See 30 Texas Administrative Code (TAC) 116.160(c)(1)(A). The revision also included a reference to 52.21(j) which implements the BACT definition. See 30 TAC 116.160(c)(2)(A). We found that the adoption of the reference to the federal definition of PSD BACT in 40 CFR 52.21(b)(12) corrected the deficiency in the 2006 submittal because it reinstated the federal BACT definition. See the final rule at 75 FR 55978 for a detailed discussion.

[27] The cross-references to the federal PSD requirements relating to BACT in its State PSD Program serves to distinguish the federal BACT requirements for PSD from the State's requirement to apply State BACT under its Minor NSR Program. See 30 TAC 116.111(a)(2)(C). See the discussion at 75 FR 55978, at 55979–55980 and 55981–55986, for detailed information on the basis for the 2010 SIP approval action.

[28] See *http://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf.*

[29] See, ''Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC),'' 75 FR 64864 (Oct. 20, 2010). This rulemaking concerned various issues relevant to $PM_{2.5}$ and PSD, including increments, significant impact levels, and a significant monitoring concentration.

[30] See, ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$),'' 73 FR 28321 (May 16, 2008). This rulemaking concerned various issues relevant to $PM_{2.5}$ and PSD, including how to address $PM_{2.5}$ precursors, significant emissions rates, and ambient air quality analysis requirements.

Because of protracted litigation over the 1997 $PM_{2.5}$ NAAQS, however, the EPA and states were significantly delayed in the implementation of the 1997 $PM_{2.5}$ NAAQS, including the infrastructure SIPs required under section 110(a)(1) and (2). The EPA did not issue guidance to states concerning these infrastructure SIP submissions until October 2, 2007.[31] The state submitted its infrastructure SIP for the 1997 $PM_{2.5}$ NAAQS soon thereafter on April 4, 2008. For the 2006 $PM_{2.5}$ NAAQS, section 110(a)(1) required the submission of an infrastructure SIP for that NAAQS by November 23, 2009. For this NAAQS, the state submitted its infrastructure SIP on November 29, 2009. In the proposal notice, for purposes of efficiency the EPA proposed action on both of these $PM_{2.5}$ infrastructure SIP submissions, in addition to the state's submission for the 1997 8-hour ozone NAAQS. Significantly, the EPA is required, under the terms of a Consent Decree, to act on the state's infrastructure SIP for the 1997 $PM_{2.5}$ NAAQS by no later than December 16, 2011.

In the process of acting on the infrastructure SIP submissions for the 1997 $PM_{2.5}$ NAAQS and the 2006 $PM_{2.5}$ NAAQS, the EPA necessarily had to consider how to approach the requirements of the 2008 $PM_{2.5}$ NSR/PSD Rule and the 2010 $PM_{2.5}$ NSR/PSD Rule. The EPA acknowledges that section 110(a)(2)(C) directs the EPA to assess the state's infrastructure SIP submission with respect to the PSD permitting program, and the EPA has taken actions accordingly.[32] In both the 2008 $PM_{2.5}$ NSR/PSD Rule and the 2010 $PM_{2.5}$ NSR/PSD Rule, the EPA directed states to make specific SIP submissions relevant to the PSD permitting programs for $PM_{2.5}$.[33] A core question is thus whether the EPA should take into account these other collateral SIP submissions in evaluating the state's infrastructure SIP submissions for the $PM_{2.5}$ NAAQS.

Unfortunately, the sequence and timing of the various SIP submissions renders consideration of the other SIP submissions required by the 2008 $PM_{2.5}$ NSR/PSD Rule and the 2010 $PM_{2.5}$ NSR/PSD Rule impracticable or impossible as part of the EPA's action on these infrastructure SIPs. The 2008 $PM_{2.5}$ NSR/PSD Rule itself was delayed by litigation over the NAAQS and other intervening events, and thus the EPA did not promulgate it until May 16, 2008. Within that rule, the EPA directed states to make a SIP submission that would accomplish certain changes to the PSD permitting program to address $PM_{2.5}$ by May 16, 2011. The state in fact made a SIP submission intended to address this requirement on May 19, 2011.[34] Similarly, in the 2010 $PM_{2.5}$ NSR/PSD Rule, the EPA required states to make certain PSD program revisions, but in that case the SIP submissions to address those requirements are not even due until July of 2012, and the State has not yet made any SIP submission to address those requirements.

Given that the state submitted its infrastructure SIP for the 1997 $PM_{2.5}$ NAAQS on April 4, 2008, nearly three years in advance of the SIP submission required by the 2008 $PM_{2.5}$ NSR/PSD Rule, that necessarily means that the state's infrastructure SIP submission for the 1997 $PM_{2.5}$ NAAQS could not have included or anticipated those later requirements. Likewise, the state's infrastructure SIP submission for the 2006 $PM_{2.5}$ NAAQS on November 29, 2009, was significantly in advance of that other required PSD SIP revision. The EPA believes that it is not reasonable to expect that the state's April 2008 and November 2009 infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS should have addressed the specific PSD program requirements that EPA had not requested the state to make SIP submissions to address until May of 2011. For the same reason, the EPA does not consider it reasonable to expect the state to have anticipated and addressed the SIP revision requirements of the 2010 $PM_{2.5}$ NSR/PSD Rule in these infrastructure submissions, when by the terms of that rule states have until July 2012 to make the necessary SIP revisions.

In theory, the EPA could have elected to act on the PSD portion of the state's May 2011 submission to meet the requirements of the 2008 $PM_{2.5}$ NSR/PSD Rule as part of acting at this time on the infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS. In other words, the EPA could have sought to accelerate action on the May 2011 submission in order to try to address the more recent SIP submission requirements relevant to the PSD program for $PM_{2.5}$. However, the EPA determined that this would not be the most appropriate course for two primary reasons: (1) The EPA's current logistical situation makes it difficult to accelerate action on a SIP submission; and (2) the EPA believes that the state is currently addressing $PM_{2.5}$ in its PSD permitting program pursuant to state law requirements and will continue to do so in the interim until the EPA is able to act on the May 2011 submission.

First, the EPA notes that the state made the SIP submission for the 2008 $PM_{2.5}$ NSR/PSD Rule only relatively recently. Because the state made the submission on May 19, 2011, it is now considered complete by operation of law as of November 23, 2011. Pursuant to section 110(k)(2), Congress provided the EPA with up to one year to act on the submission from this date. Under other logistical circumstances, the EPA might consider accelerating action upon this particular SIP submission and acting on the PSD portions of it as part of taking action on the state's infrastructure SIPs for $PM_{2.5}$ because that would allow the EPA to address the PSD requirements for $PM_{2.5}$ more comprehensively and efficiently in one consolidated action. However, the EPA is currently working on a large number of rulemaking matters, many under Consent Decree deadlines including this specific rulemaking, and this makes it difficult for the EPA to act on a SIP submission on an accelerated basis, unless such accelerated action is necessary. As noted in the proposal, the EPA intends to act on the May 2011 SIP submission for the 2008 $PM_{2.5}$ NSR/PSD Rule separately, on a schedule that will allow the agency to evaluate and take action on that submission, as appropriate.

Second, the EPA believes that action on the May 2011 SIP submission is not necessary at this time and as part of acting on the infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS because the PSD program revisions contained within that submission are already effective and enforceable as a matter of state law, as of May 12, 2011. Although the EPA acknowledges that it is important that these revisions be evaluated and approved into the state's SIP, the EPA does not believe that it is inappropriate to approve the state's infrastructure SIP submissions at this time. The state made the SIP submission required by the 2008

[31] See, ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' Memorandum from William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards (OAQPS).

[32] For example, as part of this action, the EPA is approving a portion of another SIP submission from the state necessary to make explicit that $NO_X$ is a precursor to ozone formation in the state's PSD permitting program.

[33] The EPA notes that in the context of acting on infrastructure SIPs, only provisions related to PSD permitting would be relevant, because the requirements of section 110(a)(2)(I) pertaining to nonattainment plan requirements are outside the scope of the infrastructure SIPs.

[34] As noted in the proposal, on April 20, 2011, the state adopted revisions to its SIP to amend its PSD and nonattainment NSR programs to implement the $PM_{2.5}$ NAAQS. These revisions became effective and enforceable by the state on May 12, 2011. The state submitted these changes to the EPA as a SIP revision on May 19, 2011.

$PM_{2.5}$ NSR/PSD Rule. Until such time as the EPA has the opportunity to evaluate that submission and take the necessary administrative actions to propose and finalize appropriate action upon it, the agency concludes that it is acceptable to rely on the fact that the revisions have been made and are currently enforceable for purposes of state law. The state made the submission to reflect that its PSD permitting program now includes evaluation of $PM_{2.5}$ and does not continue to rely on the use of $PM_{10}$ as surrogate for $PM_{2.5}$ as of May 2011.

Under these circumstances, the EPA does not consider it reasonable to interpret section 110(a)(2)(C) to require the EPA to disapprove the state's infrastructure SIP submissions for the 1997 $PM_{2.5}$ NAAQS and the 2006 $PM_{2.5}$ NAAQS simply because the agency has not yet acted on the May 2011 SIP submission for the 2008 $PM_{2.5}$ NSR/PSD Rule, or has not required the state to make other PSD program revisions in advance of the date required in the 2010 $PM_{2.5}$ NSR/PSD Rule. Instead, the EPA believes that it is appropriate for the EPA to take into consideration the timing and sequence of related SIP submissions as part of determining what it is reasonable to expect a state to have addressed in an infrastructure SIP for a NAAQS at the time when the EPA acts on such submission. Such an approach is reasonable, and to adopt a different approach by which the EPA could not act on an infrastructure SIP, or at least could not approve an infrastructure SIP, whenever there was any impending revision to the SIP required by another collateral rulemaking action would result in regulatory gridlock. The EPA believes that such an outcome would be an unreasonable reading of the statutory process for the infrastructure SIPs contemplated in section 110(a)(1) and (2).

The commenter also specifically expressed concern that the state's May 2011 SIP submission to meet the requirements of the 2008 $PM_{2.5}$ NSR/PSD Rule did not ''fully implement the federally required program to address the $PM_{2.5}$ NAAQS'' for two specific reasons: (1) The submission does not establish significant emissions rates for precursors that would trigger further analysis of $PM_{2.5}$ impacts; and (2) the submission does not include the $PM_{2.5}$ increments established by the EPA.

With respect to the first point, the EPA has not yet had the opportunity to analyze and take action upon the May 2011 submission, so the agency considers it premature to determine whether or not the state has correctly addressed the issue of significant emissions rates for precursors in the submission. The EPA will evaluate the submission for this and other issues when it takes action on this submission in a separate rulemaking. The commenter should participate in that action and resubmit its comments at that time.

With respect to the second point, the EPA has also not evaluated the submission yet, but notes that the May 2011 SIP submission would not be likely to include any $PM_{2.5}$ increments, nor would EPA have required it to. The EPA only established the $PM_{2.5}$ increments in the 2010 $PM_{2.5}$ NSR/PSD Rule, and did not require states to make submissions to address $PM_{2.5}$ increments until July 2012. Again, however, the EPA will evaluate the May 2011 SIP submission at a later date and the commenter should participate in that action and resubmit its comments on this issue at that time, or in the later action that will eventually occur on the SIP submission from the state to meet the requirements of the 2010 $PM_{2.5}$ NSR/PSD Rule.

Finally, one commenter suggested that, rather than approving the state's infrastructure SIP with respect to the 1997 and 2006 $PM_{2.5}$ NAAQS, the EPA should instead ''condition any approval of the infrastructure SIP'' on later revisions to the state's SIP to incorporate the NSR/PSD requirements that were in the May 2011 submission. The commenter asserted that the infrastructure SIP submission could not be ''complete'' until it addresses each applicable element of section 110(a)(2) and that the EPA ''cannot approve the SIP when some elements are missing.''

The EPA interprets the commenter's suggestion that it ''condition'' approval of the state's infrastructure SIP submission on later actions to be a reference to the concept of conditional approval under section 110(k)(4). The EPA considered the commenter's suggestion as a means of addressing the SIP submission timing issue, but the agency is constrained by the provisions of the statute. Section 110(k)(4), under the rubric of ''conditional approval,'' explicitly authorizes EPA to approve a SIP submission ''based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision.'' Courts have confirmed that conditional approvals are an available course of action under section 110(k), but only if the statutory conditions for such a conditional approval have been met.

Based on the specific language of section 110(k)(4), the EPA concluded that it would not be appropriate to use the mechanism of a conditional approval in this action on the state's infrastructure SIP submission. The statute clearly contemplates use of this approach when the state has made a commitment to make a submission in the future that meets the statutory criteria. In this instance, however, the state has already made the substantive SIP submission for the NSR/PSD requirements for the 1997 $PM_{2.5}$ NAAQS in May of 2011. In other words, the state would not need to make a commitment to make a future submission to adopt specific measures by a date certain to meet this requirement for the 1997 $PM_{2.5}$ NAAQS because the state has already made a submission intended to meet the requirement.

Given that the state has already made the submission in question, and that the EPA has not yet been able to evaluate it and take the necessary procedural steps to act upon it, the EPA does not believe that it is appropriate to use the mechanism of a conditional approval in these circumstances. Had the EPA already been able to evaluate the NSR/PSD submission substantively, in theory the agency could have requested the state to make a commitment to make revisions to that submission as part of a conditional approval. As previously discussed, however, the EPA has not yet been able to evaluate that submission fully. Thus, the EPA concluded that a conditional approval of the infrastructure SIP for this element would not be a viable option in this case. It should be noted, however, that the EPA will consider the commenter's suggestion and may utilize the mechanism of a conditional approval when it acts on the NSR/PSD submission, should that be appropriate.

With respect to the commenter's concern that the 2006 $PM_{2.5}$ NAAQS infrastructure SIP submission from the state was not ''complete'' because it did not address the NSR/PSD submission, the EPA believes that this reflects a misunderstanding of the concept of ''completeness'' as it applies in this situation. In section 110(k)(1)(B), under the rubric of ''completeness finding,'' the statute directs the EPA to make a finding whether a SIP submission meets minimum criteria within 60 days. If, however, the EPA does not make such a completeness finding within 60 days, then the submission is deemed complete by operation of law, no matter what its content, six months after submission. Whether by an actual finding, or by operation of law, the completeness starts the clock for action by the EPA on the submission under section 110(k)(2). In this instance, the state's 2006 $PM_{2.5}$ NAAQS

infrastructure SIP submission was deemed complete by operation of law on May 27, 2010.[35] Thus, regardless of what that submission said with respect to section 110(a)(2)(C) in general, or with respect to the NSR/PSD submission in particular, the state's 2006 $PM_{2.5}$ NAAQS infrastructure SIP submission was ''complete'' under the express terms of the statute for purposes of further actions. Likewise, the commenter's observation that the EPA's guidance for these SIP submissions stated that a submission must contain material relevant to each of the elements of section 110(a)(2) in order to be considered ''complete'' is not germane in this case, because that is superseded where the statute requires that a submission be deemed complete by operation of law.

Finally, the commenter's concern that the EPA should not approve an infrastructure SIP ''when some elements are missing'' raises an important question about the practical considerations of the EPA's evaluation of infrastructure SIPs. In general, the EPA of course agrees that the agency should not approve an infrastructure SIP submission for a particular element of section 110(a)(2) if the state's submission does not adequately address that element, whether by establishing that the state's existing SIP already contains the necessary basic structural requirements, by submitting revisions to the existing SIP to meet those requirements, or by some combination thereof. However, the determination of whether ''some elements are missing'' necessarily includes consideration of the sequence and timing of SIP submissions, and as in the situation at issue, there can be complications when a SIP submission that is collateral to, but also relevant to, the infrastructure SIP is required to be submitted on a schedule that does not mesh with the schedule on which the EPA must act on the infrastructure SIP itself. In short, evaluating whether an element ''is missing'' depends upon considerations such as when a SIP submission relevant to that element was or is due to be submitted, whether the EPA has yet had the opportunity to evaluate that other SIP submission, and other considerations discussed in more detail earlier in this response with respect to the commenter's other concerns.

[35] The State's submittal, dated November 23, 2009, was received by EPA on November 27, 2009.

*J. Comments That Address Single Source Ozone Modeling*

1. Comments That Address the Adequacy of Ozone Modeling Procedures

*Comment:* Two commenters assert the TCEQ has incorrectly concluded that modeling demonstrations evaluating the ozone contributions of proposed sources to existing nonattainment areas are unnecessary as summarized in the comments that address SILs,[36] and that the TCEQ has consequently issued PSD permits to sources in close proximity to those areas and also areas that are in near-nonattainment for ozone without requiring adequate modeling of each source's impact on ozone levels. Referencing the TCEQ's Air Quality Modeling Guidelines and ''Draft Ozone Procedures'' document,[37] the commenters maintain that TCEQ routinely issues PSD permits based on outdated and inadequate ozone modeling procedures. One commenter adds that the ozone screening procedure authorized by the TCEQ's modeling guidance document is partly based on, or equivalent to, inappropriate ''Scheffe Tables.'' Additionally, the commenter states the ozone screening method involves ratios of $NO_X$ to VOC without considering the impact of biogenic emissions. Two commenters state that the EPA has on multiple occasions informed the TCEQ that the ozone screening procedures authorized by the TCEQ are outdated and unreliable to evaluate a single source's ozone modeling impact on an air quality control region. One commenter states that the Texas SIP is insufficient to comport with section 110(a)(2)(C) of the Act unless it is revised to expressly require case-by-case ozone impact analyses to be conducted for major sources of ozone precursors based on sufficient modeling techniques. The commenters also stated that the TCEQ has indicated that for some situations TCEQ views the SIP process as the appropriate vehicle for evaluating ozone impacts on a nearby nonattainment area, and this is not acceptable.

*Response:* As further discussed in this response, the appropriate time to evaluate ozone impacts for major sources of ozone precursors on attainment and nearby nonattainment areas is in the permitting process. As we noted in our proposal, the TCEQ has adopted EPA's Guideline on Air Quality Models as part of its adopted-by-reference regulations.[38] Therefore, we have concluded that the TCEQ has adopted the necessary requirements and provisions for implementing a PSD program as it relates to the 1997 ozone standard infrastructure elements, including 40 CFR part 51, Appendix W: Guideline on Air Quality Models (GAQM).

The commenter has raised a number of concerns with individual permitting actions. In our proposal, we pointed out that the EPA has commented to the TCEQ on individual PSD permits regarding concerns with technical inadequacies in ozone impact analyses. We also pointed out that the EPA may address implementation of the SIP through separate action and such separate action is not precluded by approval of the infrastructure SIP. We continue to believe that specific concerns about individual permits are best addressed separately from any action taken specifically with regard to the approvability of this infrastructure SIP.

In the event there is not progress in addressing our technical concerns based on these clarifications, the EPA will consider the other regulatory tools available.

While we remain very concerned about the appropriateness of ambient impacts analyses of ozone for some past permitting actions, herein we are explaining our technical and scientific expectations for ozone impacts analysis for the state permitting authorities and the public. The EPA agrees with the commenter that Texas state permitting authority should not be using

[36] See Section III–J.3 of this rulemaking for the comments that address SILs.

[37] When we say 'modeling guidance' in this response in reference to the TCEQ's modeling guidance, we are including guidance based on the TCEQ's ''Air Quality Modeling Guidelines'' prepared by the TCEQ's New Source Review Permits Division, RG–25 (Revised) and ''Draft Ozone Procedures'' included in the docket for this action as ''TCEQ's Draft Ozone Procedures'' and other guidance the TCEQ has given applicants in the past.

[38] TAC § 116.160(d). Prevention of Significant Deterioration Requirements. 6–77, TXd118, TX110. As adopted by the TCEQ June 2, 2010, effective June 24, 2010 (6–77). Approved by the EPA September 15, 2010 (75 FR 55978) effective November 15, 2010 (TXd118). Regulations.gov docket EPA–R06–OAR–2010–0620. ''TAC § 116.160(d). All estimates of ambient concentrations required under this subsection shall be based on the applicable air quality models and modeling procedures specified in the EPA Guideline on Air Quality Models, as amended, or models and modeling procedures currently approved by the EPA for use in the state program, and other specific provisions made in the prevention of significant deterioration state implementation plan. If the air quality impact model approved by the EPA or specified in the guideline is inappropriate, the model may be modified or another model substituted on a case-by-case basis, or a generic basis for the state program, where appropriate. Such a change shall be subject to notice and opportunity for public hearing and written approval of the administrator of the EPA.''

inappropriate or outdated analytical tools including models or other ambient analysis techniques based on model outputs. The commenter is correct that the use of: (1) ''Scheffe Tables,'' (2) screening techniques which involve ratios of $NO_X$ to VOCs that do not consider the impact of biogenic emissions, or (3) screening techniques that use other outdated or irrelevant modeling, is inappropriate, except in limited circumstances, to evaluate a single source's ozone impacts on an air quality control region.[39] In our proposal, we note that these three types of procedures lack the appropriate levels of biogenic emissions, appropriate consideration of background pollutant levels, and the resulting chemistry conclusions as to whether the airshed is $NO_X$ limited or that a $NO_X$ source would result in an ozone neutral impact. $NO_X$ limited means that the airshed has plenty of VOCs from biogenics and anthropogenic sources such that the production of ozone is limited by the amount of $NO_X$ available in the atmosphere to react with VOCs. Addition of $NO_X$ emissions in an airshed that is ''$NO_X$ limited'' will result in the generation of more ozone within the local airshed. $NO_X$ plumes that have a high concentration of $NO_X$ can result in some initial ozone destruction, but as the plume further disperses the $NO_X$ reactions that create ozone overtake the destruction cycles and the overall net effect is more ozone molecules within the airshed. To be clear, using techniques that compare a proposed source's VOC to $NO_X$ ratio without consideration of the overall airshed can lead to scientifically inappropriate conclusions.[40]

We note the TCEQ's ''draft ozone procedures'' document relies upon outdated EKMA diagrams that conclude most situations are VOC limited and not $NO_X$ limited and that increases in $NO_X$ are assessed as being ozone neutral.[41] This is an inaccurate conclusion because it does not appropriately consider the total pollutant concentration in the local airshed. The procedures discussed in this response and in the proposal, and as found in the TCEQ Draft Ozone Procedures guidance, are fundamentally flawed with the exception of usage in certain limited circumstances (see footnote 39). The EPA will continue to monitor implementation of the PSD program as it relates to ozone impacts analysis and remain in communication with the state.

More scientifically appropriate screening and refined analytical tools are available; they should be considered for use in conducting ambient impact analyses for ozone. As discussed in a separate comment and as called for in the GAQM, the approach for an ozone impact analysis should be determined in consultation with the EPA Regional Office on a case-by-case basis. The TCEQ has adopted the GAQM and therefore should be following the guidance and principles outlined in GAQM to properly implement the TCEQ's PSD program.[42] We raised our fundamental concerns with TCEQ's conclusions that $NO_X$-dominated sources result in ozone neutral impacts in our proposal. The TCEQ did not provide comments on our proposal, nor did it offer supporting reasons to disagree with the EPA's position that these techniques should no longer be used. Therefore, we anticipate that the TCEQ will not use these techniques.

The current Texas SIP facially meets the requirements of 40 CFR 51.166(l)(1) and (2). We disagree with one commenter's statement that the Texas SIP is insufficient unless it is revised to explicitly require case-by-case ozone impact analyses for major sources of ozone precursors based on sufficient modeling techniques. We note that the GAQM and the Texas SIP indicates the state permitting authority should consult with the Regional Office to determine the appropriate analysis techniques, but allows flexibility through the consultation process to determine either modeling based or other analysis techniques may be acceptable. We note that not all sources have utilized the TCEQ's draft ozone procedures. Nevertheless, if the TCEQ continues to utilize inappropriate techniques, we will consider the other regulatory tools available to the EPA. The EPA's authority to take action, which may include a SIP call, a finding of failure to implement, or taking measures to address specific permits pursuant to the EPA's case-by-case permitting oversight, is not precluded by its approval of this infrastructure SIP.

2. Comments That Address Consultation

*Comment:* In conjunction with the proposition summarized in the comment regarding the adequacy of ozone modeling procedures for proposed PSD permits in Texas,[43] the commenters both indicated that the TCEQ routinely does not consult, nor does it require permit applicants to consult, with the EPA before approving a PSD permit application based upon those modeling procedures the commenters state to be inadequate. The commenters both cite to a specific PSD permit application approved by the TCEQ for the White Stallion Energy Center as illustrating the TCEQ's position that an applicant may rely on TCEQ ozone modeling procedures other than those approved by the EPA without consulting with the EPA. The commenter concludes that the TCEQ routinely issues PSD permits based upon ozone impacts analyses alleged to be inadequate (see the comment regarding the adequacy of ozone modeling procedures and footnote 43) without consulting with the EPA and therefore the Texas PSD program is insufficient to assure the NAAQS are achieved. The commenter contends the EPA should require the TCEQ to amend its SIP-approved rules to explicitly include a consultation requirement for ozone. Two commenters state that the EPA should require the TCEQ to amend its SIP to expressly include an approval requirement for ozone requiring all applicants to submit a proposed modeling procedure to the EPA regional office and receive written approval from the EPA regarding that procedure before a PSD permit may be issued.

[39] With the exception of limited circumstances, these techniques would not be acceptable to use. Such a limited circumstance may arise in an area where biogenic emissions are not present in significant quantities, such that the overall airshed being evaluated is actually VOC limited (VOC emissions limit the formation of ozone). In this unique situation, through consultation with the EPA Regional Office, the EPA Regional Office and the state permitting agency may determine a screening approach could be technically appropriate using these tools.

[40] Sillman, S., (1995), ''The Use of NOy, $H_2O_2$, and $HNO_3$ as Indicators for $O_3$-$NO_X$-ROG Sensitivity in Urban Locations,'' J. Geophys. Res. 100, 14,175–14,188; Sillman, S., D. He, C. Cardelino, and R.E. Imhoff, (1997), ''The Use of Photochemical Indicators to Evaluate Ozone-$NO_X$-Hydrocarbon Sensitivity: Case Studies from Atlanta, New York and Los Angeles,'' J. Air and Waste Mgmt. Assoc., 47 (10), 1030–1040. (Oct. 1997); Sillman, S., (1998), ''Evaluating the Relation Between Ozone, $NO_X$ and Hydrocarbons: The Method of Photochemical Indicators,'' EPA/600R–98/022, *http://www-personal.engin.umich.edu/~sillman/publications.htm;* Sillman, S., and D. He, (2002), ''Some theoretical results concerning O3-$NO_X$-VOC chemistry and $NO_X$-VOC indicators,'' J. Geophys. Res., 107, D22, 4659, doi:10.1029/2001JD001123, 2002, *http://www-personal.engin.umich.edu/~sillman/publications.htm;* Ryerson et al, (2003) ''Effect of petrochemical industrial emissions of reactive alkenes and $NO_X$ on tropospheric ozone formation in Houston, Texas,'' Journal of Geophysical Research, Vol. 108, No. D8, 4249, doi:10.1029/2002JD003070, 2003; Ryerson et al., (2001), ''Observations of Ozone Formation in Power Plant Plumes and Implications for Ozone Control Strategies,'' Science, April 27, 2001.

[41] A copy of the TCEQ Draft Ozone Procedures guidance relying upon outdated EKMA diagrams is included in the docket for this rulemaking.

[42] Id.

[43] See Section III–J.1 of this rulemaking for the comments that address the adequacy of ozone modeling procedures.

*Response:* The current Texas SIP facially meets the requirements of 40 CFR 51.166(l)(1) and (2). Specifically, the Texas SIP states ''all estimates of ambient concentrations required under PSD shall be based on applicable air quality models and procedures specified in the GAQM, or other models and modeling procedures currently approved by the EPA for use in the state program.'' Therefore the Texas SIP requires that PSD permit applications contain an adequate analysis of ozone impacts from the proposed project.[44] As indicated by the GAQM, the methods used for the ozone impacts analysis for individual PSD permit actions are determined on a case-by-case basis. 40 CFR Part 51, Appendix W, § 5.2.1.c.

The TCEQ has adopted and incorporated the EPA's PSD permitting regulations found at 40 CFR 51.166 and 52.21 into its SIP. The language of the GAQM clearly applies to permits issued in Texas. Other than the merging of the requirements from 40 CFR 52.21(l)(1) and (l)(2) and 51.166(l)(1) and (l)(2) into one requirement (30 TAC 116.160(d)), the requirements of the Texas rules do not vary from the EPA's GAQM. Section 5.2.1.c. of the GAQM provides that ''model users should consult with the Regional Office to determine the most suitable approach on a case-by-case basis (subsection 3.2.2.).'' Since this provision is incorporated into the Texas SIP, the infrastructure SIP is approvable as facially sufficient with respect to the analysis of impacts of proposed facilities on ozone concentrations in PSD permit reviews.

The commenters assert, and the EPA acknowledges, that EPA has indicated to the TCEQ on multiple occasions the state should consult with the EPA to determine the most appropriate method to analyze ozone impacts on a case-by-case basis. Pursuant to EPA's authority under the Act, EPA Region 6 has submitted formal comment letters in response to the TCEQ draft PSD permits indicating the Agency's position that PSD permit applications and draft permits did not contain an adequate analysis of ozone impacts from the proposed projects, nor was the EPA consulted about the appropriateness, or lack thereof, of an ozone impacts analyses for the facilities. The EPA is concerned that the TCEQ's consultation to date, including the development of a protocol, has not always met the EPA's expectations. The TCEQ should consult with EPA Region 6 on a case-by-case basis for determining the appropriate techniques in developing an adequate ozone impact analysis. Furthermore, a modeling protocol should be developed and agreed upon by EPA Region 6, the TCEQ, and the applicant to ensure that the analysis conducted will conform to the recommendations, requirements, and principles of the GAQM.

As indicated in Section D, the EPA is continuing to evaluate its review of implementation issues that have arisen at this time but believes that it may move forward with finalizing its proposed approval in the absence of a final EPA determination regarding the implementation issues. The EPA believes that such a determination would undermine the approvability of SIP language that is otherwise facially sufficient. The EPA is not determining in this action that the implementation concerns that have arisen no longer exist. If the EPA determines that outstanding implementation issues are sufficiently serious it will take appropriate action, which could include the use of other regulatory tools, including the issuance of a SIP call, making a finding of failure to implement, or taking measures to address specific permits pursuant to the EPA's case by case permitting oversight, depending on the nature and extent of the particular implementation problems at issue.

3. Comments That Address Significant Impact Levels (SILs)

*Comment:* Two commenters state that the TCEQ claims it cannot determine whether ozone impacts from a proposed major stationary source upon a nonattainment region are significant or de minimis because the EPA has not established a significant level for ozone. In the absence of a SIL and perceived time and monetary costs of modeling procedures, the commenters further state that the TCEQ has concluded that modeling demonstrations evaluating the contribution of proposed sources upon existing nonattainment areas are unnecessary. The commenters also state that the TCEQ has also adopted ad-hoc de minimis level of 5ppb through TCEQ permitting orders without undergoing rulemaking processes to, in part find modeling, or detailed modeling, is not necessary for a number of new coal-fired power units.

*Response:* The EPA has defined significant impact levels (commonly referred to as ''SILs''), expressed as ambient pollutant concentrations (e.g., micrograms per cubic meter or parts per million) for certain pollutants for the purpose of determining when a new or modified source's modeled impact of that pollutant are ''significant'' for purposes of analyzing whether the Source[45] causes or contributes to a violation of the NAAQS predicted to exist after the Source commences operation. 40 CFR 51.165(b), 40 CFR 52.21(l).

The purpose of a SIL in general is to compare against the ambient air quality impacts of the proposed emissions increase from a proposed Source that have been estimated using modeling or other analytical techniques. There are generally two ways a SIL may be used as part of an ambient impact analyses for PSD review. First, if an abbreviated analysis of just the impact of the proposed Source's emissions, without the inclusion of any surrounding sources, on ambient concentrations is below the SIL in all ambient air areas, then the proposed Source may be regarded as ''de minimis'' and considered not to cause or contribute to any violation of the NAAQS for that particular pollutant. Secondly, when ambient analysis/modeling of a proposed Source's emissions are included with other surrounding sources within the airshed in a ''cumulative analysis,'' a SIL can be utilized to compare the proposed Source's impacts on any exceedances/violations of ambient standards. If violations/exceedances are projected, the Source can still receive a permit if a conclusion is reached that the Source's contribution is not significant (de minimis) for all projected violations/exceedances of that standard. As we discuss further below, a SIL can aid in making a de minimis determination, but is not necessary to conduct an ambient impact analysis.

Therefore, when a SIL exists it is sometimes used in the First situation as an initial screening tool, in that when a proposed Source's impact of a particular pollutant is below the SIL at all locations and, therefore, not ''significant,'' there is no need to require a ''cumulative analysis.'' The ''cumulative analysis'' entails completing a more thorough ambient impact analysis to consider whether the proposed Source's impact along with the impact of other existing and surrounding sources in the area of concern will result in any violations/exceedances of the NAAQS after the proposed Source commences operation. The use of a SIL in this First situation as a screening procedure is acceptable

[44] As discussed further in another response to comment, the TCEQ has adopted the EPA's GAQM as part of its adopted-by-reference regulations. Thus, Texas has the appropriate rules in place to require an ambient analysis of ozone impacts from a proposed project.

[45] In this Response to Comment, the term 'Source' represents a new or modified source that has an increase in emissions that is undergoing a permit review.

in the context of most pollutants regulated by PSD. Ozone is a unique pollutant in that it is not directly emitted by sources in most circumstances but is a result of chemical reactions in the atmosphere and is generated from emissions of precursors of ozone (VOC and $NO_X$) that react with other pollutants that are already present in the local atmosphere. The amount of ozone that may be created from a proposed Source of ozone precursors is dependent on a number of variables including the existing concentrations of VOC and $NO_X$ in the airshed the proposed Source would impact. Because of this chemical interaction of the Source's pollutants with other airshed pollutants it would be technically inappropriate to attempt to model impacts on ozone levels from a proposed Source without also considering the pollutant loading in the local airshed. This technical issue is one of the reasons that development of a SIL and performing ambient impact analyses for ozone is more complicated than for other pollutants. The commenter asserts that TCEQ has concluded the lack of a SIL makes it unnecessary for TCEQ to conduct an ambient analysis for impacts on ozone levels for a proposed Source. We are discussing the two ways that SILs are commonly used to explain and conclude that the lack of a specific SIL for ozone does not limit TCEQ (or permit applicants) from conducting an ambient impact analysis for impacts on ozone levels from a proposed Source. We further discuss in this response and other responses in this notice the regulatory requirements and EPA's expectations pertaining to completing ozone impact analyses for proposed Sources.

EPA has not yet established a significant impact level (SIL) for ozone in its regulations (40 CFR 51.165(b), 51.166(k)(2), 52.21(k)(2)) or identified a specific SIL for ozone in any guidance.[46] There are other ambient standards for which we have not formally promulgated SILs at the time of the drafting of this Response, such as the 1-hour $NO_2$ and $SO_2$ standards. In those cases, we have issued guidance that includes interim SILs that can be used by states. In our recent guidance for $SO_2$ (and also $NO_2$) modeling, we indicated ''The application of any SIL that is not reflected in a promulgated regulation should be supported by a record in each instance that shows the value represents a de minimis impact on the 1-hour $SO_2$ standard'' ($NO_2$ guidance is the same quote with $NO_2$ replacing $SO_2$).[47] In the same $SO_2$ and $NO_2$ guidance documents, the EPA also indicated that states do not have to use the EPA's recommended interim SILs and can use different values if supportable by a record in each instance.

Even if a generally applicable SIL has not been defined, the permitting authority may choose to define the de minimis or SIL level through rulemaking, development of guidance or on a case-by-case basis, but the permitting authority must provide an adequate record to support the de minimis/SIL level decision. This is the current situation with the 1997 and 2008 8-hour ozone standards. The lack of a SIL (formal or interim) does not create an exemption from conducting the analysis required by the PSD provisions at 40 CFR 52.21 (k) and (m). Texas has adopted by reference provisions at 40 CFR 52.21(k) and (m) into their SIP, which require that an ambient impact analysis be conducted for the allowable emissions increase from each proposed new or modified Source, in conjunction with all other applicable emission increases or reductions (including secondary and precursor emissions). PSD regulations require an ambient impact analysis for ozone when precursor emissions of VOC and/or $NO_X$ are projected to equal or exceed the 40 tpy threshold levels. We note that 52.21(i) and 51.166(i) are potentially applicable in this context. Footnote 1 to sections 51.166(i)(5)(i) and 52.21(i)(5)(i) of EPA's regulations says the following: ''No de minimis air quality level is provided for ozone. However, any net emission increase of 100 tons per year or more of volatile organic compounds or nitrogen oxides subject to PSD would be required to perform an ambient impact analysis, including the gathering of air quality data.'' EPA previously included a similar note in a guidance listing Significant Impact Levels. In the 1990 NSR Workshop Manual (Draft, October 1990), page C.28, footnote b on this page says the following with respect to the applicable one-hour ozone NAAQS: ''No significant ambient impact concentration has been established. Instead, any net emissions increase of 100 tons per year of VOC subject to PSD would be required to perform an ambient impact analysis.'' Based on these statements, this 100 tpy value has been used by some permitting authorities in a manner similar to a SIL to assess whether a detailed air quality analysis should be conducted for ozone in a similar fashion to the ''First'' method of using a SIL discussed above. While these statements suggest a less rigorous analysis may be appropriate for sources emitting less than 100 tpy of these precursors (and greater than or equal to 40 tpy), they have not been revisited by EPA since the promulgation of the 8-hour ozone NAAQS (which included revisions to include $NO_X$ as an ozone precursor). EPA is not categorically concluding that every source emitting less than 100 tpy of $NO_X$ or 100 tpy of VOCs will not cause or contribute to a violation of the current ozone NAAQS. EPA believes it unlikely a source emitting below these levels would contribute to such a violation of the 1997 8-hour ozone NAAQS, but consultation with an EPA regional office should still be conducted in accordance with section 5.2.1.c. of Appendix W when reviewing an application for sources with emissions of these ozone precursors below 100 tpy.

For ozone, a proposed Source's emission impacts are dependent upon the ozone and ozone precursor levels present in the surrounding airshed. In addition, meteorological parameters such as wind speed and direction, temperature, solar radiation influx, and atmospheric stability are also important factors. Therefore determination of a SIL/de minimis level and conducting an ambient impact analysis is dependent on consideration of a number of issues and as previously noted, the permitting authority must support a SIL/de minimis determination with an adequate record. As discussed in other Responses in this notice 40 CFR Part 51, Appendix W—Guideline on Air Quality Models includes discussion on selection of appropriate models or analysis tools, the procedures, process and methods for conducting analyses, the guiding principles in completing ambient impact analyses and the applicant and the permitting authority working with EPA specifically in the case of completing an acceptable ambient impact analysis for ozone.[48] Given the variable factors related to ambient impact analyses for ozone we note that 40 CFR Part 51, Appendix W 1.0(e)

[46] This does not preclude EPA from developing a SIL in the future. If we were to do so, however, we note that there are some technical issues specific to ozone that would need to be considered.

[47] Guidance Memorandums: ''Guidance Concerning the Implementation of the 1-hour S02 NAAQS for the Prevention of Significant Deterioration Program'' From Stephen D. Page, Director OAQPS, August 23, 2010 and ''Guidance Concerning the Implementation of the 1-hour N02 NAAQS for the Prevention of Significant Deterioration Program'' From Stephen D. Page, Director OAQPS, June 29, 2010.

[48] 40 CFR Part 51 Appendix W—Guideline on Air Quality Models including (1.0–3.3), (5.2.1.c), and (10).

indicates that in all cases, however, the analysis applied to a given situation should be the one that provides the most accurate representation of atmospheric transport, dispersion, and chemical transformations in the area of interest. Once an analysis of the potential change in ozone levels is completed in accordance with 40 CFR 40 Appendix W, the state or permitting authority may still have to determine if the change in ozone levels is to be considered ''de minimis,'' as opposed to ''significant.'' If no exceedances/violations or near exceedances/violations, then the permitting authority may choose to not define a SIL/de minimis level if they determine it is not necessary for the review of the permit application. If exceedances/violations were projected by the ambient impact analysis, the state or permitting authority will need to make a determination of a SIL or de minimis level in order to conclude that the permit for the proposed emission increases would/would not cause or contribute to ozone exceedances. We do note that a SIL (regulatorily developed, interim, or case-by-case) does aid in the review process and can provide context for the public and stakeholders of the level of the impacts in addition to when it is necessary for reaching a conclusion of whether the proposed emission increases would/would not cause or significantly contribute to ozone exceedances. Without a SIL developed by the EPA or the permitting authority, it is difficult to determine whether the Source's contribution to a violation (exceedance) is de minimis or significant, and any increases could contribute to an estimated violation. To address the commenter's statement, a SIL is not necessary for conducting an ambient impact analysis for a proposed Source's impact on ozone levels and lack of a SIL is not a reason for not requiring an ambient impact analysis when required by PSD regulations. Moreover, the state has the authority to develop a SIL for ozone if it determines a SIL is necessary or beneficial in analyzing ambient impact analyses for ozone.

As explained earlier in this response and this rulemaking and in prior EPA rulemakings,[49] a SIL is not a prerequisite to conducting an air quality analysis for criteria pollutants, and the EPA maintains this position with respect to ozone. The EPA has also stated the absence of an EPA-promulgated SIL does not justify an exemption from the air quality analysis. In summary, the absence of a SIL for the 8-hour ozone standard does not change the regulatory requirement to conduct an ambient analysis of impacts on ozone levels when required by 40 CFR 52.21.

Furthermore, states are not precluded from developing and applying their own SILs for ozone in the absence of one established by EPA and demonstrating that a proposed Source would impact ozone levels by only a de minimis amount and thus that the proposed emissions increase would not be considered to cause or contribute to an exceedance or violation of the ozone NAAQS. When applying a threshold value like a SIL to conclude an impact is de minimis, the permitting agency must follow a rational approach to determine what level of emission is a de minimis impact.[50] The EPA affirms this principle in this rulemaking, and maintains that to the extent a state utilizes and/or develops a SIL in the absence of an established one by the EPA for determining the significance of an ozone impact, the state's SIL must be rooted in a rational basis addressing the specific situation for which it is being used. For a state-developed SIL level used in a permitting action, the administrative record must include sufficient rationale to demonstrate that an air quality impact at or below the SIL is de minimis in nature and would not cause a violation of the NAAQS. Accordingly, it should contain an explanation of how the state or permitting agency applying the SIL derived the value to support the SIL as a threshold for de minimis determinations. Additionally, the administrative record should substantiate the reasoning for employing a particular SIL. Thus, when a state or permitting agency applies an alternate SIL in the absence of an EPA-established SIL, the administrative record should elucidate both the reasoning and the methodology used to derive the SIL, and also explain the rationale for concluding the SIL is reasonable for that specific analysis.[51] Since this is a case-by-case determination that the EPA will review as part of our oversight of state permitting actions and analyses conducted in accordance with Appendix W,[52] the EPA would like to work with the state in the development of case a specific and/or interim SIL as the state deems necessary in determining if the proposed Source's impact is significant, and if such impact would contribute to an exceedance and/or violation of the standard.

The commenters state that the TCEQ has also adopted an ad-hoc de minimis level of 5 ppb through TCEQ permitting orders without undergoing rulemaking processes to in part find modeling, or detailed modeling, is not necessary for a number of new coal-fired power units. As we discuss in our response above, an ad hoc or interim SIL may be developed and applied, but we are clear that development of an interim/ad hoc de minimis level (or other de minimis/SIL determinations) would need to be fully supported by a record (administrative and technical) that would support the use of the de minimis level in a specific circumstance. We have not received an administrative record from TCEQ or any supporting technical analyses that would suggest the use of an ad hoc/interim de minimis level of 5 ppb in a PSD permitting action for a coal fired power plant in Texas. The TCEQ has also clarified that they have never used the 5 ppb as a de minimis level.[53] We note that monitored ozone levels vary widely throughout the large state of Texas, and depending on the location of a source, this may impact the level of concern with a particular source in selection of a de minimis value in a case-specific situation. If the TCEQ were to utilize an ad hoc/interim de minimis level as part of a PSD permitting action, we would review the administrative and technical record supporting the de minimis level at that time. As we expressed above, we would like to work with the TCEQ if they choose to develop a SIL/de minimis level.

*K. Comments That Address Cumulative Air Quality Impacts*

*Comment:* The commenter acknowledges that the Texas SIP incorporates federal requirements for permit applicants to perform a cumulative impacts analysis, the commenter continues though by citing statements made by the TCEQ staff through communications and depositions regarding particular permit processes for proposed coal-fired power plants as reflective of TCEQ stating it

[49] See $PM_{2.5}$ NSR final rule RTC at 75 FR 64864, 64891, October 20, 2010.

[50] *Alabama Power* v. *Costle,* 636 F.2d 323, 360 (D.C. Cir. 1979); Prevention of Significant Deterioration (PSD) for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs), and Significant Monitoring Concentration (SMC) Final Rule, 75 FR 64899 (October 20, 2010); *In Re Mississippi Lime Company,* U.S. EPA Environmental Appeals Board, PSD Appeal No. 11–01, August 9, 2011.

[51] *In Re Mississippi Lime Company,* U.S. EPA Environmental Appeals Board, PSD Appeal No. 11–01, August 9, 2011.

[52] 40 CFR Appendix W Parts 1, 2, 3 including 3.0(c), 3.2.2(a), 3.3(a & b), 10.

[53] See email from Daniel Menendez, Supervisor of the Air Quality Modeling Group for New Source Review TCEQ, to Erik Snyder, EPA Region 6 dated November 19, 2011, in the docket for this rulemaking.

does not adhere to the requirements. The commenter indicates that as a result of TCEQ's allegedly stated position it is impossible to determine the extent of cumulative air quality impacts from the proposed facilities.

*Response:* The commenter acknowledges and EPA confirms the facial sufficiency of the Texas SIP requiring permit applicants to perform a cumulative impacts analysis by incorporating federal requirements. As we note in this response and in our responses to comments that address consultation [54] in this action, the TCEQ has adopted the EPA's Guideline on Air Quality Models. The EPA expects modeling analyses conducted for PSD permits are conducted in accordance with the recommendations, requirements, and principles of the GAQM, including conducting a cumulative analysis of ozone impacts. As discussed in other responses to comments regarding conducting ozone modeling [55] or analysis of ozone impacts,[56] the unique nature of ozone chemistry and the interaction between a proposed or modified source's emissions necessitates consideration of local airshed pollutant loading of ozone precursors and ozone levels to conduct an appropriate technical analysis. Therefore a ''cumulative analysis'' approach of inclusion of other surrounding sources and background concentrations is necessary to achieve an ambient impact analysis of a proposed increase in emissions from a proposed or modified source.

As indicated in Section D, the EPA is continuing to evaluate its review of implementation issues that have arisen at this time but believes that it may move forward with finalizing its proposed approval of a facially sufficient SIP in the absence of a final EPA determination regarding the implementation issues.

## IV. Final Action

We are partially approving and partially disapproving the submittals provided by the State of Texas to demonstrate that the Texas SIP meets the requirements of Section 110(a)(1) and (2) of the Act for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

We are determining that the current Texas SIP meets the infrastructure elements for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS listed below:

Emission limits and other control measures (110(a)(2)(A) of the Act);

Ambient air quality monitoring/data system (110(a)(2)(B) of the Act);

Program for enforcement of control measures (110(a)(2)(C) of the Act), except for the portion that addresses GHGs;

Interstate transport, pursuant to section (110(a)(2)(D)(ii) of the Act), except for the portion that addresses GHGs;

Adequate resources (110(a)(2)(E) of the Act);

Stationary source monitoring system (110(a)(2)(F) of the Act);

Emergency power (110(a)(2)(G) of the Act);

Future SIP revisions (110(a)(2)(H) of the Act);

Consultation with government officials (110(a)(2)(J) of the Act);

Public notification (110(a)(2)(J) of the Act);

Prevention of significant deterioration (110(a)(2)(J) of the Act), except for the portion that addresses GHGs;

Visibility protection (110(a)(2)(J) of the Act);

Air quality modeling data (110(a)(2)(K) of the Act);

Permitting fees (110(a)(2)(L) of the Act); and

Consultation/participation by affected local entities (110(a)(2)(M) of the Act).

We are determining that the current Texas SIP does not meet the infrastructure elements for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS listed below:

Program for enforcement of control measures (110(a)(2)(C) of the Act), only as it relates to GHGs;

Interstate transport, pursuant to section 110(a)(2)(D)(ii) of the Act, only as it relates to GHGs; and

Prevention of significant deterioration (110(a)(2)(J) of the Act), only as it relates to GHGs.

We are also approving the Texas Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i)(II) that emissions from sources in Texas do not interfere with measures required in the SIP of any other state under part C of the CAA to prevent significant deterioration of air quality, except as they relate to GHGs for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

We are disapproving the portion of the Texas Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i)(II), as it relates to GHGs, that emissions from sources in Texas do not interfere with measures required in the SIP of any other state under part C of the CAA to prevent significant deterioration of air quality, for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS. We will act on the remaining three SIP elements regarding interstate transport, per section 110(a)(2)(D)(i) of the Act in separate rulemakings.

We are also approving the following revisions to 30 TAC 101.1 and 30 TAC 116.12, submitted by the TCEQ on March 8, 2011, as part of the Texas NSR SIP:

1. The substantive revisions to the definition of Maintenance area at 30 TAC 101.1.
2. The substantive revisions to the definition of Nonattainment area at 30 TAC 101.1.
3. The substantive revisions to the definition of Reportable quantity at 30 TAC 101.1.
4. The non-substantive revisions to the definition of Volatile organic compound at 30 TAC 101.1.
5. The non-substantive revision to the title of 30 TAC 116.12 from Nonattainment Review Definitions to *Nonattainment* and *Prevention of Significant Deterioration* Review Definitions.
6. The non-substantive revisions to the introductory paragraph at 30 TAC 116.12.
7. The substantive revisions that add *Federally Regulated NSR pollutant* to the definitions at 30 TAC 116.12.
8. The non-substantive changes to rename the definition of Major facility/stationary source at 30 TAC 116.12 to *Major stationary source* and the substantive changes making the definition consistent with 40 CFR 51.166(b)(1).
9. The non-substantive changes to the definition of Major modification at 30 TAC 116.12 that provide editorial revisions, and the substantive changes making the definition consistent with 40 CFR 51.165(a)(1) and 40 CFR 51.166(b)(1) and (2), and which address the grounds for the September 15, 2010 disapproval of this definition.

The EPA is taking these actions in accordance with section 110 and part C of the Act and the EPA's regulations and consistent with EPA guidance.

## V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to act on state law as meeting Federal requirements and does

[54] See Section III–J.2 of this rulemaking for our responses to the comments that address consultation.

[55] See Section III–J.1 of this rulemaking for our RTCs that address the adequacy of ozone modeling procedures.

[56] See Section III–J.3 of this rulemaking for our RTCs that address SILs.

not impose additional requirements beyond those imposed by state law.

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This final action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

*B. Paperwork Reduction Act*

This final action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* because this SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new information collection burdens but simply acknowledges that a required program is not included in the SIP. Burden is defined at 5 CFR 1320.3(b).

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of the September 22, 2011 proposed rule on small entities, small entity was defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of the September 22, 2011 (76 FR 58748) proposed rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This proposed SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new requirements but simply acknowledges that a required program is not included in the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the CAA prescribes that various consequences (e.g., higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action.

*D. Unfunded Mandates Reform Act*

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector.'' The EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action acknowledges that certain pre-existing requirements are not in the SIP and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

*E. Executive Order 13132, Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires the EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely acknowledges that a required program is not included in the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, Executive Order 13132 does not apply to this action.

*F. Executive Order 13175, Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because this action neither imposes substantial direct compliance costs on tribal governments, nor preempts tribal law. Therefore, the requirements of section 5(b) and 5(c) of the Executive Order do not apply to this rule. Consistent with EPA policy, the EPA nonetheless offered consultation to Tribes regarding this rulemaking action. No comments were received from the Tribes concerning this rulemaking action.

*G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks*

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new regulations but simply acknowledges that a required program is not included in the SIP.

*H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution or Use*

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides

not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, the EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely acknowledges that a required program is not included in the SIP under section 110 and subchapter I, part D of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

*K. Congressional Review Act*

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

*L. Judicial Review*

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 27, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

*M. Statutory Authority*

The statutory authority for this action is provided by section 110 of the CAA, as amended (42 U.S.C. 7410).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 16, 2011.

**Al Armendariz,**

*Regional Administrator, Region 6.*

40 CFR part 52 is amended as follows:

## PART 52—[AMENDED]

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

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

## Subpart SS—Texas

■ 2. In Section 52.2270:

■ a. The table in paragraph (c) entitled ''EPA Approved Regulations in the Texas SIP'' is amended as follows:

■ i. Revising the entry under ''Chapter 101—General Air Quality Rules'' for Section 101.1.

■ ii. Revising the entry under ''Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification'' for Section 116.12.

■ b. Paragraph (e) is amended by adding a new entry for ''Infrastructure and Interstate Transport for the 1997 Ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS'' at the end of the second table in paragraph (e) entitled ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP.''

The amendments read as follows:

**§ 52.2270 Identification of plan.**

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE TEXAS SIP

| State citation | Title/subject | State approval/ submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| * | * | * | * | * |
| **Chapter 101—General Air Quality Rules** | | | | |
| **Subchapter A—General Rules** | | | | |
| Section 101.1 | Definitions | 1/23/2006; 2/9/2011; 5/26/2011 | 11/10/2010 75 FR 68989; 12/28/2012, [Insert FR page number where document begins]. | Except for the definitions listed immediately below, the SIP retains the Section 101.1 Definitions, adopted 1/23/2006 and approved 11/10/2010 (75 FR 68989); the following revised definitions adopted 2/9/2011 and 5/26/2011 are approved: maintenance area; nonattainment area; reportable quantity; and volatile organic compound. |

EPA-APPROVED REGULATIONS IN THE TEXAS SIP—Continued

| State citation | Title/subject | State approval/ submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| * | * | * | * | * |
| **Subchapter A—Definitions** | **Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification** | | | |
| * | * | * | * | * |
| Section 116.12 ..... | Nonattainment Review Definitions; Nonattainment and Prevention of Significant Deterioration Review Definitions. | 8/20/2003; 2/9/2011 ... | 3/20/2009 74 FR 11851; 12/28/2012, [Insert FR page number where document begins]. | Except for the definitions listed immediately below, the SIP retains the Section 116.12 Nonattainment Review Definitions, adopted 8/20/2003 and approved 3/20/2009 (74 FR 11851); the following revisions adopted 2/9/2011 are approved: the revised title and the introductory paragraph at 116.12, and the definitions for Federally Regulated NSR pollutant, Major stationary source, and Major modification. |
| * | * | * | * | * |

* * * * *

(e) * * *

* * * * *

EPA-APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

| Name of SIP provision | Applicable geographic or non-attainment area | State submittal date/ effective date | EPA approval date | Explanation |
|---|---|---|---|---|
| * | * | * | * | * |
| Infrastructure and Interstate Transport for the 1997 Ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS. | Statewide ..... | 12/12/2007, 3/11/2008, 4/4/2008, 11/23/2009 | 12/28/2012, [Insert FR page number where document begins]. | Approval for CAA elements 110(a)(2)(A), (B), (E), (F), (G), (H), (K), (L), and (M). Approval for CAA elements 110(a)(2)(C), (D)(ii) and (J), except for the portions that address Greenhouse Gas (GHG) emissions. Approval for revisions to prohibit interference with PSD in any other state (CAA element 110(a)(2)(D)(i)(II)), except for the portion that addresses GHG emissions. |

[FR Doc. 2011–33253 Filed 12–27–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2011–0972; FRL–9329–9]**

## Extension of Tolerances for Emergency Exemptions (Multiple Chemicals)

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

**ACTION:** Final rule.

**SUMMARY:** This regulation extends time-limited tolerances for the pesticides listed in Unit II. of the **SUPPLEMENTARY INFORMATION**. These actions are in response to EPA's granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of these pesticides. Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA) requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA.

**DATES:** This regulation is effective December 28, 2011. Objections and requests for hearings must be received on or before February 27, 2012, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2011–0972. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose

disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** See the table in this unit for the name of a specific contact person. The following information applies to all contact persons: Emergency Response Team, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

| Pesticide/CFR citation | Contact person |
|---|---|
| Diflubenzuron, 40 CFR 180.377; Metconazole, 40 CFR 180.617; Pyraclostrobin, 40 CFR 180.582. | Libby Pemberton—*pemberton.libby@epa.gov*—(703) 764–0212. |
| Linuron, 40 CFR 180.184; Spiromesifen, 40 CFR 180.607 ..... | Andrea Conrath—*conrath.andrea@epa.gov*—(703) 308–9356. |

**SUPPLEMENTARY INFORMATION:**

## I. General Information

*A. Does this action apply to me?*

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

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

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

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

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2011–0972 in the subject line on the first page of your submission. All requests must be in writing, and must be received by the Hearing Clerk on or before February 27, 2012. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2011–0972 by one of the following methods:

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

## II. Background and Statutory Findings

EPA published final rules in the **Federal Register** for each chemical listed. The initial issuance of these final rules announced that EPA, on its own initiative, under section 408 of FFDCA, 21 U.S.C. 346a, was establishing time-limited tolerances.

EPA established the tolerances because FFDCA section 408(l)(6) requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under FIFRA section 18. Such tolerances can be established without providing notice or time for public comment.

EPA received requests to extend the use of these chemicals for this year's growing season. After having reviewed these submissions, EPA concurs that emergency conditions exist. EPA assessed the potential risks presented by residues for each chemical. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18.

The data and other relevant material have been evaluated and discussed in the final rule originally published to support these uses. Based on that data and information considered, the Agency reaffirms that extension of these time-limited tolerances will continue to meet the requirements of FFDCA section 408(l)(6). Therefore, the time-limited tolerances are extended until the date listed. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations (CFR). Although these tolerances will expire and are revoked on the date listed, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on the commodity after that date will not be unlawful, provided the residue is present as a result of an application or use of a pesticide at a time and in a manner that was lawful under FIFRA, the tolerance was in place at the time of

the application, and the residue does not exceed the level that was authorized by the tolerance. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Tolerances for the use of the following pesticide chemicals on specific commodities are being extended:

*Diflubenzuron.* EPA has authorized under FIFRA section 18 the use of the insecticide, diflubenzuron for control of Mormon crickets (*Anabrus simplex*) and grasshoppers (Family *Acrididae,* various spp.) on alfalfa grown for hay. This regulation extends time-limited tolerances for residues of the insecticide, diflubenzuron and its metabolites p-chlorophenylurea and p-chloroaniline in or on alfalfa, forage and alfalfa, hay at 6.0 parts per million (ppm), for an additional 3-year period. These tolerances will expire and be revoked on December 31, 2014. Time-limited tolerances were originally published in the **Federal Register** of November 28, 2008 (73 FR 72352) (FRL 8388–9).

*Linuron.* EPA has authorized under FIFRA section 18 the use of linuron on lentils for control of mayweed chamomile and prickly lettuce in Washington and Idaho. This regulation extends a time-limited tolerance for combined residues of the herbicide linuron (3-(3,4-dichlorophenyl)-1-methoxy-1-methylurea) and its metabolites convertible to 3,4-dichloroaniline, in or on lentil at 0.1 ppm for an additional 3-year period. This tolerance will expire and is revoked on December 31, 2014. A time-limited tolerance was originally published in the **Federal Register** of September 5, 2008 (73 FR 51722) (FRL–8379–6).

*Metconazole.* EPA has authorized under FIFRA section 18 the use of the fungicide, metconazole for control of Orange Rust (*Puccinia kuehnii*) on sugarcane in Florida. This regulation extends time-limited tolerances for residues of the fungicide, metconazole, 5-[(4-chlorophenyl)-methyl]-2,2-dimethyl-1-(1H–1,2,4-triazol-1-ylmethyl)cyclopentanol, including its metabolites and degradates, in or on sugarcane, cane at 1.6 ppm and sugarcane, molasses at 3.2 ppm for an additional 3-year period. These tolerances will expire and be revoked on December 31, 2014. Time-limited tolerances were originally published in the **Federal Register** of May 7, 2009 (74 FR 21260) (FRL 8408–6).

*Pyraclostrobin.* EPA has authorized under FIFRA section 18 the use of the fungicide, pyraclostrobin for control of Orange Rust (*Puccinia kuehnii*) on sugarcane in Florida. This regulation extends time-limited tolerances for combined residues of the fungicide pyraclostrobin; carbamic acid, [2-[[[1-(4-chlorophenyl)-1H-pyrazol-3-yl]oxy]methyl]phenyl]methoxy-, methyl ester and its desmethoxy metabolite; (methyl-N-[[[1-(4-chlorophenyl)-1H-pyrazol-3-yl]oxy]methyl]phenylcarbamate, in or on sugarcane, cane at 0.02 ppm and sugarcane, molasses at 0.4 ppm for an additional 3-year period. These tolerances will expire and be revoked on December 31, 2014. Time-limited tolerances were originally published in the **Federal Register** of March 18, 2009 (74 FR 11494) (FRL 8402–8).

*Spiromesifen.* EPA has authorized under FIFRA section 18 the use of spiromesifen on soybeans for control of spider mites in Delaware. This regulation extends the time-limited tolerances for combined residues of the miticide spiromesifen [2-oxo-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-4-yl 3,3-dimethylbutanoate] and 4-hydroxy-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-2-one, calculated as the stoichiometric equivalent of spiromesifen, in or on soybean forage at 30 ppm, soybean hay at 86 ppm, and soybean seed at 0.02 ppm for an additional 3-year period. These tolerances will expire and are revoked on December 31, 2014. Time-limited tolerances originally published in the **Federal Register** of April 8, 2009 (74 FR 15880) (FRL–8406–6).

## III. International Residue Limits

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

The Codex has not established MRL's for diflubenzuron on alfalfa; linuron on lentil; metconazole or pyraclostrobin on sugarcane; nor spiromesifen on soybean hay, forage, or seed.

## IV. Statutory and Executive Order Reviews

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

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

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

rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

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

### V. Congressional Review Act

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

### List of Subjects in 40 CFR Part 180

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

Dated: December 13, 2011.

**Lois Rossi,**

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

Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

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

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

#### § 180.184 [Amended]

■ 2. In § 180.184, in the table to paragraph (b), amend the entry for ''Lentil'' by revising the expiration date ''12/31/2011'' to read ''12/31/2014.''

#### § 180.377 [Amended]

■ 3. In § 180.377, in the table to paragraph (b), amend the entries for ''Alfalfa, forage''' and ''Alfalfa, hay'' by revising the expiration dates ''12/31/11'' to read ''12/31/2014.''

#### § 180.582 [Amended]

■ 4. In § 180.582, in the table to paragraph (b), amend the entries for ''Sugarcane, cane'' and ''Sugarcane, molasses'' by revising the expiration dates ''12/31/11'' to read ''12/31/2014.''

#### § 180.607 [Amended]

■ 5. In § 180.607, in the table to paragraph (b), amend the entries for ''Soybean, forage'', ''Soybean, hay'', and ''Soybean, seed'' by revising the expiration dates ''12/31/11'' to read ''12/31/2014.''

#### § 180.617 [Amended]

■ 6. In § 180.617, in the table to paragraph (b), amend the entries for ''Sugarcane, cane'' and ''Sugarcane, molasses'' by revising the expiration dates ''12/31/11'' to read ''12/31/2014.''

[FR Doc. 2011–33250 Filed 12–27–11; 8:45 am]

BILLING CODE 6560–50–P

---

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

### 49 CFR Parts 172 and 173

**[Docket No. PHMSA–2009–0151(HM–218F)]**

**RIN 2137–AE84**

## Hazardous Materials: Miscellaneous Amendments; Response to Appeals; Corrections

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

**ACTION:** Correcting amendments.

**SUMMARY:** On July 20, 2011, PHMSA published a final rule under Docket Number PHMSA–2009–0151 (HM–218F) making miscellaneous amendments to the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180). The amendments made by PHMSA in the July 20, 2011 final rule promote safer transportation practices; eliminate unnecessary regulatory requirements; finalize outstanding petitions for rulemaking; facilitate international commerce; and simplify the regulations. This final rule corrects errors in the pictorial display of labels, eliminates references to transitional provisions that were previously removed from the HMR, clarifies shipping paper amendments, corrects an editorial error, and extends the effective date of certain shipping paper amendments adopted in the July 20, 2011 final rule.

**DATES:** These correcting amendments are effective December 28, 2011. A delayed compliance date of August 19, 2012 is authorized for shipping paper amendments in this final rule.

**FOR FURTHER INFORMATION CONTACT:** Deborah L. Boothe, Standards and Rulemaking Division, (202) 366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

**SUPPLEMENTARY INFORMATION:**

### I. Background

*A. Notice of Proposed Rulemaking*

On September 29, 2010, PHMSA published a Notice of Proposed Rulemaking (NPRM) under this docket HM–218F (74 FR 16135). The NPRM proposed amendments to the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) based on PHMSA initiatives and petitions for rulemaking submitted in accordance with 49 CFR 106.95. The amendments proposed in the NPRM were intended to provide relief to industry by eliminating, revising, clarifying, or relaxing regulatory requirements.

The comment period for the NPRM closed on November 29, 2010. Eleven commenters provided comments in response to the NPRM. PHMSA received comments from the following companies, and organizations:

- United Parcel Service (UPS)
- Worthington Cylinder Corporation (Worthington)
- Veolia Environmental Services
- Institute of Makers of Explosives (IME)
- PPG Industries, Inc.
- Barlen and Associates, Inc.
- Arrowhead Industrial Services USA, Inc.
- New England Fuel Institute
- Stericycle, Inc.
- Truck Trailer Manufacturers Association (TTMA)
- American Trucking Associations (ATA)

*B. Final Rule*

On July 20, 2011, PHMSA issued a final rule titled ''Hazardous Materials: Miscellaneous Amendments'' under Docket Number PHMSA–2009–0151(HM–218F) (76 FR 43510) amending the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) by making miscellaneous amendments to update and clarify certain regulatory requirements. Based on an assessment of the proposed changes and the comments received, PHMSA's July 20, 2011 final rule covered the following topics:

- Materials incorporated by reference
- Definition of ''person''
- Consolidation bins
- Transitional provisions

- Reporting infectious substances incidents
- Hazard communication for IBCs
- Hazardous Materials Table Revisions
- Hazard Communication
- Exclusive use vehicles for regulated medical waste (RMW)
- Fireworks
- Explosives
- Rail Transloading Operations
- Cylinders
- Cargo Tanks
- Permeation Devices
- Alcoholic beverage exception
- Special Permits
- Lab Packs
- Batteries containing sodium or cells containing sodium

## II. Appeals to the Final Rule

### *A. List of Appellants*

In this final rule, we respond to appeals submitted in response to the July 20, 2011 final rule. The following organizations submitted appeals:

- The Dangerous Goods Advisory Council (DGAC)
- Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA)
- Dangerous Goods Management USA Atlanta (DGM USA Atlanta)
- Bureau of Explosives (BOE) Publications.

### *B. Discussion of Appeals by Section*

The specific concerns raised by the appellants are outlined below by section:

Section 172.203

Section 172.203 of the HMR provides additional shipping paper description requirements for hazardous materials. On May 30, 2005, PHMSA received a petition for rulemaking from the Association of American Railroads (petition number P–1456; Docket Number PHMSA–2005–21198) requesting that we require shipping papers to include a notation for shipments of non-odorized liquefied petroleum gas (LPG). Due to safety risks posed by non-odorized LPG, PHMSA agreed with the petition.

On September 29, 2010, PHMSA published a Notice of Proposed Rulemaking (NPRM) (74 FR 16135) proposing to incorporate the AAR petition. To ensure that emergency responders are made aware when a shipment of LPG is not odorized, PHMSA proposed to add a new paragraph (p) to § 172.203 to require the words ''non-odorized'' to precede the proper shipping name when a non-odorized LPG is offered for transportation. PHMSA received one comment from New England Fuel Institute (NEFI) supporting this proposed amendment. PHMSA received no comments opposing the requirement.

On July 29, 2011, DGAC submitted an appeal addressing the new § 172.203(p). In its appeal, DGAC requests that PHMSA provide a delayed compliance date for the amendment; authorize the wording to be located in association with the proper shipping description (rather than preceding) to facilitate international commerce; and, consistent with §§ 172.328(d) and 172.330(c), authorize the use of the words ''not-odorized'' or ''non-odorized.''

DGAC indicates that persons with preprinted shipping papers will need more time beyond the August 19, 2011 effective date of the July 20, 2011 final rule to comply with the new § 172.203(p). DGAC's requests at least a one-year transition period for compliance to be fully accomplished. We agree. Section 172.101(l)(1)(ii) provides delayed compliance of up to one year from the effective date of the rule. This ensures that individuals are provided sufficient time to deplete existing stocks of preprinted shipping papers and package markings. Therefore, this preamble discussion clarifies that mandatory compliance with the provision in new § 172.203(p) is delayed until August 19, 2012. Further, PHMSA is correcting the final rule to clarify that the words ''not-odorized'' or ''non-odorized'' may be used and must be located in association with the proper shipping description.

Sections 172.432 and 172.446

Section 172.432 describes the INFECTIOUS SUBSTANCE label size and color and provides an illustration of how it must appear. References to the Centers for Disease Control (CDC) are no longer required on this label. Therefore, in the September 29, 2010 NPRM, PHMSA proposed to remove the text that refers to the CDC on the label. The text states ''In U.S.A. Notify Director—CDC, Atlanta, GA 1–(800) 232–0124.'' PHMSA proposed to allow three years from the effective date of the final rule to use up existing stocks of preprinted labels. PHMSA received no comments on this proposed amendment and adopted it as proposed in the July 20, 2011 final rule.

Section 172.446 describes the Class 9 (miscellaneous hazardous materials) label specifications, including size, color, and an illustration. The illustration in § 172.446 shows a thin, horizontal line running across the label at its midpoint (just at the bottom of the vertical black bars). The line does not exist in the International Civil Aviation Organization (ICAO) Technical Instructions or the International Maritime Dangerous Good (IMDG) Code. The difference has resulted in some international shipments being relabeled in transit, causing delays. In an effort to avoid continued frustrated or delayed shipments, PHMSA proposed, in the September 29, 2010 NPRM, to revise the Class 9 (miscellaneous hazardous materials) label specifications by removing the horizontal line running across the label at its midpoint. PHMSA proposed a three-year transition period from the effective date of the final rule to deplete existing stocks. PHMSA received one comment from the United Parcel Service, Inc. supporting the amendment for its potential to eliminate shipment delays. Therefore, in the July 20, 2011 final rule the amendment was adopted as proposed.

On August 5, 2011, COSTHA submitted an appeal expressing concerns about the redesigned INFECTIOUS SUBSTANCE and Class 9 (miscellaneous hazardous materials) labels and continued lack of consistency with the international labels. COSTHA also expressed concerns regarding the August 19, 2011 effective date of the final rule. COSTHA expressed concern that because the text in the INFECTIOUS SUBSTANCE label is located in the center of the label instead of just below the center line, as currently shown in the HMR, would create problems when shipping internationally. COSTHA requests PHMSA relocate the text below the center line of the label to avoid problems when shipping internationally. Additionally, COSTHA is appealing the Class 9 label design stating that the vertical bars on either side of the label are incorrectly shown in the label illustration. PHMSA agrees with COSTHA's appeal and is correcting the INFECTIOUS SUBSTANCE and Class 9 (miscellaneous hazardous materials) label designs, as requested, in this final rule.

COSTHA also expressed concerns regarding the August 19, 2011 effective date of the final rule and the September 30, 2011 grandfather date for use of labels previously in effect. PHMSA agrees with COSTHA's appeal. PHMSA corrected the compliance date under a final rule titled, ''Hazardous Materials: Minor Editorial Corrections and Clarifications,'' issued on September 13, 2011 under docket PHMSA–2011–0134 (HM–244D) (76 FR 56304). The September 13, 2011 final rule amended the compliance date for the INFECTIOUS SUBSTANCE and Class 9 (miscellaneous hazardous materials) labels to authorize labels in effect on

August 18, 2011 to continue to be used until January 1, 2014.

Section 173.32

Section 173.32 prescribes requirements for the use of portable tanks. As amended by the July 20, 2011 final rule, the transitional provisions in § 171.14 were removed and relocated to the appropriate section. However, PHMSA did not remove the text ''(see § 171.14(d)(4) for transitional provisions applicable to T codes)'' in § 173.32(c)(2). Therefore, we are correcting the section by removing this reference to § 171.14(d)(4) transitional provisions for T codes.

Section 175.10

Section 175.10 specifies the conditions for which passengers, crew members, or an operator may carry hazardous materials aboard an aircraft. In an international harmonization final rule published on January 19, 2011 (Docket PHMSA–2009–0126) (76 FR 3308), PHMSA added a new paragraph (a)(17) to permit a mobility aid such as a wheelchair, containing a lithium ion battery, to be transported in accordance with specific conditions. Since publication of the January 19, 2011 final rule, PHMSA has noted an inconsistency between the requirements of the ICAO Technical Instructions and the requirements of the HMR in relation to the acceptance of lithium battery powered mobility aids for transportation by aircraft. In particular, the HMR require the removal of the battery under certain conditions prior to transportation by aircraft. It is not our intent to be inconsistent with the requirements of the ICAO Technical Instructions in this regard. Thus, in the July 20, 2011 final rule, we corrected the inconsistency in § 175.10(a)(17) to clearly indicate that batteries are not required to be removed.

However, on August 29, 2011 PHMSA received an appeal from DGM USA Atlanta stating this amendment continues to be inconsistent with international standards. DGM indicates that batteries should not be removed if not necessary as many wheelchair and mobility aid manufacturers design the devices so that the batteries are not accessible and are constructed to prevent the battery from being removed. DGM requests PHMSA fully adopt the current ICAO Technical Instructions language in order to harmonize and reduce complexity of compliance with the regulations.

PHMSA considers this requested change outside the scope of this rulemaking. Nonetheless, PHMSA believes that the request has merit and will address the concerns raised by DGM's appeal in a future rulemaking.

Section 174.104

This section prescribes the general requirements for car selection, preparation, inspection, and certification of rail cars containing Division 1.1 or 1.2 (explosive) materials. We are revising paragraph (f) where the year on the certificate is referred to as ''19__'' to update it to reflect the year ''20__.'' This update to the certificate was not included in the corrections and clarifications in the final rule, Docket No. PHMSA–2011–0134 (HM–244D), Minor Editorial Corrections and Clarifications, published September 13, 2011 (76 FR 56304).

## III. Corrections and Amendments

As indicated above, based on appeals submitted to the July 20, 2011 final rule, this final rule is:

1. Clarifying that the shipping paper amendments adopted in the July 20, 2011 final rule are provided a delayed compliance date of August 19, 2012 based on the provisions in § 172.101(l)(l)(ii);
2. Correcting the shipping paper amendments to allow the use of the words ''not- odorized'' or ''non-odorized'' in association with the proper shipping description for non odorized LPG shipments;
3. Revising the erroneous display of the Class 9 (miscellaneous hazardous materials) label by correcting the width of the vertical lines on either side of the label in the graphic display;
4. Revising the erroneous display of the INFECTIOUS SUBSTANCE label by moving the text below the center line of the label; and
5. Correcting § 173.32(c)(2) by removing the reference to ''(see § 171.14(d)(4) for transitional provisions applicable to T codes).''
6. Correcting § 174.104(f) by removing the references to the year ''19__'' on the certificate to the year ''20_.''

## IV. Regulatory Analyses and Notices

### *A. Statutory/Legal Authority for This Rulemaking*

1. This final rule is published under authority of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*). Section 5103(b) of Federal hazmat law authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, hazardous materials in intrastate, interstate, and foreign commerce.

2. 49 U.S.C. 5120(b) authorizes the Secretary of Transportation to ensure that, to the extent practicable, regulations governing the transportation of hazardous materials in commerce are consistent with standards adopted by international authorities.

### *B. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures*

This final rule is not considered a significant regulatory action under section 3(f) Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget (OMB). The final rule is not considered a significant rule under the Regulatory Policies and Procedures order issued by the U.S. Department of Transportation (44 FR 11034).

Executive Orders 12866 and 13563 require agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.'' As discussed in this rulemaking, PHMSA amends various provisions in the HMR to clarify the provisions and to relax overly burdensome requirements. This final rule responds to appeals from industry associations to correct the label pictorial displays and extend the effective date of the shipping paper amendments. PHMSA anticipates the amendments contained in this rule generate economic benefits to the regulated community. This final rule is designed to increase the clarity of the HMR, thereby increasing voluntary compliance while reducing compliance costs.

### *C. Executive Order 13132*

This final rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This final rule would preempt state, local and Indian tribe requirements but does not propose any regulation that has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This final rule concerns the classification, packaging, marking, labeling, and handling of hazardous materials, among other covered subjects. As adopted, this rule preempts any state, local, or Indian tribe requirements concerning these subjects unless the non-Federal requirements are

''substantively the same'' (see 49 CFR 107.202(d) as the Federal requirements.)

*D. Executive Order 13175*

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

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

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines the rule is not expected to have a significant impact on a substantial number of small entities. This final rule would respond to appeals and correct label pictorial displays and extend the effective date of the shipping paper amendments from the July 20, 2011 final rule.

*Consideration of alternative proposals for small businesses.* The Regulatory Flexibility Act directs agencies to establish exceptions and differing compliance standards for small businesses, where it is possible to do so and still meet the objectives of applicable regulatory statutes. In the case of hazardous materials transportation, it is not possible to establish exceptions or differing standards and still accomplish our safety objectives.

The impact of this final rule is not expected to be significant. The changes are generally intended to provide relief to shippers, carriers, and packaging manufacturers and testers, including small entities. The majority of entities affected by this rule are small entities. Although the rule will create less burden, the overall effect of this positive change is not significant. Therefore, this final rule will not have a significant economic impact on a substantial number of small entities.

This final rule has been developed in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

*F. Paperwork Reduction Act*

This final rule imposes no new information collection and recordkeeping requirements.

*G. Regulation Identifier Number (RIN)*

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

*H. Unfunded Mandates Reform Act*

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $141,300,000 or more to either state, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

*I. Environmental Assessment*

The National Environmental Policy Act of 1969 (NEPA) requires Federal agencies to consider the consequences of major Federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. In the July 20, 2011 final rule, we developed an assessment to determine the effects of these revisions on the environment and whether a more comprehensive environmental impact statement may be required. Our findings conclude that there are no significant environmental impacts associated with this final rule. The amendments are intended to: Update, clarify, or provide relief from certain existing regulatory requirements to promote safer transportation practices; eliminate unnecessary regulatory requirements; finalize outstanding petitions for rulemaking; facilitate international commerce; and make these requirements easier to understand. For interested parties, a detailed environmental assessment is included with the July 20, 2011 final rule available in the public docket.

*J. Privacy Act*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://www.regulations.gov/search/footer/privacyanduse.jsp.*

*K. International Trade Analysis*

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standards have a legitimate domestic objective, such as the protection of safety, and do not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. PHMSA notes the purpose is to ensure the safety of the American public, and has assessed the effects of this rule to ensure that it does not exclude imports that meet this objective. As a result, this rule is not considered as creating an unnecessary obstacle to foreign commerce.

**List of Subjects**

*49 CFR Part 172*

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

*49 CFR Part 173*

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

*49 CFR Part 174*

Hazardous materials transportation, Radioactive materials, Rail carriers, Railroad safety, Reporting and recordkeeping requirements.

Accordingly, 49 CFR parts 172, 173, and 174 are corrected by making the following correcting amendments:

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

■ 1. The authority citation for Part 172 continues to read as follows:

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

■ 2. In § 172.203, paragraph (p) is revised to read as follows:

**§ 172.203 Additional description requirements.**

* * * * *

(p) *Liquefied petroleum gas (LPG).* The word ''non-odorized'' or ''not-odorized'' must be included in association with the proper shipping description on a shipping paper when non-odorized liquefied petroleum gas is offered for transportation.

■ 3. In § 172.432, paragraph (a) is revised to read as follows:

**§ 172.432 INFECTIOUS SUBSTANCE label.**

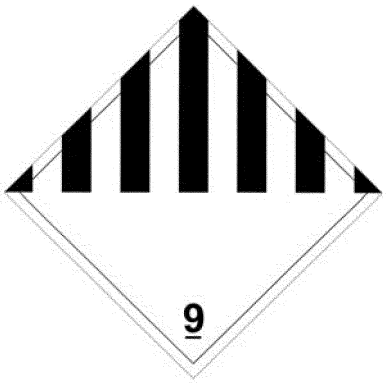
(a) Except for size and color, the INFECTIOUS SUBSTANCE label must be as follows:

* * * * *

■ 4. In § 172.446, paragraph (a) is revised to read as follows:

**§ 172.446 CLASS 9 label.**

(a) Except for size and color, the ''CLASS 9'' (miscellaneous hazardous materials) label must be as follows:




* * * * *

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

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

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

■ 6. In § 173.32, in paragraph (c)(2), the wording ''(see § 171.14(d)(4) for transitional provisions applicable to T codes)'' is removed.

## PART 174—CARRIAGE BY RAIL

■ 7. The authority citation for part 174 continues to read as follows:

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

**§ 174.104 [Amended]**

■ 8. In § 174.104, in paragraph (f), each reference to the year ''19__'' on the certificate is removed and replaced with the year ''20__.''

Issued in Washington, DC, on December 21, 2011 under authority delegated in 49 CFR part 1.

**Cynthia L. Quarterman,**

*Administrator, Pipeline and Hazardous Materials Safety Administration.*

[FR Doc. 2011–33193 Filed 12–27–11; 8:45 am]

BILLING CODE 4910–60–P

# Proposed Rules

Federal Register
Vol. 76, No. 249
Wednesday, December 28, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 7 CFR Part 319

**[Docket No. APHIS–2009–0084]**

**RIN 0579–AD56**

## Importation of Litchi Fruit From Australia

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to allow, under certain conditions, the importation of commercial shipments of litchi fruit from Australia into the continental United States, except Florida. As a condition of entry, the litchi fruit would have to be grown in production areas that are registered with and monitored by the national plant protection organization of Australia and treated with irradiation at a dose of 400 gray for plant pests of the class Insecta, except pupae and adults of the order Lepidoptera, and subject to inspection. The fruits would also have to be accompanied by a phytosanitary certificate with an additional declaration stating that the conditions for importation have been met. Additionally, litchi would not be imported into or distributed to the State of Florida, due to the presence of litchi rust mite in Australia. This action would allow for the importation of litchi fruit from Australia into the continental United States, except Florida, while continuing to provide protection against the introduction of quarantine pests.

**DATES:** We will consider all comments that we receive on or before February 27, 2012.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0084-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2009–0084, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2009-0084* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 6902817 before coming.

**FOR FURTHER INFORMATION CONTACT:** Ms. Dorothy C. Wayson, Regulatory Coordination Specialist, PPQ, APHIS, 4700 River Road Unit 141, Riverdale, MD 20737–1231; (301) 734–0772.

**SUPPLEMENTARY INFORMATION:**

### Background

The regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–54, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

The national plant protection organization (NPPO) of Australia has requested that the Animal and Plant Health Inspection Service (APHIS) amend the regulations to allow fresh litchi fruit (*Litchi chinensis* Sonn.) from Australia to be imported into the continental United States. As part of our evaluation of Australia's request, we prepared a pest risk assessment (PRA) and a risk management document. Copies of the PRA and risk management document may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the Regulations.gov Web site or in our reading room (see **ADDRESSES** above for a link to Regulations.gov and information on the location and hours of the reading room).

As part of our evaluation of that request, we prepared a PRA titled ''Importation of Fresh Litchi, *Litchi chinensis* Sonn. Fruit from Australia into the Continental United States'' (November 2008). That PRA evaluates the risks associated with the importation of litchi fruit with up to 5 millimeters of stem into the continental United States from Australia. The threshold allowing for a maximum of 5 millimeters of stem on the imported litchi fruit was included in Australia's request and therefore established as the allowable limit in the PRA.

The PRA identified 15 pests of quarantine significance present in Australia that could be introduced into the United States through the importation of litchi fruit, including 3 fruit flies, 7 lepidopteran pests, 2 scales, 2 insect pests, and 1 mite.

*Fruit flies*

Jarvis's fruit fly (*Bactrocera jarvisi*).
Queensland fruit fly (*Bactrocera tryoni*).
Mediterranean fruit fly (*Ceratitis capitata*).

*Lepidopteran pests*

Yellow peach moth (*Conogethes punctiferalis*).
Litchi fruit moth (*Cryptophlebia ombrodelta*).
Orange fruit borer (*Isotenes miserana*).
The moth *Cateremna quadriguttella.*
Bright cornelian (*Deudorix diovis*).
Dull cornelian (*Deudorix epijarbas dido*).
Flower caterpillar (*Phycita leucomilta*).

*Scales*

Red wax scale (*Ceroplastes rubens*).
Green scale (*Coccus viridis*).

*Insect pests*

Spherical mealybug (*Nipaecoccus viridis*).
Passionvine mealybug (*Planococcus minor*).

*Mite*

Litchi hairy mite (*Aceria litchii*).

### Proposed Systems Approach

Based on the risk management document, APHIS has determined that measures beyond the standard port of arrival inspection are required to mitigate the risks posed by these plant pests. Therefore, we are proposing to allow the importation of litchi from Australia into the United States only if they are produced in accordance with a

systems approach to mitigate pest risk as outlined below. We are proposing to add the systems approach to the regulations in a new § 319.56–55 governing the importation of litchi from Australia.

**Place of Production Requirements**

Paragraph (a) of proposed § 319.56–55 would require that litchi fruit be grown in approved places of production that are registered with and monitored by the NPPO of Australia.

**Treatment**

Paragraph (b) of proposed § 319.56–55 would require that litchi fruit be treated with a minimum absorbed irradiation dose of 400 gray in accordance with the provisions of § 305.9 and the PPQ Treatment Manual (table 3–8–1). This is the established generic dose for all insect pests except pupae and adults of the order Lepidoptera. Seven of the insect pests of concern, yellow peach moth, litchi fruit moth, orange fruit borer, the moth *Cateremna quadriguttella,* bright cornelian, dull cornelian, and flower caterpillar, belong to the order Lepidoptera, and the 400 gray dose is not approved to treat pupae and adults of the order Lepidoptera. However, the life stages of concern for these pests are the eggs and the larvae, because the eggs and the larvae of these species are internal feeders and thus difficult to detect through inspection; the 400 gray dose is approved to treat those stages of the life cycle for Lepidoptera pests. The pupae and adults of these species are external feeders, and we are confident that inspection can detect them. Within part 305, § 305.9 contains a number of other requirements for irradiation treatment, including monitoring by APHIS inspectors and safeguarding of the fruit. Treatment could be conducted at an approved facility in Australia or in the United States.

Paragraph (c) would require that each shipment of fruit be accompanied by a phytosanitary certificate issued by the NPPO of Australia containing an additional declaration stating that the conditions for importation have been met.

**Distribution Restrictions**

The required irradiation treatment would not mitigate the risks posed by the litchi hairy mite (*Aceria litchii*), and because of the mite's microscopic size, inspection alone is not considered sufficient to mitigate the risk of introduction into the United States. Based on the distribution and reported host range of this pest, we estimate it could establish in the continental United States in USDA Plant Hardiness Zones 9 through 11. Neither of its two hosts, longan or litchi, occur naturally in the United States; however, both litchis and longans are commercially grown in the State of Florida and the climatic conditions in Florida present the highest risk for establishment of the pest. For this reason, our regulations generally prohibit the movement of litchi into Florida from areas where the litchi hairy mite is present. Litchi from China, India, and Thailand that are imported under § 319.56–13 and § 319.56–47, respectively, are also not allowed to be imported or distributed in Florida.

Because the litchi hairy mite is not present in Florida and because we have consistently prohibited host movement into Florida from areas where that pest is present, we propose to prohibit the importation and distribution of litchi from Australia into the State of Florida. Accordingly, paragraph § 319.56–55 (d) would stipulate that all cartons of litchi would have to be stamped ''Not for importation into or distribution in FL.''

**Commercial Shipments**

Paragraph (e) would state that only commercial consignments of litchi fruit would be allowed to be imported. Produce grown commercially is less likely to be infested with plant pests than noncommercial shipments. Noncommercial shipments are more prone to infestations because the commodity is often ripe to overripe, could be of a variety with unknown susceptibility to pests, and is often grown with little or no pest control. Commercial shipments, as defined in § 319.56–1, are shipments of fruits and vegetables that an inspector identifies as having been produced for sale and distribution in mass markets. Identification of a particular shipment as commercial is based on a variety of indicators, including, but not limited to, the quantity of produce, the type of packaging, identification of a grower or packinghouse on the packaging, and documents consigning the shipment to a wholesaler or retailer.

Commercially produced fruit in Australia are already subjected to standard commercial cultural and post-harvest practices that reduce the risk associated with plant pests. While not specifically required by this proposal, standard cultural practices other than the twice yearly application of broad spectrum fungicides (e.g., the regular use of sanitation measures, irrigation, fertilization, and pest control) help to further ensure that the pests of concern do not follow the pathway. All export orchards are registered production sites with traceback capability. Harvested fruit is moved to the packinghouses in a manner that would preclude reinfestation by pests. Culling of blemished and damaged fruit occurs in the field and during the post-harvest commercial processing of the fruit.

The regulations in § 319.56–3 provide that all imported fruits and vegetables shall be inspected, and shall be subject to such disinfection at the port of first arrival as may be required by an inspector. The pre-export inspection conducted by APHIS personnel as part of preclearance activities in the country of export typically serves to satisfy the inspection requirement. Section 319.56–3 also provides that any shipment of fruits and vegetables may be refused entry if the shipment is so infested with plant pests that an inspector determines that it cannot be cleaned or treated. We believe that the proposed conditions described above, as well as all other applicable requirements in § 319.56–3, would be adequate to prevent the introduction of plant pests into the continental United States, except Florida, with litchi fruit imported from Australia.

The proposed conditions described above for the importation of litchi fruit from Australia into the continental United States, except Florida, would be added to the fruits and vegetables regulations as a new § 319.56–55.

**Executive Order 12866 and Regulatory Flexibility Act**

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

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

This proposed rule is in response to a request from Australia to export fresh litchis to all States in the United States except Florida. Litchi is grown in Florida, Hawaii, and California, and U.S. production is estimated to be about 500 metric tons (MT) per year. Based on available information, most, if not all, litchi farms are small entities.

The United States imports litchis from such countries as Taiwan, China, Israel, and Mexico. Australia expects to export about 400 MT of litchis to the United States annually. This amount is

equivalent to less than 3 percent of the quantity of litchis that was imported by the United States in 2004, the latest year for which we have data. Most likely, the quantity of litchis expected to be imported from Australia is of even lesser significance when compared to current litchi imports by the United States, given the expanding demand for this fruit.

Any litchi price declines that might result from this rule would be insignificant, especially if, as is likely, at least some litchi imports from Australia were to displace imports from other countries. Moreover, given that the agricultural seasons in the Southern Hemisphere are generally the opposite of those in the Northern Hemisphere, the proposed imports from Australia likely would not directly compete with U.S. litchi production.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

*Executive Order 12988*

This proposed rule would allow litchi fruit to be imported into the United States from Australia. If this proposed rule is adopted, State and local laws and regulations regarding litchi fruit imported under this rule would be preempted while the fruit is in foreign commerce. Fresh fruits and vegetables are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

*Paperwork Reduction Act*

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2009–0084. Please send a copy of your comments to: (1) Docket No. APHIS–2009–0084, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

APHIS is proposing to amend the fruits and vegetables regulations to allow, under certain conditions, the importation into the United States of commercial consignments of litchi fruit from Australia. The conditions for the importation of litchi fruit from Australia include requirements for pest exclusion at the production site, irradiation treatment, pest-excluding packinghouse procedures and port-of-entry inspections. The litchi would also be required to be accompanied by a phytosanitary certificate issued by the national plant protection organization (NPPO) of Australia with an additional declaration confirming that the litchi had been produced in accordance with the proposed requirements. This action would allow for the importation of litchi fruit from Australia while continuing to provide protection against the introduction of injurious plant pests into the United States.

Implementing this rule will require the completion of phytosanitary certificates, compliance agreements, preclearance workplans, treatment records and trust fund agreements. We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency s functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, 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 information collection on those who are to respond (such as 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).

*Estimate of burden:* Public reporting burden for this collection of information is estimated to average 0.5455 hours per response.

*Respondents:* Foreign business and NPPO of Australia.

*Estimated annual number of respondents:* 2.

*Estimated annual number of responses per respondent:* 11.

*Estimated annual number of responses:* 22.

*Estimated total annual burden on respondents:* 12 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**E-Government Act Compliance**

The Animal and Plant Health Inspection Service is committed to compliance with the EGovernment Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**List of Subjects in 7 CFR Part 319**

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

## PART 319—FOREIGN QUARANTINE NOTICES

1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. A new § 319.56–55 is added to read as follows:

**§ 319.56–55 Litchi from Australia (including Tasmania).**

Litchi (*Litchi chinensis*) with up to 5 millimeters of stem may be imported into the continental United States from Australia only under the following conditions and in accordance with all other applicable provisions of this subpart:

(a) Litchi must be grown in a production area that is registered with and monitored by the national plant protection organization (NPPO) of Australia.

(b) The litchi must be treated for plant pests of the class Insecta, except pupae

and adults of the order Lepidoptera, with irradiation in accordance with § 305.9 of this chapter. Treatment must be conducted prior to importation of the fruits into the United States.

(c) Each shipment of litchi must be accompanied by a phytosanitary certificate of inspection issued by the NPPO of Australia with an additional declaration stating that the litchi were treated with irradiation as described in the Plant Protection and Quarantine Treatment Manual.

(d) In addition to meeting the labeling requirements in Part 305 of this chapter, cartons in which litchi are packed must be stamped ''Not for importation into or distribution in FL.''

(e) The litchi may be imported in commercial consignments only.

Done in Washington, DC, this 19th day of December 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–33201 Filed 12–27–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 9 CFR Part 92

**[Docket No. APHIS–2007–0158]**

**RIN 0579–AD30**

## Information From Foreign Regions Applying for Recognition of Animal Health Status

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the regulations that govern the importation of animals and animal products by revising the list of factors APHIS considers when evaluating the animal health status of a foreign region. Additionally, we are proposing criteria for considering a region to be historically free of a specific disease. These changes would make clearer the type of information APHIS needs from a requesting region to most expeditiously conduct an evaluation.

**DATES:** We will consider all comments that we receive on or before February 27, 2012.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2007-0158-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2007–0158, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2007-0158* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

**FOR FURTHER INFORMATION CONTACT:** Dr. Kelly Rhodes, Regionalization Evaluation Services, Sanitary Trade Issues Team, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–4356.

**SUPPLEMENTARY INFORMATION:**

### Background

The regulations in 9 CFR part 92, ''Importation of Animals and Animal Products; Procedures for Requesting Recognition of Regions'' (referred to below as the regulations), set forth the process by which a foreign government may request recognition of the animal health status of a region.

Section 92.2 of the regulations requires that such requests be accompanied by information regarding the region that will enable the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture to evaluate the request. Currently, the provisions in paragraph (b) of § 92.2 state that each request must include the following information, which APHIS commonly refers to as ''the 11 factors'':

- The authority, organization, and infrastructure of the veterinary services organization in the region.
- Disease status, i.e., is the restricted disease agent known to exist in the region? If ''yes,'' at what prevalence? If ''no,'' when was the most recent diagnosis?
- The status of adjacent regions with respect to the agent.
- The extent of an active disease control program, if any, if the agent is known to exist in the region.
- The vaccination status of the region. When was the last vaccination? What is the extent of vaccination if it is currently used, and what vaccine is being used?
- The degree to which the region is separated from adjacent regions of higher risk through physical or other barriers.
- The extent to which movement of animals and animal products is controlled from regions of higher risk, and the level of biosecurity regarding such movements.
- Livestock demographics and marketing practices in the region.
- The type and extent of disease surveillance in the region, e.g., is it passive and/or active; what is the quantity and quality of sampling and testing?
- Diagnostic laboratory capabilities.
- Policies and infrastructure for animal disease control in the region, i.e., emergency response capacity.

Current paragraph (e) of § 92.2 provides that if, after evaluating the information submitted, APHIS believes the action being requested can be safely taken, the Agency will publish a proposed rule in the **Federal Register** proposing to take such action and will provide a period of time during which the public may comment on the proposal. Current paragraph (f) of § 92.2 provides that, during the comment period, the public will have access both to the information upon which APHIS based its analysis of risk and the analysis itself. Once APHIS reviews and considers all comments received, it makes a final decision regarding the request and publishes that decision in the **Federal Register**.

In order to conduct a valid evaluation of a region's animal health status and any risk that might be associated with the action requested, it is important that APHIS have complete and pertinent information regarding the region, its disease history, its animal health practices and capabilities, and any effect its import practices or relationship to adjacent regions might have on disease risk.

The 11 factors listed in § 92.2(b) specify the types of information APHIS needs to accomplish its evaluation. To assist foreign governments making a request under § 92.2, APHIS also makes available on its Web site detailed guidance as to the types of information required. This guidance is forth in a document titled ''Clarification of Information Requested for Recognition of a Region,'' which can be viewed at *http://www.aphis.usda.gov/import_export/downloads/info_request.pdf.*

Each year, APHIS receives a number of requests to evaluate the animal health status of foreign regions. However, the evaluation process is often hindered because, even with the assistance of the

guidance, the initial information sent to APHIS is incomplete and requires APHIS to contact the requesting government for additional information.

Based on our experience, we believe it is advisable to clarify further what information is necessary for APHIS to initiate an evaluation of risk. Therefore, we are proposing to revise the list of factors in § 92.2(b) and to make available more detailed guidance as to the specific types of information encompassed by each factor.

Our experience dealing with requests from foreign governments indicates that the list of 11 factors can be confusing because the information requested in some of the factors overlaps with information requested in other factors. For instance, one of the factors asks for information regarding the degree to which the region is separated from adjacent regions of higher risk through physical or other barriers. A separate factor asks for information regarding the extent to which movement of animals and animal products is controlled from regions of higher risk and the level of biosecurity regarding such movements.

To eliminate such overlap, we propose to consolidate the 11 factors into 8 factors, listed as follows:

- Scope of the evaluation being requested;
- Veterinary control and oversight;
- Disease history and vaccination practices;
- Livestock demographics and traceability;
- Epidemiological separation from potential sources of infection;
- Diagnostic laboratory capabilities;
- Surveillance practices; and
- Emergency preparedness and response.

The type of information required would not change substantively from what we currently require to conduct an evaluation. It would simply be described in what we believe is a more helpful way. More detailed guidance as to the specific types of information encompassed by each factor would be set forth in a guidance document available on the APHIS Web site or by contacting APHIS. Instructions for accessing or obtaining the guidance document would be set forth in § 92.2(b) of the regulations. The revised guidance document, ''Clarification of Information Requested for Recognition of a Region,'' is available for review and comment as part of this rulemaking and may be viewed on the Regulations.gov Web site or in our reading room. Instructions for accessing Regulations.gov and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this proposed rule. In addition, a copy may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

An overview of the information required for each of the factors, as explained in the guidance document, is as follows:

1. *Scope of the evaluation being requested.* This factor would require identification of the disease(s) for which an APHIS evaluation is requested; a detailed description of the region, including maps; identification of the animal commodities proposed for export to the United States; and an estimate of the projected annual volume of export for each commodity. Although this type of information is not specifically referenced in the current regulations and guidance document, it is standard practice for APHIS to require such information from a requesting region before beginning an evaluation.

2. *Veterinary control and oversight.* This factor would require sufficient information for APHIS to assess the infrastructure of the official veterinary services in the region and the ability of the veterinary services to oversee animal health activities, monitor for disease, and implement disease control measures.

3. *Disease history and vaccination practices.* This factor would require sufficient information to enable APHIS to understand the history of the disease(s) being evaluated in the region, including prior control measures, revisions to those measures as applicable, and the vaccination status and history in the region.

4. *Livestock demographics and traceability.* This factor would require sufficient information for APHIS to assess the geographic distribution of livestock and wildlife species that are susceptible to the disease(s) under evaluation, patterns of livestock movement within the region, and the ability of the official veterinary services of the region to trace livestock movements in the event of a disease outbreak.

5. *Epidemiological separation from potential sources of infection.* This factor would require sufficient information to enable APHIS to evaluate the ability of the region to prevent incursions of the disease(s) under evaluation. Relevant risk factors that we would evaluate include the presence of the disease(s) in adjacent regions or in regions with epidemiological links to the requesting region, natural and manmade barriers to disease introduction, trading practices, and inspection practices.

6. *Surveillance.* This factor would require sufficient information to enable APHIS to determine whether the surveillance system in the region is sufficient to ensure early detection of the disease(s) under evaluation. Countries would need to submit information regarding active and/or passive surveillance as applicable.[1] Documentation regarding collection and analysis of disease and infection data must be sufficient to provide confidence in the disease status of the region.

7. *Diagnostic laboratory capabilities.* This factor would require sufficient information to enable APHIS to determine whether the animal health laboratory system, diagnostic procedures, and quality assurance measures in the region are sufficient to effectively support surveillance for the disease(s) under evaluation.

8. *Emergency preparedness and response.* This factor would require information sufficient for APHIS to assess emergency preparedness measures and response capabilities in the region, as well as procedures in place to notify trading partners and other international entities of a disease outbreak.

**Regions Historically Free of a Disease**

In regions in which a significant period of time has elapsed since a particular disease or infection has occurred, if it has ever occurred, certain information required as part of the eight factors listed above would not be applicable or necessary. An example of this would be some of the information on surveillance, particularly active pathogen-specific surveillance. In the guidance document for the eight factors above, APHIS asks for detailed information regarding surveillance specific to the pathogen under consideration, including the following: Target populations, targeted prevalence for detection and estimated confidence level, sampling plan, types of samples collected, frequency of sampling, and the targeted and actual numbers of samples collected and the results of screening and confirmatory testing for the past 3 years.

[1] *Active surveillance* is defined in § 92.1 of the regulations as sample collection using a systematic or statistically designed survey methodology to actively seek out and find cases of animals with a restricted disease agent, or to determine the prevalence of the restricted disease agent in the population. *Passive surveillance* is defined as a surveillance system that does not depend on active participation by the responsible agency to seek out and monitor a restricted disease agent. The definition explains, further, that such a system relies on mandatory reporting, a pool of trained investigators, diagnostic submission procedures and laboratory support, and periodic public information and continuing education programs on diseases.

However, if a particular disease or infection has not occurred in a region for many years, the benefit of active surveillance specifically targeting that pathogen would be minimal. In such a case, it would not be necessary for APHIS to receive detailed information from the region regarding active pathogen-specific surveillance. However, to be recognized as free of a disease, it would still be necessary for the region to demonstrate an effective early detection system for the disease(s) under evaluation, as described below.

The World Organization for Animal Health (OIE), of which the United States is a Member country, is the internationally recognized standard-setting body that develops science-based recommendations for the safe trade of animals and animal products. The World Trade Organization has recognized the OIE as the international forum for setting animal health standards, reporting global animal disease events, and presenting guidelines and recommendations on sanitary measures relating to animal health. The OIE recommends criteria for recognizing a country or zone free of a disease based on a significant period of time having elapsed since the disease was last reported, if it was ever reported.[2] Such an area is described by the OIE as being historically free of a disease.

In its Terrestrial Animal Health Code (Code), the OIE recommends that a region may be recognized as historically free of a disease if the disease has never occurred in the region or has not occurred for at least the past 25 years, provided the following conditions have been met for at least the past 10 years:

- The disease has been a notifiable disease; [3]
- An early detection system has been in place for all relevant species;
- Measures to prevent disease/infection introduction have been in place and no vaccination against the disease has been carried out unless otherwise provided in the Code; and
- There has been no evidence of infection in wildlife in the region.

Based on APHIS' experience evaluating the animal health status of foreign regions, we concur with the OIE's recommended criteria for being recognized as historically free of a disease, and we are proposing to add a new paragraph (c) in § 92.2 of the regulations that would list the factors we will consider in evaluating whether to recognize a region as historically free. Much of the information is the same as that required for the eight factors discussed above. However, consistent with OIE guidelines, APHIS' evaluations for historically free status will focus on verifying an effective early detection system for the disease(s) under consideration, disease reporting requirements, and measures in place to prevent introduction. Therefore, certain information encompassed by the eight factors would not be required.

In evaluating whether a region can be considered historically free of a disease, we would consider the following six factors:

- Scope of the evaluation being requested;
- Veterinary control and oversight;
- Disease history and vaccination practices;
- Disease reporting;
- Disease detection; and
- Barriers to disease introduction.

As with the eight factors discussed earlier in this document, more detailed guidance as to the specific types of information encompassed by each factor for regions historically free of a disease would be set forth in a guidance document available on the APHIS Web site or by contacting APHIS. Instructions for accessing or obtaining the guidance document would be set forth in § 92.2(c) of the regulations. The guidance document, ''Clarification of Information Requested for Recognition of a Historically Free Region,'' is available for review and comment as part of this rulemaking and may be viewed on the *Regulations.gov* Web site or in our reading room.

Consistent with the OIE guidelines, proposed § 92.2(c) would indicate that, for a region to be considered historically free of a disease, the disease must not have occurred in domestic livestock for at least the past 25 years and must not have been reported in wildlife for at least the past 10 years. An overview of the information required for each of the factors, as explained in the guidance document, is as follows.

1. *Scope of the evaluation being requested.* The information we would require for this factor is the same as that described for the eight factors, above.

2. *Veterinary control and oversight.* This factor would require sufficient information to enable APHIS to determine whether the veterinary services in the region have had and continue to have sufficient legal authority, organization, and infrastructure to effectively investigate, diagnose, and report the disease(s) under evaluation, if detected.

3. *Disease history and vaccination practices.* For this factor, the requesting authority would need to indicate when each disease under evaluation was last reported, if ever, in domestic livestock and wildlife in the region. Additionally, if vaccination against the disease(s) has occurred within the past 10 years, the request must include information indicating the reasons for vaccination, the source and type of vaccines used, target populations, recordkeeping requirements, and procedures to distinguish vaccinated animals.

4. *Disease reporting.* This factor would require sufficient information to enable APHIS to determine whether each disease under evaluation has been legally notifiable in the region for at least the past 10 years.

5. *Disease detection.* This factor would require sufficient information for APHIS to determine whether an effective early detection system has been in place for at least the past 10 years for the disease(s) under evaluation. An effective early detection system would include, among other things, representative coverage of susceptible animal populations by field services, a training program for detecting and reporting unusual animal health incidents, the ability to undertake effective disease investigation and reporting, and access to laboratories capable of diagnosing and differentiating relevant diseases.

6. *Barriers to disease introduction.* This factor would require sufficient information for APHIS to determine whether measures have been in place for at least the past 10 years to prevent introduction of the disease(s) under evaluation.

**Initiation of an Evaluation**

Historically, the evaluations APHIS has conducted in accordance with part 92 have been at the request of a representative of a foreign jurisdiction. We expect that to continue to be the case the great majority of the time. However, there might be instances where APHIS initiates an evaluation on its own initiative. As with evaluations done at the request of a foreign region, we would consider the factors set forth in this proposed rule and, if our intent is to recognize the health status of the region, would give notice in the **Federal Register** of that intent, make the

[2] When discussing areas with regard to animal diseases, OIE's use of the terms ''country'' and ''zone'' is equivalent to APHIS' use of the term ''region.'' In § 92.1, a region is defined as any of the following: (1) A national entity (country); (2) part of a national entity (zone, county, department, municipality, parish, Province, State, etc.; (3) parts of several national entities combined into an area; or (4) a group of national entities combined into a single area.

[3] The Code defines a notifiable disease as one listed by the Veterinary Authority in a region that, as soon as it is detected or suspected, must be brought to the attention of the Veterinary Authority in accordance with national regulations.

relevant information and data and our evaluation available to the public, and accept public comment regarding our intent. After reviewing and considering any comments received, we would give notice to the public of our final determination. In this proposed rule, we include a footnote to § 92.2(a) that references such situations.

**Information Received With Requests**

Current § 92.2(d) states that the information sent to APHIS with requests submitted in accordance with part 92 will be made available to the public prior to initiation by APHIS of any rulemaking action on the request. Current § 92.2(f) provides that, in cases where APHIS does publish a proposed rule based on a request, the public will be provided a period of time to comment on the proposal and that, during the comment period, the public will have access to the information upon which APHIS based its analysis supporting the proposal, as well as its methodology in conducting the analysis.

We believe that the wording of current § 92.2(d) can be confusing. The intent of that paragraph is to give notice to the public that, at the time a proposal is published, information supporting the proposal will have been made available to the public. Such information is posted on the APHIS Web site. However, the wording of current § 92.2(d) does not indicate how early in the process such information will be made available to the public. It has been APHIS' practice to make such information available immediately before publication of a proposed rule. APHIS does not begin an evaluation until it has sufficient information to conduct a valid analysis of a request, and does not take the further action of publishing a proposed rule in the **Federal Register** unless it believes the results of the evaluation support the action being requested. We believe that, until a proposed rule is ready for publication, it can be confusing and misleading for the public to review what APHIS considers partial information or information with regard to which further action may not be taken. However, we believe it could be useful to the public to know which foreign regions have requested APHIS' recognition of their animal health status. Therefore, in this document, we are proposing to remove the statement in § 92.2(d) that supporting information will be made available to the public prior to initiation of rulemaking and to replace it with the statement that a list of regions that have requested recognition of their animal health status is available to the public. We will continue to make available to the public by the time APHIS publishes a proposal in the **Federal Register** any relevant information received from a requesting country.

**Miscellaneous**

As noted above, current paragraph (e) of § 92.2 provides that if, after evaluating the information submitted with a region's request for APHIS' recognition of its animal health status, APHIS believes the action being requested can be safely taken, the Agency will publish a proposed rule in the **Federal Register** proposing to take such action and will provide a period of time during which the public may comment on the proposal. However, recent rulemaking by APHIS has made it incorrect to say that a proposed rule will be used in all cases to give notice of APHIS' intent. On January 24, 2011, we published in the **Federal Register** an interim rule (76 FR 4046–4056, Docket No. APHIS–2006–0074) concerning highly pathogenic avian influenza (HPAI) as it applies to the importation of live birds and poultry and the products of birds and poultry. In that interim rule, we provide for a method of notifying the public of APHIS' intent regarding the HPAI status of a region that differs somewhat from the method currently provided for in § 92.2(e). Instead of publishing a proposed rule, as provided for in current § 92.2(e), the HPAI interim rule indicates that a region will be removed from the list of regions where HPAI is considered to exist only after APHIS makes its evaluation available for public comment through a notice published in the **Federal Register**. The interim rule provides that, following the close of the comment period, APHIS will publish another notice responding to comments and announcing APHIS' decision.

In order to account for such situations where a notice, rather than proposed rule, will be used to solicit comment regarding APHIS' evaluation of the animal health status of a foreign region, we are proposing to revise paragraph (e) of § 92.2 to provide that, if APHIS believes a request from a foreign region for APHIS' recognition of its animal health status can be safely granted, APHIS will indicate its intent and make its evaluation available for public comment through a document published in the **Federal Register**. Paragraph (f) of § 92.2 would indicate that, during the comment period, the public will have access to the information upon which APHIS based its evaluation, as well as the evaluation itself, and that, once APHIS has reviewed all comments received, it will make a final determination regarding the request and will publish that determination in the **Federal Register**.

Additionally, in this document, we are clarifying which requests are governed by § 92.2. The scope of § 92.2 is reflected in its heading, which reads ''Application for recognition of the animal health status of a region.'' Requests submitted to APHIS in accordance with part 92 are evaluated by the Regionalization Evaluation Services staff of APHIS' Veterinary Services. However, the wording in paragraphs (b), (c), and (e) of current § 92.2 indicates that the section also governs requests for approval to export a particular type of animal or animal product to the United States from a foreign region. Although the evaluations conducted by the Regionalization Evaluation Services staff can ultimately affect which commodities are allowed importation into the United States and under what conditions, requests to import specific types of animals or animal products are governed by parts in 9 CFR other than part 92. To clarify the scope of part 92, we are proposing to remove from that part the references to exportation of a particular type of animal or animal product to the United States from a foreign region.

Currently, § 92.2(c) indicates where requests for recognition of a region, and information supporting such a request, should be sent. That paragraph also requests that, where possible, a copy of the request and supporting information be submitted on a 3.5-inch floppy disk in ASCII or a word processing format. In this proposal, we include the address to which requests and supporting information should be sent in § 92.2(a) instead of § 92.2(c) and propose to remove the request for submission on a 3.5-inch floppy disk. Such disks are no longer commonly used. In proposed § 92.2(a), we request that, where possible, a copy of the request and accompanying information be included in electronic format.

We are also proposing several nonsubstantive wording changes to § 92.2 for the sake of clarity.

**Executive Order 12866 and Regulatory Flexibility Act**

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

We have prepared an economic analysis for this action. The analysis identifies importers and producers of animals and animal products as the small entities most likely to be affected by this action and considers the

reduction in time it would take under this proposal for APHIS to initiate and complete an evaluation of the animal disease status of a region. Based on the information presented in the analysis, we expect that decreasing the amount of time and APHIS resources required to initiate and complete such an evaluation would not have a significant economic effect on the entities affected. We invite comment on our economic analysis, which is posted with this proposed rule on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov) and may also be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Executive Order 12988**

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

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

**List of Subjects in 9 CFR Part 92**

Animal diseases, Imports, Livestock, Poultry and poultry products, Region, Reporting and recordkeeping requirements.

Accordingly, we propose to amend 9 CFR part 92 as follows:

## PART 92—IMPORTATION OF ANIMALS AND ANIMAL PRODUCTS; PROCEDURES FOR REQUESTING RECOGNITION OF REGIONS

1. The authority citation for part 92 continues to read as follows:

**Authority:** 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

2. In § 92.2, paragraphs (a) through (f) are revised to read as follows:

**§ 92.2 Application for recognition of the animal health status of a region.**

(a) The representative of the national government(s) of any country or countries who has the authority to make such a request may request that APHIS recognize the animal health status of a region.[1] Such requests must be made in English and must be sent to the Administrator, c/o National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231. (Where possible, include a copy of the request and accompanying information in electronic format.)

(b) Requests for recognition of the animal health status of a region, other than requests submitted in accordance with paragraph (c) of this section, must include, in English, the following information about the region. More detailed information regarding the specific types of information that will enable APHIS to most expeditiously conduct an evaluation of the request is available at [address to be added in final rule] or by contacting the Director, Sanitary Trade Issues Team, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737.

(1) Scope of the evaluation being requested.

(2) Veterinary control and oversight.

(3) Disease history and vaccination practices.

(4) Livestock demographics and traceability.

(5) Epidemiological separation from potential sources of infection.

(6) Surveillance.

(7) Diagnostic laboratory capabilities.

(8) Emergency preparedness and response.

(c) Requests for recognition that a region is historically free of a disease based on the amount of time that has elapsed since the disease last occurred in a region, if it has ever occurred, must include, in English, the following information about the region. More detailed information regarding the specific types of information that will enable APHIS to most expeditiously conduct an evaluation of the request is available at [address to be added in final rule] or by contacting the Director, Sanitary Trade Issues Team, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737. For a region to be considered historically free of a disease, the disease must not have been reported in domestic livestock for at least the past 25 years and must not have been reported in wildlife for at least the past 10 years.

(1) Scope of the evaluation being requested.

(2) Veterinary control and oversight.

(3) Disease history and vaccination practices.

(4) Disease notification.

(5) Disease detection.

(6) Barriers to disease introduction.

(d) A list of those regions that have requested APHIS' recognition of their animal health status is available at [*address to be added in final rule*].

(e) If, after review and evaluation of the information submitted in accordance with paragraph (b) or (c) of this section, APHIS believes the request can be safely granted, APHIS will indicate its intent and make its evaluation available for public comment through a document published in the **Federal Register**.

(f) APHIS will provide a period of time during which the public may comment on its evaluation. During the comment period, the public will have access to the information upon which APHIS based its evaluation, as well as the evaluation itself. Once APHIS has reviewed all comments received, it will make a final determination regarding the request and will publish that determination in the **Federal Register**.

* * * * *

Done in Washington, DC, this 19th day of December 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–33206 Filed 12–27–11; 8:45 am]

**BILLING CODE 3410–34–P**

[1] Additionally, APHIS may choose to initiate an evaluation of the animal health status of a foreign region on its own initiative. In such cases, APHIS will follow the same evaluation and notification procedures set forth in this section.

---

## DEPARTMENT OF ENERGY

## 10 CFR Part 719

## 48 CFR Parts 931, 952 and 970

**RIN 1990–AA37**

## Contractor Legal Management Requirements; Acquisition Regulations

**AGENCY:** Office of General Counsel, Department of Energy.

**ACTION:** Notice of proposed rulemaking and opportunity for public comment.

**SUMMARY:** The Department of Energy (DOE or Department) is proposing to revise existing regulations covering contractor legal management requirements. Conforming amendments are also proposed to the Department of Energy Acquisition Regulation (DEAR). The proposed regulations will provide rules for handling of legal matters and associated costs by certain contractors whose contracts exceed $100,000,000 as well as legal counsel retained directly by the Department for matters in which costs exceed $100,000.

**DATES:** DOE will accept comments, data, and information regarding this notice of

proposed rulemaking (NOPR) no later than February 27, 2012.

**ADDRESSES:** Any comments submitted must identify this NOPR on Contractor Legal Management Requirements, and provide regulatory information number (RIN) 1990–AA37. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email: DOE.719comments@hq.doe.gov.* Include RIN 1990–AA37 in the subject line of the message.

3. *Mail:* Lisa Pinder, Administrative Assistant, U.S. Department of Energy, Office of General Counsel, GC–60, 1000 Independence Ave. SW., Washington, DC 20585. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Lisa Pinder, Administrative Assistant, U.S. Department of Energy, GC–60, 1000 Independence Ave. SW., Washington, DC, 20585. Telephone: (202) 586–5426. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No faxes will be accepted.

For further information on how to submit a public comment, review other public comments and the docket, contact Ms. Lisa Pinder (202) 586–5426 or by Email: *lisa.pinder@hq.doe.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Eric Mulch, Attorney-Adviser, U.S. Department of Energy, Office of General Counsel, 1000 Independence Avenue SW., Washington, DC, 20585–0121. Telephone: (202) 287–5746. Email: *eric.mulch@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

I. Background.
II. Summary of the Proposed Rule.
III. Procedural Requirements.
A. Review Under Executive Order 12866.
B. Review Under Executive Order 12988.
C. Review Under the Regulatory Flexibility Act.
D. Review Under the Paperwork Reduction Act.
E. Review Under the National Environmental Policy Act.
F. Review Under Executive Order 13132.
G. Review Under the Unfunded Mandates Reform Act of 1995.
H. Review Under the Treasury and General Government Appropriations Act, 1999.
I. Review Under Executive Order 13211.
J. Review Under the Treasury and General Government Appropriations Act, 2001.

## I. Background

The Department's high dollar contracts that include cost reimbursable elements generally make legal costs, including the cost of litigation, allowable if reasonable and incurred in accordance with the applicable cost principles and contract clauses. Consequently, the Department has an ongoing obligation to monitor, supervise, and control the legal costs that it reimburses.

The Department has a long history of overseeing aspects of its contractors' management of legal matters and costs. This practice was formalized in 1994 when the Department published an interim Acquisition Letter as an interim policy in the **Federal Register** (59 FR 44981). The interim Acquisition Letter was finalized as a Policy Statement on April 3, 1996 (61 FR 14763). This Policy Statement was followed by a formal rulemaking which added part 719, Contractor Legal Management Requirements, to Title 10 of the Code of Federal Regulations with an effective date of April 23, 2001 (66 FR 4616, 66 FR 19717).

Today's proposed rule revises the current contractor legal management requirements found in part 719, in Chapter 10 of the Code of Federal Regulations. The revisions reflect lessons learned by the Department during the years since implementing part 719. The part establishes regulations to monitor and control legal costs and to provide guidance to aid contractors and the Department in making determinations regarding the reasonableness of outside legal costs, including the costs associated with litigation. Today's amendments to part 719 and the associated portions of the Department of Energy Acquisition Regulation (DEAR) are designed to clarify and streamline existing requirements, improve efficiency of contractor legal management, and facilitate oversight over the expenditure of taxpayer dollars.

Today's proposed rules and guidance slightly expands the coverage of the existing regulations. The proposed rules cover all outside legal costs incurred under the Department's Management and Operating (M&O) contracts, non-management and operating cost reimbursement contracts exceeding $100,000,000, and non-management and operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000. The proposed rules delete current requirements limiting applicability of the part to contracts involving work performed at facilities owned or leased by the Department. Part 719 would continue to apply to legal counsel retained directly by the Department where the legal costs over the life of the matter for which counsel has been retained are expected to exceed $100,000. The proposed rules also delete the current coverage exception for legal matters handled through retrospective insurance arrangements and make certain portions of the rules applicable to such arrangements.

The proposed regulations continue to require contractor submission of legal management plans, staffing and resource plans, and engagement letters under specific circumstances and set forth the requirements for these submissions. Today's proposed rules require contractors to submit proposed legal settlements requiring Contractor payment of $25,000 or more for Department review and approval. Currently, common practice requires contractors to obtain permission from Department counsel to enter a settlement agreement requiring Contractor payment of $50,000 or more. The Department is seeking public comment regarding the proposed reduction of the threshold to $25,000 and the proposed inclusion of the requirement in the regulations. In order to streamline and simplify the regulations related to contractor litigation, requirements related to initiation, defense, and settlement of litigation have been removed from the DEAR and consolidated in part 719. The proposed rule moves much of the material currently located in the Appendix to part 719 to the part, itself.

The proposed part 719 continues to identify certain costs that generally would be considered unallowable. Certain categories of costs that require Departmental pre-approval in order to be considered for reimbursement are also identified. The proposed rules provide that compliance with part 719 is a prerequisite for allowability of legal costs, but notes that compliance with the part does not guarantee that costs will be determined to be allowable. All costs, whether or not identified as specifically allowable or unallowable, are still subject to the rules of allowability in the Federal Acquisition Regulation (FAR) and the DEAR.

The Department also proposes changes to the DEAR. The changes correspond to the proposed substantive changes to part 719 as well as clarify and streamline the DEAR provisions related to contractor legal management. The proposed rules require inclusion of 48 CFR 952.231–71, Insurance—Litigation and Claims, or 48 CFR 970.5228–1, Insurance—Litigation and Claims, in the majority, but not all contracts, to which part 719 applies. Both Insurance—Litigation and Claims

clauses have been revised to delete requirements related to contractor initiation or defense of litigation that are proposed for consolidation in part 719.

## II. Summary of the Proposed Rule

Subpart A, sections 719.1–719.8, includes general provisions. The subpart provides definitions and addresses applicability of the part. Section 719.3 states that the part covers all Management and Operating (M&O) contracts, non-management and operating cost reimbursement contracts exceeding $100,000,000, and non-management and operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000. Sections 719.3 and 719.4 make it clear that any contract exceeding $100,000 that the Department awards directly to retained legal counsel are subject to compliance with the rules. Sections 719.5 and 719.6 describe types of contracts and legal matters not covered by the part. The proposed rules include coverage of certain retrospective insurance arrangements that are excluded from coverage under the current rules. Procedures for exceptions or deviations from the part are set out in section 719.7. In the case of a Department contract, the determination would be made by the Department's General Counsel; in the case of a National Nuclear Security Administration (NNSA) contract, it would be made by the NNSA General Counsel. Section 719.8 states that the sharing of certain information between contractors and the Department does not waive any applicable privilege.

Subpart B, sections 719.10–719.17, describes the requirements for submission of a legal management plan, staffing and resource plan, and annual legal budget. The subpart describes what is to be included in the plans and in the budget. The proposed rules modify the current requirements for legal management plans, in response to lessons learned by the Department and to ensure adequate oversight of contractor legal management. Section 719.11 provides that contractors must submit a legal management plan within 60 days following execution of a contract with the Department or upon request of the contracting officer. Section 719.15 sets out a requirement for submission of a staffing and resource plan for significant matters (those with legal costs estimated to exceed $100,000 over the life of the matter or as determined by Department Counsel). Section 719.16 requires submission of the staffing and resource plan no later than 30 days after the filing of an answer or a dispositive motion in lieu of an answer in a significant matter involving litigation, 30 days after a determination that the cost is expected to exceed $100,000, or 30 days after notification by Department Counsel that a matter is considered significant, whichever is sooner. Section 719.17 requires submission of an annual legal budget for existing or anticipated significant matters.

Subpart C, sections 719.20–719.21, describes the requirements for engagement letters. Engagement letters must be prepared and submitted to Department Counsel for matters where costs are expected to exceed $25,000. Section 719.21 states the requirements for engagement letters. Section 719.21(b)(3) requires the contractor to include the right of the government to inspect, copy and audit documentation of billable fees and other records where the Department is reimbursing the legal costs. Section 719.21(b)(8) requires that the engagement letter set forth an agreement that retained counsel will prepare a staffing and resource plan in accordance with the part. Section 719.21(b)(11) requires that the engagement letter include a requirement that a specific certification be included in invoices. This certification requirement is currently set forth in the Attachment to the part.

Subpart D, sections 719.30–719.35, describes the requirements related to contractor initiation of offensive or defensive litigation, including appeals, and for contractor settlement of legal matters. Current part 719 addresses initiation and defense of litigation in the Appendix to the part. Today's proposed rules delete these portions of the Appendix and move all requirements regarding initiation and notification of litigation to subpart D. The proposed regulations move requirements related to initiation and notification of litigation from the DEAR Insurance—Litigation and claims clauses, 48 CFR 952.231–71 and 48 CFR 970.5228–1, to part 719, subpart D, in order to clarify the requirements and streamline the regulations. Requirements regarding Departmental approval of contractor settlements are currently included in contractor legal management plans. The proposed rules regulate requirements related to contractor settlement of legal matters for the first time. Section 719.33 requires that a contractor obtain permission from Department Counsel to enter a settlement agreement requiring Contractor payment of $25,000 or more. Section 719.34 lists documentation that must be submitted with a contractor's request to settle a matter.

Subpart E, sections 719.40–719.47, describes the policies and limitations for reimbursement of legal costs associated with retained legal counsel. Section 719.40 makes clear that compliance with part 719 is a prerequisite for allowability of legal costs. Sections 719.42–719.44 describe categories of costs that are unallowable or which require special treatment or advance approval. Section 719.43 describes the treatment of outside counsel travel costs. Section 719.45 of the proposed rules makes certain aspects of part 719 applicable to subcontractors and retrospective insurance carriers. Retrospective insurance arrangements are currently excluded from coverage of the current part 719 and the Department is seeking public comment regarding the proposed coverage of retrospective insurance carriers. Coverage of such carriers is proposed in order to ensure consistent management of all contractor legal management costs that may be reimbursed by the Department. Among the proposed requirements is Departmental approval of retrospective insurance carrier settlements of matters involving payment of $25,000 or more. Section 719.46 clearly states that costs covered by the part are subject to audit. Section 719.47 describes what happens when more than one Departmental contractor is party to a legal matter.

Subpart F, sections 719.50–719.52, discusses the roles and responsibilities of Department Counsel. Section 719.50 discusses the limitations of Department Counsel authority. Sections 719.51 and 719.52 set forth parameters for Department Counsel coordination with DOE and NNSA Offices of General Counsel.

The Appendix to part 719 discusses expectations related to alternative dispute resolution. The Appendix also makes clear that there is no presumption of reasonableness attached to incurrence of costs by a contractor and notes that the reasons underlying incurrence of a legal cost may affect its allowability. The Attachment to part 719 includes a model bill format for contractor use.

The Department is also proposing corresponding changes to the DEAR. The clause prescription at 48 CFR 931.205–19 is revised to prescribe insertion of the clause at 48 CFR 952.231–71 in (1) non-management and operating cost reimbursement contracts exceeding $100,000,000, and (2) non-management and operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $100,000,000. The clause prescription at 48 CFR 970.2803–2 is revised to prescribe insertion of the clause at 48 CFR 970.5228–1 in all management and

operating contracts. Both prescriptions are revised to clarify that the prescribed clauses are to be inserted instead of the clause at 48 CFR 52.228–7. The Insurance—Litigation and claims clauses at 48 CFR 952.231–71 and 48 CFR 970.5228–1 are revised to reflect the above described consolidation of requirements related to initiation and notification of litigation in subpart D of part 719. Other changes to the clauses are included to simplify and clarify their requirements. The cost principle at 48 CFR 931.205–33 is revised to reflect the amended applicability of the DEAR Insurance—Litigation and claims clauses and to clarify the requirement for contractor compliance with part 719 when the part is applicable to a particular contract.

## III. Procedural Requirements

### *A. Review Under Executive Orders 12866 and 13563*

This regulatory action has been determined not to be a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, 58 FR 51735, October 4, 1993. Accordingly, this proposed rule is not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (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.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that today's NOPR is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

### *B. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729, February 7, 1996, imposes on executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. With regard to the review required by Section 3(a), 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 that 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, these regulations meet the relevant standards of Executive Order 12988.

### *C. Review Under the Regulatory Flexibility Act*

This proposed rule has been reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* which requires preparation of an initial regulatory flexibility analysis for any rule that must be proposed for public comment and is likely to have a significant economic impact on a substantial number of small entities. The proposed rule would not have a significant economic impact on small entities because it imposes no significant burdens.

Accordingly, DOE certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

### *D. Review Under Paperwork Reduction Act*

The proposed rule would require each covered contractor to submit a legal management plan that describes the contractor's practices for managing legal matters for which it procures the services of retained legal counsel. Under certain circumstances staffing and resource plans, annual legal budgets, and engagement letters are required to be submitted to the Department. Documentation related to initiation of litigation and settlement of legal matters may also be required. This collection of information is required for the Department to determine whether to approve reimbursement of contractors' litigation and other legal expenses.

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection has been reviewed and assigned a control number by Office of Management and Budget (OMB). The existing regulations at 10 CFR part 719 have been assigned OMB control number 1910–5115, 75 FR 38514–02.

The Department is submitting to the Office of Management and Budget (OMB), simultaneously with the publication of this proposed rule, information explaining the proposed amendments to the current collection of information for review and approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

### *E. Review Under the National Environmental Policy Act*

DOE has concluded that promulgation of this proposed rule falls into a class of actions which would not individually or cumulatively have significant impact on

the human environment, as determined by DOE's regulations, 10 CFR Part 1021, Subpart D, implementing the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq.* Specifically, this proposed rule is categorically excluded from NEPA review because the amendments to the DEAR would be strictly procedural (categorical exclusion A6). Therefore, this proposed rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

*F. Review Under Executive Order 13132*

Executive Order 13132, 64 FR 43255, August 4, 1999, imposes certain requirements on agencies formulating and implementing policies or regulations that preempt state law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and carefully assess the necessity for such actions. DOE has examined today's proposed rule and has determined that it would not preempt state law and would not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

*G. Review Under the Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, requires a federal agency to perform a detailed assessment of costs and benefits of any rule imposing a federal mandate with costs to state, local or tribal governments, or to the private sector, of $100 million or more in any single year. This rulemaking does not impose a federal mandate on state, local or tribal governments or on the private sector.

*H. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, requires federal agencies to issue a Family Policymaking Assessment for any rule or policy that may affect family well-being. This proposed rule would have no impact on family well being.

*I. Review Under Executive Order 13211*

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 FR 28355, May 22, 2001, requires federal agencies to prepare and submit to the OIRA, OMB, a Statement of Energy Effects for any 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 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.

This proposed rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

*J. Review Under the Treasury and General Government Appropriations Act, 2001*

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 implementing guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452, February 22, 2002, and DOE's guidelines were published at 67 FR 62446, October 7, 2002. DOE has reviewed today's proposed rulemaking under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

**List of Subjects**

*10 CFR Part 719*

Government contracts, Legal services, Reporting and recordkeeping requirements.

*48 CFR Parts 931, 952 and 970*

Government contracts, Government procurement.

Issued in Washington, DC, on December 16, 2011.

**Steven Chu,**

*Secretary of Energy.*

For the reasons set out in the preamble, the Department of Energy (DOE) proposes to amend Chapter III of Title 10 and Chapter 9 of Title 48 of the Code of Federal Regulations as set forth below:

**Title 10—Energy**

**Chapter III—Department of Energy**

1. Part 719 is revised to read as follows:

## PART 719—CONTRACTOR LEGAL MANAGEMENT REQUIREMENTS

Sec.

**Subpart A—General Provisions**

719.1 What is the purpose of this part?
719.2 What are the definitions of terms used in this part?
719.3 What contracts are covered by this part?
719.4 Are law firms that are retained by contract by the department covered by this part?
719.5 What contracts are not covered by this part?
719.6 Are there any types of legal matters not included in the coverage of this part?
719.7 Is there a procedure for exceptions or deviations from this part?
719.8 Does the provision of protected documents from the contractor to the department constitute a waiver of privilege?

**Subpart B—Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget**

719.10 Who must submit a Legal Management Plan?
719.11 When must a Legal Management Plan be submitted or revised?
719.12 What information must be included in the Legal Management Plan?
719.13 Who at the department receives and reviews the Legal Management Plan?
719.14 Will the department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?
719.15 What are the requirements for a staffing and resource plan?
719.16 When must the staffing and resource plan be submitted?
719.17 Are there any budgetary requirements?

**Subpart C—Engagement Letter**

719.20 When must an engagement letter be used?
719.21 What are the required elements of an engagement letter?

**Subpart D—Requests From Contractor To Initiate, Defend and Settle Legal Matters**

719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?
719.31 When must the contractor initiate litigation against third parties?
719.32 What must the contractor do when it receives notice that it is a party to litigation?
719.33 In what circumstances must the contractor seek permission from the department to enter a settlement agreement?
719.34 What documentation must the contractor provide to department counsel when it seeks permission to enter a settlement agreement?

719.35 When must the contractor provide a copy of an executed settlement agreement?

**Subpart E—Reimbursement of Costs Subject to This Part**

719.40 What effect do the regulations of this part have on cost allowability?
719.41 How does the department determine whether fees are reasonable?
719.42 What categories of costs are unallowable?
719.43 What is the treatment for travel costs?
719.44 What categories of costs require advance approval?
719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?
719.46 Are costs covered by this part subject to audit?
719.47 What happens when more than one contractor is party to a matter?

**Subpart F—Department Counsel**

719.50 What authority does department counsel have?
719.51 What information must be forwarded to the general counsel's office concerning contractor submissions to department counsel under this part?
719.52 What types of field actions must be coordinated with the general counsel?
Appendix A to Part 719—Guidance for Legal Resource Management

**Authority:** 42 U.S.C. 2201, 5814, 5815 and 7101, *et seq.;* 50 U.S.C. 2401, *et seq.*

## Subpart A—General Provisions

### § 719.1 What is the purpose of this part?

This part facilitates management of retained legal counsel and Contractor legal costs, including litigation and legal matter costs. It requires the Contractor to develop a Legal Management Plan, to document the analysis used to decide when to utilize outside counsel, and to document what law firm or individual attorney will be engaged as outside counsel. This part also requires the Contractor to document the terms of the engagement with retained legal counsel. Payment of law firm invoices and reimbursement of Contractor legal costs under Covered Contracts is subject to compliance with this part.

### § 719.2 What are the definitions of terms used in this part?

For purposes of this part:

*Alternative dispute resolution* includes, but is not limited to, processes such as mediation, neutral evaluation, mini-trials and arbitration.

*Contractor* means any person or entity with whom the Department contracts for the acquisition of goods or services.

*Covered contracts* means those contracts described in § 719.3 of this part.

*Days* means calendar days.

*Department* means the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA).

*Department Counsel* means the attorney in the DOE or NNSA field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a Contractor or for Department retained legal counsel, for purposes of this part.

*General Counsel* means the DOE General Counsel for DOE legal matters and the NNSA General Counsel for NNSA legal matters.

*Legal costs* means, but is not limited to, administrative expenses associated with the provision of legal services by retained legal counsel; the costs of legal services provided by retained legal counsel; the costs of the services, if the services are procured in connection with a legal matter, of accountants, consultants, experts or others retained by the Contractor or by retained legal counsel; and any similar costs incurred by retained legal counsel or in connection with the services of retained legal counsel.

*Legal Management Plan* means a document required by subpart B of this part describing the Contractor's practices for managing legal costs and legal matters for which it procures the services of retained legal counsel.

*Legal matter* means any particular legal issue, or aggregate of legal issues associated with a particular subject area, e.g., employee benefits, immigration, taxation, for which the Contractor retains legal counsel, including but not limited to litigation.

*Litigation* means a proceeding to which the Contractor is a party in state or federal court or before a state or federal administrative body or an arbitrator.

*Retained legal counsel* means a licensed attorney working in the private sector who is retained by a Contractor or the Department to provide legal services.

*Retrospective insurance* means any insurance policy under which the premium is not fixed, but is subject to adjustments based on actual losses incurred or paid (e.g. claims, settlements, damages, and legal costs).

*Settlement agreement* means a written agreement between a Contractor and one or more parties pursuant to which one or more parties waives the right to pursue a legal claim in exchange for something of value.

*Significant matters* means legal matters, including litigation, involving significant issues as determined by Department Counsel, and any legal matter where the amount of any legal costs, over the life of the matter, is expected to exceed $100,000.).

*Staffing and Resource Plan* means a statement prepared in accordance with subpart B of this part by retained legal counsel that describes the method for managing a significant matter.

### § 719.3 What contracts are covered by this part?

(a) This part covers three categories of contracts:

(1) All management and operating contracts;

(2) Non-management and operating cost reimbursement contracts exceeding $100,000,000; and

(3) Non-management and operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000 (e.g., contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time and materials contracts where the materials portions exceed $10,000,000).

(b) This part also covers contracts otherwise not covered by paragraph (a) of this section but which contain a clause requiring compliance with this part.

(c) This part also covers any contract the Department awards directly to retained legal counsel exceeding $100,000.

### § 719.4 Are law firms that are retained by contract by the department covered by this part?

Legal counsel retained under fixed rate or other type of contract by the Department to provide legal services must comply with the following if the legal costs over the life of the matter for which counsel has been retained are expected to exceed $100,000:

(a) Requirements related to Staffing and Resource Plans in subpart B of this part;

(b) Cost guidelines in subpart E of this part; and

(c) Engagement letter requirements in subpart C of this part if the retained legal counsel subcontracts legal work valued at $25,000 or more (e.g., a law firm retained by the Department subcontracts with another law firm to provide $26,000 in discovery-related legal work).

### § 719.5 What contracts are not covered by this part?

This part does not cover any contract under which the Department is not responsible for directly reimbursing the Contractor for legal costs, such as fixed price contracts.

**§ 719.6 Are there any types of legal matters not included in the coverage of this part?**

Matters not covered by this part include:

(a) Matters handled by counsel retained by an insurance carrier, except under Retrospective Insurance in accordance with § 719.45;

(b) Routine intellectual property law support services; and

(c) Routine workers and unemployment compensation matters.

**§ 719.7 Is there a procedure for exceptions or deviations from this part?**

(a) Requests for exceptions or deviations from this part must be made in writing to Department Counsel and approved by the General Counsel. If an alternate procedure is proposed for compliance with an individual requirement in this part, that procedure must be included in the written request by the Contractor.

(b) The General Counsel may authorize exceptions. The General Counsel may also establish exceptions to this part based on current field office and Contractor practices that satisfy the purpose of these requirements.

(c) Exceptions to this part that are also a deviation from the Department of Energy Acquisition Regulation (DEAR) cost principles (see subpart D of this part) must be approved by the Senior Procurement Executive of DOE or NNSA as applicable. Written requests from Contractors for a deviation from a cost principle must be submitted to the contracting officer, with a copy provided to Department Counsel.

**§ 719.8 Does the provision of protected documents from the contractor to the department constitute a waiver of privilege?**

Contractors are required to provide detailed information about third-party claims and litigation to the Department. The Department and its Contractors typically share common legal and strategic interests relating to pending or threatened litigation. The common interest between the parties is rooted in the fact that the Department reimburses Contractors for allowable costs incurred when litigation is threatened or initiated against Contractors. To the extent documents associated with compliance with this part (e.g. Staffing and Resource Plans, invoices, engagement letters, settlement authority requests, and draft pleadings) are protected from disclosure to third parties because the items constitute attorney work product and/or involve attorney client communications, the Contractor's provision of these items to the Department does not constitute a waiver of privilege. As long as the Department and the Contractor share a common interest in the outcome of legal matters, this mutual legal interest permits the parties to share privileged material without waiving any applicable privilege.

## Subpart B—Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget

**§ 719.10. Who must submit a Legal Management Plan?**

Contractors who are parties to contracts identified under § 719.3(a) and (b) must submit a Legal Management Plan.

**§ 719.11 When must a Legal Management Plan be submitted or revised?**

(a) Contractors must submit a Legal Management Plan to Department Counsel within 60 days following award of the contract. The deadline for submitting the Legal Management Plan may be extended by the contracting officer.

(b) Contractors must submit a revised Legal Management Plan upon request of the contracting officer within 60 days of receipt of the contracting officer's request.

**§ 719.12 What information must be included in the Legal Management Plan?**

The Legal Management Plan must include the following items:

(a) A description of the Contractor's in-house counsel resources at the time the Legal Management Plan is submitted, including areas of expertise and levels of experience of each legal staff member and an explanation of the types of matters expected to be handled in-house.

(b) A description of the legal matters that may necessitate engagement of retained legal counsel.

(c) A description of the factors the Contractor will consider in determining whether to handle a particular matter utilizing retained legal counsel.

(d) An outline of the factors the Contractor must consider in selecting retained legal counsel, including:

(1) Cost;

(2) Past performance of previously retained counsel;

(3) Particular expertise in a specific area of the law;

(4) Familiarity with the Department's activity at the particular site and the prevalent issues associated with facility history and current operations;

(5) Location of retained legal counsel relative to:

(i) The site involved in the matter,

(ii) Any forum in which the matter will be processed, and

(iii) The location where a significant portion of the work will be performed;

(6) Experience as an advocate in alternative dispute resolution procedures such as mediation;

(7) Actual or potential conflicts of interest; and

(8) The means and rate of compensation (e.g., hourly billing, fixed fee, blended fees).

(e) A description of the system that the Contractor will use to review each matter in litigation to determine whether and when alternative dispute resolution is appropriate.

(f) A description of the role of in-house counsel in cost management.

(g) A description of the Contractor's process for review and approval of invoices for legal costs.

(h) A description of the Contractor's strategy for interaction with, and supervision of retained legal counsel.

(i) A description of the procedures the Contractor will employ in order to seek timely approval from Department Counsel to settle any legal matters as required by § 719.34 of this part;

(j) A description of the Contractor's strategy for keeping Department Counsel apprised of all legal matters covered by this part (e.g., regularly scheduled meetings and written communications).

(k) A description of procedures providing for earliest possible notification to the Department of the likely initiation of any legal matter involving class actions, radiation or toxic substance exposure, the safeguarding of classified information, and any other matters involving issues which the Contractor has reason to believe are of general importance to the Department or the government as a whole.

(l) A description of the procedures the Contractor will employ to ensure that unallowable costs are not submitted for Department reimbursement.

**§ 719.13 Who at the department receives and reviews the Legal Management Plan?**

Contractors must submit a Legal Management Plan to Department Counsel. If the Contractor has not been notified of the assignment of Department Counsel, the Contractor must submit the Legal Management Plan to the contracting officer and the DOE Deputy General Counsel for Litigation and Enforcement or the NNSA Deputy General Counsel as appropriate.

**§ 719.14 Will the department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?**

The contracting officer or Department Counsel will notify the Contractor within 30 days of the Contractor's submission of the plan of any non-

compliances or inadequate information relating to requirements in § 719.12. The Contractor must correct matters identified within 30 days of notification.

**§ 719.15 What are the requirements for a staffing and resource plan?**

(a) For significant matters, the Contractor must require retained legal counsel to prepare a Staffing and Resource Plan. The Contractor must then forward the Staffing and Resource Plan to Department Counsel.

(b) Retained legal counsel retained directly by the Department subject to this part must prepare a Staffing and Resource Plan and forward it to Department Counsel.

(c) A Staffing and Resource Plan must describe the following:

(1) Major phases likely to be involved in the handling of the matter;

(2) Timing and sequence of such phases;

(3) Projected cost for each phase of the representation; and

(4) Detailed description of resources that the retained legal counsel intends to devote to the representation.

(d) For significant matters in litigation, in addition to the generalized annual budget required by § 719.17, a Staffing and Resource Plan must include a budget, broken down by phases, including at a minimum the following phases:

(1) Matter assessment, development and administration;

(2) Pretrial pleadings and motions;

(3) Discovery;

(4) Trial preparation and trial; and

(5) Appeal.

(e) The Contractor must obtain Department Counsel approval before incurring retained legal counsel costs in excess of costs listed in the budget developed pursuant to paragraph (c) of this section.

**§ 719.16 When must the staffing and resource plan be submitted?**

(a) The Contractor or retained legal counsel must submit the Staffing and Resource Plan to Department Counsel within 30 days after the filing of an answer or a dispositive motion in lieu of an answer, 30 days after a determination that the cost is expected to exceed $100,000, or 30 days after notification from Department Counsel that a matter is considered significant, whichever is sooner.

(b) Department Counsel may state objections to the Staffing and Resource Plan within 30 days of receipt of a Staffing and Resource Plan. When an objection is stated, retained legal counsel has 30 days to revise the Staffing and Resource Plan to satisfy the objection.

(c) Contractors must require retained legal counsel to update Staffing and Resource Plans annually or more frequently if there are significant changes in the matter. The Contractor must submit the Staffing and Resource Plan updates to Department Counsel. Similarly, Department retained legal counsel must submit to Department Counsel annual Staffing and Resource Plan updates or more frequent updates if there are significant changes in the matter.

(d) When it is unclear whether a matter is significant, the Contractor must consult with Department Counsel on the question.

**§ 719.17 Are there any budgetary requirements?**

(a) Contractors required to submit a Legal Management Plan must also submit an annual legal budget to Department Counsel.

(b) The annual legal budget must include cost projections for existing or anticipated significant matters, at a level of detail reflective of the types of billable activities and the stage of each such matter.

(c) For informational purposes for both the Contractor and Department Counsel, the Contractor must submit a report to Department Counsel comparing its budgeted and actual legal costs within 30 days of the conclusion of the period covered by each annual legal budget. The Department recognizes, however, that there may be departures from the annual budget beyond the control of the Contractor.

## Subpart C—Engagement Letters

**§ 719.20 When must an engagement letter be used?**

Contractors must submit the terms of a proposed engagement letter between it and proposed retained legal counsel, to Department Counsel when the proposed retained counsel is expected to provide $25,000 or more in legal services for a particular matter. A copy of the executed engagement letter must be submitted to Department Counsel upon execution.

**§ 719.21 What are the required elements of an engagement letter?**

(a) The engagement letter must require retained legal counsel to assist the Contractor in complying with this part and any supplemental guidance distributed under this part.

(b) At a minimum, the engagement letter must include the following:

(1) A process for review and documented approval of all billing by a Contractor representative including the timing and scope of billing reviews.

(2) A statement that provision of records to the Government is not intended to constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of these records to third parties. An exemption for specific records may be obtained where Contractors can demonstrate that a particular situation may provide grounds for a waiver.

(3) A requirement that the Contractor, the Department, and the Government Accountability Office have the right, upon request, at reasonable times and locations to inspect, copy, and audit all records documenting billable fees and costs.

(4) A statement that all records must be retained for a period of six (6) years and three (3) months after the final payment or after final case disposition, whichever is later.

(5) Identification of all attorneys and staff who are assigned to the matter and the rate and basis of their compensation (i.e., hourly rates, fixed fees, contingency arrangement) and a process for obtaining approval of temporary adjustments in staffing levels or identified attorneys.

(6) An initial assessment of the matter, along with a commitment to provide updates as necessary.

(7) A description of billing procedures, including frequency of billing and billing statement format.

(8) A statement setting forth agreement that the retained legal counsel will prepare a Staffing and Resource Plan in accordance with the requirements of § 719.15.

(9) A statement setting forth agreement to consider alternative dispute resolution at as early a stage as possible and thereafter as appropriate where litigation is involved.

(10) A statement setting forth agreement that retained legal counsel must comply with the cost guidelines in subpart E of this part.

(11) A statement setting forth agreement that retained legal counsel will provide a certification concerning the costs submitted for reimbursement. The certification that must be included in bills or invoices submitted by retained legal counsel must appear as follows: ''Under penalty of law, [the representative] acknowledges the expectation that the bill will be paid by the Contractor and that the Contractor will be reimbursed by the Federal Government through the U.S. Department of Energy, and, based on personal knowledge and a good faith belief, certifies that the bill is truthful and accurate, and that the services and charges set forth herein comply with the terms of engagement and the policies set

forth in the Department of Energy's regulation and guidance on Contractor legal management requirements, and that the costs and charges set forth herein are necessary.'' The certification must be signed and dated by a representative of the retained legal counsel. Invoices must be submitted in conformance with the model bill format which is set forth in the Attachment to the Appendix to this part.

(12) A statement setting forth agreement to identify and address promptly any professional conflicts of interest.

(c) There may be additional requirements for an engagement letter based on the needs of the Contractor or the Departmental element requiring the services of the Department retained legal counsel.

## Subpart D—Requests From Contractor Counsel To Initiate, Defend and Settle Legal Matters

### § 719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?

The Contractor may not initiate litigation (including counterclaims) or appeals from adverse decisions, without the prior written authorization of Department Counsel.

(a) The following information must be provided to Department Counsel in connection with a Contractor request to initiate litigation:

(1) Identification of the proposed parties;

(2) The nature of the proposed action;

(3) Relief sought;

(4) Venue;

(5) Proposed representation and reason for selection;

(6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;

(7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;

(8) Whether, for any reason, the Contractor will assume any part of the costs of the action;

(9) A description of any attempts to resolve the issues that would be the subject of the Litigation, such as through mediation or other means of alternative dispute resolution; and

(10) A discussion regarding why initiating Litigation would prove beneficial to the Contractor and to the Department.

(b) Department Counsel should advise the contracting officer concerning each request and should provide assistance to the contracting officer in communicating the Department's decision to the Contractor.

### § 719.31 When must the contractor initiate litigation against third parties?

The Contractor must, upon the request of the contracting officer, initiate litigation against third parties including proceedings before administrative agencies, in connection with the contract. The Contractor shall proceed with such litigation in good faith and as directed from time to time by Department Counsel.

### § 719.32 What must the contractor do when it receives notice that it is a party to litigation?

(a) The Contractor shall give the contracting officer and Department Counsel immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of the contract and provide a copy of all relevant filings and any other documents that may be requested by the contracting officer and/or Department Counsel. The Department Counsel will direct the Contractor as to:

(1) Whether or not the Contractor may proceed with the defense of the litigation, and any applicable conditions;

(2) Whether the Contractor must authorize the Government to defend the action;

(3) Whether the Government will take charge of the action; or

(4) Whether the Government must receive an assignment of the Contractor's rights.

(b) The Contractor shall proceed with such litigation in good faith and as directed from time to time by the Department Counsel.

(c) If the costs and expenses associated with the claim against the Contractor are potentially allowable under the contract, the Contractor shall:

(1) Authorize Department representatives to collaborate with Contractor in-house counsel or DOE/NNSA-approved outside counsel in settling or defending the claim; or counsel for any associated insurance carrier in settling or defending the claim if retrospective insurance applies or the amount of liability claimed exceeds the amount of insurance coverage; and

(2) Authorize Department representatives to settle the claim or to defend or represent the Contractor in and/or to take charge of any litigation, if required by the Department, except where the liability is covered by bond or is insured by an insurance policy other than retrospective insurance.

### § 719.33 In what circumstances must the contractor seek permission from the department to enter a settlement agreement?

The Contractor must obtain permission from Department Counsel to enter a settlement agreement if the settlement agreement requires Contractor payment of $25,000 or more. Obtaining this approval does not represent a determination that the settlement amount and/or the Legal Costs incurred in connection with the underlying legal matter will be determined to be allowable.

### § 719.34 What documentation must the contractor provide to department counsel when it seeks permission to enter a settlement agreement?

The Contractor must provide a written statement to the Department Counsel that includes the following information, as applicable:

(a) The amount of any proposed monetary settlement payment.

(b) Titles and docket numbers associated with the case(s) for which the Contractor is seeking approval to settle;

(c) The procedural history of the case(s) or issue(s);

(d) A narrative description of the legal claims or allegations at issue in the matter and any background information that explains events that precipitated the initiation of the matter;

(e) A description of the history of the settlement discussions;

(f) A description of the terms of the proposed settlement agreement or requested settlement authority and the rationale for the Contractor entering into the proposed agreement;

(g) If the proposed total monetary settlement amount would be allocated among multiple plaintiffs, a list of the plaintiffs and the amount of money each would receive pursuant to the proposed settlement agreement as well as an explanation as to why the settlement amount is different for any particular plaintiff, if appropriate;

(h) A description as to why settlement of the matter is in the best interest of the Department; and

(i) Any additional supporting documents requested by Department Counsel.

### § 719.35 When must the contractor provide a copy of an executed settlement agreement?

A Contractor must provide a copy of an executed settlement agreement within seven (7) days of execution.

## Subpart E—Reimbursement of Costs Subject to This Part

### § 719.40 What effect do the regulations of this part have on cost allowability?

Contractor and retained legal counsel compliance with this part is a prerequisite for allowability of legal costs. However, compliance with this part does not guarantee that legal costs will be determined to be allowable. Only the contracting officer has the authority to determine allowability of costs.

### § 719.41 How does the department determine whether fees are reasonable?

In determining whether fees or rates charged by retained legal counsel are reasonable, the Department may consider:

(a) Whether the lowest reasonably achievable fees or rates (including any currently available or negotiable discounts) were obtained from retained legal counsel;

(b) Whether lower rates from other firms providing comparable services were available;

(c) Whether alternative rate structures such as flat, contingent, and other innovative proposals, were considered; and

(d) The complexity of the legal matter and the expertise of the law firm in this area.

### § 719.42 What categories of costs are unallowable?

(a) Specific categories of unallowable costs are contained in the cost principles at 48 CFR (FAR) part 31, 48 CFR (DEAR) part 931 and 48 CFR 970.31. See also 41 U.S.C. 4304;

(b) Costs that are customarily or already included in billed hourly rates are not separately reimbursable.

(c) Interest charges that a Contractor incurs on any outstanding (unpaid) bills from retained legal counsel are not reimbursable.

### § 719.43 What is the treatment for travel costs?

(a) Travel and related expenses must at a minimum comply with the restrictions set forth in 48 CFR 31.205–46, or 48 CFR (DEAR) 970.3102–05–46, as appropriate, to be reimbursable.

(b) Travel time may be allowed at a full hourly rate for the portion of time during which retained legal counsel performs legal work for which it was retained; any remaining travel time shall be reimbursed at 50 percent of the full hourly rate, except that in no event will travel time spent working for other clients be allowable. Also, for long distance travel that could be completed by various methods of transportation, e.g., car, train, or plane, costs charged by retained legal counsel or any agent of retained legal counsel will be considered reasonable only if the individuals charge no more travel time than it would take to utilize the fastest mode of transportation that is cost-effective. For example, if retained legal counsel travels for 10 hours by train when a cost-effective flight that would take two hours to get to the same destination is available, the attorney may charge a maximum of two hours for the time spent traveling.

### § 719.44 What categories of costs require advance approval?

(a) To be considered for reimbursement, costs for the following require advance written approval from Department Counsel or the submission of subsequent specific justification to Department Counsel when circumstances out of the Contractor's control make advance approval unobtainable:

(1) Computers or general application software, or non-routine computerized databases specifically created for a particular matter. For costs associated with the creation and use of computerized databases, Contractors and retained legal counsel must ensure that the creation and use of computerized databases is necessary and cost-effective. Use of databases originally created by the Department or its Contractors for other purposes, but that can be used to assist a Contractor or retained legal counsel in connection with a particular matter, should be considered. Contractors and retained legal counsel must ensure that DOE is provided the discretion to obtain unlimited access to and dominion over any computers or general application software, or non-routine computerized databases specifically created for a particular matter;

(2) Charges for materials or nonattorney services exceeding $5,000;

(3) Secretarial and support services, word processing, or temporary support personnel;

(4) Attendance by more than one attorney at a deposition, court hearing or interview;

(5) Expert witnesses and consultants;

(6) Trade publications, books, treatises, background materials, and other similar documents;

(7) Professional or educational seminars and conferences;

(8) Preparation of bills or time spent responding to questions about bills from either the Department or the Contractor;

(9) Food and beverages when the attorney or consultant is not on travel status and away from the home office;

(10) Pro hac vice admissions; and

(11) Time charged for law students' or interns' services.

(b) Requests for fee increases by retained legal counsel other than those under contract directly with the Department must be sent in writing to the Contractor, who will review the request for reasonableness. If the Contractor determines the request is reasonable, the Contractor must seek approval for the increase from Department Counsel and the contracting officer before it authorizes any increase. Contractors should attempt to lock in rates for partners, associates and paralegals for at least a two year period.

### § 719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?

(a) The Contractor must have a monitoring system for subcontractor legal matters likely to reach $100,000 over the life of the matter when the Contractor's contract with the subcontractor provides that the Contractor will reimburse the subcontractor's legal costs resulting from the subcontractor's performance under its contract. The purpose of this system is to enable the Contractor to perform the same type and level of analysis and review of subcontractor legal management practices that the Department can perform of the Contractor's legal management practices. The monitoring system is intended to enable the Contractor to keep the Department informed about significant subcontractor legal matters, including significant matters in litigation. The Contractor is responsible for answering questions raised by the Department concerning significant subcontractor legal matters.

(b) Contractors must submit informational copies of subcontractor invoices for legal services to Department Counsel.

(c) Insurance carriers that provide insurance coverage to Contractors pursuant to retrospective insurance are ''subcontractors'' for purposes of this part.

(d) In addition to the requirements set forth in paragraphs (a) and (b) of this section, the Contractor shall require any insurance carrier with whom the Contractor enters into a retrospective insurance arrangement after the effective date of this part, including any policy renewals, to provide to the Contractor for prior approval a staffing and resource plan for all legal matters that are expected to exceed $100,000 in cost. The staffing and resource plan submitted by the insurance carrier must

contain all of the items described in § 719.15, including, but not limited to, a description of the major phases and timing and sequence of events anticipated in handling the matter, and a corresponding budget breakdown.

(e) When the insurance carrier retains outside counsel and outside counsel is expected to provide $25,000 or more in legal services for a particular matter, the Contractor shall require the insurance company to provide it with a copy of any engagement letter that outlines the terms of the arrangement between the insurance company and the law firm it retains to defend lawsuits that are covered by retrospective insurance. The engagement letter must contain all of the items described in § 719.21.

(e) The Contractor shall require the insurance company to request prior permission from the Contractor to enter into settlement agreements with third parties involving payment of $25,000 or more. The Contractor shall require the insurance carrier to submit all documentation described in § 719.34, and to provide the contractor with a copy of the executed settlement agreement within seven days of execution, which the Contractor will promptly forward to Department Counsel. The Contractor shall not authorize the insurance carrier to enter into any settlement agreement involving payment of $25,000 or more without obtaining the approval of the Department Counsel.

(f) Staffing and resource plans and engagement letters required under this section must be reviewed and approved by the Contractor and approved by Department Counsel.

(g) All legal costs incurred by insurance carriers under retrospective insurance are subject to audit pursuant to § 719.46. The Contractor shall provide reviewed costs and status updates for all matters handled by retrospective insurance carriers in accordance with § 719.51.

### § 719.46 Are costs covered by this part subject to audit?

All costs covered by this part are subject to audit by the Department, its designated representative, or the Government Accountability Office. See § 719.21.

### § 719.47 What happens when more than one contractor is a party to a matter?

(a) If more than one Contractor is a party in a particular matter and the issues involved are similar for all the Contractors, a single legal counsel designated by the General Counsel must either represent all of the Contractors or serve as lead counsel, when the rights of the Contractors and the Government can be effectively represented by a single legal counsel, consistent with the standards for professional conduct applicable in the particular matter. Contractors may propose to the General Counsel their preference for the individual or law firm to perform as the lead counsel for a particular matter.

(b) If a Contractor, having been afforded an opportunity to present its views concerning joint or lead representation, does not acquiesce in the designation of one retained legal counsel to represent a number of Contractors, or serve as lead counsel, then the legal costs of such Contractor are not reimbursable by the Department, unless the Contractor demonstrates that it was reasonable for the Contractor to incur such expenses.

## Subpart F—Department Counsel

### § 719.50 What authority does department counsel have?

(a) Department Counsel will receive written delegated authority from the contracting officer to serve as the contracting officer's representative for legal matters.

(b) Actions by Department Counsel may not exceed the responsibilities and limitations as delegated by the contracting officer. Delegated contracting officer representative authority shall not be construed to include the authority to execute or modify the contract or resolve any contract dispute arising under the contract. Additional discussion of the authority and limitation of contracting officers can be found at 48 CFR 1.602–1, and contracting officer's representatives at 48 CFR (DEAR) 942.270–1. The clause, Technical Direction, 48 CFR (DEAR) 952.242–70, also discusses the responsibilities and authority of a contracting officer's representative.

### § 719.51 What information must be forwarded to the general counsel's office concerning contractor submissions to department counsel under this part?

Department Counsel must submit through the General Counsel reporting system, the reviewed costs and status updates for all matters involving retained counsel, including but not limited to Contractor litigation. The reports are to be received by the 15th day of the month following the end of each quarter of the fiscal year.

### § 719.52 What types of field actions must be coordinated with the general counsel?

(a) Requests from Contractors for exceptions or deviations from this part must be submitted to the contracting officer and Department Counsel, and approved by the General Counsel or his or her designee.

(b) Requests from Contractors for approval to initiate or defend litigation, or to appeal from adverse decisions, where legal issues of first impression, sensitive issues, issues of national significance to the Department or of broad applicability to the Government that might adversely impact its operations are involved must be coordinated by Department Counsel with the General Counsel or his/her designee.

(c) Department Counsel must inform the General Counsel of any significant matter, as defined in this part, and must coordinate any action involving a significant matter with the General Counsel, or his/her designee, as directed by the General Counsel or his/her designee.

## Appendix A to Part 719—Guidance for Legal Resource Management

Management and Administration of Outside Legal Services
1.0 Alternative Dispute Resolution
2.0 Cost Allowability Issues
2.1 Underlying Cause for Incurrence of Costs
Attachment—Contractor Litigation and Legal Costs, Model Bill Format

*Management and Administration of Outside Legal Services*

This guidance is intended to assist Contractors, contracting officers and retained legal counsel in managing the costs of outside legal services.

*1.0 Alternative Dispute Resolution*

Contractors are expected to evaluate all matters for appropriate alternative dispute resolution (ADR) at various stages of an issue in dispute, e.g., before a case is filed, during prediscovery, after initial discovery and during pretrial. This evaluation should be done in coordination with the Department's ADR liaison if one has been established or appointed or Department Counsel if an ADR liaison has not been appointed. Contractors, Contractor counsel, and Department Counsel are also encouraged to consult with the Department's Director of the Office of Conflict Prevention and Resolution. The Department anticipates that mediation will be the principal and most common method of Alternative Dispute Resolution. Agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act (incorporated in part at 5 U.S.C. 571, *et seq.*) and Department guidance issued under that Act. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants.

*2.0 Cost Allowability Issues*

A determination of cost reasonableness depends on a variety of considerations and circumstances. 48 CFR 31.201–3 establishes that no presumption of reasonableness is

attached to the incurrence of costs by a Contractor.

*2.1 Underlying Cause for Incurrence of Costs*

While 10 CFR part 719 provides procedures associated with incurring and monitoring legal costs, the evaluation of the reason for the incurrence of the legal costs, *e.g.,* liability, fault or avoidability, is a separate issue. The reason for the Contractor incurring costs may impact the allowability of the Contractor's legal costs. In some cases, the final determination of allowability of legal costs cannot be made until a matter is fully resolved. In certain circumstances, contract and cost principle language may permit conditional reimbursement of costs pending the outcome of the legal matter. Whether the Department makes conditional reimbursements or withholds any payment pending the outcome, legal costs ultimately reimbursed by the Department must comply with the applicable cost principles, the terms of the contract, and part 719.

**Attachment—Contractor Litigation and Legal Costs, Model Bill Format**

*1. Model Bill Format*

I—FOR FEES

| Date of service | Description of service | Name or initials of attorney | Approved rate | Time charged | Amount (rate × time) |
|---|---|---|---|---|---|
| (See Note 1 to this table). | | | | | |

II—FOR DISBURSEMENTS

| Date | Description of disbursement | Amount |
|---|---|---|
| (See Note 2 to this table). | | |

**Note 1—Description of Service:** All fees must be itemized and described in sufficient detail and specificity to reflect the purpose and nature of the work performed (e.g., subject matter researched or discussed; names of participants of calls/meetings; type of documents reviewed).

**Note 2—Description of Disbursement:** Description should be in sufficient detail to determine that the disbursement expense was in accordance with all applicable Department policies on reimbursement of Contractor legal costs and the terms of engagement between the Contractor and the retained legal counsel. The date the expense was incurred or disbursed should be listed rather than the date the expense was processed. The following should be itemized: copy charge (*i.e.,* number of pages times a maximum of 10 cents per page); fax charges (date, phone number and actual amount); overnight delivery (date and amount); electronic research (date and amount); extraordinary postage (*e.g.,* bulk or certified mail); court reporters; expert witness fees; filing fees; outside copying or binding charges; temporary help (assuming prior approval).

**Note 3—Receipts:** Receipts for all expenses equal to or above $75 must be attached.

## Title 48—Federal Acquisition Regulations System

### Chapter 9—Department of Energy

## PART 931—CONTRACT COST PRINCIPLES AND PROCEDURES

2. The authority citation for part 931 continues to read as follows:

**Authority:** 42 U.S.C. 7101, et seq.; 50 U.S.C. 2401, et seq;

3. Section 931.205–19 is revised to read as follows:

**931.205–19 Insurance and indemnification.**

(f) The contracting officer shall insert the clause at 952.231–71, Insurance-litigation and claims, instead of the clause at 48 CFR 52.228–7, in

(1) Non-management and operating cost reimbursement contracts exceeding $100,000,000, and

(2) Non-management and operating contracts that include cost reimbursable elements exceeding $100,000,000, for example, contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $100,000,000 or time and materials contracts where the materials portions exceed $100,000,000.

4. Section 931.205–33 is revised to read as follows:

**931.205–33 Professional and consultant service costs.**

(g) If the clause at 48 CFR 952.231–71 or the clause at 48 CFR 970.5228–1 is included in the contract, or the contract is a non-management and operating contract exceeding $100,000,000 that includes cost reimbursable elements exceeding $10,000,000 (for example, contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time and materials contracts where the materials portions exceed $10,000,000), litigation and other legal costs are only allowable if both: incurred in accordance with 10 CFR part 719, Contractor Legal Management Requirements; and not otherwise made unallowable by law, regulation, or the terms of the contract.

## PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. The authority citation for part 952 continues to read as follows:

**Authority:** 42 U.S.C. 7101 et seq. and 50 U.S.C. 2401 et seq.

6. Section 952.231–71 is revised to read as follows:

**952.231–71 Insurance-litigation and claims.**

As prescribed in 931.205–19(f), insert the following clause in applicable non-management and operating contracts:

**Insurance—Litigation and Claims (XX 20XX)**

(a) The Contractor must comply with 10 CFR part 719, Contractor Legal Management Requirements.

(b)(1) Except as provided in paragraph (b)(2) of this clause, the Contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement. If an insurance cost (whether a premium for

commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the Contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the limitation of cost or limitation of funds clause of this contract.

(e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(f)(1) Notwithstanding any other provision of this contract, the Contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but are not limited to litigation costs, counsel fees, judgment and settlements—

(i) Which are otherwise unallowable by law or the provisions of this contract, including the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31;

(ii) For which the Contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer; or

(iii) Which were caused by Contractor managerial personnel's—

(A) Willful misconduct;

(B) Lack of good faith; or

(C) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(2) The term ''contractor's managerial personnel'' is defined in the Property clause in this contract.

(g)(1) All litigation costs, including counsel fees, judgments and settlements shall be properly allocated, segregated and excluded by the Contractor. If the Contracting Officer provisionally disallows such costs, then the Contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the Contractor that is allocable to coverage of liabilities referred to in paragraph (f) of this clause is not allowable.

(h) The Contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the Contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(End of clause)

## PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

7. The authority citation for part 970 continues to read as follows:

**Authority:** 42 U.S.C. 2201: 2282a: 2282b: 2282c: 42 U.S.C. 7101 et seq.: 50 U.S.C. 2401, et seq.

8. Section 970.2803–2 is revised to read as follows:

### 970.2803–2 Contract clause.

The contracting officer shall insert the clause at 970.5228–1, Insurance—Litigation and Claims, instead of the clause at 48 CFR 52.228–7, in all management and operating contracts. Paragraphs (f)(3)(C) and (g)(2) of that clause apply to a nonprofit contractor only to the extent specifically provided in the individual contract.

9. Section 970.5228–1 is revised to read as follows:

### 970.5228–1 Insurance—litigation and claims.

As prescribed in 970.2803–2, insert the following clause:

### Insurance—Litigation and Claims (XX 20XX)

(a) The Contractor must comply with 10 CFR part 719, Contractor Legal Management Requirements.

(b)(1) Except as provided in paragraph (b)(2) of this clause, the Contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the Contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the clause of this contract entitled ''Obligation of Funds.''

(e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(f)(1) Notwithstanding any other provision of this contract, the Contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but are not limited to litigation costs, counsel fees, judgments and settlements—

(i) Which are otherwise unallowable by law or the provisions of this contract, including the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31;

(ii) For which the Contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer; or

(iii) Which were caused by Contractor managerial personnel's—

(A) Willful misconduct;

(B) Lack of good faith; or

(C) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(2) The term ''contractor's managerial personnel'' is defined in the Property clause in this contract.

(g)(1) All litigation costs, including counsel fees, judgments and settlements shall be properly allocated, segregated and excluded by the Contractor. If the Contracting Officer provisionally disallows such costs, then the Contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the Contractor that is allocable to coverage of liabilities referred to in paragraph (f) of this clause is not allowable.

(h) The Contractor may at its own expense and not as an allowable cost procure for its

own protection insurance to compensate the Contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(End of clause)

[FR Doc. 2011–33170 Filed 12–27–11; 8:45 am]

BILLING CODE 6450–01–P

## NATIONAL CREDIT UNION ADMINISTRATION

## 12 CFR Parts 701, 703, 723, and 742

**RIN 3133–AD98**

## Eligible Obligations, Charitable Contributions, Nonmember Deposits, Fixed Assets, Investments, Member Business Loans, and Regulatory Flexibility Program

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** NCUA proposes to eliminate the Regulatory Flexibility Program (RegFlex) to provide regulatory relief to Federal credit unions. NCUA also proposes to remove or amend related rules to ease compliance burden while retaining certain safety and soundness standards. Those rules pertain to eligible obligations, charitable contributions, nonmember deposits, fixed assets, investments, and member business loans.

**DATES:** Send your comments to reach us on or before February 27, 2012. We may not consider comments received after the above date in making our decision on the proposed rule.

**ADDRESSES:** You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments. NCUA Web Site: *http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov*. Include ''[Your name] Comments on Proposed Rule 742, Regulatory Flexibility Program'' in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

*Public Inspection:* You can view all public comments on NCUA's Web site at *http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx* as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to *OGCMail@ncua.gov*.

**FOR FURTHER INFORMATION CONTACT:** Chrisanthy Loizos, Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518–6540, or Matthew J. Biliouris, Director of Supervision, or J. Owen Cole, Director, Division of Capital Markets, Office of Examination and Insurance, at the above address or telephone (703) 518–6360.

**SUPPLEMENTARY INFORMATION:**

I. Background
II. The Rule as Proposed
III. Section-by-Section Analysis
IV. Regulatory Procedures

### I. Background

*a. Why is NCUA proposing this rule?*

On July 11, 2011, President Obama issued Executive Order 13579, ordering independent agencies, including NCUA, to consider whether they can modify, streamline, expand, or repeal existing rules to make their programs more effective and less burdensome.[1] Consistent with the spirit of the Executive Order and as part of NCUA's Regulatory Modernization Initiative, the NCUA Board (Board) has decided to propose a rule that streamlines its regulatory program by eliminating RegFlex. The proposed rule would relieve regulatory burden on Federal credit unions (FCUs) because they would no longer need to engage in any process for a RegFlex designation. In addition, FCUs that are currently not RegFlex eligible would receive regulatory relief because the proposal extends to them most of the flexibilities previously available only to RegFlex FCUs.

*b. What is RegFlex?*

RegFlex relieves FCUs from certain regulatory restrictions and grants them additional powers if they have demonstrated sustained superior performance as measured by CAMEL rating and net worth classification. 12 CFR 742.1. An FCU may qualify for RegFlex treatment automatically or by application to the appropriate regional director. 12 CFR 742.2. Specifically, an FCU automatically qualifies when it has received a composite CAMEL rating of ''1'' or ''2'' during its last two examinations and has maintained a net worth classification of ''well capitalized'' under part 702 of NCUA's rules for the last six quarters. If an FCU is subject to a risk-based net worth (RBNW) requirement under part 702, it also qualifies for RegFlex treatment when it has remained ''well capitalized'' for the last six quarters after applying the applicable RBNW requirement. An FCU that does not automatically qualify may apply for a RegFlex designation with the appropriate regional director. 12 CFR 742.2(a) and (b).

The Board established RegFlex in 2002. 66 FR 58656 (Nov. 23, 2001). Since then, NCUA has amended RegFlex a number of times to increase available relief for FCUs from a variety of regulatory restrictions, reduce the criteria to obtain RegFlex status, or enhance safety and soundness for FCUs. 71 FR 4039 (Jan. 25, 2006); 72 FR 30247 (May 31, 2007); 74 FR 13083 (Mar. 26, 2009); 75 FR 66298 (Oct. 28, 2010).

The current RegFlex rule provides RegFlex FCUs with relief from restrictions in the following six areas or ''flexibilities'': (1) Charitable contributions; (2) nonmember deposits; (3) fixed assets; (4) zero-coupon investments; (5) borrowing repurchase transactions; and (6) commercial mortgage related securities. It also provides an additional flexibility by specifically authorizing the purchase of obligations from federally insured credit unions beyond those an FCU may purchase under the NCUA's eligible obligations rule, § 701.23.

### II. The Rule as Proposed

*a. How would this rule change RegFlex and reduce regulatory burden on FCUs?*

NCUA proposes to eliminate RegFlex and the charitable contributions rule, and amend the rules that apply to eligible obligations, nonmember deposits, fixed assets, and investments. With this proposal, the Board intends to enable FCUs to engage in the activities permitted by the existing RegFlex rule. As of June 30, 2011, there are 4,534 FCUs, 2,764 of which are RegFlex FCUs. The proposed changes would extend regulatory relief to the remaining 1,770 FCUs that do not currently enjoy a RegFlex designation. NCUA requests

[1] President Obama also signed the Plain Writing Act of 2010 (Pub. L. 111–274) into law on October 13, 2010 ''to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use.'' This preamble is written to meet plain writing objectives.

your comments on the proposed rulemaking.

The proposed rule places most of the six flexibilities of the RegFlex rule into the subject-specific rules that apply to all FCUs. Under the existing rule, RegFlex FCUs do not have to comply with the charitable contributions rule. The proposed rulemaking, therefore, removes the charitable contributions rule so that all FCUs may make donations based on sound judgment and business practices without regulatory restrictions. At present, RegFlex FCUs do not have to comply with the limits on nonmember deposits. The NCUA Board has reviewed the amount of nonmember deposits currently held by FCUs and proposes an adjustment to the nonmember deposits rule to allow FCUs to accept more nonmember deposits. Likewise, the proposed rulemaking extends the amount of time in which FCUs must occupy unimproved property to six years, as currently permitted for RegFlex FCUs. Finally, the proposed amendments to the investment rule permit extended maturities for zero-coupon investments and borrowing repurchase transactions as well as the ability to purchase commercial mortgage related securities under similar conditions to the existing RegFlex rule. In addition, the proposed rule moves the provisions to buy nonmember and other obligations currently found in the RegFlex rule, into the eligible obligations rule, § 701.23.

This proposal closely follows the analyses the Board previously used when it adopted the various flexibilities in the RegFlex rule. While the proposed rule extends relief to FCUs, the Board recognizes the relief granted by this proposal may not be appropriate for every FCU. Only FCUs with the requisite expertise and policies to engage in the activities addressed in this rulemaking, as well as the financial condition necessary for particular activities, should avail themselves of the proposed new authorities. Each FCU's board of directors bears the ultimate responsibility for its FCU's direction and control. NCUA may also take appropriate supervisory action to address unsafe and unsound practices or conditions.

*b. Does this rule create greater restrictions than the current rules?*

No, although the proposal modifies some of the RegFlex flexibilities. The Board proposes to establish a maximum maturity of 30 years for zero-coupon investments even though the RegFlex rule does not currently subject RegFlex FCUs to a maturity limit on these investments. The Board believes the maturity cap will have no negative impact on these FCUs. The proposed rule also removes the automatic exemption from the nonmember deposits limit, but the Board does not foresee any adverse impact on FCUs with the proposed change.

RegFlex FCUs currently operating under the automatic exemption criteria for a RegFlex designation will generally continue to be able to avail themselves of the flexibilities found in part 742. Under the proposal, FCUs that received a RegFlex designation from a regional director because they did not meet the standards for automatic qualification will now, like current non-RegFlex FCUs, have certain conditions placed on their previous RegFlex flexibilities, unless they receive approval for additional authority. The Board discusses these conditions further in the section-by-section analysis.

## III. Section-by-Section Analysis

NCUA proposes to remove part 742 in its entirety to eliminate RegFlex. NCUA also proposes to remove or amend the related rules that apply to eligible obligations, charitable contributions, nonmember deposits, fixed assets, investments, and member business loans. As the Board noted when it first adopted RegFlex, the regulatory provisions covered in RegFlex are not specifically required by statute. This proposed rulemaking aims to ease compliance burden and permit greater flexibility for FCUs in managing their operations, while simultaneously retaining certain safety and soundness standards.

The Board also intends to delete an FCU's ability to appeal the revocation of its RegFlex designation to the NCUA's Supervisory Review Committee. NCUA Interpretive Ruling and Policy Statement (IRPS) 11–1, 76 FR 23871 (Apr. 29, 2011). If the Board eliminates RegFlex designations as proposed, there will be no need for such an appeal. In that event, the Board intends to issue a direct final IRPS that would remove RegFlex revocations from the list of material supervisory determinations an FCU may appeal under NCUA IRPS 11–1.

*a. Charitable Contributions*

FCUs make charitable contributions under the provision in the FCU Act that authorizes an FCU ''to exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated.'' 44 FR 56691 (Oct. 2, 1979); 64 FR 19441 (Apr. 21, 1999); 12 U.S.C. 1757(17).

The current charitable contributions rule, § 701.25, restricts an FCU's ability to make donations. It only allows an FCU to make charitable contributions or donations to nonprofit organizations located in or conducting activities in a community in which the FCU has a place of business, or to organizations that are tax exempt under § 501(c)(3) of the Internal Revenue Code and operate primarily to promote and develop credit unions. The rule requires an FCU's board of directors to approve charitable contributions based on a determination that the contributions are in the best interests of the FCU and are reasonable given the FCU's size and financial condition. Under the rule, directors may establish a budget for charitable donations and authorize FCU officials to select recipients and disburse funds. The RegFlex rule, § 742.4(a)(1), exempts RegFlex FCUs from the entire charitable contributions rule.

The Board proposes to eliminate the entire charitable contributions rule, § 701.25, so that any FCU can make donations without the prior approval of its board of directors and without regulatory restrictions as to recipients. The Board notes that, even in the absence of a charitable contributions rule, an FCU's authority to make donations is dictated by its incidental powers authority given in the FCU Act. As such, contributions must be necessary or requisite to enable the FCU to effectively carry on its business. *See* 12 CFR 721.2. Furthermore, FCU directors have a fiduciary duty to direct management to operate within sound business practices and the best interests of the membership under § 701.4. In addition, article XVI, section 4 of the FCU Bylaws prohibits FCU directors, committee members, officers, agents, and employees from conflicts of interest that could arise in the context of making charitable donations.

*b. Nonmember Deposits*

The FCU Act permits an FCU to receive shares from nonmember public units, political subdivisions [2] and credit

[2] The terms ''public unit'' and ''political subdivision'' in the nonmember deposit rule are defined in paragraphs (c) and (d) of § 745.1. ''Public unit'' means the United States, any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, any territory or possession of the United States, any county, municipality, or political subdivision thereof, or any Indian tribe as defined in section 3(c) of the Indian Financing Act of 1974. ''Political subdivision'' includes any subdivision of a public unit or any principal department of such public unit, (1) The creation of which subdivision or department has been expressly authorized by state statute, (2) to which some functions of government have been delegated by state statute, and (3) to which funds have been allocated by

unions, but the FCU is subject to the limits in the nonmember deposits rule, § 701.32. 12 U.S.C. 1757(6); 12 CFR 701.32. Under paragraph (b) of § 701.32, the maximum amount of all public unit and nonmember shares that an FCU may hold cannot exceed the greater of 20% of the FCU's total shares or $1.5 million. This means that an FCU holding less than $7.5 million in total shares cannot accept nonmember deposits in excess of $1.5 million, as 20% of $7.5 million is $1.5 million. Under paragraph (c) of § 701.32, nonmember share deposits that an FCU has accepted to meet a matching requirement for a Community Development Revolving Loan Fund loan counts against the nonmember deposit limit once the FCU has repaid the loan. An FCU may request an exemption from the appropriate regional director to exceed the limit. If the regional director denies the request for an exemption, the FCU may appeal the decision to the Board. The RegFlex rule currently exempts RegFlex FCUs from both paragraphs (b) and (c) of § 701.32. RegFlex FCUs, therefore, are not subject to the limit on the amount of deposits they may accept from nonmember public units and credit unions.

Currently, only four RegFlex FCUs exceed the limitation in § 701.32(b) of the greater of 20% of total shares or $1.5 million in nonmember deposits. Each of those FCUs holds more than $1.5 million in nonmember deposits, but less than $3 million. The Board, therefore, proposes to raise the dollar threshold on the nonmember deposit limit in § 701.32(b) to $3 million. The increase in the dollar limit would permit FCUs with less than $7.5 million in total shares to accept up to $3 million in nonmember deposits, compared to their current $1.5 million limit. The Board acknowledges that, by eliminating RegFlex, RegFlex FCUs would lose their blanket exemption from the nonmember deposit cap. From its review of the nonmember deposits presently held by RegFlex FCUs, however, the Board believes the proposal provides all of the necessary flexibility and regulatory relief to all FCUs without adversely affecting any of the RegFlex FCUs that have accepted nonmember deposits in excess of the cap. The Board also continues to recognize the risks that nonmember shares may present. Nonmember shares are characteristically more volatile than core member shares. This additional volatility can pose asset liability management concerns and liquidity concerns. The proposed adjustment to the dollar threshold in paragraph (b)(1) maintains the regulatory relief that RegFlex FCUs have enjoyed, extends relief to FCUs, and remains attentive to safety and soundness considerations.

*c. Fixed Assets*

The FCU Act authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations. 12 U.S.C. 1757(4). Generally, the fixed asset rule provides limits on fixed asset investments, establishes occupancy and other requirements for acquired and abandoned premises, and prohibits certain transactions. 12 CFR 701.36. Fixed assets are defined in § 701.36(e) and include premises. Premises means any office, branch office, suboffice, service center, parking lot, facility, or real estate where a credit union transacts or will transact business.

When an FCU acquires premises for future expansion and does not fully occupy the space within one year, the rule requires the FCU's board of directors to have a resolution in place by the end of that year with plans for full occupation. 12 CFR 701.36(b)(1). Additionally, the FCU must partially occupy the premises within three years, unless the FCU obtains a waiver within 30 months of acquiring the premises. 12 CFR 701.36(b)(1)–(2). Where an FCU is acquiring unimproved land, the partial occupancy requirement often is more difficult to satisfy than if the FCU were purchasing premises with an existing branch building. The existing fixed assets rule and the RegFlex rule extend the three-year time period to six years for RegFlex FCUs, but only with respect to the acquisition of unimproved land. 12 CFR 701.36(d), 742.4(a)(3).

The Board proposes to amend the fixed assets rule to extend the three-year time period to six years for any FCU that is acquiring unimproved land. This extension would not apply, however, to any other kind of premises. As it discussed in previous rulemakings, the Board is aware that the fixed asset rule's three-year partial occupancy requirement, even with a waiver option, may be burdensome for some FCUs. NCUA recognizes many real estate transactions are complex and time consuming. These transactions involve a full array of issues that an FCU must address before it is ready to occupy the premises. This is especially true in the unimproved land context with its construction-related issues. The Board believes it is appropriate to now extend relief from this compliance burden to all FCUs by allowing an FCU up to six years to partially occupy some of the space on a full-time basis if it initially acquired the property as unimproved land. Under the proposed change to paragraph (b)(2) in § 701.36, all FCUs would have additional flexibility they need to manage their fixed asset portfolios, consistent with safe and sound credit union operations.

*d. Zero-Coupon Investments*

Under § 703.16(b), an FCU may not purchase a zero-coupon investment with a maturity date that is more than 10 years from the related settlement date. The RegFlex rule exempts RegFlex FCUs from the maximum maturity length of 10 years in the investment rule. 12 CFR 742.4(a)(4). When creating the exemption for RegFlex FCUs, the Board determined it would not have a significant adverse impact on safety and soundness and would increase potential yield with prudent asset liability management. 66 FR 58656, 58659 (Nov. 23, 2001).

Since the adoption of the RegFlex rule, however, NCUA has carefully reviewed the strategic and risk management considerations for permitting the use of long-term zero-coupon investments in credit union portfolios. NCUA has concluded that such long-term investments generally are not appropriate. Zero-coupon investments with maturities exceeding 10 years have higher price sensitivity than other securities, including shorter-term zero-coupon investments. This increased price sensitivity, together with the lack of interim cash flows, makes long-term zero-coupon investments inconsistent with the primary portfolio objectives of safety and liquidity.

The table below shows approximate percentage declines in the price of zero-coupon investments and coupon-bearing Treasury bonds from a 300 basis point increase in rates. The percentage loss on zero-coupon investments increases dramatically with maturity and greatly exceeds that on coupon-bearing Treasury bonds at maturities greater than 10 years. Losses of this magnitude could also make FCUs reluctant to sell zero-coupon investments and recognize losses during periods of liquidity stress.

statute or ordinance for its exclusive use and control. It also includes drainage, irrigation, navigation improvement, levee, sanitary, school or power districts and bridge or port authorities, and other special districts created by state statute or compacts between the states. Subordinate or nonautonomous divisions, agencies, or boards within principal departments are not included.

| Maturity (Years) | % Change in Price (from +300 bps) Zero-Coupon Treasury | % Change in Price (from +300 bps) Coupon Treasury |
|---|---|---|
| 2 | 4 | 4 |
| 5 | 12 | 12 |
| 10 | 25 | 21 |
| 20 | 44 | 30 |
| 30 | 58 | 39 |

*Source:* Bloomberg—TRA function, October 7, 2011.

To balance the risk management concerns inherent in zero-coupon investments with the flexibility previously granted to RegFlex FCUs, the Board proposes to establish the maximum maturity date of zero-coupon investments to 30 years for any FCU that meets a ''well capitalized standard'' for purposes of this rulemaking. An FCU meeting the ''well capitalized standard'' is an FCU that has received a composite CAMEL rating of ''1'' or ''2'' during its last two examinations and (1) has maintained a ''well capitalized'' net worth classification for the immediately preceding six quarters, or (2) has remained ''well capitalized'' for the immediately preceding six quarters after applying the applicable RBNW requirement. The Board expects that FCUs considering the purchase of zero-coupon investments will be familiar with the dramatic rise in percentage loss on these investments with maturity, as demonstrated in the table. Only FCUs with the appropriate level of expertise positioned to measure the safety and soundness of purchasing zero-coupons with extended maturities should consider such investments.

To ensure the proposed rule does not eliminate the flexibility currently enjoyed by RegFlex FCUs, the proposed rule ''grandfathers'' zero-coupon investments purchased in accordance with current § 742.4(a)(4) before the effective date of the final rule. As such, the rule would not require an FCU that, under its RegFlex authority, purchased zero-coupon investments with maturities greater than 10 years to divest these investments so long as those investments are on the FCU's books before the effective date of the final rule.

An FCU that does not meet the well capitalized standard will be held to the requirement currently found in § 703.16(b). It may not purchase a zero-coupon investment with a maturity date that is more than 10 years from the related settlement date, unless the FCU has received approval from its regional director to purchase such an investment with a greater maturity.

To achieve the Board's objectives, the Board proposes to remove the current prohibition from § 703.16, amend §§ 703.14 and 703.18, and add a new § 703.20. The proposed rule adds the purchase of zero-coupon investments to § 703.14(i) as a permissible investment under certain conditions. An FCU may only purchase a zero-coupon investment with a maturity date of up to 10 years from the related settlement date, unless it receives written approval from its regional director to purchase such investment with a longer maturity under new proposed § 703.20. FCUs meeting the well capitalized standard may purchase zero-coupon investments with maturity dates no greater than 30 years. Finally, the proposed rule adds a grandfather provision to § 703.18 for zero-coupon investments purchased under RegFlex authority before the effective date of the final rule.

*e. Borrowing Repurchase Transactions*

A borrowing repurchase transaction is a transaction in which an FCU agrees to sell a security to a counterparty and to repurchase the same or an identical security from that counterparty at a specified future date and at a specified price. 12 CFR 703.2. Subject to additional restrictions, an FCU may enter into a borrowing repurchase transaction so long as any investments the FCU purchases with borrowed funds mature no later than the maturity of the borrowing repurchase transaction. 12 CFR 703.13(d).

As stated, the investment rule prohibits an FCU from purchasing a security with the proceeds from a borrowing repurchase agreement if the purchased security matures after the maturity of the borrowing repurchase agreement. 12 CFR 703.13(d)(3). NCUA adopted this restriction because FCUs could incur significant interest rate risk by borrowing funds at short-term interest rates and investing in long-term fixed rate instruments. Interest rate risk results if an FCU invests the proceeds of the transaction significantly shorter or longer than the borrowing transaction.

NCUA, however, adopted a limited exemption for RegFlex FCUs from the maturity restriction. 68 FR 32958, 32959 (June 3, 2003). In so doing, the Board recognized that NCUA does not impose a similar prohibition for other borrowing arrangements. The RegFlex rule permits RegFlex FCUs to purchase securities with maturities exceeding the maturity of the borrowing repurchase transaction, also commonly referred to as having mismatched maturities. The amount of any such purchased securities, however, cannot exceed the credit union's net worth under § 742.4(a)(5).

The Board proposes to continue this flexibility of mismatched maturities for borrowing repurchase transactions for FCUs meeting the well capitalized standard. The Board also proposes extending relief from the maturity requirement to FCUs that do not meet the well capitalized standard. The proposal amends paragraph (d)(3) of § 703.13 to permit FCUs to enter into borrowing repurchase transactions and use the proceeds to purchase securities with maturities no more than 30 days later than the transaction's term and the value of the purchased assets does not exceed the FCU's net worth. FCUs that do not meet the well capitalized standard may also request additional authority from their regional directors under proposed § 703.20 to enter transactions whereby the maturity mismatch would be greater than 30 days. The proposed rule also adds a grandfather provision to § 703.18 for borrowing repurchase transactions that an FCU entered under its RegFlex authority before the effective date of the final rule.

The proposed § 703.13(d)(3), therefore, sets out the three possible scenarios for borrowing repurchase transactions. In the first instance, the borrowing and corresponding investment transactions must have matched maturities. In the second instance, the matched maturity requirement would not apply if an FCU buys investments that mature no more than 30 days later than the borrowing repurchase transaction and the value of those investments does not exceed 100 percent of the FCU's net worth. In the third instance, an FCU that meets the well capitalized standard may enter borrowing repurchase transactions with mismatched maturities greater than 30 days if the value of the investments does not exceed 100 percent of the FCU's net worth.

The Board proposes that an FCU that does not meet the well capitalized standard enter a borrowing repurchase agreement with a maturity mismatch between the repurchase agreement and the reinvested funds not to exceed 30 days. The Board seeks comment on whether the regulation should specify minimum experience requirements for staff involved in the analysis and ongoing risk management of a repurchase-agreement book, especially in cases where maturities of sources and uses are mismatched.

*f. Commercial Mortgage Related Security*

Section 703.16(d) of NCUA's investment rule generally prohibits an FCU from purchasing commercial

mortgage related securities (CMRS) of an issuer other than a government-sponsored enterprise. This prohibition is consistent with section 107(7)(E) of the FCU Act. 12 U.S.C. 1757(7)(E). Under § 107(15)(B) of the FCU Act, however, FCUs are permitted to purchase mortgage related securities (as defined in section 3(a)(41) of the Securities Exchange Act of 1934, as amended). 12 U.S.C. 1757(15)(B). That definition includes mortgage related securities backed solely by residential mortgages, solely by CMRS, and by mixed residential and commercial mortgages. Although section 107(15)(B) and section 107(7)(E) permit different kinds of investments for FCUs, some overlap exists between the two. Specifically, some CMRS described in section 107(15)(B) also fit the description of investments permitted by section 107(7)(E). 67 FR 78996, 78997 (Dec. 27, 2002).

Based on its analysis of the interplay of these sections in the FCU Act and the development of the CMRS market, NCUA permitted RegFlex FCUs to purchase CMRS that are not otherwise permitted by section 107(7)(E) of the FCU Act, subject to certain safety and soundness related restrictions. 68 FR 32958 (June 3, 2003).

Under the existing RegFlex rule, § 742.4(a)(6), RegFlex FCUs may purchase CMRS that are not otherwise permitted by section 107(7)(E) if: (i) The security is rated in one of the two highest rating categories by at least one nationally-recognized statistical rating organization (NSRO);[3] (ii) the security meets the definition of mortgage related security as defined in 15 U.S.C. 78c(a)(41) and the definition of CMRS in § 703.2; (iii) the pool of loans underlying the CMRS contains more than 50 loans with no one loan representing more than 10 percent of the pool; and (iv) the FCU does not purchase an aggregate amount of CMRS in excess of 50 percent of its net worth. The Board proposes to permit all FCUs to purchase private label CMRS under certain conditions.

The proposed rule removes the § 703.16 prohibition barring the purchase of private label CMRS and adds the authority as a permissible investment in proposed § 703.14(j), with limits based on whether the FCU meets the well capitalized standard. An FCU that meets the well capitalized standard may purchase private label CMRS under the same parameters currently found in § 742.4(a)(6). An FCU that does not meet the well capitalized standard may purchase private label CMRS if: (i) The security is rated in one of the two highest rating categories by at least one NSRO (as amended in accordance with Section 939A of Dodd-Frank); (ii) the security meets the definition of mortgage related security as defined in 15 U.S.C. 78c(a)(41) and the definition of CMRS in § 703.2; (iii) the pool of loans underlying the CMRS contains more than 50 loans with no one loan representing more than 10 percent of the pool; and (iv) the FCU does not purchase an aggregate amount of private label CMRS in excess of 25 percent of its net worth, unless it receives authority from the applicable regional director to purchase a higher amount. Proposed § 703.20 provides the approval process so that an FCU may exceed the aggregate cap on CMRS of 25% net worth up to a maximum of 50% of net worth. As part of its request for approval, an FCU must demonstrate three consecutive years of effective CMRS portfolio management and the ability to evaluate key risk factors.

Finally, the proposed rule adds a grandfather provision to § 703.18 for private label CMRS purchased by an FCU under its RegFlex authority before the effective date of the final rule. As such, an FCU that does not meet the well capitalized standard under the proposal, but which holds private label CMRS in excess of 25% of its net worth, would not be required to divest of those holdings on its books when the final rule takes effect. Such an FCU, however, could not make additional purchases of CMRS while its aggregate CMRS holdings exceed 25% of its net worth, without the approval from the appropriate regional director under proposed § 703.20.

The Board acknowledges that the proposed authority, as with all of the flexibilities that would be granted under this proposed rulemaking, is not appropriate for every FCU. Selection of CMRS consistent with safety and soundness requires careful analysis of the underlying commercial mortgages and corresponding collateral, as well as analysis of the cash flow, credit structure, and market performance of the security. As with all investments, FCUs must understand and be capable of managing the risks associated with CMRS before purchasing them. The investment rule's § 703.3 requires an FCU's board of directors to develop investment policies that address credit, liquidity, interest rate, and concentration risks. 12 CFR 703.3. The policy must also identify the characteristics of any investments that are suitable for the FCU. FCUs that purchase CMRS must develop sound risk management policies and construct limits that represent the FCU board's risk tolerance.

The Board also notes that the proposal does not diminish NCUA's authority to require an FCU to divest its investments or assets for substantive safety and soundness reasons. Divestiture is a safety and soundness remedy imposed on a case-by-case basis.

The Board seeks comment on whether the conditions for purchasing CMRS in the rule should be enhanced to encourage diversity and mitigate risk. NCUA is concerned from its recent experience that the current rule may contain inadequate limitations.

*g. Eligible Obligations*

The eligible obligations rule permits an FCU to purchase loans from any source, provided that two conditions are satisfied. 12 CFR 701.23. First, the borrower is a member of that FCU. Second, the loan is either of a type the FCU is empowered to grant or the FCU refinances the loan within 60 days of its purchase to meet that standard. 12 CFR 701.23(b)(1)(i). The phrase ''empowered to grant'' refers to an FCU's authority to make the type of loans permitted by the FCU Act, NCUA regulations, FCU Bylaws, and an FCU's own internal policies. NCUA OGC Op. 04–0713 (Oct. 25, 2004). The rule also permits an FCU to purchase student loans and real estate-secured loans, from any source, if the purchasing FCU grants these loans on an ongoing basis and is purchasing either type of loan to facilitate the packaging of a pool of such loans for sale or pledge on the secondary market. 12 CFR 701.23(b)(1)(iii)–(iv). An FCU may also purchase the obligations of a liquidating credit union's individual members from the liquidating credit union. 12 CFR 701.23(b)(ii). The eligible obligations rule imposes restrictions, including a limit on the aggregate amount of loans that an FCU may purchase of 5 percent of the purchasing FCU's unimpaired capital and surplus. 12 CFR 701.23(b)(3). It excludes certain types of loans from this limit, including loans purchased to facilitate a sale or pledge on the secondary market. 12 CFR 701.23(b)(3).

The current RegFlex rule permits RegFlex FCUs to buy loans from other federally insured credit unions without regard to whether the loans are eligible obligations of the purchasing FCU's

[3] As required by Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the Board issued a proposal on March 1, 2011 to change this prong with the following language: ''The issuer has at least a very strong capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the security.'' 76 FR 11164 (Mar. 1, 2011). If and when a final rule is adopted, a similar conforming change will be made as necessary for this rulemaking.

members or the members of a liquidating credit union. 12 CFR 742.4(b). Loans purchased from a liquidating credit union, however, are subject to the eligible obligations cap of 5 percent unimpaired capital and surplus. 12 CFR § 742.4(b)(4); 66 FR 15055, 15059 (Mar. 15, 2001). RegFlex FCUs may also purchase student loans and real-estate secured loans without the need to purchase them in order to facilitate a secondary market pool package under current § 742.4(b). When the Board adopted the rule, it relied on its legal analysis of sections 107(13) and 107(14) in the FCU Act to provide the relief to RegFlex FCUs. Section 107(13) of the FCU Act authorizes the purchase of eligible obligations of an FCU's members or the members of a liquidating credit union. 12 U.S.C. 1757(13). Section 107(14) of the FCU Act allows an FCU to purchase all or part of the assets of another credit union. 12 U.S.C. 1757(14). In relying on the authority of Section 107(14) to adopt the eligible obligation provision in the RegFlex rule, the Board acknowledged that it was taking a more expansive interpretation than it had in the past, but that the interpretation was consistent with other FCU powers. 66 FR 58656, 58660 (Nov. 23, 2001); 51 FR 15055, 15059 (Mar. 15, 2001). In adopting this provision in the RegFlex rule, NCUA intended to expand the liquidity options for RegFlex FCUs, provide them with enhanced regulatory flexibility, and enhance the safety and soundness of the credit union system.

The proposed rule retains the flexibility provided currently in the RegFlex rule for FCUs meeting the well capitalized standard by transferring the provisions of current § 742.4(b) to a renumbered § 701.23 as paragraph (b)(2). The Board also proposes to grandfather all obligations purchased by RegFlex FCUs under the existing § 742.4(b) as addressed in the proposed paragraph (b)(5) of § 701.23. NCUA proposes a similar amendment to paragraph (e) in § 723.1 to address nonmember business loans purchased under RegFlex authority or proposed § 701.23(b)(2).

The Board requests specific comment on whether it should extend the flexibility from the eligible obligations rule as discussed to all FCUs. Are there safety and soundness concerns that prevent the Board from extending this authority to all FCUs? Alternatively, should the final rule permit FCUs that do not meet the well capitalized standard to request approval from regional directors, similar to the proposed process for expanded investment authority?

*h. Summary of Proposed Sections*

In a further effort to comply with the Plain Writing Act of 2010 (Pub. L. 111–274), the Board includes the following table to assist readers in following the various proposed authorities for well capitalized FCUs and FCUs that do not meet the well capitalized standard. We are providing this table for your reference only. Please refer to the preamble and proposed regulatory text for specific information about the proposed rule.

| Proposed rule authority | FCUs meeting well capitalized standard | FCUs not meeting well capitalized standard |
|---|---|---|
| Charitable Contributions | Well capitalized FCUs may make donations consistent with their incidental powers authority and board's fiduciary duties. | This flexibility would be extended to all FCUs. |
| Non-member Deposits | May accept up to the greater of 20% total shares or $3 million. May request exemption from regional director for greater amount. | This flexibility would be extended to all FCUs. (The proposed rule raises the dollar threshold from $1.5 million to $3 million. An FCU with less than $15 million in total shares may now accept up to $3 million in nonmember deposits.) |
| Unimproved Property for Future Expansion | May take up to six years to partially occupy unimproved property purchased for future expansion. | This flexibility would be extended to all FCUs. |
| Zero-coupon Investments* | May purchase Zero-coupon investments with maturity dates up to 30 years. | May purchase Zero-coupon investments with maturity dates up to 10 years. May request authority from regional director for maturities up to 30 years. |
| Borrowing Repurchase Transaction* | May enter into Borrowing Repurchase Transactions where the underlying investments mature later than the borrowing, up to 100 percent of net worth. | May enter into Borrowing Repurchase Transactions where the underlying investments mature no later than 30 days after the borrowing, up to 100 percent of net worth. May request authority from regional director for longer maturity mismatch. |
| Private Label Commercial Mortgage Related Security (CMRS)*. | Not restricted to purchasing only CMRS issued by Fannie Mae or Freddie Mac. May purchase Private Label CMRS if:<br>(i) the security is rated in one of the two highest rating categories by at least one NSRO;<br>(ii) it is a "mortgage related security" under the Securities Exchange Act of 1934 and § 703.2;<br>(iii) the pool of loans underlying the CMRS contains more than 50 loans with no one loan representing more than 10 percent of the pool; and<br>(iv) the FCU does not purchase an aggregate amount in excess of 50 percent of net worth. | Similar flexibilities would be extended to all FCUs, under the following conditions:<br>Requirements (i)–(iii) would be the same as for Well Capitalized FCUs.<br>The limit in requirement (iv) would be 25 percent of net worth. May request approval from the regional director for higher limit, up to 50 percent of net worth, if FCU has 3 consecutive years of effective CMRS portfolio management and the ability to evaluate key risk factors. |

| Proposed rule authority | FCUs meeting well capitalized standard | FCUs not meeting well capitalized standard |
|---|---|---|
| Purchase of Eligible Obligations (EOs)* | In addition to the authority in the current § 701.23, may buy loans from other federally insured credit unions without regard to whether the loans are EOs of the purchasing FCU's members. May also purchase nonmember student loans and real estate loans without the need to purchase them in order to facilitate a secondary market pool package. Also may purchase loans from a liquidating credit union regardless of whether the loans were made to liquidating CU's members, subject to the aggregate cap on eligible obligations of 5 percent of unimpaired capital and surplus. | May purchase EOs under the conditions in the current § 701.23 (subject to membership or pooling requirements). |

* All authorized activity entered into before effective date is grandfathered.

*i. Request for Comment*

The Board asks for your comment on whether the proposed rulemaking accomplishes the following: (1) Reduces compliance burden for FCUs; (2) assists them in improving financial performance; and (3) better enables them to provide member services, including extensions of credit. The Board also asks for your comment as to whether FCUs without consistently strong examination ratings and levels of net worth have the ability to manage the risks of the proposed expanded authorities. For instance, if NCUA grants additional authority regarding the maturity limit restrictions on zero-coupon investments or borrowing repurchase transactions for FCUs, that either do not meet the well capitalized standard or lack demonstrated expertise in managing particular investment risk, does it raise significant liquidity or safety and soundness concerns?

**IV. Regulatory Procedures**

*a. Regulatory Flexibility Act*

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small entities (primarily those under ten million dollars in assets). This proposed rule reduces compliance burden and extends regulatory relief while maintaining existing safety and soundness standards. NCUA has determined this proposed rule will not have a significant economic impact on a substantial number of small credit unions, so NCUA is not required to conduct a regulatory flexibility analysis.

*b. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 USC 3507(d); 5 CFR part 1320. For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections.

The proposed rule contains an information collection in the form of a voluntary written request for additional authorities from a regional director under proposed § 703.20. An FCU that does not meet the ''well capitalized standard'' may submit a written request to its regional director to request expanded authority above any or all of the following provisions in the proposed rule: (1) The borrowing repurchase transaction maximum maturity mismatch of 30 days under proposed § 703.13(d)(3)(ii), (2) the zero-coupon investment 10-year maximum maturity under proposed § 703.14(i), up to a maturity of no more than 30 years, and (3) the aggregate commercial mortgage related security limit of 25% of net worth under proposed § 703.14(j), up to no more than 50% of net worth. An FCU meets the ''well capitalized'' standard if the FCU has received a composite CAMEL rating of ''1'' or ''2'' during its last two examinations and (1) has maintained a ''well capitalized'' net worth classification for the immediately preceding six quarters, or (2) has remained ''well capitalized'' for the immediately preceding six quarters after applying the applicable RBNW requirement. The Board estimates 1,770 FCUs may apply for an additional authority under § 703.20. The cumulative total annual paperwork burden is estimated to be approximately 1,770 hours.

NCUA considers comments by the public on this proposed collection of information in:

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the NCUA, including whether the information will have a practical use;
- Evaluating the accuracy of the NCUA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of collection of information on those who are required 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.

The PRA requires the Office of Management and Budget (OMB) to make a decision concerning the collection of information contained in the proposed regulation between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to NCUA on the proposed regulation.

Comments on the proposed information collection requirements should be sent to: Office of Information and Regulatory Affairs, OMB, New Executive Office Building, 725 17th Street NW., Washington, DC 20503; Attention: NCUA Desk Officer, with a copy to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

*c. Executive Order 13132*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. This proposed rule would

not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

*e. Agency Regulatory Goal*

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether this proposed rule is understandable and minimally intrusive if implemented as proposed.

**List of Subjects**

*12 CFR part 701*

Credit unions.

*12 CFR part 703*

Credit unions, Investments.

*12 CFR part 723*

Credit, Credit unions, Reporting and recordkeeping requirements.

*12 CFR part 742*

Credit unions, reporting and recordkeeping requirements.

By the National Credit Union Administration Board on December 15, 2011.

**Mary Rupp,**

*Secretary of the Board.*

For the reasons discussed above, NCUA proposes to amend 12 CFR parts 701, 703, 723, and 742 as follows:

## PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

1. The authority citation for part 701 continues to read as follows:

**Authority:** 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, and 1789. Section 701.6 is also authorized by 31 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.,* 42 U.S.C. 1861 and 42 U.S.C. 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

2. In § 701.23:

a. Redesignate paragraphs (b)(2) and (3) as paragraphs (b)(3) and (4);

b. Add new paragraph (b)(2);

c. In newly redesignated paragraph (b)(4) introductory text, remove the phrase ''under paragraph (b) of this section'' and add in its place ''under paragraphs (b)(1) and (b)(2)(ii) of this section'';

d. Add paragraph (b)(5) to read as follows:

The additions read as follows:

**§ 701.23 Purchase, sale, and pledge of eligible obligations.**

* * * * *

(b) * * *

(2) *Purchase of obligations from a FICU.* A Federal credit union that received a composite CAMEL rating of ''1'' or ''2'' for the last two (2) examinations and maintained a net worth classification of ''well capitalized'' under part 702 of this chapter for the six (6) immediately preceding quarters or, if subject to a risk-based net worth (RBNW) requirement under part 702 of this chapter, has remained ''well capitalized'' for the six (6) immediately preceding quarters after applying the applicable RBNW requirement may purchase and hold the following obligations, provided that it would be empowered to grant them:

(i) *Eligible obligations.* Eligible obligations pursuant to paragraph (b)(1)(i) of this section without regard to whether they are obligations of its members, provided they are purchased from a federally-insured credit union only;

(ii) *Eligible obligations of a liquidating credit union.* Eligible obligations of a liquidating credit union pursuant to paragraph (b)(1)(ii) of this section without regard to whether they are obligations of the liquidating credit union's members.

(iii) *Student loans.* Student loans pursuant to paragraph (b)(1)(iii) of this section, provided they are purchased from a federally-insured credit union only;

(iv) *Mortgage loans.* Real-estate secured loans pursuant to paragraph (b)(1)(iv) of this section, provided they are purchased from a federally-insured credit union only;

* * * * *

(5) *Grandfathered purchases.* Subject to safety and soundness considerations, a Federal credit union may hold any of the loans described in paragraph (b)(2) of this section provided it was authorized to purchase the loan and purchased the loan before [EFFECTIVE DATE OF FINAL RULE].

* * * * *

**§ 701.25 [Removed and Reserved]**

3. Remove and reserve § 701.25.

**§ 701.32 [Amended]**

4. In § 701.32, amend paragraph (b)(1) by removing ''$1.5 million'' after the words ''federal credit union'' and adding in its place ''$3 million''.

5. Amend § 701.36 by revising paragraph (b)(2) and removing paragraph (d) and redesignating paragraph (e) as paragraph (d).

The revision reads as follows:

**§ 701.36 FCU ownership of fixed assets.**

* * * * *

(b) * * *

(2) When a Federal credit union acquires premises for future expansion, it must partially occupy the premises within a reasonable period, not to exceed three years, unless the credit union has acquired unimproved real property for future expansion. The NCUA may waive this partial occupation requirement in writing upon written request. The request must be made within 30 months after the property is acquired. If the Federal credit union has acquired unimproved real property to develop for future expansion, it must partially occupy the premises within a reasonable period, not to exceed six years.

* * * * *

## PART 703—INVESTMENTS AND DEPOSIT ACTIVITIES

6. The authority citation for part 703 continues to read as follows:

**Authority:** 12 U.S.C. 1757(7), 1757(8), 1757(15).

7. In § 703.13, revise paragraph (d)(3) to read as follows:

**§ 703.13 Permissible investment activities.**

* * * * *

(d) * * *

(3) The investments referenced in paragraph (d)(2) of this section must mature under the following conditions:

(i) No later than the maturity of the borrowing repurchase transaction;

(ii) No later than thirty days after the borrowing repurchase transaction, unless authorized under § 703.20, provided the value of the investments does not exceed 100 percent of the Federal credit union's net worth; or

(iii) At any time later than the maturity of the borrowing repurchase transaction, provided the value of the investments does not exceed 100 percent of the Federal credit union's net worth and the credit union received a composite CAMEL rating of ''1'' or ''2'' for the last two (2) examinations and maintained a net worth classification of ''well capitalized'' under part 702 of this chapter for the six (6) immediately preceding quarters or, if subject to a risk-based net worth (RBNW) requirement under part 702 of this chapter, has remained ''well capitalized'' for the six (6) immediately preceding quarters after applying the applicable RBNW requirement.

* * * * *

8. Amend § 703.14 by adding paragraphs (i) and (j) to read as follows:

**§ 703.14 Permissible investments.**

* * * * *

(i) *Zero-coupon investments.* A Federal credit union may only purchase a zero-coupon investment with a maturity date that is no greater than 10 years from the related settlement date, unless authorized under § 703.20 or otherwise provided in this paragraph. A Federal credit union that received a composite CAMEL rating of ''1'' or ''2'' for the last two (2) examinations and maintained a net worth classification of ''well capitalized'' under part 702 of this chapter for the six (6) immediately preceding quarters or, if subject to a risk-based net worth (RBNW) requirement under part 702 of this chapter, has remained ''well capitalized'' for the six (6) immediately preceding quarters after applying the applicable RBNW requirement may purchase a zero-coupon investment with a maturity date that is no greater than 30 years from the related settlement date.

(j) *Commercial mortgage related security (CMRS).* A Federal credit union may purchase a CMRS permitted by Section 107(7)(E) of the Act; and, pursuant to Section 107(15)(B) of the Act, a CMRS of an issuer other than a government-sponsored enterprise enumerated in Section 107(7)(E) of the Act, provided:

(1) The CMRS is rated in one of the two highest rating categories by at least one nationally-recognized statistical rating organization;

(2) The CMRS meets the definition of mortgage related security as defined in 15 U.S.C. 78c(a)(41) and the definition of commercial mortgage related security as defined in § 703.2 of this part;

(3) The CMRS's underlying pool of loans contains more than 50 loans with no one loan representing more than 10 percent of the pool; and

(4) The aggregate amount of private label CMRS purchased by the Federal credit union does not exceed 25 percent of its net worth, unless authorized under § 703.20 or as otherwise provided in this subparagraph. A Federal credit union that has received a composite CAMEL rating of ''1'' or ''2'' for the last two (2) examinations and maintained a net worth classification of ''well capitalized'' under part 702 of this chapter for the six (6) immediately preceding quarters or, if subject to a risk-based net worth (RBNW) requirement under part 702 of this chapter, has remained ''well capitalized'' for the six (6) immediately preceding quarters after applying the applicable RBNW requirement, may hold private label CMRS in an aggregate amount not to exceed 50% of its net worth.

**§ 703.16 [Amended]**

9. In § 703.16, remove paragraph (b) and paragraph (d) and redesignate paragraphs (c), (e), and (f) as paragraphs (b), (c), and (d), respectively.

10. In § 703.18, redesignate paragraph (b) as paragraph (c) and add new paragraph (b) read as follows:

**§ 703.18 Grandfathered investments.**

* * * * *

(b) A Federal credit union may hold a zero-coupon investment with a maturity greater than 10 years, a borrowing repurchase transaction in which the investment matures at any time later than the maturity of the borrowing, or CMRS that cause the credit union's aggregate amount of CMRS from issuers other than government-sponsored enterprises to exceed 25% of its net worth, in each case if it purchased the investment or entered the transaction under the Regulatory Flexibility Program before [EFFECTIVE DATE OF FINAL RULE].

11. Add § 703.20 to read as follows:

**§ 703.20 Request for additional authority.**

(a) *Additional authority.* A Federal credit union may submit a written request to its regional director seeking expanded authority above the following limits in this part:

(1) Borrowing repurchase transaction maximum maturity mismatch of 30 days under § 703.13(d)(3)(ii).

(2) Zero-coupon investment 10-year maximum maturity under § 703.14(i), up to a maturity of no more than 30 years.

(3) CMRS aggregate limit of 25% of net worth under § 703.14(j), up to no more than 50% of net worth. To obtain approval for additional authority, the Federal credit union must demonstrate three consecutive years of effective CMRS portfolio management and the ability to evaluate key risk factors.

(b) *Written request.* A Federal credit union desiring additional authority must submit a written request to the NCUA regional office having jurisdiction over the geographical area in which the credit union's main office is located, that includes the following:

(1) A copy of your investment policy;

(2) The higher limit sought;

(3) An explanation of the need for additional authority;

(4) Documentation supporting your ability to manage the investment or activity; and

(5) An analysis of the credit union's prior experience with the investment or activity.

(c) *Approval process.* A regional director will provide a written determination on a request for expanded authority within 60 calendar days after receipt of the request; however, the 60-day period will not begin until the requesting credit union has submitted all necessary information to the regional director. The regional director will inform the requesting credit union, in writing, of the date the request was received and of any additional documentation that the regional director might require in support of the request. If the regional director approves the request, the regional director will establish a limit on the investment or activity as appropriate and subject to the limitations in this part. If the regional director does not notify the credit union of the action taken on its request within 60 calendar days of the receipt of the request or the receipt of additional requested supporting information, whichever occurs later, the credit union may proceed with its proposed investment or investment activity.

(d) *Appeal to NCUA Board.* A Federal credit union may appeal any part of the determination made under paragraph (c) to the NCUA Board by submitting its appeal through the regional director within 30 days of the date of the determination.

## PART 723—MEMBER BUSINESS LOANS

12. The authority citation for part 723 continues to read as follows:

**Authority:** 12 U.S.C. 1756, 1757, 1757A, 1766, 1785, 1789.

13. In § 723.1 revise paragraph (e) to read as follows:

**§ 723.1 What is a member business loan?**

* * * * *

(e) *Purchases of nonmember loans and nonmember loan participations.* Any interest a credit union obtains in a nonmember loan, pursuant to § 701.22, § 701.23(b)(2), under a Regulatory Flexibility Program designation before [EFFECTIVE DATE OF FINAL RULE] or other authority, is treated the same as a member business loan for purposes of this rule and the risk weighting standards under part 702 of this chapter, except that the effect of such interest on a credit union's aggregate member business loan limit will be as set forth in § 723.16(b) of this part.

## PART 742—[REMOVED]

16. Under the authority of 12 U.S.C. 1756 and 1766, the National Credit Union Administration removes part 742.

[FR Doc. 2011–33041 Filed 12–27–11; 8:45 am]

BILLING CODE 7535–01–P

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 107

### Small Business Investment Companies—Early Stage SBICs; Public Webinars

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice of public Webinars.

**SUMMARY:** The U.S. Small Business Administration (SBA) announces that it is holding a series of public Webinars regarding its proposed Early Stage Small Business Investment Companies (Early Stage SBIC) rule. The proposed Early Stage SBIC rule defines a new sub-category of small business investment companies (SBICs) that will focus on making equity investments in early stage small businesses. The Webinars will provide a basic overview of and respond to questions regarding the proposed rule. The Webinars will be transcribed or summarized and become part of the administrative record.

**DATES:** Webinars are scheduled for January 11, 13, and 19, 2012, as outlined in Section II.

**ADDRESSES:** The phone number and corresponding web address for each Webinar will be provided to participants upon registration.

**FOR FURTHER INFORMATION CONTACT:** Office of Investment and Innovation at *startupamerica@sba.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Background Information

On December 9, 2011, SBA published a proposed Early Stage SBIC rule to define a new sub-category of SBICs that will focus on making equity investments in early stage small businesses. This initiative is part of President Obama's ''Start-Up America Initiative'' to encourage American innovation and job creation by promoting high-growth entrepreneurship across the country to help encourage private sector investment in job-creating startups and small firms, accelerate research, and address barriers to success for entrepreneurs and small businesses.

In order to familiarize the public with the content of the proposed Early Stage SBIC rule, SBA will host several Webinars on the proposed rule. Interested parties may choose any Webinar listed in Section II to attend, although one Webinar will be directed towards participants already familiar with the SBIC program and the other Webinars will be directed to those not familiar with the SBIC program. Webinars will be transcribed or summarized and become part of the administrative record. Since the purpose of the Webinars is to familiarize participants with the proposed rule, comments on specific aspects of the rule will not be solicited during the Webinars. Comments regarding the proposed rule must be submitted at *www.regulations.gov/#!documentDetail;D=SBA-2011-0023-0001*.

### II. Webinar Schedule

| Webinar participant focus | Webinar date and time | Registration closing date |
|---|---|---|
| Participants Already Familiar with the SBIC Program. | January 11, 2012, 1 pm Eastern Standard Time (EST). | January 6, 2012, 11:59 pm EST. |
| Participants Not Familiar with the SBIC Program. | January 13, 2012, 1 pm EST | January 10, 2012, 11:59 pm EST. |
| Participants Not Familiar with the SBIC Program. | January 19, 2012, 2 pm EST | January 13, 2012, 11:59 pm EST. |

Each session is expected to last no more than 1 hour.

### III. Registration

If you are interested in attending any Webinar, you must pre-register by the registration closing date by sending an email to startupamerica@sba.gov. You must include in the SUBJECT line the date of the Webinar for which you wish to participate, and in the body of the email, please provide the following: Participant's Name, Title, Organization Affiliation, Address, Telephone Number, Email Address, and Fax Number. Please also note if you need accommodation because of a disability. SBA will accommodate all reasonable requests made at least one week in advance of the requested Webinar. You must submit your email by the applicable registration closing date listed in Section II of this notice.

Due to technological limitations, participation is limited to 110 registrants per session. If the requested session is unavailable, SBA will try to schedule you for a different session and notify you via email. Because of the limited number of registrants, please only register for one Webinar. If demand exceeds capacity for all three sessions, SBA may consider holding more Webinars. SBA will announce any additional Webinars through a **Federal Register** notice and on its Web site, *www.sba.gov/inv/earlystage*.

SBA will confirm the registration via email along with instructions for participating. SBA will post any presentation materials associated with the Webinars on the day of the Webinar at *www.sba.gov/inv/earlystage*. Participants are responsible for ensuring their systems are compatible with the Webinar software.

If there are specific questions you would like SBA to address during the Webinars, please send your question(s) to SBA no later than January 4, 2012. If there is time at the end of each Webinar, the Webinar will open for questions from participants. Since the Early Stage SBIC rule is in the proposed rulemaking stage, SBA will not be able to answer questions that are outside the scope of the proposed rule. All participants are encouraged to submit comments regarding the proposed rule at *www.regulations.gov/#!documentDetail;D=SBA-2011-0023-0001*.

**Sean Greene,**

*Associate Administrator for Investment and Special Advisor for Innovation.*

[FR Doc. 2011–33044 Filed 12–27–11; 8:45 am]

BILLING CODE 8025–01–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2011–1408; Directorate Identifier 2008–SW–10–AD]**

**RIN 2120–AA64**

### Airworthiness Directives; Eurocopter France (Eurocopter) Helicopters

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

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

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the Eurocopter Model SA330F, G, J and AS332C, L, L1, and L2 helicopters. This

proposed AD is prompted by two reports of jamming of one of the fuel shut-off control levers, which originated from solidified grease in the tangential gearbox (gearbox). Corrosion was also found in a gearbox. The proposed actions are intended to prevent jamming of a fuel shut-off control lever preventing the shut off of engine fuel and preventing the parallel-mounted electrical micro switches, normally activated by shutting off both of the fuel shut-off control levers, from switching off the electrical power system during an emergency shut down.

**DATES:** We must receive comments on this proposed AD by February 27, 2012.

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

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

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

For service information identified in this proposed AD, contact American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005; telephone (972) 641–3460; fax (972) 641–3527; or at *http://www.eurocopter.com/techpub.* You may review copies of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

**FOR FURTHER INFORMATION CONTACT:** Eric Haight, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *eric.haight@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

We invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

## Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued Emergency AD No. 2007–0082–E, dated March 27, 2007, to correct an unsafe condition for the Eurocopter Model SA330F, G, J and AS332C, C1, L, L1, and L2 helicopters. EASA advises that the emergency AD was issued following two reports of jamming of one of the fuel shut-off control levers discovered during maintenance. In both cases, this jamming originates from solidified grease in the gearboxes. They also found corrosion in a gearbox. Jamming of a fuel shut-off control lever constitutes an unsafe condition because it prevents the shut off of engine fuel and prevents the parallel-mounted electrical micro switches, normally activated by shutting off both of the fuel shut-off control levers, from switching off the electrical power system during an emergency shut down.

## FAA's Determination

We are proposing this AD because we evaluated all known relevant information and determined that the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs.

## Related Service Information

Eurocopter has issued an Alert Service Bulletin (ASB), Revision 1, dated March 22, 2007, with 3 different numbers (Nos. 76.00.04, 76.00.03, and 76.03). No. 76.03 applies to the United States type-certificated Model SA330F, G, and J and also applies to the non-type-certificated, military Model 330 helicopters. No. 76.00.04 applies to the United States type certificated Model AS332C, C1, L, L1, and L2 helicopters and also applies to the non type-certificated AS332C1 and military Model 332 helicopters. No. 76.00.03 applies to the non type-certificated military Model 532 helicopters. EASA classified this service information as mandatory and issued Emergency AD No. 2007–0082–E, dated March 27, 2007, to correct the same unsafe condition as identified in the service information.

## Proposed AD Requirements

The proposed AD would require within 50 hours time-in-service (TIS), unless already done, cleaning, inspecting and lubricating each gearbox, and adjusting, as necessary, the fuel shut-off control travel by following the Accomplishment Instructions, paragraph 2.B.2. (reference Figures 3 through 7), of Eurocopter ASB No. 76.03, Revision 1, dated March 22, 2007, for the Model SA330F, G, and J, or ASB No. 76.00.04, Revision 1, dated March 22, 2007, for the Model AS332C, L, L1, and L2 helicopters.

## Differences Between This Proposed AD and the EASA AD

- We use the word ''inspect'' to describe the actions required by a mechanic versus the word ''check.''
- We refer to the compliance time as ''hours TIS'' rather than ''flying hours.''
- We use a different compliance time for inspecting and lubricating the gearboxes.
- We are not including the military model helicopters or the Model AS332C1 in the applicability because they are not type certificated in the U.S.
- We are not requiring measuring the operating loads of the fuel shut-off controls per paragraph 1.1 of the MCAI AD (paragraph 2.B.1 of the ASB).

## Costs of Compliance

We estimate that this proposed AD would affect about 29 helicopters of U.S. registry. We also estimate that operators may incur the following costs to comply with this AD: $7,395 for the fleet assuming 3 work-hours to lubricate each gearbox at an average labor rate of $85 per work-hour.

### Authority for This Rulemaking

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

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

### Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

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

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

### List of Subjects in 14 CFR Part 39

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

### The Proposed Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**Eurocopter France:** Docket No. FAA–2011–1408; Directorate Identifier 2008–SW–10–AD.

**(a) Applicability**

This AD applies to Model SA330F, G, J and AS332C, L, L1, and L2 helicopters, certificated in any category.

**(b) Unsafe Condition**

This AD defines the unsafe condition as jamming of one of the fuel shut-off control levers due to solidified grease in a tangential gearbox (gearbox). This condition could prevent the shut off of engine fuel and prevent the parallel-mounted electrical micro switches, normally activated by shutting off both of the fuel shut-off control levers, from switching off the electrical power system during an emergency shut down.

**(c) Compliance**

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

**(d) Actions**

Within 50 hours time-in-service, clean, inspect, and lubricate each gearbox and adjust, as necessary, the fuel shut-off control travel by following the Accomplishment Instructions, paragraph 2.B.2. (reference Figures 3 through 7), of Eurocopter Alert Service Bulletin (ASB) No. 76.03, Revision 1, dated March 22, 2007, for the Model SA330F, G, and J, or ASB No. 76.00.04, Revision 1, dated March 22, 2007, for the Model AS332C, L, L1, and L2 helicopters.

**(e) Alternative Methods of Compliance (AMOC)**

(1) The Manager, Safety Management Group, Rotorcraft Directorate, FAA, may approve AMOCs for this AD. Send your proposal to: Eric Haight, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *eric.haight@faa.gov.*

(2) For operations conducted under a Part 119 operating certificate or under Part 91, Subpart K, we suggest that you notify your principal inspector or, lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

**(f) Additional Information**

The subject of this AD is addressed in European Aviation Safety Agency (EASA) AD No. 2007–0082–E, dated March 27, 2007.

**(g) Subject**

Air Transport Association of America (ATA) Code 7600, Engine Control.

Issued in Fort Worth, Texas, on December 16, 2011.

**Jorge Castillo,**

*Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.*

[FR Doc. 2011–33248 Filed 12–27–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF COMMERCE

## United States Patent and Trademark Office

## 37 CFR Part 1

**[Docket No. PTO–P–2011–0058]**

**RIN 0651–AC63**

## Revision of Patent Term Adjustment Provisions Relating to Appellate Review

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice of proposed rule making.

**SUMMARY:** The United States Patent and Trademark Office (Office) is proposing to revise the patent term adjustment provisions of the rules of practice in patent cases. The patent term adjustment provisions of the American Inventors Protection Act of 1999 (AIPA) provide for patent term adjustment if, *inter alia,* the issuance of the patent was delayed due to appellate review by the Board of Patent Appeals and Interferences (BPAI) or by a Federal court and the patent was issued under a decision in the review reversing an adverse determination of patentability. The Office is proposing to change the rules of practice to indicate that the period of appellate review under the patent term adjustment provisions of the AIPA begins when jurisdiction over the application passes to the BPAI rather than the date on which a notice of appeal to the BPAI is filed. The Office recently published the final rule (eff. date Jan 23, 2012) concerning practice before the BPAI in ex parte appeals and defined that jurisdiction of the appeal passes to the BPAI at the earlier of the filing of the reply brief or upon the expiration of the time in which to file a reply brief. *See Rules Of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals* 76 FR 72270, 72273 (November 22, 2011). Accordingly, for purposes of calculating patent term adjustment based upon appellate review, the impact of the rule change would be to reduce the amount of patent term adjustment awarded for

successful appeal under 35 USC 154(b)(1)(C)(iii). However, the impact may be offset by potentially increasing the amount of patent term adjustment awarded for failing to issue the patent within three years of the actual filing date in the United States under 35 USC 154(b)(1)(B). The patent term adjustment award for the three year provision may increase when the examiner reopens prosecution after a notice of appeal is filed (e.g., following a pre-appeal conference or an appeal conference) and the patent issues thereafter, because the period of time between the filing of the notice of appeal and the examiner's reopening of prosecution would no longer be deducted under 35 USC 154(b)(1)(B)(ii).

**DATES:** *Comment Deadline Date:* Written comments must be received on or before January 27, 2012. No public hearing will be held.

**ADDRESSES:** Comments concerning this notice should be sent by electronic mail message over the Internet addressed to *AC63.comments@uspto.gov.* Comments may also be submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA, 22313–1450, marked to the attention of Kery A. Fries, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy. Although comments may be submitted by mail, the Office prefers to receive comments via the Internet.

Comments may also be sent by electronic mail message over the Internet via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal.

The comments will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available via the Internet (*http://www.uspto.gov*). Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

**FOR FURTHER INFORMATION CONTACT:** Kery A. Fries, Senior Legal Advisor, Office of Patent Legal Administration, by telephone at (571) 272–7757, by mail addressed to: Box Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Kery A. Fries.

**SUPPLEMENTARY INFORMATION:** The Uruguay Round Agreements Act (URAA) amended 35 U.S.C. 154 to provide that the term of a patent ends on the date that is twenty years from the filing date of the application, or the earliest filing date for which a benefit is claimed under 35 U.S.C. 120, 121, or 365(c). *See* Public Law 103–465, § 532(a)(1), 108 Stat. 4809, 4983–85 (1994). The URAA also contained provisions, codified at 35 U.S.C. 154(b), for patent term extension due to certain examination delays. Under the patent term extension provisions of 35 U.S.C. 154(b) as amended by the URAA, an applicant is entitled to patent term extension for delays due to interference, secrecy order, or successful appellate review. *See* 35 U.S.C. 154(b) (1995). The Office implemented the patent term extension provisions of the URAA in a final rule published in April of 1995. *See Changes to Implement 20-Year Patent Term and Provisional Applications,* 60 FR 20195 (Apr. 25, 1995) (twenty-year patent term final rule).

The American Inventors Protection Act of 1999 (AIPA) further amended 35 U.S.C. 154(b) to expand the list of administrative delays which may give rise to patent term adjustment (characterized as ''patent term adjustment'' in the AIPA). *See* Public Law 106–113, 113 Stat. 1501, 1501A–552 through 1501A–591 (1999). Specifically, under the patent term adjustment provisions of 35 U.S.C. 154(b) as amended by the AIPA, an applicant is entitled to patent term adjustment for the following reasons: (1) If the Office fails to take certain actions during the examination and issue process within specified time frames (known as the ''A'' provision, being in 35 U.S.C. 154(b)(1)(A)); (2) if the Office fails to issue a patent within three years of the actual filing date of the application in the United States (known as the ''B'' provision, being in 35 U.S.C. 154(b)(1)(B)); and (3) for delays due to interference, secrecy order, or successful appellate review (known as the ''C'' provision, being in 35 U.S.C. 154(b)(1)(C)). *See* 35 U.S.C. 154(b)(1). The Office implemented the patent term adjustment provisions of 35 U.S.C. 154(b) as amended by the AIPA in a final rule published in September of 2000. *See Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term,* 65 FR 56365 (Sept. 18, 2000) (patent term adjustment final rule).

The patent term adjustment provisions of the AIPA apply to original (*i.e.,* non-reissue) utility and plant applications filed on or after May 29, 2000. *See Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term,* 65 FR at 56367. The patent term extension provisions of the URAA (for delays due to secrecy order, interference or successful appellate review) continue to apply to original utility and plant applications filed on or after June 8, 1995, and before May 29, 2000. *See id.*

In April 2011 the Office proposed to revise the patent term extension and adjustment provisions of the URAA and AIPA to provide, with certain exceptions, that the reopening of prosecution by an examiner would be considered a ''decision in the review reversing an adverse determination of patentability,'' since in many such situations the reopening of the application after a notice of appeal has been filed is the result of a decision in the pre-BPAI review that there is some weakness in the adverse patentability determination from which the appeal was taken, making it appropriate to treat such situations as a ''decision in the review reversing an adverse determination of patentability'' under the patent term adjustment and extension provisions. *See Revision of Patent Term Extension and Adjustment Provisions Relating to Appellate Review and Information Disclosure Statements,* 76 FR 18990 (Apr. 6, 2011). The Office received several comments suggesting that a better approach would be to treat the appellate review period as beginning when jurisdiction passes to the BPAI, rather than on the date a notice of appeal to the BPAI was filed. This approach would give applicants the possibility of obtaining patent term adjustment under the ''B'' provision for Office delays during the pre-BPAI process (including when prosecution is reopened). Specifically, the Office would not subtract from the ''B'' period the period of time from the filing of the notice of appeal to the earlier of the filing of a reply brief or the expiration of the period to file the reply brief. The Office has decided to seek public comment on this approach. Accordingly, the Office is proposing to change its interpretation of the appellate review language of the ''B'' provision (35 U.S.C. 154(b)(1)(B)(ii)), and provide that appellate review begins on the date on which jurisdiction over the application passes to the Board of Patent Appeals and Interferences under 37 CFR 41.35 (rather than the date on which a notice of appeal under 35 U.S.C. 134 was filed as in the current rule).

The ''B'' provision provides for the possibility of patent term adjustment ''if the issue of an original patent is delayed due to the failure of the United States

Patent and Trademark Office to issue a patent within 3 years after the actual filing date of the application in the United States.'' 35 U.S.C. 154(b)(1)(B). The ''B'' provision also provides that certain periods are not included in determining whether the issue of a patent is delayed due to the failure of the Office to issue the patent within three years of its filing date, one of such periods being ''any time consumed by appellate review by the Board of Patent Appeals and Interferences or by a Federal court.'' 35 U.S.C. 154(b)(1)(B)(ii). Since the period of appellate review by the BPAI or a Federal court is not included in determining whether the issue of a patent is delayed due to the failure of the Office to issue the patent within three years of its filing date under the ''B'' provision, a later beginning of the appellate review by the BPAI, as now being proposed, would result in the possibility of a greater period of patent term adjustment under the ''B'' provision vis-à-vis the Office's interpretation of this provision in 2000.

The ''C'' provision provides for the possibility of patent term adjustment ''if the issue of an original patent is delayed due to'' *inter alia* ''appellate review by the Board of Patent Appeals and Interferences or by a Federal court in a case in which the patent was issued under a decision in the review reversing an adverse determination of patentability.'' 35 U.S.C 154(b)(1)(C). The Office is also proposing to change its interpretation of the appellate review language of the ''C'' provision (35 U.S.C. 154(b)(1)(C)(iii)). To change the interpretation of the appellate review language of the ''B'' provision without also changing the appellate review language of the ''C'' provision would be difficult to justify because it would require the Office to interpret the same statutory term, ''appellate review by the Board,'' appearing in two closely related provisions, in two different ways. Doing so violates the well-recognized canon of statutory interpretation that the same terms appearing in related statutory provisions are to be given the same meaning. *See, e.g., Yi v. Fed. Bureau of Prisons,* 412 F.3d 526, 531 (4th Cir. 2005). Since the period of adjustment under the appellate review portion of the ''C'' provision is the period of appellate review by the BPAI or by a Federal court, a later beginning of the appellate review by the BPAI, as now being proposed, would result in the possibility of a lesser period of patent term adjustment under the ''C'' provision vis-à-vis the Office's interpretation of this provision in 2000.

The Office recognizes that there is a question as to whether the URAA should be considered instructive in interpreting the ''C'' provisions of 35 U.S.C. 154(b) as amended by the AIPA. The Office has, until now, treated the AIPA patent term adjustment provisions as an extension of, rather than a replacement for, the URAA patent term extension provisions. The AIPA (like the URAA) provided patent term adjustment for delays caused by secrecy order, interference proceedings, and successful appellate review (the ''C'' provision), with the legislative history characterizing this provision as the ''existing'' provisions. *See* H.R. Rep. No. 106–464, at 125 (1999). The appellate review provision of the URAA provides for patent term extension if ''the issue of a patent is delayed due to appellate review by the Board of Patent Appeals and Interferences or by a Federal court and the patent is issued pursuant to a decision in the review reversing an adverse determination of patentability,'' and specifically defines the period of appellate review as ''includ[ing] any period beginning on the date on which an appeal is filed under section 134 or 141 of this title, or on which an action is commenced under section 145 of this title, and ending on the date of a final decision in favor of the applicant.'' *See* 35 U.S.C. 154(b)(2) and 154(b)(3)(A) as amended by § 532(a) of the URAA, 108 Stat. at 4984.

Since the appellate review provisions of the AIPA use the same phrase as the URAA appellate review provision (''appellate review by the Board of Patent Appeals and Interferences or by a Federal court'') and the AIPA provides no alternative definition of the date that is the beginning of the period of appellate review by the BPAI or by a Federal court, the Office originally interpreted the beginning of the pendency of ''appellate review by the Board of Patent Appeals and Interferences or by a Federal court'' (35 U.S.C. 154(b)(1)(C)(iii)) using the guidance provided in 35 U.S.C. 154(b)(3)(A) as amended by the URAA for the beginning of the period of appellate review, namely that the beginning of the period of appellate review is the date on which an appeal to the BPAI is filed under 35 U.S.C. 134. *See Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term,* 65 FR, 17215, 17218 and 17227 (Mar. 31, 2000). The USPTO did not receive any comment on its original interpretation of this provision. Finally, the U.S. Court of Appeals for the Federal Circuit has also in passing characterized the ''C'' provision of the 35 U.S.C. 154(b)(1)(C) as the patent term extension provisions of the URAA. *See Wyeth* v. *Kappos,* 591 F.3d 1364, 1372 (Fed. Cir. 2010) (''Before enactment of the AIPA, section 154(b) only provided extensions for the category that now fall under the C adjustments'').

The Office has reconsidered its prior position and now believes that the better view is that the URAA's express definition of the appellate-review period should not carry over to the ''C'' provision of AIPA, because the URAA definition is completely absent from the AIPA. It is a canon of statutory construction that Congress is presumed to intend its statutory amendments to have ''real and substantial effect.'' *Intel Corp.* v. *Advanced Micro Devices, Inc.,* 542 U.S. 241, 258–59 (2004). Thus, when Congress deletes a term or provision from a statute, it is inappropriate to read that term or provision back into the statute. *See id.* (holding that because Congress amended 28 U.S.C. 1782(a) to delete the requirement that proceedings covered by the statute be ''pending,'' Court rejected view that this statute comes into play only for pending proceedings). Likewise, the Office now believes that it is not appropriate to read back into the ''C'' provision of the AIPA the appellate-review definition that Congress deleted from Title 35. Therefore, the Office is also proposing to change its interpretation of the appellate review language of the ''C'' provision (35 U.S.C. 154(b)(1)(C)(iii)), and also to provide that appellate review begins on the date on which jurisdiction over the application passes to the BPAI under 37 CFR 41.35 (rather than the date on which a notice of appeal under 35 U.S.C. 134 was filed as in the current rule).

The AIPA also sets forth a number of conditions and limitations on any patent term adjustment accrued under 35 U.S.C. 154(b)(1). Specifically, 35 U.S.C. 154(b)(2)(C) provides, in part, that ''[t]he period of adjustment of the term of a patent under [35 U.S.C. 154(b)(1)] shall be reduced by a period equal to the period of time during which the applicant failed to engage in reasonable efforts to conclude prosecution of the application'' and that ''[t]he Director shall prescribe regulations establishing the circumstances that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application.'' 35 U.S.C. 154(b)(2)(C)(i) and (iii). The rules of practice (37 CFR 41.37) require that an appeal brief be filed within two months from the date of filing of the notice of appeal under 35 U.S.C. 134

and 37 CFR 41.31. An applicant, however, may delay or prevent the passing of jurisdiction of the application to the BPAI by: (1) Obtaining an extension of time to file the appeal brief; (2) filing an appeal brief that does not comply with the requirements of 37 CFR 41.37; or (3) seeking further prosecution before the examiner by filing a request for continued examination under 37 CFR 1.114. Therefore, the Office is proposing, under its authority under 35 U.S.C. 154(b)(2)(C), to provide that the failure to file an appeal brief in compliance with 37 CFR 41.37 within two months from the date on which a notice of appeal to the BPAI was filed under 35 U.S.C. 134 and 37 CFR 41.31 constitutes a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application.

**Discussion of Specific Rules**

Title 37 of the Code of Federal Regulations, Part 1, is proposed to be amended as follows:

*Section 1.703:* Section 1.703(b)(4), which defines the period of appellate review in 35 U.S.C. 154(b)(1)(B)(ii), is amended to define this period as the sum of the number of days, if any, in the period beginning on the date on which jurisdiction over the application passes to the BPAI under § 41.35 of this title and ending on the date of a final decision in favor of the applicant by the BPAI or by a Federal court in an appeal under 35 U.S.C. 141 or a civil action under 35 U.S.C. 145. Section 1.703(b)(4) currently defines this period as beginning on the date on which a notice of appeal to the BPAI was filed under 35 U.S.C. 134 and § 41.31.

Section 1.703(e), which defines the period of appellate review in 35 U.S.C. 154(b)(1)(C)(iii), is amended to define this period as the sum of the number of days, if any, in the period beginning on the date on which jurisdiction over the application passes to the BPAI under § 41.35 of this title and ending on the date of a final decision in favor of the applicant by the BPAI or by a Federal court in an appeal under 35 U.S.C. 141 or a civil action under 35 U.S.C. 145. Section 1.703(e) currently defines this period as beginning on the date on which a notice of appeal to the BPAI was filed under 35 U.S.C. 134 and § 41.31.

*Section 1.704:* Section 1.704(c) is amended to provide that the failure to file an appeal brief in compliance with § 41.37 within two months from the date on which a notice of appeal to the BPAI was filed under 35 U.S.C. 134 and § 41.31 constitutes a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application. Section 1.704(c) would also provide that in such a case the period of adjustment set forth in § 1.703 shall be reduced by the number of days, if any, beginning on the day after the date two months from the date on which a notice of appeal to the Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31 of this title and ending on the date an appeal brief was filed in compliance with 41.37 or a request for continued examination was filed in compliance with § 1.114.

**Rule Making Considerations:**

A. *Regulatory Flexibility Act:* For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes proposed in this notice will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

The changes to the rules of practice proposed in this notice: (1) Revise the provisions that define the beginning and ending dates of the period of appellate review under 35 U.S.C. 154(b)(1)(B)(ii) and 154(b)(1)(C)(iii) to provide that this period begins on the date on which jurisdiction over the application passes to the BPAI under 37 CFR 41.35; and (2) provide that that the failure to file a proper appeal brief within two months from the date on which a notice of appeal to the BPAI was filed, as required by 35 U.S.C. 134, constitutes a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application. This notice does not propose to add any additional requirements (including information collection requirements) or fees for patent applicants or patentees.

The proposed changes to 37 CFR 1.703(b)(4) and (e) merely reinterpret the beginning and ending dates of the period of appellate review under 35 U.S.C. 154(b)(1)(B)(ii) and 154(b)(1)(C)(iii). They do not impose any additional burden on applicants. The proposed change to 37 CFR 1.704(c) specifies that the failure to file a proper appeal brief within two months from the date on which a notice of appeal to the BPAI was filed, as required by 35 U.S.C. 134, constitutes failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application would not have will not have a significant economic impact on a substantial number of small entities because: (1) applicants are not entitled to patent term adjustment for examination delays that result from their delay in prosecuting the application (35 U.S.C. 154(b)(2)(C)(i) and 37 CFR 1.704(a)); and (2) applicants may avoid any consequences from this provision simply by filing an appeal brief in compliance with 37 CFR 41.37 (or filing a request for continued examination under 37 CFR 1.114) within two months from the date on which a notice of appeal to the BPAI was filed as required by 35 U.S.C. 134 and § 41.31.

For the foregoing reasons, neither of the changes proposed in this notice will have a significant economic impact on a substantial number of small entities.

B. *Executive Order 12866 (Regulatory Planning and Review):* This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

C. *Executive Order 13563 (Improving Regulation and Regulatory Review):* The Office has complied with Executive Order 13563. Specifically, the Office has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector and the public as a whole, and provided on-line access to the rule making docket; (7) attempted to promote coordination, simplification and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

D. *Executive Order 13132 (Federalism):* This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

E. *Executive Order 13175 (Tribal Consultation):* This rule making will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not

required under Executive Order 13175 (Nov. 6, 2000).

F. *Executive Order 13211 (Energy Effects):* This rule making is not a significant energy action under Executive Order 13211 because this rule making is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

G. *Executive Order 12988 (Civil Justice Reform):* This rule making meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

H. *Executive Order 13045 (Protection of Children):* This rule making does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

I. *Executive Order 12630 (Taking of Private Property):* This rule making will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

J. *Congressional Review Act:* Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the United States Patent and Trademark Office will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the Government Accountability Office. The changes in this notice are not expected to result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this notice is not expected to result in a ''major rule'' as defined in 5 U.S.C. 804(2).

K. *Unfunded Mandates Reform Act of 1995:* The changes proposed in this notice do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

L. *National Environmental Policy Act:* This rule making will not have any effect on the quality of environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

M. *National Technology Transfer and Advancement Act:* The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rule making does not contain provisions which involve the use of technical standards.

N. *Paperwork Reduction Act:* The rules of practice pertaining to patent term adjustment and extension have been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) under OMB control number 0651–0020. The changes to the rules of practice proposed in this notice: (1) Revise the provisions that define the beginning and ending dates of the period of appellate review under 35 U.S.C. 154(b)(1)(B)(ii) and 154(b)(1)(C)(iii) to provide that this period begins on the date on which jurisdiction over the application passes to the BPAI under 37 CFR 41.35; and (2) provide that that the failure to file a proper appeal brief within two months from the date on which a notice of appeal to the BPAI was filed, as required by 35 U.S.C. 134, constitutes a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application. This notice does not propose to add any additional requirements (including information collection requirements) or fees for patent applicants or patentees. Therefore, the Office is not resubmitting information collection packages to OMB for its review and approval because the changes proposed in this notice do not affect the information collection requirements associated with the information collections approved under OMB control number 0651–0020 or any other information collections.

Notwithstanding any other provision of law, no person is required to respond to nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

**List of Subjects in 37 CFR Part 1**

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and record keeping requirements, Small Businesses.

For the reasons set forth in the preamble, 37 CFR part 1 is proposed to be amended as follows:

## PART 1—RULES OF PRACTICE IN PATENT CASES

1. The authority citation for 37 CFR Part 1 continues to read as follows:

**Authority:** 35 U.S.C. 2(b)(2).

2. Section 1.703 is amended by revising paragraph (b)(4) and (e) to read as follows:

### § 1.703 Period of adjustment of patent term due to examination delay.

* * * * *

(b) * * *

(4) The number of days, if any, in the period beginning on the date on which jurisdiction over the application passes to the Board of Patent Appeals and Interferences under § 41.35 of this title and ending on the date of the last decision by the Board of Patent Appeals and Interferences or by a Federal court in an appeal under 35 U.S.C. 141 or a civil action under 35 U.S.C. 145.

* * * * *

(e) The period of adjustment under § 1.702(e) is the sum of the number of days, if any, in the period beginning on the date on which jurisdiction over the application passes to the Board of Patent Appeals and Interferences under § 41.35 of this title and ending on the date of a final decision in favor of the applicant by the Board of Patent Appeals and Interferences or by a Federal court in an appeal under 35 U.S.C. 141 or a civil action under 35 U.S.C. 145.

* * * * *

3. Section 1.704 is amended by redesignating paragraph (c)(9) through (c)(11) as (c)(10) through (c)(12), respectively, and adding a new paragraph (c)(9) to read as follows:

### § 1.704 Reduction of period of adjustment of patent term.

* * * * *

(c) * * *

(9) Failure to file an appeal brief in compliance with § 41.37 within two months from the date on which a notice of appeal to the Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31 of this title, in which case the period of adjustment set forth in § 1.703 shall be reduced by the number of days, if any, beginning on the day after the date two months from the date on which a notice of appeal to the

Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31 of this title and ending on the date an appeal brief in compliance with 41.37 or a request for continued examination in compliance with § 1.114 was filed;

* * * * *

Dated: December 15, 2011.

**David J. Kappos,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2011–33150 Filed 12–27–11; 8:45 am]

**BILLING CODE 3510–16–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 721

**[EPA–HQ–OPPT–2011–0633; FRL–9325–9]**

**RIN 2070–AB27**

## Proposed Significant New Use Rule for Phenol, 2,4-dimethyl-6-(1-methylpentadecyl)-

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing a significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for the chemical substance identified as phenol, 2,4-dimethyl-6-(1-methylpentadecyl)- (PMN P–94–209; CAS No. 134701–20–5). This action would require persons who intend to manufacture, import, or process the substance for an activity that is designated as a significant new use by this proposed rule to notify EPA at least 90 days before commencing that activity. The required notification would provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it occurs.

**DATES:** Comments must be received on or before January 27, 2012.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2011–0633, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave. NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2011–0633. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPPT–2011–0633. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or email. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:** *For technical information contact:* Abeer Hashem, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–1117; email address: *hashem.abeer@epa.gov.*

*For general information contact:* The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA–Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you manufacture, import, process, or use the chemical substance contained in this proposed rule. Potentially affected entities may include, but are not limited to:

- Manufacturers, importers, or processors of the subject chemical substance (NAICS codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in § 721.5. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15

U.S.C. 2612) import certification requirements promulgated at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. Importers of chemicals subject to a final SNUR must certify their compliance with the SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) (see § 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

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

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

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

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

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

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

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

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

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

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

## II. Background

*A. What action is the agency taking?*

Under section 5(a)(2) of TSCA, EPA is re-proposing a SNUR previously proposed for phenol, 2,4-dimethyl-6-(1-methylpentadecyl)- (PMN P–94–209; CAS No. 134701–20–5) in the **Federal Register** of September 9, 1998 (63 FR 48157) (FRL–6020–8) but which was not finalized. In the 1998 proposed SNUR, based on submitted test data, EPA expressed concerns for liver toxicity, kidney toxicity, adrenal toxicity, and blood toxicity. Additionally, based on submitted test data and analogy to phenols, EPA was also concerned that toxicity to aquatic organisms would occur at concentrations as low as 1 part per billion (ppb). EPA determined that use of the substance as described in the Premanufacture Notice (PMN) did not present an unreasonable risk because workers would not be subject to significant dermal exposures and there were no significant environmental releases. EPA also determined that other potential uses of the substance may result in significant dermal exposures to workers and significant environmental releases. Based on this information, the PMN substance met the concern criteria at § 721.170 (b)(3)(i) and (b)(4)(i). In the 1998 proposed SNUR, EPA proposed worker protection requirements as specified in § 721.63 (a)(2)(i) and (a)(3), release to water restrictions as specified in § 721.90 (a)(1), (b)(1), and (c)(1) and associated recordkeeping requirements.

Recently, EPA re-evaluated the information now available on phenol, 2,4-dimethyl-6-(1-methylpentadecyl)-. Since the PMN was initially reviewed, the Agency's Ecological Structure Activity Relationships (EcoSAR) dataset for phenols has been significantly updated to include 203 chemicals, up from 78 chemicals. The additional number of data points has increased the robustness of the category, which has changed the underlying Quantitative Structure Activity Relationships (QSAR). As a result, when the most recent version of EcoSAR was run for phenol, 2,4-dimethyl-6-(1-methylpentadecyl)- in 2011, the program predicted no adverse ecotoxicological effects at saturation for this substance. Additionally, measured water solubility data submitted to the Agency subsequent to the 1998 proposal support the new EcoSAR prediction of no expected acute or chronic adverse ecological effects.

Therefore, based upon the new EcoSAR predictions and the measured water solubility data, EPA now concludes that the ecological hazard and risk of this substance are low. EPA no longer determines that this substance may present an unreasonable risk to the aquatic environment. As a result EPA, based on the new data received and the Agency's predictive tools, no longer finds that the PMN substance meets the concern criteria at § 721.170 (b)(4)(i). Therefore, EPA is re-proposing this SNUR, retaining the previously proposed worker protection requirements specified in § 721.63 (a)(2)(i) and (a)(3), while removing the proposed release to water restrictions specified § 721.90 (a)(1), (b)(1), and (c)(1).

This proposed SNUR would require persons to notify EPA at least 90 days before commencing the manufacture, import, or processing of the chemical substance identified as phenol, 2,4-dimethyl-6-(1-methyl pentadecyl)-, (PMN P–94–209; CAS No.134701–20–5), for any activity preliminarily designated by this proposed SNUR as a significant new use. Receipt of such notices allows EPA to assess risks that may be presented by the intended uses and, if appropriate, to regulate the proposed use before it occurs. The record established for this proposed SNUR is available in the docket under Docket ID number EPA–HQ–OPPT–2011–0633.

*B. What is the agency's authority for taking this action?*

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including those listed in TSCA section 5(a)(2). Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1)(B) requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture, import, or process the chemical substance for that use. Persons who must report are described in § 721.5.

*C. Applicability of General Provisions*

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the rule. Provisions relating to user fees appear at 40 CFR part 700. According to

§ 721.1(c), persons subject to these SNURs must comply with the same notice requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A). In particular, these requirements include the information submission requirements of TSCA section 5(b) and 5(d)(1), the exemptions authorized by TSCA section 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA may take regulatory action under TSCA section 5(e), 5(f), 6, or 7 to control the activities for which it has received the SNUN. If EPA does not take action, EPA is required under TSCA section 5(g) to explain in the **Federal Register** its reasons for not taking action.

## III. Significant New Use Determination

Section 5(a)(2) of TSCA states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In addition to these factors enumerated in TSCA section 5(a)(2), the statute authorized EPA to consider any other relevant factors.

To determine what would constitute a significant new use for the chemical substance that is the subject of this proposed SNUR, EPA considered relevant information about the toxicity of the chemical substance, likely human exposures and environmental releases associated with possible uses, taking into consideration the four bulleted TSCA section 5(a)(2) factors listed in this unit.

## IV. Substance Subject to This Proposed Rule

EPA is proposing to establish significant new use and recordkeeping requirements for the chemical substance identified as phenol, 2,4-dimethyl-6-(1-methylpentadecyl)- (P–94–209). In this unit, EPA provides the following information for this chemical substance:

**PMN Number P–94–209**

*Chemical name:* Phenol 2,4-dimethyl-6-(1-methylpentadecyl)-.

*Chemical Abstracts Service (CAS) number:* 134701–20–5.

*Basis for action:* The PMN states that the substance will be used as an antioxidant. EPA is not aware of additional uses of this PMN chemical substance. Based on submitted test data, there is concern for liver toxicity, kidney toxicity, adrenal toxicity, and blood toxicity. However, after review of the PMN EPA determined that use of the substance as described in the PMN did not present an unreasonable risk because workers would not be subject to significant dermal exposures. EPA has determined that other potential uses of the substance may result in significant dermal exposures to workers. Based on this information the PMN substance meets the concern criteria at § 721.170(b)(3)(i).

*Recommended testing:* EPA has determined that a dermal absorption study (OPPTS Test Guideline 870.3250) would help characterize the health effects of the PMN substance. Test reports should include protocols approved by the EPA, certificate of analysis for the test substance, raw data, and results.

*CFR citation:* 40 CFR 721.5725.

## V. Rationale and Objectives of the Proposed Rule

### *A. Rationale*

During review of phenol, 2,4-dimethyl-6-(1-methylpentadecyl)-, EPA preliminarily determined that one or more of the criteria of concern established at § 721.170 were met, as discussed in Units II and IV.

### *B. Objectives*

EPA is proposing this SNUR for a chemical substance that has undergone premanufacture review because the Agency wants to achieve the following objectives with regard to the significant new uses designated in this proposed rule:

- EPA would receive notice of any person's intent to manufacture, import, or process a listed chemical substance for the described significant new use before that activity begins.
- EPA would have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing, importing, or processing a listed chemical substance for the described significant new use.
- EPA would be able to regulate prospective manufacturers, importers, or processors of a listed chemical substance before the described significant new use of that chemical substance occurs, provided that regulation is warranted pursuant to TSCA sections 5(e), 5(f), 6, or 7.

Issuance of a SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Inventory. Guidance on how to determine if a chemical substance is on the TSCA Inventory is available on the Internet at *http://www.epa.gov/opptintr/existingchemicals/pubs/tscainventory/index.html.*

## VI. Notice and Comment Procedures

EPA is issuing this SNUR by notice and comment procedure, as described in § 721.170(d)(4). In accordance with § 721.170(d)(4)(ii)(A), persons are given the opportunity to submit comments on or before January 27, 2012 on whether EPA should establish notification requirements.

## VII. Applicability of the Proposed Rule to Uses Occurring Before Effective Date of the Final Rule

To establish a significant ''new'' use, EPA must determine that the use is not ongoing. EPA solicits comments on whether any of the uses proposed as significant new uses are ongoing.

As discussed in the **Federal Register** of April 24, 1990 (55 FR 17376), EPA has decided that the intent of TSCA section 5(a)(1)(B) is best served by designating a use as a significant new use as of the date of publication of the proposed rule rather than as of the effective date of the final rule. If uses begun after publication of the proposed rule were considered ongoing rather than new, it would be difficult for EPA to establish SNUR notice requirements because a person could defeat the SNUR by initiating the significant new use before the rule became final, and then argue that the use was ongoing before the effective date of the final rule. Thus, persons who begin commercial manufacture, import, or processing activities with the chemical substances that would be regulated as a ''significant new use'' through this proposed rule, must cease any such activity before the effective date of the rule if and when finalized. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires.

EPA has promulgated provisions to allow persons to comply with this proposed SNUR before the effective date. If a person were to meet the conditions of advance compliance under § 721.45(h), the person would be

considered exempt from the requirements of the SNUR.

## VIII. Test Data and Other Information

EPA recognizes that TSCA section 5 does not require developing any particular test data before submission of a SNUN. The two exceptions are:

1. Development of test data is required where the chemical substance subject to the SNUR is also subject to a test rule under TSCA section 4 (see TSCA section 5(b)(1)).

2. Development of test data may be necessary where the chemical substance has been listed under TSCA section 5(b)(4) (see TSCA section 5(b)(2)).

In the absence of a TSCA section 4 test rule or a TSCA section 5(b)(4) listing covering the chemical substance, persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (see § 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. EPA recommended certain testing in Unit IV. Descriptions of tests are provided for informational purposes. EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol selection. To access the OPPTS Test Guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines.''

The recommended tests may not be the only means of addressing the potential risks of the chemical substance. However, submitting a SNUN without any test data may increase the likelihood that EPA will take action under TSCA section 5(e), particularly if satisfactory test results have not been obtained from a prior PMN or SNUN submitter. EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substances.
- Potential benefits of the chemical substances.
- Information on risks posed by the chemical substances compared to risks posed by potential substitutes.

## IX. SNUN Submissions

According to § 721.1(c), persons submitting a SNUN must comply with the same notice requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in § 720.50. SNUNs must be submitted on EPA Form No. 7710–25 in accordance with the procedures set forth in §§ 721.25 and 720.40. E–PMN software is available electronically at *http://www.epa.gov/opptintr/newchems.*

## X. Economic Analysis

EPA has evaluated the potential costs of establishing SNUN requirements for potential manufacturers, importers, and processors of the chemical substances subject to this proposed rule. EPA's complete economic analysis is available in the docket under docket ID number EPA–HQ–OPPT–2011–0633.

## XI. Statutory and Executive Order Reviews

### *A. Executive Order 12866*

This proposed rule would establish a SNUR for a chemical substance that was the subject of a PMN. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993).

### *B. Paperwork Reduction Act*

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* an Agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable. EPA would amend the table in 40 CFR part 9 to list the OMB approval number for the information collection requirements contained in this proposed rule, if the SNUR is subsequently issued as a final rule. This listing of the OMB control numbers and their subsequent codification in the CFR satisfies the display requirements of PRA and OMB's implementing regulations at 5 CFR part 1320. This Information Collection Request (ICR) was previously subject to public notice and comment prior to OMB approval, and given the technical nature of the table, EPA finds that further notice and comment to amend it is unnecessary. As a result, EPA finds that there is ''good cause'' under section 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), to amend this table without further notice and comment.

The information collection requirements related to this action have already been approved by OMB pursuant to PRA under OMB control number 2070–0012 (EPA ICR No. 574). This action would not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Collection Strategies Division, Office of Environmental Information (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

### *C. Regulatory Flexibility Act*

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that promulgation of this SNUR would not have a significant adverse economic impact on a substantial number of small entities. The rationale supporting this conclusion is discussed in this unit. The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the rule as a ''significant new use.'' Because these uses are ''new,'' based on all information currently available to EPA, it appears that no small or large entities presently engage in such activities. A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. Although some small entities may decide to pursue a significant new use in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of over 1,000 SNURs, the Agency receives on average only 5 notices per year. Of those SNUNs submitted from 2006–2008, only one appears to be from a small entity. In addition, the estimated reporting cost for submission of a SNUN (see Unit IX.) is minimal regardless of the size of the firm. Therefore, EPA

believes that the potential economic impacts of complying with this SNUR are not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** of June 2, 1997 (62 FR 29684) (FRL–5597–1), the Agency presented its general determination that final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

*D. Unfunded Mandates Reform Act*

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government would be impacted by this proposed rule. As such, EPA has determined that this proposed rule would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of sections 202, 203, 204, or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

*E. Executive Order 13132*

This action would not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999).

*F. Executive Order 13175*

This proposed rule would not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This proposed rule would not significantly nor uniquely affect the communities of Indian Tribal governments, nor would it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), do not apply to this proposed rule.

*G. Executive Order 13045*

This action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

*H. Executive Order 13211*

This proposed rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

In addition, since this action does not involve any technical standards, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), does not apply to this action.

*J. Executive Order 12898*

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

**List of Subjects in 40 CFR Part 721**

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 16, 2011.

**Wendy C. Hamnett,**

*Director, Office of Pollution Prevention and Toxics.*

Therefore, it is proposed that 40 CFR part 721 be amended as follows:

## PART 721—[AMENDED]

1. The authority citation for part 721 continues to read as follows:

**Authority:** 15 U.S.C. 2604, 2607, and 2625(c).

2. Add § 721.5725 to subpart E to read as follows:

**§ 721.5725 Phenol, 2,4-dimethyl-6-(1-methylpentadecyl)-.**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as phenol, 2,4-dimethyl-6-(1-methylpentadecyl)- (PMN P–94–209; CAS No. 134701–20–5) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(2)(i) and (a)(3).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), and (e) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

[FR Doc. 2011–33256 Filed 12–27–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 721

**[EPA–HQ–OPPT–2010–1075; FRL–9329–4]**

**RIN 2070–AB27**

## Proposed Significant New Use Rules on Certain Chemical Substances

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing significant new use rules (SNURs) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for the chemical substances rutile, tin zinc, calcium-doped (CAS No. 389623–01–2) and rutile, tin zinc, sodium-doped (CAS No. 389623–07–8) which were the subject of premanufacture notices (PMNs P–06–36 and P–06–37) and TSCA section 5(e) consent orders issued by EPA. The proposed SNURs on these substances, which are based on and consistent with the provisions of the underlying consent orders, would designate as a significant new use the absence of the protective measures required in the consent orders. This action would require persons who intend to manufacture, import, or process either of the chemical substances for an activity that is designated as a significant new use by this proposed rule to notify EPA at least 90 days before commencing that activity. The required notification would provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit the activity before it occurs.

**DATES:** Comments must be received on or before January 27, 2012.

**ADDRESSES:** Submit your comments, identified by docket identification (ID)

number EPA–HQ–OPPT–2010–1075, by one of the following methods:

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

• *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2010–1075. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPPT–2010–1075. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or email. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:** *For technical information contact:* Kenneth Moss, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–9232; email address: moss.kenneth@epa.gov.

*For general information contact:* The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA–Hotline@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

You may be potentially affected by this action if you manufacture, import, process, or use the chemical substances contained in this proposed rule. Potentially affected entities may include, but are not limited to:

• Manufacturers, importers, or processors of one or more subject chemical substances (NAICS codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in § 721.5. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements promulgated at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. Importers of chemicals subject to a final SNUR must certify their compliance with the SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) (see § 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

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

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

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

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

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

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

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

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

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

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

## II. Background

### *A. What action is the agency taking?*

EPA is proposing significant new use rules (SNURs) under section 5(a)(2) of TSCA for two chemical substances which were the subject of PMNs and TSCA section 5(e) consent orders. The two chemical substances are identified as rutile, tin zinc, calcium-doped (PMN P–06–36; CAS No. 389623–01–2) and rutile, tin zinc, sodium-doped (PMN P–06–37; CAS No. 389623–07–8). The proposed SNUR on these substances are based on and consistent with the provisions in the underlying consent orders. The proposed SNURs designate as a significant new use the absence of the protective measures required in the corresponding consent orders. These SNURs would require persons who intend to manufacture, import, or process either of these chemical substances for an activity that is designated as a significant new use to notify EPA at least 90 days before commencing that activity.

In the **Federal Register** of October 5, 2011 (76 FR 61566) (FRL–8880–2), EPA issued direct final SNURs on these two chemical substances in accordance with the procedures at § 721.160(c)(3)(i). EPA received notice of intent to submit adverse comments on these SNURs. Therefore, as required by § 721.160(c)(3)(ii), in the **Federal Register** of December 5, 2011 (76 FR 75794) (FRL–9329–5), EPA withdrew the direct final SNURs and is now issuing this proposed rule on the two chemical substances. The record for the direct final SNURs on these substances was established as docket EPA–HQ–OPPT–2010–1075. That record includes information considered by the Agency in developing the direct final rule and the notice of intent to submit adverse comments.

### *B. What is the agency's authority for taking this action?*

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including the four bulleted TSCA section 5(a)(2) factors listed in Unit III. Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1)(B) requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture, import, or process the chemical substance for that use. Persons who must report are described in § 721.5.

### *C. Applicability of General Provisions*

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the rule. Provisions relating to user fees appear at 40 CFR part 700. According to § 721.1(c), persons subject to these SNURs must comply with the same notice requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A). In particular, these requirements include the information submission requirements of TSCA section 5(b) and 5(d)(1), the exemptions authorized by TSCA section 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA may take regulatory action under TSCA section 5(e), 5(f), 6, or 7 to control the activities for which it has received the SNUN. If EPA does not take action, EPA is required under TSCA section 5(g) to explain in the **Federal Register** its reasons for not taking action.

## III. Significant New Use Determination

Section 5(a)(2) of TSCA states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In addition to these factors enumerated in TSCA section 5(a)(2), the statute authorizes EPA to consider any other relevant factors.

To determine what would constitute a significant new use for the two chemical substances that are the subject of these proposed SNURs, EPA considered relevant information about the toxicity of the chemical substances, likely human exposures and environmental releases associated with possible uses, taking into consideration the four bulleted TSCA section 5(a)(2) factors listed in this unit.

## IV. Substances Subject to This Proposed Rule

EPA is proposing to establish significant new use and recordkeeping requirements for two chemical substances in 40 CFR part 721, subpart E. In this unit, EPA provides the following information for each chemical substance:

- PMN number.
- Chemical name.
- Chemical Abstracts Service (CAS) number.
- Basis for the TSCA section 5(e) consent order.
- Toxicity concerns.
- Tests recommended by EPA to provide sufficient information to evaluate the chemical substance (see Unit VII. for more information).
- CFR citation assigned in the regulatory text section of this proposed rule.

This proposed rule concerns two PMN substances that are subject to ''risk-based'' consent orders under TSCA section 5(e)(1)(A)(ii)(I). Those consent orders require protective measures to limit exposures or otherwise mitigate the potential unreasonable risk. The so-called ''5(e) SNURs'' on these PMN substances are promulgated pursuant to § 721.160, and are based on and consistent with the provisions in the underlying consent orders. The 5(e) SNURs designate as a ''significant new use'' the absence of the protective measures required in the corresponding consent orders.

### *PMN Numbers P–06–36 and P–06–37*

*Chemical names:* (P–06–36) Rutile, tin zinc, calcium-doped and (P–06–37) Rutile, tin zinc, sodium-doped.

*CAS numbers:* (P–06–36) 389623–01–2 and (P–06–37) 389623–07–8.

*Effective date of TSCA section 5(e) consent order:* February 17, 2009.

*Basis for TSCA section 5(e) consent order:* The PMN states that the substances will be used as colorants for

polymers and industrial coatings. The order was issued under TSCA sections 5(e)(1)(A)(i) and 5(e)(1)(A)(ii)(I) based on a finding that the substances may present an unreasonable risk of injury to human health. To protect against these risks, the consent order requires: Use of personal respiratory equipment, including a National Institute for Occupational Safety and Health (NIOSH)-certified respirator with an Assigned Protection Factor (APF) of at least 10, or compliance with a New Chemical Exposure Limit (NCEL) of 1.5 mg/m$^3$ as an 8-hour time weighted average; establishment of a hazard communication program; and restricts the company from manufacturing the PMN substances with a d10 particle size less than 100 nanometers, where d10 particle size presents the particle size, as determined by laser light scattering, at which 10 percent by weight of the substance measured is smaller; and corresponding recordkeeping. The SNUR designates as a ''significant new use'' the absence of these protective measures.

*Toxicity concern:* Based on structural activity relationship analysis derived from test data on structurally similar respirable, poorly soluble particulates, the PMN substances may cause lung overload and fibrosis in workers exposed to the PMN substances by the inhalation route.

*Recommended testing:* EPA has determined that the following test would help characterize the human health effects of the PMN substances: A 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465) in rats. The testing should include a 60-day recovery period to assess the progression or regression of any lesions; and include special attention to histopathology (inflammation and cell proliferation) of the lung tissues and to various parameters of the bronchoalveolar lavage fluid (BALF), e.g., marker enzyme activities, total protein content, total cell count, cell differential, and cell viability. The order does not require submission of the aforementioned information at any specified time or production volume. However, the order's restrictions on manufacturing, import, processing, distribution in commerce, use, and disposal of the PMN substances will remain in effect until the order is modified or revoked by EPA based on submission of that or other relevant information.

*CFR citations:* 40 CFR 721.10230 (P–06–36) and 40 CFR 721.10231 (P–06–37).

## V. Rationale and Objectives of the Proposed Rule

### *A. Rationale*

During review of the PMNs submitted for these two chemical substances, EPA concluded that regulation was warranted under TSCA section 5(e), pending the development of information sufficient to make reasoned evaluations of the human health effects of the chemical substances. The basis for such findings is outlined in Unit IV. Based on these findings, TSCA section 5(e) consent orders requiring the use of appropriate exposure controls were negotiated with the PMN submitters. The proposed SNUR provisions for these chemical substances are consistent with the provisions of the TSCA section 5(e) consent orders. These proposed SNURs are issued pursuant to § 721.160.

### *B. Objectives*

EPA is proposing these SNURs for specific chemical substances that have undergone premanufacture review because the Agency wants to achieve the following objectives with regard to the significant new uses designated in this proposed rule:

- EPA would receive notice of any person's intent to manufacture, import, or process a listed chemical substance for the described significant new use before that activity begins.
- EPA would have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing, importing, or processing a listed chemical substance for the described significant new use.
- EPA would be able to regulate prospective manufacturers, importers, or processors of a listed chemical substance before the described significant new use of that chemical substance occurs, provided that regulation is warranted pursuant to TSCA sections 5(e), 5(f), 6, or 7.
- EPA would ensure that all manufacturers, importers, and processors of the same chemical substance that is subject to a TSCA section 5(e) consent order are subject to similar requirements.

Issuance of a SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Inventory. Guidance on how to determine if a chemical substance is on the TSCA Inventory is available on the Internet at *http://www.epa.gov/opptintr/existingchemicals/pubs/tscainventory/index.html.*

## VI. Applicability of the Proposed Rule to Uses Occurring Before Effective Date of the Final Rule

To establish a significant ''new'' use, EPA must determine that the use is not ongoing. The chemical substances subject to this proposed rule have undergone premanufacture review and are subject to TSCA section 5(e) consent orders. The PMN submitters are prohibited by these TSCA section 5(e) consent orders from undertaking activities which EPA is proposing as significant new uses. EPA solicits comments on whether any of the uses proposed as significant new uses are ongoing.

As discussed in the **Federal Register** issue of April 24, 1990 (55 FR 17376), EPA has decided that the intent of TSCA section 5(a)(1)(B) is best served by designating a use as a significant new use as of the date of publication of the proposed rule rather than as of the effective date of the final rule. If uses begun after publication were considered ongoing rather than new, it would be difficult for EPA to establish SNUR notice requirements because a person could defeat the SNUR by initiating the significant new use before the rule became final, and then argue that the use was ongoing before the effective date of the final rule. Thus, persons who begin commercial manufacture, import, or processing activities with the chemical substances regulated through this proposed SNUR must cease any such activity before the effective date of the rule, if and when finalized. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires.

EPA has promulgated provisions to allow persons to comply with this proposed SNUR before the effective date. If a person meets the conditions of advance compliance under § 721.45(h), the person is considered exempt from the requirements of the SNUR.

## VII. Test Data and Other Information

EPA recognizes that TSCA section 5 does not require developing any particular test data before submission of a SNUN. The two exceptions are:

1. Development of test data is required where the chemical substance subject to the SNUR is also subject to a test rule under TSCA section 4 (see TSCA section 5(b)(1)).

2. Development of test data may be necessary where the chemical substance has been listed under TSCA section 5(b)(4) (see TSCA section 5(b)(2)).

In the absence of a TSCA section 4 test rule or a TSCA section 5(b)(4)

listing covering the chemical substance, persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (see § 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. In cases where EPA issued a TSCA section 5(e) consent order that requires or recommends certain testing, Unit IV. describes those tests. Descriptions of tests are provided for informational purposes. EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol selection and test reporting. To access the harmonized test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines.''

In the TSCA section 5(e) consent orders for the two chemical substances regulated under this proposed rule, EPA has established restrictions in view of the lack of data on the potential human health risks that may be posed by the significant new uses or increased exposure to the chemical substances. These restrictions will not be removed until EPA determines that the unrestricted use will not present an unreasonable risk of injury or result in significant or substantial exposure or environmental release. This determination is usually made based on the results of the required or recommended toxicity tests.

The recommended tests specified in Unit IV. may not be the only means of addressing the potential risks of the chemical substance. However, submitting a SNUN without any test data may increase the likelihood that EPA will take action under TSCA section 5(e), particularly if satisfactory test results have not been obtained from a prior PMN or SNUN submitter. EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substances.
- Potential benefits of the chemical substances.
- Information on risks posed by the chemical substances compared to risks posed by potential substitutes.

## VIII. SNUN Submissions

According to § 721.1(c), persons submitting a SNUN must comply with the same notice requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in § 720.50. SNUNs must be submitted on EPA Form No. 7710–25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in §§ 721.25 and 720.40. E–PMN software is available electronically at *http://www.epa.gov/opptintr/newchems*.

## IX. Economic Analysis

EPA has evaluated the potential costs of establishing SNUN requirements for potential manufacturers, importers, and processors of the chemical substances during the development of the direct final rule. EPA's complete Economic Analysis is available in the docket under docket ID number EPA–HQ–OPPT–2010–1075.

## X. Statutory and Executive Order Reviews

### *A. Executive Order 12866*

This proposed rule would establish SNURs for two chemical substances that were the subject of PMNs and TSCA section 5(e) consent orders. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993).

### *B. Paperwork Reduction Act*

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* an Agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable. EPA would amend the table in 40 CFR part 9 to list the OMB approval number for the information collection requirements contained in this proposed rule. This listing of the OMB control numbers and their subsequent codification in the CFR satisfies the display requirements of PRA and OMB's implementing regulations at 5 CFR part 1320. This Information Collection Request (ICR) was previously subject to public notice and comment prior to OMB approval, and given the technical nature of the table, EPA finds that further notice and comment to amend it is unnecessary. As a result, EPA finds that there is ''good cause'' under section 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), to amend this table without further notice and comment.

The information collection requirements related to this action have already been approved by OMB pursuant to PRA under OMB control number 2070–0012 (EPA ICR No. 574). This action would not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Collection Strategies Division, Office of Environmental Information (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

### *C. Regulatory Flexibility Act*

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that promulgation of this SNUR would not have a significant adverse economic impact on a substantial number of small entities. The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the final rule as a ''significant new use.'' Because these uses are ''new,'' based on all information currently available to EPA, it appears that no small or large entities presently engage in such activities. A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. Although some small entities may decide to pursue a significant new use in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of SNURs covering over 1,000 chemicals substances, the Agency receives only a handful of

SNUNs per year. For example, the number of SNUNs was four in Federal fiscal year (FY) 2005, eight in FY 2006, six in FY 2007, eight in FY 2008, and seven in FY 2009. During this 5-year period, three small entities submitted a SNUN. In addition, the estimated reporting cost for submission of a SNUN (see Unit VIII.) is minimal regardless of the size of the firm. Therefore, EPA believes that the potential economic impacts of complying with those SNURs are not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** issue of June 2, 1997 (62 FR 29684) (FRL–5597–1), the Agency presented its general determination that final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

*D. Unfunded Mandates Reform Act*

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government would be impacted by this proposed rule. As such, EPA has determined that this proposed rule would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any affect on small governments subject to the requirements of sections 202, 203, 204, or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

*E. Executive Order 13132*

This action would not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999).

*F. Executive Order 13175*

This proposed rule would not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This proposed rule would not significantly nor uniquely affect the communities of Indian Tribal governments, nor would it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), do not apply to this proposed rule.

*G. Executive Order 13045*

This action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

*H. Executive Order 13211*

This proposed rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

In addition, since this action does not involve any technical standards, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), does not apply to this action.

*J. Executive Order 12898*

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

**List of Subjects in 40 CFR Part 721**

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 16, 2011.

**Wendy C. Hamnett,**

*Director, Office of Pollution Prevention and Toxics.*

Therefore, it is proposed that 40 CFR part 721 be amended as follows:

## PART 721—[AMENDED]

1. The authority citation for part 721 continues to read as follows:

**Authority:** 15 U.S.C. 2604, 2607, and 2625(c).

2. Add § 721.10230 to subpart E to read as follows:

**§ 721.10230 Rutile, tin zinc, calcium-doped.**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as rutile, tin zinc, calcium-doped (PMN P–06–36; CAS No. 389623–01–2) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance that have been incorporated into a polymer, glass, dispersion, cementitious matrix, or a similar incorporation.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(4), (a)(5), (a)(6)(i), (b) (concentration set at 1.0 percent), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirators with an assigned protection factor (APF) of 10 meet the minimum requirements for § 721.63(a)(5):

(A) NIOSH-certified air-purifying, tight-fitting half-face respirator equipped with N100 (if oil aerosols absent), R100, or P100 filters;

(B) NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N100 (if oil aerosols absent), R100, or P100 filters;

(C) NIOSH-certified powered air-purifying respirator equipped with a loose- fitting hood or helmet and high efficiency particulate air (HEPA) filters;

(D) NIOSH-certified powered air-purifying respirator equipped with a tight-fitting facepiece (either half-face or full-face) and HEPA filters; or

(E) NIOSH-certified supplied-air respirator operated in pressure demand or continuous flow mode and equipped with a hood or helmet, or tight-fitting facepiece (either half-face or full-face).

(*1*) As an alternative to the respiratory requirements listed in paragraph (a)(2)(i), a manufacturer, importer, or processor may choose to follow the new chemical exposure limit (NCEL) provisions listed in the TSCA section 5(e) consent order for these substances. The NCEL is 1.5 mg/m$^3$ as an 8-hour time-weighted-average for both chemical substances combined. Persons who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will receive NCELs provisions comparable to those contained in the corresponding section 5(e) consent order.

(*2*) [Reserved]

(ii) *Hazard communication program.* Requirements as specified in § 721.72

(a), (b), (c), (d), (e) (concentration set at 1.0 percent), (f), (g)(1)(ii), (g)(2)(ii), (g)(2)(iv) (use respiratory protection or maintain workplace airborne concentrations at or below an 8-hour time-weighted average of 1.5 mg/m$^3$), and (g)(5).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) (manufacture of the substances with a particle size less than 100 nanometers, where d10 particle size presents the particle size, as determined by laser light scattering, at which 10 percent by weight of the substance measured is smaller).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (f), (g), (h), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

3. Add § 721.10231 to subpart E to read as follows:

**§ 721.10231 Rutile, tin zinc, sodium-doped.**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as rutile, tin zinc, sodium-doped (PMN P–06–37; CAS No. 389623–07–8) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance that have been incorporated into a polymer, glass, dispersion, cementitious matrix, or a similar incorporation.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(4), (a)(5), (a)(6)(i), (b) (concentration set at 1.0 percent), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirators with an assigned protection factor (APF) of 10 meet the minimum requirements for § 721.63(a)(5):

(A) NIOSH-certified air-purifying, tight-fitting half-face respirator equipped with N100 (if oil aerosols absent), R100, or P100 filters;

(B) NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N100 (if oil aerosols absent), R100, or P100 filters;

(C) NIOSH-certified powered air-purifying respirator equipped with a loose-fitting hood or helmet and high efficiency particulate air (HEPA) filters;

(D) NIOSH-certified powered air-purifying respirator equipped with a tight-fitting facepiece (either half-face or full-face) and HEPA filters; or

(E) NIOSH-certified supplied-air respirator operated in pressure demand or continuous flow mode and equipped with a hood or helmet, or tight-fitting facepiece (either half-face or full-face).

(*1*) As an alternative to the respiratory requirements listed in paragraph (a)(2)(i), a manufacturer, importer, or processor may choose to follow the new chemical exposure limit (NCEL) provisions listed in the TSCA section 5(e) consent order for these substances. The NCEL is 1.5 mg/m$^3$ as an 8-hour time-weighted-average for both chemical substances combined. Persons who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will receive NCELs provisions comparable to those contained in the corresponding section 5(e) consent order.

(*2*) [Reserved]

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at 1.0 percent), (f), (g)(1)(ii), (g)(2)(ii), (g)(2)(iv) (use respiratory protection or maintain workplace airborne concentrations at or below an 8-hour time-weighted average of 1.5 mg/m$^3$), and (g)(5).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) (manufacture of the substances with a particle size less than 100 nanometers, where d10 particle size presents the particle size, as determined by laser light scattering, at which 10 percent by weight of the substance measured is smaller).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (f), (g), (h), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

[FR Doc. 2011–33255 Filed 12–27–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 721

[EPA–HQ–OPPT–2010–0279; FRL–9326–2]

RIN 2070–AB27

## Proposed Significant New Use Rules on Certain Chemical Substances

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing significant new use rules (SNURs) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for 17 chemical substances which were the subject of premanufacture notices (PMNs). Fifteen of these chemical substances are subject to TSCA section 5(e) consent orders issued by EPA. This action would require persons who intend to manufacture, import, or process any of these 17 chemical substances for an activity that is designated as a significant new use by this proposed rule to notify EPA at least 90 days before commencing that activity. The required notification would provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it occurs.

**DATES:** Comments must be received on or before January 27, 2012.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2010–0279, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East, Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2010–0279. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPPT–2010–0279. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://*

*www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or email. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:** *For technical information contact:* Kenneth Moss, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–9232; email address: *moss.kenneth@epa.gov.*

*For general information contact:* The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA–Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

You may be potentially affected by this action if you manufacture, import, process, or use the chemical substances contained in this proposed rule. Potentially affected entities may include, but are not limited to:

- Manufacturers, importers, or processors of one or more subject chemical substances (NAICS codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in § 721.5. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements promulgated at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. Importers of chemicals subject to a final SNUR must certify their compliance with the SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) (see § 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

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

1. Submitting CBI. Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for preparing your comments. When submitting comments, remember to:

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

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

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

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

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

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

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

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

## II. Background

### *A. What action is the agency taking?*

These proposed SNURs would, when finalized, require persons to notify EPA at least 90 days before commencing the manufacture, import, or processing of the specific chemical substances identified in the PMNs for any activity

designated by these SNURs as a significant new use. Receipt of such notices allows EPA to assess risks that may be presented by the intended uses and, if appropriate, to regulate the proposed use before it occurs. Additional rationale and background to these rules are more fully set out in the preamble to EPA's first direct final SNUR published in the **Federal Register** of April 24, 1990 (55 FR 17376). Consult that preamble for further information on the objectives, rationale, and procedures for SNURs and on the basis for significant new use designations, including provisions for developing test data.

*B. What is the agency's authority for taking this action?*

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including the TSCA section 5(a)(2) factors, listed in Unit III. of this document. Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1)(B) and 40 CFR part 721 requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture, import, or process the chemical substance for that use. Persons who must report are described in § 721.5.

*C. Applicability of General Provisions*

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the final rule. Provisions relating to user fees appear at 40 CFR part 700.

According to § 721.1(c), persons subject to these SNURs must comply with the same notice requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A). In particular, these requirements include the information submission requirements of TSCA section 5(b) and 5(d)(1), the exemptions authorized by TSCA section 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA may take regulatory action under TSCA section 5(e), 5(f), 6, or 7 to control the activities for which it has received the SNUN. If EPA does not take action, EPA is required under TSCA section 5(g) to explain in the **Federal Register** its reasons for not taking action.

## III. Significant New Use Determination

Section 5(a)(2) of TSCA states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In addition to these factors enumerated in TSCA section 5(a)(2), the statute authorized EPA to consider any other relevant factors.

To determine what would constitute a significant new use for the 17 chemical substances that are the subject of these proposed SNURs, EPA considered relevant information about the toxicity of the chemical substances, likely human exposures and environmental releases associated with possible uses, taking into consideration the four bulleted TSCA section 5(a)(2) factors listed in this unit.

## IV. Substances Subject to this Proposed Rule

EPA is proposing to establish significant new use and recordkeeping requirements for 17 chemical substances in 40 CFR part 721, subpart E. In this unit, EPA provides the following information for each chemical substance:

- PMN number.
- Chemical name (generic name, if the specific name is claimed as CBI).
- Chemical Abstracts Service (CAS) number (if assigned for non-confidential chemical identities).
- Basis for the TSCA section 5(e) consent order or, for non-section 5(e) SNURs, the basis for the SNUR (i.e., SNURs without TSCA section 5(e) consent orders).
- Toxicity concerns.
- Tests recommended by EPA to provide sufficient information to evaluate the chemical substance (see Unit VIII. for more information).
- CFR citation assigned in the regulatory text section of this proposed rule.

This proposed rule includes 7 PMN substances whose reported chemical names include the term ''carbon nanotube'' or ''CNT''. Because of a lack of established nomenclature for carbon nanotubes, the TSCA Inventory names for carbon nanotubes are currently in generic form, e.g., carbon nanotube (CNT), multi-walled carbon nanotube (MWCNT), double-walled carbon nanotube (DWCNT), or single-walled carbon nanotube (SWCNT). EPA uses the specific structural characteristics provided by the PMN submitter to more specifically characterize the Inventory listing for an individual CNT. All submitters of new chemical notices for CNTs have claimed those specific structural characteristics as CBI. EPA is publishing the generic chemical name along with the PMN number to identify that a distinct chemical substance was the subject of the PMN without revealing the confidential chemical identity of the PMN substance. Confidentiality claims preclude a more detailed description of the identity of these CNTs. If an intended manufacturer, importer, or processor of CNTs is unsure of whether its CNTs are subject to this proposed SNUR or any other SNUR, the company can either contact EPA or obtain a written determination from EPA pursuant to the bona fide procedures at § 721.11. EPA is using the specific structural characteristics, for all CNTs submitted as new chemical substances under TSCA, to help develop standard nomenclature for placing these chemical substances on the TSCA Inventory. EPA has compiled a generic list of those structural characteristics entitled ''Material Characterization of Carbon Nanotubes for Molecular Identity (MI) Determination & Nomenclature.'' A copy of this list is available in the docket for these proposed SNURs under docket ID number EPA–HQ–OPPT–2010–0279. If EPA develops a more specific generic chemical name for these materials, that name will be made publicly available.

The regulatory text section of this proposed rule specifies the activities designated as significant new uses. Certain new uses, including exceeding production volume limits (i.e., limits on manufacture and importation volume) and other uses designated in this rule, may be claimed as CBI.

This proposed rule includes 15 PMN substances for which EPA determined, pursuant to TSCA section 5(e), that uncontrolled manufacture, import, processing, distribution in commerce, use, and disposal may present an unreasonable risk of injury to human health or the environment. Accordingly, these substances are subject to ''risk-based'' consent orders under TSCA section 5(e)(1)(A)(ii)(I). Those consent

orders require protective measures to limit exposures or otherwise mitigate the potential unreasonable risk. The so-called ''5(e) SNURs'' on these PMN substances are proposed pursuant to § 14;721.160, and are based on and consistent with the provisions in the underlying consent orders. The 5(e) SNURs designate as a ''significant new use'' the absence of the protective measures required in the corresponding consent orders.

Where EPA has determined that the PMN substance may present an unreasonable risk of injury to human health via inhalation exposure, the underlying TSCA section 5(e) consent order usually requires, among other things, that potentially exposed employees wear specified respirators unless actual measurements of the workplace air show that air-borne concentrations of the PMN substance are below a New Chemical Exposure Limit (NCEL) that is established by EPA to provide adequate protection to human health. In addition to the actual NCEL concentration, the comprehensive NCELs provisions in TSCA section 5(e) consent orders, which are modeled after Occupational Safety and Health Administration (OSHA) Permissible Exposure Limits (PELs) provisions, include requirements addressing performance criteria for sampling and analytical methods, periodic monitoring, respiratory protection, and recordkeeping. However, no comparable NCEL provisions exist in 40 CFR part 721, subpart B, for SNURs. Therefore, for these cases, the individual SNURs in 40 CFR part 721, subpart E, will state that persons subject to the SNUR who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. EPA expects that persons whose § 721.30 requests to use the NCELs approach for SNURs are approved by EPA will be required to comply with NCELs provisions that are comparable to those contained in the corresponding TSCA section 5(e) consent order for the same chemical substance.

This proposed rule also includes SNURs on 2 PMN substances that are not subject to a consent order under TSCA section 5(e). In these cases, for a variety of reasons, EPA did not find that the use scenario described in the PMN met the criteria set forth under TSCA section 5(e). However, EPA does believe that certain changes from the use scenario described in these PMNs could result in increased exposures, and therefore should be designated a significant new use. These so-called ''non-5(e) SNURs'' are being proposed pursuant to § 721.170. EPA has determined that every activity designated as a ''significant new use'' in all non-5(e) SNURs issued under § 721.170 satisfies the two requirements stipulated in § 721.170(c)(2), i.e., these significant new use activities, ''(i) are different from those described in the premanufacture notice for the substance, including any amendments, deletions, and additions of activities to the premanufacture notice, and (ii) may be accompanied by changes in exposure or release levels that are significant in relation to the health or environmental concerns identified'' for the PMN substance.

**PMN Number P–04–244**

*Chemical name:* Ethane, 2-bromo-1, 1-difluoro-.

*CAS number:* 359–07–9.

*Effective date of the TSCA section 5(e) consent order:* February 16, 2010.

*Basis for the TSCA section 5(e) consent order:* The PMN states that the substance will be used as a chemical intermediate for an herbicide. The order was issued under TSCA sections 5(e)(1)(A)(i) and 5(e)(1)(A)(ii)(I) based on a finding that this substance may present an unreasonable risk of injury to human health. To protect against this risk, the consent order: (1) Requires use of personal protective equipment including impervious gloves and a National Institute for Occupational Safety and Health (NIOSH)-certified supplied-air respirator operated in pressure demand or other positive pressure mode and equipped with a tight-fitting full facepiece with an assigned protection factor (APF) of at least 75, or compliance with a NCEL of 0.5 mg/m$^3$ as an 8-hour time-weighted average; (2) requires establishment of a hazard communication program; (3) prohibits use of the PMN substance other than as a chemical intermediate for an herbicide; and (4) requires corresponding recordkeeping. The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

*Toxicity concern:* Based on test data on analogous structurally similar alkyl halides, EPA identified health concerns for systemic toxicity, developmental toxicity, reproductive toxicity, and cancer in workers exposed to the PMN substance by the inhalation route.

*Recommended testing:* EPA has determined that a carcinogenicity test (OPPTS Test Guideline 870.4200) in rats by the inhalation route would help characterize the human health effects of the PMN substance. The PMN submitter has agreed not to exceed a particular production volume limit without performing this test.

*CFR citation:* 40 CFR 721.10265.

**PMN Numbers P–08–733 and P–08–734**

*Chemical names:* Multi-walled carbon nanotubes (generic) (P–08–733 and P–08–734).

*CAS numbers:* Not available.

*Effective date of the TSCA section 5(e) consent order:* July 26, 2010.

*Basis for the TSCA section 5(e) consent order:* The PMNs state that the generic (non-confidential) uses of the substances will be as: Reinforcement for composites, conductive additive for composites, and conductive additive for batteries. The order was issued under TSCA sections 5(e)(1)(A)(i) and 5(e)(1)(A)(ii)(I) based on a finding that these substances may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the consent order: (1) Requires use of personal protective equipment including gloves and chemical protective clothing, and a NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter with an APF of at least 50; (2) prohibits the domestic manufacture of the PMN substances; (3) restricts use of the PMN substances to those uses specified in the consent order; prohibits the release of the PMN substances into the waters of the United States; and (4) requires corresponding recordkeeping. The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

*Toxicity concern:* Based on test data for analogous chemicals, including other carbon nanotubes, there are concerns for pulmonary toxicity, fibrosis, carcinogenicity, mutagenicity, and immunotoxicity of the PMN substances. Based on test data on respirable, poorly soluble particulates, EPA has concerns for lung effects. There are also data suggesting that pulmonary deposition of some nanoscale materials, including carbon nanotubes in the agglomerated form, may induce cardiovascular toxicity when these nanoscale materials are inhaled. The major health concerns are for potential pulmonary toxicity, fibrosis, and cancer to workers exposed via inhalation. Sublethal effects have been noted for some carbon nanoscale substances in fish at levels as low as 100 parts per billion (ppb). Further, studies need to be conducted before EPA can determine a concentration of concern. Such studies must measure actual concentrations of carbon nanotubes and control for the effects of contaminants, solvents, and physical factors such as blockage of gills or intestines.

*Recommended testing:* EPA has determined that the following tests would help characterize possible effects of the substances. The PMN submitter has agreed not to exceed a specified production limit without performing these tests on one of the PMN substances: A 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465 or Organisation for Economic Co-operation and Development (OECD) Test Guideline 413) with a post-exposure observation period of up to 3 months, bronchoalveolar lavage fluid (BALF) analysis, a determination of cardiovascular toxicity (clinically-based blood/plasma protein analyses), and histopathology of the heart and certain material characterization data.

*CFR citation:* 40 CFR 721.10266.

**PMN Numbers P–09–54, P–09–55, P–09–56, and P–09–57**

*Chemical names:* (P–09–54) [5,6]Fullerene-C60-Ih; (P–09–55) [5,6]Fullerene-C70-D5h(6); (P–09–56) [5,6]Fullerene-C84-D2; and (P–09–57) [5,6]Fullerene-C84-D2d.

*CAS numbers:* (P–09–54) 99685–96–8; (P–09–55) 115383–22–7; (P–09–56) 145809–19–4; and (P–09–57) 145809–20–7.

*Effective date of the TSCA section 5(e) consent order:* August 16, 2010.

*Basis for the TSCA section 5(e) consent order:* The PMN states that uses of the substances will be as: An intermediate compound for use in producing downstream products that will in turn be used in organic electronic devices and an additive to improve mechanical properties or conductivity; a compound used to improve the mechanical properties of rubbers, plastics, and lubricants; and a compound for use as an additive to increase the conductivity of materials. The order was issued under TSCA sections 5(e)(1)(A)(i) and 5(e)(1)(A)(ii)(I) based on a finding that these substances may present an unreasonable risk of injury to human health. To protect against this risk, the consent order: (1) Requires use of personal protective equipment including gloves and protective clothing impervious to the chemical substances and a NIOSH-certified full-face respirator with N–100 cartridges; (2) restricts use of the PMN substances to those uses specified in the consent order; (3) prohibits release of the PMN substances into the waters of the United States; and (4) requires corresponding recordkeeping. The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

*Toxicity concern:* Based on test data on poorly soluble particulates, including some carbon-based nano-sized chemicals, and test data correlating lung irritation to particle size, EPA has concerns for lung effects from inhalation exposure.

*Recommended testing:* EPA has determined that the following tests would help characterize possible effects of the substances. The PMN submitter has agreed not to exceed a particular production limit without performing these tests on all of the PMN substances: Dry particle size distribution by count for each PMN substance in a form which has the highest content of particles smaller than 10 microns as manufactured, processed, or used in the workplace at sites controlled by the PMN submitter (the method shall be scanning transmission electron microscopy, using a dry particle counting method, with a resolution of less than 1 nanometer and with no counting after dispersion in a solution and evaporating solvent) and dustiness (EN 15051 method).

EPA has determined that the results of the following tests would help characterize the human health effects of the PMN substance. The order does not require the submission of the following information at any specified time or production volume: 90-day inhalation toxicity (OPPTS Test Guideline 870.3465 or OECD Test Guideline 413); dispersion and solubility in fresh water without the use of dispersants or solvents (Refs. 1 and 2). However, the order's restrictions on manufacture, import, processing, distribution in commerce, use, and disposal of the PMN substance will remain in effect until the order is modified or revoked by EPA based on submission of that or other relevant information.

*CFR citations:* 40 CFR 721.10267 (P–09–54); 40 CFR 721.10268 (P–09–55); 40 CFR 721.10269 (P–09–56); and 40 CFR 721.10270 (P–09–57).

**PMN Numbers P–09–142, P–09–143, P–09–144, and P–09–416**

*Chemical names:* (P–09–142 and Chemical A in P–09–416) 3′-H-cyclopropa[1,9][5,6]fullerene-C60-Ih-3′-butanoic acid, 3′-phenyl-, methyl ester; (P–09–143 and Chemical B in P–09–416) 3′H-cyclopropa[8,25][5,6]fullerene-C70-D5h(6)-3′-butanoic acid, 3′-phenyl-, methyl ester; and (P–09–144 and Chemical C in P–09–416) 3′H-cyclopropa[7,22][5,6]fullerene-C70-D5h(6)-3′-butanoic acid, 3′-phenyl-, methyl ester.

*CAS numbers:* (P–09–142 and Chemical A in P–09–416) 160848–22–6; (P–09–143 and Chemical B in P–09–416) 609771–63–3; and (P–09–144 and Chemical C in P–09–416) 1051371–21–1.

*Effective date of the TSCA section 5(e) consent orders:* (P–09–142, P–09–143, and P–09–144) November 1, 2010 and (P–09–416) October 28, 2010.

*Basis for the TSCA section 5(e) consent orders:* The PMNs state that the uses of the substances will be: As a compound used in fabrication and/or operation of electronic devices that enables or improves the conductivity, efficiency, voltage, or other characteristics of the device, and a compound that improves the mechanical properties of lubricants and plastics (P–09–142, P–09–143, and P–09–144), and as acceptor molecules in a polymer coating in an encapsulated organic photovoltaic electronic device (P–09–416). The orders were issued under TSCA sections 5(e)(1)(A)(i) and 5(e)(1)(A)(ii)(I) based on a finding that these substances may present an unreasonable risk of injury to human health. To protect against these risks, the consent orders: (1) Require the use of personal protective equipment including impervious gloves and chemical protective clothing and use of a NIOSH-certified air-purifying tight-fitting full-face respirator equipped with N–100 cartridges; (2) restrict use of the PMN substances to those uses specified in their respective consent orders; (3) prohibit release of the PMN substances into the waters of the United States; and (4) require corresponding recordkeeping. The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

*Toxicity concern:* Based on test data on poorly soluble particulates, including some carbon-based nano-sized chemicals, and test data correlating lung irritation to particle size, EPA has concerns for lung effects from inhalation exposure.

*Recommended testing:* EPA has determined that the following tests would help characterize the human health effects of the PMN substances. The consent orders each contain two production limits. The PMN submitters have agreed not to exceed their first production limits without performing a 90-day inhalation toxicity study (OPPTS Test Guideline 870.3465 or OECD Test Guideline 413) in rats with a post exposure observation period of up to 3 months, including a BALF analysis, a determination of cardiovascular toxicity (clinically-based blood/plasma protein analyses), and histopathology of the heart and certain material characterization data on the test material which can be any one of these PMN substances. The PMN submitters

have also agreed not to exceed the second production limits without providing certain physical-chemical properties on each of the PMN substances.

The consent order for P–09–416 does not require the submission of the following information at any specified time or production volume: Dispersion and solubility in fresh water without the use of dispersants or solvents (Refs. 1 and 2) and daphnid chronic toxicity test (OPPTS Test Guideline 850.1300). However, the order's restrictions on manufacture, import, processing, distribution in commerce, use, and disposal of the PMN substance will remain in effect until the order is modified or revoked by EPA based on submission of that or other relevant information.

*CFR citations:* 40 CFR 721.10271 (P–09–142 and Chemical A in P–09–416); 40 CFR 721.10272 (P–09–143 and Chemical B in P–09–416); and 40 CFR 721.10273 (P–09–144 and Chemical C in P–09–416).

**PMN Number P–09–188**

*Chemical name:* Multi-walled carbon nanotubes (generic) (P–09–188).

*CAS number:* Not available.

*Effective date of the TSCA section 5(e) consent order:* December 14, 2010.

*Basis for the TSCA section 5(e) consent order:* The PMN states that the generic (non-confidential) use of the substance will be as an electric conductive filler to replace conventional material such as carbon black or carbon fiber in matrices such as polymer resin for conductive applications. The order was issued under TSCA sections 5(e)(1)(A)(i) and 5(e)(1)(A)(ii)(I) based on a finding that this substance may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the consent order: (1) Requires use of personal protective equipment including gloves and chemical protective clothing impervious to the PMN substance, and a NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter with an APF of at least 50; (2) prohibits domestic manufacture in the United States; (3) restricts use of the PMN substance to those uses specified in the consent order; (4) prohibits the manufacture, processing, or use of the PMN substance for commercial or consumer products, or in a consumer product; prohibits release of the PMN substance into the waters of the United States; and (5) requires corresponding recordkeeping. The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

*Toxicity concern:* Based on test data for analogous chemicals including other carbon nanotubes there are concerns for pulmonary toxicity, fibrosis, carcinogenicity, mutagenicity, and immunotoxicity of the PMN substance. Based on test data on respirable, poorly soluble particulates, EPA has concerns for lung effects. There are also data suggesting that pulmonary deposition of some nanoscale materials, including carbon nanotubes in the agglomerated form, may induce cardiovascular toxicity when these nanoscale materials are inhaled. The major health concerns are for potential pulmonary toxicity, fibrosis, and cancer to workers exposed via inhalation. Sublethal effects have been noted for some carbon nanoscale substances in fish at levels as low as 100 ppb. Further studies need to be conducted before EPA can determine a concentration of concern. Such studies must measure actual concentrations of carbon nanotubes and control for the effects of contaminants, solvents, and physical factors such as blockage of gills or intestines.

*Recommended testing:* EPA has determined that the following tests would help characterize possible effects of the PMN substance. The PMN submitter has agreed not to exceed two production volume limits specified in the order without performing these tests: A 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465 or OECD Test Guideline 413) with a post-exposure observation period of up to 3 months, a BALF analysis, determination of cardiovascular toxicity, heart histopathology, data on pulmonary deposition, and certain material characterization and physical-chemical properties on the test material(s).

The order does not require the submission at any specified time or production volume of the following exposure data on representative forms of the PMN substance: Release of the PMN substance after landfill disposal (EPA Method 1320), release of the PMN substance during burning (American Society for Testing and Materials International (ASTM) E1354–09), release of the PMN substance after exposure to sunlight (ASTM D2565–99 (2008)), and release of the PMN substance during shipping and use. However, the order's restrictions on manufacture, import, processing, distribution in commerce, use, and disposal of the PMN substance will remain in effect until the order is modified or revoked by EPA based on submission of that or other relevant information. The company may propose alternative methods, guidelines, or representative sets subject to EPA's approval.

*CFR citation:* 40 CFR 721.10274.

**PMN Number P–09–417**

*Chemical name:* Multi-walled carbon nanotubes (generic) (P–09–417).

*CAS number:* Not available.

*Effective date of the TSCA section 5(e) consent order:* March 23, 2010.

*Basis for the TSCA section 5(e) consent order:* The PMN states that the use of the substance will be as a plastics additive to improve electrical, thermal, and/or mechanical properties. The order was issued under TSCA sections 5(e)(1)(A)(i) and 5(e)(1)(A)(ii)(I) based on a finding that this substance may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the consent order: (1) Requires use of personal protective equipment including gloves and protective clothing impervious to the chemical substance and NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter with an APF of 50; (2) prohibits the domestic manufacture of the PMN substance; (3) restricts use of the PMN substance to the uses specified in the consent order; (4) prohibits use of the PMN substance in commercial or consumer products; (5) prohibits release of the PMN substance into the waters of the United States during processing and use activities; and (6) requires corresponding recordkeeping. The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

*Toxicity concern:* Based on test data for analogous chemicals including other carbon nanotubes there are concerns for pulmonary toxicity, fibrosis, carcinogenicity, mutagenicity, and immunotoxicity of the PMN substance. Based on test data on the PMN substance and respirable, poorly soluble particulates, EPA has concerns for lung effects. There are also data suggesting that pulmonary deposition of some nanoscale materials, including carbon nanotubes in the agglomerated form, may induce cardiovascular toxicity when these nanoscale materials are inhaled. The major health concerns are for potential pulmonary toxicity, fibrosis, and cancer to workers exposed via inhalation. Sublethal effects have been noted for some carbon nanoscale substances in fish at levels as low as 100 ppb. Further studies need to be conducted before EPA can determine a concentration of concern. Such studies must measure actual concentrations of carbon nanotubes and control for the

effects of contaminants, solvents, and physical factors such as blockage of gills or intestines.

*Recommended testing:* EPA has determined that the following test would help characterize the possible effects of the PMN substance. The PMN submitter has agreed not to exceed the production limit without providing certain physical/chemical properties test data. The order does not require the submission of the following information at any specified time or production volume: The results of a combined chronic toxicity/carcinogenicity testing of respirable fibrous particles test (OPPTS Test Guideline 870.8355). However, the order's restrictions on manufacture, import, processing, distribution in commerce, use, and disposal of the PMN substance will remain in effect until the order is modified or revoked by EPA based on submission of that or other relevant information.

*CFR citation:* 40 CFR 721.10275.

**PMN Numbers P–10–39 and P–10–40**

*Chemical names:* Multi-walled carbon nanotubes (generic) (P–10–39) and single-walled and multi-walled carbon nanotubes (generic) (P–10–40).

*CAS numbers:* (P–10–39) Not available and (P–10–40) not available.

*Effective date of the TSCA section 5(e) consent order:* August 30, 2010.

*Basis for the TSCA section 5(e) consent order:* The PMN states that the generic (non-confidential) use of the substances will be as composite structures for defense, electronic, and aerospace applications. The order was issued under TSCA sections 5(e)(1)(A)(i) and 5(e)(1)(A)(ii)(I) based on a finding that these substances may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the consent order: (1) Requires use of personal protective equipment including gloves and protective clothing impervious to the chemical substances, and a NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter with an APF of at least 50; (2) restricts use of the PMN substances to the uses specified in the consent order; (3) prohibits manufacture, processing, or use of the PMN substance for commercial or consumer products; (4) prohibits release of the PMN substances into the waters of the United States; and (5) requires corresponding recordkeeping. The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

*Toxicity concern:* Based on test data for analogous chemicals including other carbon nanotubes there are concerns for pulmonary toxicity, fibrosis, carcinogenicity, mutagenicity, and immunotoxicity of the PMN substances. Based on test data on respirable, poorly soluble particulates, EPA has concerns for lung effects. There are also data suggesting that pulmonary deposition of some nanoscale materials, including carbon nanotubes in the agglomerated form, may induce cardiovascular toxicity when these nanoscale materials are inhaled. The major health concerns are for potential pulmonary toxicity, fibrosis, and cancer to workers exposed via inhalation. Sublethal effects have been noted for some carbon nanoscale substances in fish at levels as low as 100 ppb. Further studies need to be conducted before EPA can determine a concentration of concern. Such studies must measure actual concentrations of carbon nanotubes and control for the effects of contaminants, solvents, and physical factors such as blockage of gills or intestines.

*Recommended testing:* EPA has determined that the following tests would help characterize the possible effects of the PMN substances. The consent order contains three production limits. The PMN submitter has agreed not to exceed the first production limit without submitting certain material characterization data on both substances. The PMN submitter has agreed not to exceed the second production limit without performing workplace exposure monitoring and characterization testing (including byproducts) as well as quantification and characterization of substances that may be released during exposures typical during the use phase. The PMN submitter has also agreed not to exceed the third production limit without performing a 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465 or OECD Test Guideline 413) with a post-exposure observation period of up to 3 months, a BALF analysis, determination of cardiovascular toxicity, heart histopathology, data on pulmonary deposition, and certain material characterization and physical-chemical properties on either or both of the substances that workers may be exposed to.

*CFR citations:* 40 CFR 721.10276 (P–10–39) and 40 CFR 721.10277 (P–10–40).

**PMN Number P–10–224**

*Chemical name:* 4,4′-Bipyridinium, 1-(phosphonoalkyl)-1′-substituted-, salt with anion (1:2) (generic).

*CAS number:* Not available.

*Basis for action:* The PMN states that the generic (non-confidential) use of the substance will be as a constituent in ink formulation. Based on test data on a salt of the anion of the PMN substance and analogous respirable poorly soluble particulates, EPA identified concerns for toxicity concerns to the liver and lung and neurotoxicity to workers exposed to the PMN substance. For the uses described in the PMN, significant worker exposure is unlikely, as dermal and inhalation exposure will be minimal due to adequate personal protective equipment and no domestic manufacture. Therefore, EPA has not determined that the proposed manufacturing method, processing method, or use of the substance may present an unreasonable risk. EPA has determined, however, that any use of the PMN substance: (1) Without the use of impervious gloves where there is potential for dermal exposure, (2) without the use of a NIOSH-certified respirator with an APF of at least 10 where there is potential inhalation exposure, (3) involving domestic manufacture, (4) other than as described in the PMN, (5) where the annual manufacture and importation volume exceeds 1,000 kilograms, or (6) in the form of a powder or a solid may cause serious health effects. Based on this information, the PMN substance meets the concern criteria at § 721.170(b)(3)(ii).

*Recommended testing:* EPA has determined that the results of a 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465 or OECD Test Guideline 413) would help characterize the human health effects of the PMN substance.

*CFR citation:* 40 CFR 721.10278.

**PMN Number P–10–246**

*Chemical name:* Multi-walled carbon nanotubes (generic) (P–10–246).

*CAS number:* Not available.

*Effective date of the TSCA section 5(e) consent order:* April 4, 2011.

*Basis for the TSCA section 5(e) consent order:* The PMN states that the use of the substance will be as a conductivity additive to resins, rubber, and battery electrodes. The order was issued under TSCA sections 5(e)(1)(A)(i) and 5(e)(1)(A)(ii)(I) based on a finding that this substance may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the order: (1) Requires use of personal protective equipment including gloves and protective clothing impervious to the chemical substance, and at minimum, a NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 cartridges or power air purifying particulate

respirator with an APF of at least 50; (2) prohibits the domestic manufacture of the PMN substance; (3) restricts use of the PMN substance to the uses specified in the consent order; (4) prohibits release of the PMN substance into the waters of the United States during processing and use activities; and (5) requires corresponding recordkeeping. The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

*Toxicity concern:* Based on test data for analogous chemicals including other carbon nanotubes there are concerns for pulmonary toxicity, fibrosis, carcinogenicity, mutagenicity, and immunotoxicity of the PMN substances. Based on test data on respirable, poorly soluble particulates, EPA has concerns for lung effects. There are also data suggesting that pulmonary deposition of some nanoscale materials, including carbon nanotubes in the agglomerated form, may induce cardiovascular toxicity when these nanoscale materials are inhaled. The major health concerns are for potential pulmonary toxicity, fibrosis, and cancer to workers exposed via inhalation. Sublethal effects have been noted for some carbon nanoscale substances in fish at levels as low as 100 ppb. Further studies need to be conducted before EPA can determine a concentration of concern. Such studies must measure actual concentrations of carbon nanotubes and control for the effects of contaminants, solvents, and physical factors such as blockage of gills or intestines.

*Recommended testing:* EPA has determined that the results of the following tests would help characterize possible effects of the PMN substance. The PMN submitter has agreed not to exceed a specified production time limit before performing these tests on the PMN substance: A 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465 or OECD Test Guideline 413) in rats with a post exposure observation period of up to 3 months, including a BALF analysis, a determination of cardiovascular toxicity (clinically-based blood/plasma protein analyses), and histopathology of the heart and certain material characterization data.

*CFR citation:* 40 CFR 721.10279.

**PMN Number P–10–476**

*Chemical name:* Benzene, ethenyl-, polymer with 1,3-butadiene.

*CAS number:* 1195978–93–8.

*Basis for action:* The PMN states that the generic (non-confidential) use of the substance will be as a polymer additive. Based on analogous high molecular weight polymers, EPA identified concerns for potential lung overload from exposure to the PMN substance via inhalation. Specifically, EPA predicts potential toxicity to consumers and the general population from inhalation of respirable particles of 10 microns or less of the PMN substance where the average number molecular weight is greater than 10,000 daltons. Further, based on the physical/chemical properties of the PMN substance, EPA has concluded, if the PMN substance were manufactured where the average number molecular weight is less than 1,000 daltons, the PMN substance may be considered persistent, bio-accumulative, and toxic (PBT), as described in the New Chemical Program's PBT category (64 FR 60194; November 4, 1999) (FRL–6097–7). EPA estimates, if the PMN substance were manufactured where the average number molecular weight is less than 1,000 daltons, that the PMN substance will persist in the environment more than six months and estimates a bioaccumulation factor of greater than or equal to 1,000. For the manufacturing method, processing method, and use described in the PMN, significant inhalation exposures are unlikely, and the PMN is not considered to be a PBT. Accordingly, EPA has not determined that the proposed manufacturing method, processing method, or use of the substance as described in the PMN notice may present an unreasonable risk. EPA has determined, however, that any manufacturing method, processing method, or use of the PMN substance where greater than 5 percent of the particles are in the respirable range of 10 microns or less and the average number molecular weight is greater than 10,000 daltons may cause serious health effects. EPA has also determined that any manufacturing method, processing method, or use of the PMN substance where the average number molecular weight is less than 1,000 daltons may cause significant adverse environmental effects and may be characterized as a potential PBT substance. Based on this information, the PMN substance meets the concern criteria at § 721.170 (b)(3)(ii), (b)(4)(ii), and (b)(4)(iii).

*Recommended testing:* EPA has determined that the results of the following testing would help characterize the possible human health effects and potential PBT attributes of the PMN substance: A 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465 or OECD Test Guideline 413) with a 60-day holding period (for the PMN substance where greater than 5 percent is in the respirable range of 10 microns or less and the average number molecular weight is greater than 10,000 daltons) and the tiered testing described in the New Chemicals Program's PBT Category (64 FR 60194; November 4, 1999) (FRL–6097–7) (for the PMN substance where the average number molecular weight is less than 1,000 daltons). Test reports should include protocols approved by EPA, certificate of analysis for the test substance, raw data, and results.

*CFR citation:* 40 CFR 721.10280.

## V. Rationale and Objectives of the Proposed Rule

### *A. Rationale*

During review of the PMNs submitted for the chemical substances that are subject to these proposed SNURs, EPA concluded that for 15 of the 17 chemical substances, regulation was warranted under TSCA section 5(e), pending the development of information sufficient to make reasoned evaluations of the health or environmental effects of the chemical substances. The basis for such findings is outlined in Unit IV. Based on these findings, TSCA section 5(e) consent orders requiring the use of appropriate exposure controls were negotiated with the PMN submitters. The proposed SNUR provisions for these chemical substances are consistent with the provisions of the TSCA section 5(e) consent orders. These SNURs are being proposed pursuant to § 721.160.

In the other 2 cases, where the uses were not regulated under a TSCA section 5(e) consent order, EPA determined that one or more of the criteria of concern established at § 721.170 were met, as discussed in Unit IV.

### *B. Objectives*

EPA is proposing these SNURs for specific chemical substances which have undergone premanufacture review because the Agency wants to achieve the following objectives with regard to the significant new uses designated in this proposed rule:

- EPA would receive notice of any person's intent to manufacture, import, or process a listed chemical substance for the described significant new use before that activity begins.
- EPA would have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing, importing, or processing a listed chemical substance for the described significant new use.
- EPA would be able to regulate prospective manufacturers, importers, or processors of a listed chemical substance before the described significant new use of that chemical substance occurs, provided that

regulation is warranted pursuant to TSCA sections 5(e), 5(f), 6, or 7.

• EPA would ensure that all manufacturers, importers, and processors of the same chemical substance that is subject to a TSCA section 5(e) consent order are subject to similar requirements.

Issuance of a SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Inventory. Guidance on how to determine if a chemical substance is on the TSCA Inventory is available on the Internet at *http://www.epa.gov/opptintr/existingchemicals/pubs/tscainventory/index.html.*

## VI. Notice and Comment Procedures

EPA is issuing these SNURs by notice and comment procedure, as described in § 721.170(d)(4). In accordance with § 721.170(d)(4)(ii)(A), persons are being given the opportunity to submit comments on or before January 27, 2012 on whether EPA should establish notification requirements.

## VII. Applicability of Proposed Rule to Uses Occurring Before Effective Date of the Final Rule

To establish a significant ''new'' use, EPA must determine that the use is not ongoing. The chemical substances subject to this proposed rule have undergone premanufacture review. TSCA section 5(e) consent orders have been issued for 15 chemical substances and the PMN submitters are prohibited by the TSCA section 5(e) consent orders from undertaking activities which EPA is designating as significant new uses. EPA is soliciting comments on whether any of the uses proposed as significant new uses are ongoing.

As discussed in the **Federal Register** of April 24, 1990, EPA has decided that the intent of TSCA section 5(a)(1)(B) is best served by designating a use as a significant new use as of the date of publication of this proposed rule rather than as of the effective date of the final rule. If uses begun after publication of the proposed rule were considered ongoing rather than new, it would be difficult for EPA to establish SNUR notice requirements because a person could defeat the SNUR by initiating the significant new use before the rule became final, and then argue that the use was ongoing before the effective date of the final rule. Thus, persons who begin commercial manufacture, import, or processing of the chemical substances that would be regulated through these proposed SNURs will have to cease any such activity before the effective date of the rule if and when finalized. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires.

EPA has promulgated provisions to allow persons to comply with these proposed SNURs before the effective date. If a person were to meet the conditions of advance compliance under § 721.45(h), the person would be considered exempt from the requirements of the SNUR.

## VIII. Test Data and Other Information

EPA recognizes that TSCA section 5 does not require developing any particular test data before submission of a SNUN. There are two exceptions:

1. Development of test data is required where the chemical substance subject to the SNUR is also subject to a test rule under TSCA section 4 (see TSCA section 5(b)(1)).

2. Development of test data may also be necessary where the chemical substance has been listed under TSCA section 5(b)(4) (see TSCA section 5(b)(2)).

In the absence of a TSCA section 4 test rule or a TSCA section 5(b)(4) listing covering the chemical substance, persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (see § 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing.

In the TSCA section 5(e) consent orders for 15 of the chemical substances regulated under this proposed rule, EPA has established restrictions in view of the lack of data on the potential health and environmental risks that may be posed by the significant new uses or increased exposure to the chemical substances. These restrictions will not be removed until EPA determines that the unrestricted use will not present an unreasonable risk of injury or result in significant or substantial exposure or environmental release. This determination is usually made based on the results of the required or recommended toxicity tests.

In cases where EPA issued a TSCA section 5(e) consent order that requires or recommends certain testing, Unit IV. lists tests required or recommended in each of the section 5(e) consent orders underlying the proposed 5(e) SNURs, and lists tests recommended for the substances subject to the proposed non-5(e) SNURs. Descriptions of tests are provided for informational purposes. EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol selection. To access the OPPTS Test Guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines.'' The Organisation for Economic Co-operation and Development (OECD) test guidelines are available from the OECD Bookshop at *http://www.oecdbookshop.org* or SourceOECD at *http://www.sourceoecd.org.* The American Society for Testing and Materials International (ASTM) standards are available at *http://www.astm.org/Standard/index.shtml.* To access the European standard, EN 15051 method, issued by The European Committee for Standardization (CEN), please go to *http://www.cen.eu/cen/products.* To access EPA Method 1320, please go to *http://www.epa.gov/osw/hazard/testmethods/sw846/pdfs/1320.pdf.*

When physical/chemical properties of test material and/or material characterization tests are recommended for nanoscale substances that are the subject of this proposed rule, you should take into consideration the characterizations identified in the Guidance Manual for the Testing of Manufactured Nanomaterials: OECD's Sponsorship Programme, which is available at *http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=env/jm/mono(2009)20/rev&doclanguage=en.*

The recommended testing specified in Unit IV. of this document may not be the only means of addressing the potential risks of the chemical substance. However, submitting a SNUN without any test data may increase the likelihood that EPA will take action under TSCA section 5(e), particularly if satisfactory test results have not been obtained from a prior PMN or SNUN submitter. EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

• Human exposure and environmental release that may result from the significant new use of the chemical substances.

• Potential benefits of the chemical substances.

• Information on risks posed by the chemical substances compared to risks posed by potential substitutes.

## IX. SNUN Submissions

According to § 721.1(c), persons submitting a SNUN must comply with the same notice requirements and EPA regulatory procedures as persons

submitting a PMN, including submission of test data on health and environmental effects as described in § 720.50. SNUNs must be submitted to EPA on EPA Form No. 7710–25 in accordance with the procedures set forth in § 721.25 and § 720.40. Forms and information are available on-line at *http://www.epa.gov/opptintr/newchems.*

## X. Economic Analysis

EPA has evaluated the potential costs of establishing SNUN requirements for potential manufacturers, importers, and processors of the chemical substances subject to this proposed rule. EPA's complete Economic Analysis is available in the docket under docket ID number EPA–HQ–OPPT–2010–0279.

## XI. References

The following is a listing of the documents that have been placed in the proposed rule phase of the docket under docket ID number EPA–HQ–OPPT–2010–0279, which is available for inspection as specified under **ADDRESSES**.

1. Cheng, X., Kan, A.T., and Tomson, M.B. Napthalene Adsorption and Desorption from Aqueous $C_{60}$ Fullerene. *Journal of Chemical & Engineering Data.* 2004, 49 (3), 675–683.

2. Brant, J., Lecoanet, H., Hotze, M., and Wiesner, M. Comparison of Electrokinetic properties of Colloidal Fullerenes (n-$C_{60}$) Formed Using Two Procedures. *Environmental Science & Technology* 2005, 39 (17), 6343–6351.

## XII. Statutory and Executive Order Reviews

### *A. Executive Order 12866*

This proposed rule would establish SNURs for several new chemical substances that were the subject of PMNs, and, in some cases, TSCA section 5(e) consent orders. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993).

### *B. Paperwork Reduction Act*

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* an Agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable. EPA would amend the table in 40 CFR part 9 to list the OMB approval number for the information collection requirements contained in these proposed SNURs, if the SNURs are subsequently issued as final rules. This listing of the OMB control numbers and their subsequent codification in the CFR satisfies the display requirements of PRA and OMB's implementing regulations at 5 CFR part 1320. This Information Collection Request (ICR) was previously subject to public notice and comment prior to OMB approval, and given the technical nature of the table, EPA finds that further notice and comment to amend it is unnecessary. As a result, EPA finds that there is ''good cause'' under section 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), to amend this table without further notice and comment.

The information collection requirements related to this action have already been approved by OMB pursuant to PRA under OMB control number 2070–0012 (EPA ICR No. 574). This action would not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Collection Strategies Division, Office of Environmental Information (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

### *C. Regulatory Flexibility Act*

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that promulgation of these SNURs would not have a significant adverse economic impact on a substantial number of small entities. The rationale supporting this conclusion is discussed in this unit. The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the proposed rule as a ''significant new use.'' Because these uses are ''new,'' based on all information currently available to EPA, it appears that no small or large entities presently engage in such activities. A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. Although some small entities may decide to pursue a significant new use in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of SNURs covering over 1,000 chemicals, the Agency receives only a handful of notices per year. For example, the number of SNUNs was four in Federal fiscal year (FY) 2005, eight in FY 2006, six in FY 2007, eight in FY 2008, and seven in FY 2009. During this 5-year period, three small entities submitted a SNUN. In addition, the estimated reporting cost for submission of a SNUN (see Unit X.) is minimal regardless of the size of the firm. Therefore, the potential economic impacts of complying with these SNURs would not be expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** of June 2, 1997 (62 FR 29684) (FRL–5597–1), the Agency presented its general determination that final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

### *D. Unfunded Mandates Reform Act*

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government would be impacted by this proposed rule. As such, EPA has determined that this proposed rule would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of sections 202, 203, 204, or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

### *E. Executive Order 13132*

This action would not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999).

*F. Executive Order 13175*

This proposed rule would not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This proposed rule would not significantly nor uniquely affect the communities of Indian Tribal governments, nor would it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), do not apply to this proposed rule.

*G. Executive Order 13045*

This action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

*H. Executive Order 13211*

This proposed rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

In addition, since this action does not involve any technical standards, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), does not apply to this action.

*J. Executive Order 12898*

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

**List of Subjects in 40 CFR Part 721**

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 19, 2011.

**Wendy C. Hamnett,**

*Director, Office of Pollution Prevention and Toxics.*

Therefore, it is proposed that 40 CFR part 721 be amended as follows:

## PART 721—[AMENDED]

1. The authority citation for part 721 continues to read as follows:

**Authority:** 15 U.S.C. 2604, 2607, and 2625(c).

2. Add § 721.10265 to subpart E to read as follows:

**§ 721.10265 Ethane, 2-bromo-1, 1-difluoro-.**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as ethane, 2-bromo-1, 1-difluoro-(PMN P–04–244; CAS No. 359–07–9) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been completely reacted (cured).

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(3), (a)(4), (a)(6)(v), (a)(6)(vi), (b) (concentration set at 0.1 percent), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator with an assigned protection factor (APF) of at least 75 meets the minimum requirements for § 721.63(a)(4): NIOSH-certified supplied-air respirator operated in pressure demand or other positive pressure mode and equipped with a tight-fitting full facepiece.

(A) As an alternative to the respiratory requirements listed in paragraph (a)(2)(i), a manufacturer, importer, or processor may choose to follow the new chemical exposure limit (NCEL) provisions listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.5 mg/m$^3$ as an 8-hour time-weighted average. Persons who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will receive NCELs provisions comparable to those contained in the corresponding section 5(e) consent order.

(B) [Reserved]

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (g)(1)(iv), (g)(1)(vi), (g)(1)(vii), (g)(1)(ix), (g)(2)(ii), (g)(2)(iii), (g)(2)(iv) (use respiratory protection or maintain workplace airborne concentrations at or below an 8-hour time-weighted average of 0.5 mg/m$^3$), and (g)(5).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (k) (chemical intermediate for a herbicide), and (q).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), (f), (g), (h), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to this section.

3. Add § 721.10266 to subpart E to read as follows:

**§ 721.10266 Multi-walled carbon nanotubes (generic) (P–08–733 and P–08–734).**

(a) *Chemical substances and significant new uses subject to reporting.* (1) The chemical substances identified generically as multi-walled carbon nanotubes (PMNs P–08–733 and P–08–734) are subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substances after they have been completely reacted (cured); embedded or incorporated into a polymer matrix that has been reacted (cured); or embedded, encapsulated or incorporated by the polymer binder into a permanent solid matrix (does not include slurries) that is not intended to undergo further processing, except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), (a)(6)(i), (a)(6)(ii), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator with an assigned protection factor (APF) of at least 50 meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (f), (k), and (q).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of these substances.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to this section.

4. Add § 721.10267 to subpart E to read as follows:

**§ 721.10267 [5,6]Fullerene-C60-Ih.**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as [5,6]fullerene-C60-Ih (PMN P–09–54; CAS No. 99685–96–8) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer form that is not intended to undergo further processing except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), (a)(6)(i), (a)(6)(ii), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) (an intermediate compound for use in producing downstream products that will in turn be used in organic electronic devices and an additive to improve mechanical properties or conductivity; a compound used to improve the mechanical properties of rubbers, plastics, and lubricants; or a compound for use as an additive to increase the conductivity of materials).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

5. Add § 721.10268 to subpart E to read as follows:

**§ 721.10268 [5,6]Fullerene-C70-D5h(6).**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as [5,6]fullerene-C70-D5h(6) (PMN P–09–55; CAS No. 115383–22–7) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer form that is not intended to undergo further processing except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), (a)(6)(i), (a)(6)(ii), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator with an assigned protection factor (APF) of at least 50 meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) (an intermediate compound for use in producing downstream products that will in turn be used in organic electronic devices and an additive to improve mechanical properties or conductivity; a compound used to improve the mechanical properties of rubbers, plastics, and lubricants; or a compound for use as an additive to increase the conductivity of materials).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

6. Add § 721.10269 to subpart E to read as follows:

**§ 721.10269 [5,6]Fullerene-C84–D2.**

(a) Chemical *substance and significant new uses subject to reporting.* (1) The chemical substance identified as [5,6]fullerene-C84-D2 (PMN P–09–56; CAS No. 145809–19–4) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer form that is not intended to undergo further processing except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), (a)(6)(i), (a)(6)(ii), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) (an intermediate compound for use in producing downstream products that will in turn be used in organic electronic devices and an additive to improve mechanical properties or conductivity; a compound used to improve the mechanical properties of rubbers, plastics, and lubricants; or a compound for use as an additive to increase the conductivity of materials).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125

(a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

7. Add § 721.10270 to subpart E to read as follows:

**§ 721.10270 [5,6]Fullerene-C84-D2d.**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as [5,6]fullerene-C84-D2d (PMN P–09–57; CAS No. 145809–20–7) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer form that is not intended to undergo further processing except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), (a)(6)(i), (a)(6)(ii), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N100 cartridges.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) (an intermediate compound for use in producing downstream products that will in turn be used in organic electronic devices and an additive to improve mechanical properties or conductivity; a compound used to improve the mechanical properties of rubbers, plastics, and lubricants; or a compound for use as an additive to increase the conductivity of materials).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

8. Add § 721.10271 to subpart E to read as follows:

**§ 721.10271 3′H-cyclopropa[1,9][5,6]Fullerene-C60-Ih-3′-butanoic acid, 3′-phenyl-, methyl ester.**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as 3′H-cyclopropa[1,9][5-6]Fullerene-C60–Ih-3′-butanoic acid, 3′-phenyl-, methyl ester, (PMNs P–09–142 and Chemical A in P–09–416; CAS No. 160848–22–6) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substances after they have been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer form that is not intended to undergo further processing, except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), (a)(6)(i), (a)(6)(ii), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N100 cartridges.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (k) (use as a compound used in fabrication and/or operation of electronic devices that enables or improves the conductivity, efficiency, voltage, or other characteristics of the device and a compound that improves the mechanical properties of lubricants and plastics; or use as an acceptor molecule in a polymer coating in an encapsulated organic photovoltaic electronic device) and (q).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to this section.

9. Add § 721.10272 to subpart E to read as follows:

**§ 721.10272 3′H-cyclopropa[8,25][5,6]Fullerene-C70-D5h(6)-3′-butanoic acid, 3′-phenyl-, methyl ester.**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substances identified as 3′H-cyclopropa[8,25][5-6]Fullerene-C70-D5h(6)-3′-butanoic acid, 3′-phenyl-, methyl ester (PMNs P–09–143 and Chemical B in P–09–416; CAS No. 609771–63–3) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substances after they have been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer form that is not intended to undergo further processing, except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), (a)(6)(i), (a)(6)(ii), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N100 cartridges.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (k) (use as a compound used in fabrication and/or operation of electronic devices that enables or improves the conductivity, efficiency, voltage or other characteristics of the device and a compound that improves the mechanical properties of lubricants and plastics; or use as an acceptor molecule in a polymer coating in an encapsulated organic photovoltaic electronic device) and (q).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to this section.

10. Add § 721.10273 to subpart E to read as follows:

**§ 721.10273 3′H-cyclopropa[7,22][5-6]Fullerene-C70–D5h(6)-3′-butanoic acid, 3′-phenyl-, methyl ester.**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substances identified as 3′H-cyclopropa[7,22][5,6]Fullerene-C70–D5h(6)-3′-butanoic acid, 3′-phenyl-, methyl ester (P–09–144 and Chemical C in P–09–416, CAS No. 1051371–21–1) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substances after they have been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer form that is not intended to undergo further processing, except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), (a)(6)(i), (a)(6)(ii), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N100 cartridges.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) (use as a compound used in fabrication and/or operation of electronic devices that enables or improves the conductivity, efficiency, voltage or other characteristics of the device and a compound that improves the mechanical properties of lubricants and plastics; or use as an acceptor molecule in a polymer coating in an encapsulated organic photovoltaic electronic device) and (q).

(iii) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to this section.

11. Add § 721.10274 to subpart E to read as follows:

**§ 721.10274 Multi-walled carbon nanotubes (generic) (P–09–188).**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as multi-walled carbon nanotubes (PMN P–09–188) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer form with a concentration of the PMN substance equal to or below 30 percent that is not intended to undergo further processing except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (k), (m), (o), and (q).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to this section.

12. Add § 721.10275 to subpart E to read as follows:

**§ 721.10275 Multi-walled carbon nanotubes (generic) (P–09–417).**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as multi-walled carbon nanotubes (PMN P–09–417) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer form that is not intended to undergo further processing, except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), (a)(6)(i), (a)(6)(ii), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirator with an assigned protection factor (APF) of at least 50 meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (f), (k) (plastics additive to improve electrical, thermal, and/or mechanical properties), (m), and (o).

(iii) *Release to water.* Requirements as specified in § 721.90 (b)(1) and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

13. Add § 721.10276 to subpart E to read as follows:

**§ 721.10276 Multi-walled carbon nanotubes (generic) (P–10–39).**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as multi-walled carbon nanotubes (PMN P–10–39) is subject to reporting under this section for the

significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer, metal, glass, or ceramic form that is not intended to undergo further processing except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirators with an approved protection factor (APF) of at least 50 meets the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k), (m), (o), and (p) (120,000 kilograms of the aggregate of this chemical substance and the substance in § 721.10277 for P–10–40).

(iii) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of these substances.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to this section.

14. Add § 721.10277 to subpart E to read as follows:

**§ 721.10277 Single-walled and multi-walled carbon nanotubes (generic) (P–10–40).**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as single-walled and multi-walled carbon nanotubes (PMN P–10–40) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer, metal, glass, or ceramic form that is not intended to undergo further processing except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirators with an assigned protection factor (APF) of at least 50 meet the minimum requirements for § 721.63(a)(4): NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N–100, P–100, or R–100 filter.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k), (m), (o), and (p) (120,000 kilograms of the aggregate of this chemical substance and the substance in § 721.10276 for P–10–39).

(iii) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of these substances.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to this section.

15. Add § 721.10278 to subpart E to read as follows:

**§ 721.10278 4,4′-Bipyridinium, 1-(phosphonoalkyl)-1′-substituted-, salt with anion (1:2) (generic).**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as 4,4′-bipyridinium, 1-(phosphonoalkyl)-1′-substituted-, salt with anion (1:2) (PMN P–10–224) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(3) (applicable to gloves only), (a)(4), (a)(6), (b) (concentration set at 1.0 percent), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirators with an assigned protection factor (APF) of 10–25 meet the minimum requirements for § 721.63(a)(4):

(A) NIOSH-certified air-purifying, tight-fitting half-face respirator equipped with N100 (if oil aerosols absent), R100, or P100 filters;

(B) NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N100 (if oil aerosols absent), R100, or P100 filters;

(C) NIOSH-certified powered air-purifying respirator equipped with a loose- fitting hood or helmet and high efficiency particulate air (HEPA) filters;

(D) NIOSH-certified powered air-purifying respirator equipped with a tight-fitting facepiece (either half-face or full-face) and HEPA filters; or

(E) NIOSH-certified supplied-air respirator operated in pressure demand or continuous flow mode and equipped with a hood or helmet, or tight-fitting facepiece (either half-face or full-face).

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (j), (s) (1,000 kilograms), (v)(1), and (v)(2).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), (d), (e), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to this section.

16. Add § 721.10279 to subpart E to read as follows:

**§ 721.10279 Multi-walled carbon nanotubes (generic) (P–10–246).**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as multi-walled carbon nanotubes (PMN P–10–246) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been completely reacted (cured); embedded or incorporated into a polymer matrix that itself has been reacted (cured); or embedded in a permanent solid polymer form that is not intended to undergo further processing, except for mechanical processing.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in

§ 721.63(a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(4), (a)(6)(i), (a)(6)(ii), and (c). The following National Institute for Occupational Safety and Health (NIOSH)-certified respirators with an assigned protection factor (APF) of at least 50 meet the minimum requirements for § 721.63(a)(4):

(A) NIOSH-certified air-purifying, tight-fitting full-face respirator equipped with N100 (if oil aerosols absent), R100, or P100 filters;

(B) NIOSH-certified powered air-purifying respirator equipped with a loose-fitting hood or helmet and high efficiency particulate air (HEPA) filters; or

(C) NIOSH-certified powered air-purifying respirator equipped with a tight-fitting facepiece (either half-face or full-face) and HEPA filters.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (k) (conductivity additive to resins, rubber, and to battery electrodes), and (q).

(iii) *Release to water.* Requirements as specified in § 721.90(b)(1) and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), (d), (e), (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to this section.

17. Add § 721.10280 to subpart E to read as follows:

**§ 721.10280 Benzene, ethenyl-, polymer with 1,3-butadiene.**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as benzene, ethenyl-, polymer with 1,3-butadiene (PMN P–10–476; CAS No. 1195978–93–8) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j) (manufacture by the method where the average number molecular weight is in the range of 1,000 to 10,000 daltons or where less than 5 percent of the particles are in the respirable range of 10 microns or less and the average number molecular weight is greater than or equal to 10,000 daltons).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

[FR Doc. 2011–33261 Filed 12–27–11; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Chapter I

**[GC Docket No. 11–199; DA 11–2002]**

### Preliminary Plan for Retrospective Analysis of Existing Rules

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of availability.

**SUMMARY:** This document seeks comment on the Commission's preliminary plan for retrospective analysis of existing rules. The Commission prepared this preliminary plan consistent with the President's Executive Order 13579 encouraging independent agencies to engage in such retrospective review in order to identify unnecessary or unduly burdensome regulations that may be hindering job creation and economic development. The Commission seeks input from the public on all aspects of its preliminary plan.

**DATES:** Comments may be filed on or before February 8, 2012, and reply comments may be filed on or before February 22, 2012.

**ADDRESSES:** You may submit comments, identified by GC Docket No. 11–199, by any of the following methods:

■ *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.

■ *Mail:* See the **SUPPLEMENTARY INFORMATION** section of this document.

■ *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** For further information regarding this proceeding, contact Jennifer Tatel, Office of General Counsel, (202) 418–1700.

**SUPPLEMENTARY INFORMATION:** This is a summary of a Public Notice released by the Office of General Counsel on December 8, 2011. The full text of this document is available for public inspection and copying during regular business hours in the Commission's Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (202) 488–5300, facsimile (202) 488–5563 or via email *FCC@BCPIWEB.com.* The full text may also be downloaded at *http://www.fcc.gov.* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

■ *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*

■ *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

■ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes

must be disposed of *before* entering the building.

■ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

■ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

Documents will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, Room CY–A257, 445 12th Street SW., Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488–5300, facsimile (202) 488–5563, TTY (202) 488–5562, email *fcc@bcpiweb.com.*

*People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty). The Commission has designated this proceeding as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. 47 CFR 1.1200 *et seq.; Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization,* Notice of Proposed Rulemaking, 25 FCC Rcd 2430, 2439–40 (2010). Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b) of the Commission's rules. In proceedings governed by § 1.49(f) of the Commission's rules or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

**Summary of Public Notice**

This Public Notice seeks comment on the Commission's Preliminary Plan for Retrospective Analysis of Existing Rules, released on November 7, 2011. The Preliminary Plan describes the Commission's ongoing process of identifying outmoded or counterproductive rules and provides an overview of recent and current proceedings that include retrospective analysis. The Commission seeks comment generally on the Preliminary Plan.

The Commission is committed to being a responsive, efficient and effective agency that harnesses and promotes the technological and economic opportunities of the new millennium. As part of the Commission's goal to be a model of excellence in government, the agency has, since 2009, undertaken far-reaching initiatives designed to achieve its statutory objectives while removing burdens on industry and promoting innovation and job growth.

In furtherance of these objectives, the Commission seeks comment on the following questions: What additional steps should the Commission take to identify rules that should be changed, streamlined, consolidated, or removed? How can the Commission further reduce burdens on industry and consumers while fostering competition, diversity and innovation? Are there Commission rules or reporting requirements that are duplicative or that have conflicting requirements among its bureaus and offices or with other agencies? Are there Commission rules or reporting requirements that could be modified to better accomplish their regulatory objectives? In addition, commenters are encouraged to submit other suggestions that may help the Commission develop better regulations and processes. Commenters are asked to specifically identify the rules or reporting requirements they are addressing and to provide specific suggestions for ways the Commission should modify such rules or reporting requirements, including alternative language where possible.

Federal Communications Commission.

**Julie A. Veach,**

*Deputy General Counsel, Office of General Counsel.*

[FR Doc. 2011–33014 Filed 12–27–11; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

### 49 CFR Parts 385, 386, 390, and 395

**[Docket No. FMCSA–2011–0373]**

### Hours of Service of Motorcoach Drivers

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of public listening session.

**SUMMARY:** FMCSA announces that it will hold a public listening session to solicit information, concepts, ideas, and information on hours-of-service (HOS) requirements for motorcoach drivers. Specifically, the Agency would like to know what factors, issues, and data may be pertinent as it considers development of a rulemaking on these requirements. The session, which will be held in Grapevine, Texas, will allow interested persons to present comments, views, and relevant new research. This listening session will be recorded and a transcript of the public meeting will be placed in the docket for FMCSA's consideration, as well as all comments submitted during the session. The listening session will also be webcast via the Internet.

**DATES:** The listening session will be held on Monday, January 9, 2012, in Grapevine, TX (near Dallas, TX). The listening session will be held from 10 a.m. until noon, CT, and from 2:30 p.m. until 4:30 p.m. CT, or earlier, if all participants wishing to express their views have done so.

**ADDRESSES:** The January 9, 2012, meeting will be held at the Gaylord Texan Resort & Convention Center, 1501 Gaylord Trail, Grapevine, TX 76051–1945. The hotel telephone number is 1–(817) 778–2000.

*Internet Address for Live Webcast.* FMCSA will post specific information on how to participate via the Internet on

the FMCSA Web site at *http://www.fmcsa.dot.gov.*

You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2004–19608 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line 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 or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* 1–(202) 493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

*Docket:* For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit 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., ET, Monday through Friday, except Federal holidays. The on-line Federal document management system 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 Federal Docket Management System 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:** For information concerning the listening session or the live webcast, please contact Ms. Shannon L. Watson, Senior Advisor for Policy, FMCSA, (202) 385–2395.

If you need sign language assistance to participate in this HOS listening session, also contact Ms. Shannon L. Watson, at the above phone number, by Thursday, January 6, 2012, to allow us to arrange for such services. There is no guarantee that interpreter services requested on short notice can be provided.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The HOS requirements for motorcoach operators have not been substantially revised in several decades. The FMCSA did not include changes to the motorcoach HOS requirements in its April 28, 2003 final rule (68 FR 22456) concerning HOS requirements for truck drivers or in subsequent revisions of that rule because the Agency did not have enough data and information on motorcoach operations to form the basis of a rulemaking. Motorcoach operations differ significantly from trucking operations and the information upon which the Agency relied for its truck drivers' rule did not address the unique fatigue issues associated with the scheduling and operating practices of the motorcoach industry.

The current HOS rules for passenger-carrying commercial motor vehicle (CMVs) operations allow up to 10 hours of driving time following 8 consecutive hours off duty. Driving is prohibited after the operator has accumulated 15 hours of on-duty time following 8 consecutive hours off duty (15-hour rule). However, miscellaneous off-duty periods during the day are not counted in the 15-hour window. Therefore, the amount of time between the beginning of the work day and driver completing all driving tasks may exceed 15 hours.

With regard to weekly limitations, drivers of passenger-carrying CMVs are prohibited from driving after accumulating: 60 hours of on-duty time in any 7 consecutive days if the employing motor carrier does not operate CMVs every day of the week; or, 70 hours in any period of 8 consecutive days if the employing motor carrier operates CMVs every day of the week.

## II. Meeting Participation and Information FMCSA Seeks From the Public

The listening session is open to the public. Speakers' remarks will be limited to 5 minutes each. The public may submit material to the FMCSA staff at the session for inclusion in the public docket, FMCSA–2011–0373.

The Agency seeks data and answers relating to the following issues and questions. The comments sought below may be submitted in written form at the session and summarized verbally, if desired.

1. *Driving Time.* FMCSA seeks information or data that examine fatigue and safety differences associated with different driving time periods.

2. *Duty Time/Driving Window.* FMCSA solicits information on patterns of work for motorcoach drivers.

3. *Time-On-Task (TOT) Function.* The Agency seeks comments and information on methods for evaluating fatigue associated with the time motorcoach operators spend on the actual driving task during the work day. The Agency is interested in suggestions for estimating TOT effects, especially information on where it might obtain data on exposure and other motorcoach driver characteristics that would enable it to estimate how or whether crash risk varies over successive hours of daily driving.

4. *Cumulative Fatigue.* The Agency seeks comments and information on the effects of cumulative fatigue during the work week, particularly in the form of scientific studies or data that would allow evaluation of cumulative fatigue and its impact on workplace safety, motorcoach driver safety performance, and productivity.

## III. Alternative Media Broadcasts During and Immediately After the Listening Session on January 9, 2012

FMCSA will webcast the listening session on the Internet. Specific information on how to participate via the Internet and the telephone access number will be on the FMCSA Web site at *http://www.fmcsa.dot.gov.* FMCSA will docket the transcripts of the webcast and a separate transcription of the listening session that will be prepared by an official court reporter.

Issued on: December 21, 2011.

**Larry W. Minor,**

*Associate Administrator for Policy.*

[FR Doc. 2011–33228 Filed 12–27–11; 8:45 am]

**BILLING CODE 4910–EX–P**

# Notices

Federal Register

Vol. 76, No. 249

Wednesday, December 28, 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

December 21, 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) 720–8958.

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.

#### Animal and Plant Health Inspection Service

*Title:* Bovine Brucellosis Class Free State and Certified Brucellosis-Free Herds; Revisions to Testing and Certification Requirements.

*OMB Control Number:* 0579–NEW.

*Summary of Collection:* The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture board authority to detect, control, or eradicate pests or diseases of livestock or poultry. The Secretary may also prohibit or restrict import or export of any animal or related material if necessary to prevent the spread of any livestock or poultry pest or disease. In connection with this mission, Veterinary Services (VS) participates in the Cooperative State-Federal Bovine Brucellosis Eradication Program, a national program to eliminate bovine brucellosis from the United States. Brucellosis is an infectious disease, caused by bacteria of the genus *Brucella* that affect both animals and humans.

*Need and Use of the Information:* The Animal and Plant Health Inspection Service (APHIS) will collect information using the brucellosis management plan and the Memorandum of Understanding. The information provided by these documents is critical to APHIS' mission to prevent the introduction or spread of bovine brucellosis. Failure to collect this information would cripple APHIS' ability to conduct an effective State-Federal Cooperative Brucellosis Eradication Program.

*Description of Respondents:* State, Local or Tribal Government.

*Number of Respondents:* 3.

*Frequency of Responses:* Reporting: Annually.

*Total Burden Hours:* 1,800.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2011–33210 Filed 12–27–11; 8:45 am]

BILLING CODE 3410–34–P

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

December 22, 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), New Executive Office Building, Washington, DC; *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 publication 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.

#### National Agricultural Statistics Service

*Title:* Field Crops Objective Yield.

*OMB Control Number:* 0535–0088.

*Summary of Collection:* The primary function of the National Agricultural

Statistics Service (NASS) is to prepare and issue current official State and national estimates of crop and livestock production. General authority for these data collection activities is granted under U.S. Code Title 7, Section 2204. This statue specifies the ''The Secretary of Agriculture shall procure and preserve all information concerning agriculture which he can obtain * * * by the collection of statistics * * * and shall distribute them among agriculturists''. Data is collected provides yield estimates for corn, cotton, potatoes, soybeans and wheat. The yield estimates are extremely important because they're used in conjunction with price data to estimate production and in making policy decisions in agricultural sectors.

*Need and Use of the Information:* NASS will collect information on sample fields of, corn, cotton, potatoes, soybeans, and winter wheat. The information will be used by USDA to anticipate loan receipts and pricing of loan stocks for grains. Farmers and businesses use the production estimates in marketing decisions to evaluate expected prices and to determine when to sell.

*Description of Respondents:* Farms.

*Number of Respondents:* 8,000.

*Frequency of Responses:* Reporting: Monthly during growing season.

*Total Burden Hours:* 2,820.

**Charlene Parker,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2011–33285 Filed 12–27–11; 8:45 am]

**BILLING CODE 3410–20–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2011–0118]**

### Notice of Request for Extension of Approval of an Information Collection; Importation of Small Lots of Seed

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of small lots of seed into the United States.

**DATES:** We will consider all comments that we receive on or before February 27, 2012.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0118–0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2011–0118, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0118* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 6902817 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information on regulations for the importation of small lots of seed into the United States, contact Dr. Arnold Tschanz, Senior Plant Pathologist/Risk Manager, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737; (301) 734–5306. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**SUPPLEMENTARY INFORMATION:**

*Title:* Importation of Small Lots of Seed.

*OMB Number:* 0579–0285.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. The regulations contained in ''Subpart–Plants for Planting'' (7 CFR 319.37–1 through 319.37–14) prohibit or restrict, among other things, the importation of living plants, plant parts, and seed for propagation.

These regulations allow small lots of seed to be imported into the United States under an import permit with specific conditions, including seed packet labeling, as an alternative to a phytosanitary certificate requirement.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.035576923 hours per response.

*Respondents:* Importers, horticultural societies, arboreta, and small business.

*Estimated annual number of respondents:* 1,600.

*Estimated annual number of responses per respondent:* 13.

*Estimated annual number of responses:* 20,800.

*Estimated total annual burden on respondents:* 740 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 19th day of *December 2011.*

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–33208 Filed 12–27–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2011–0111]**

### Notice of Request for Extension of Approval of an Information Collection; Importation of Baby Corn and Baby Carrots From Zambia

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of baby corn and baby carrots from Zambia.

**DATES:** We will consider all comments that we receive on or before December 28, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0111–0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2011–0111, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0111* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information on regulations for the importation of baby corn and baby carrots from Zambia, contact Mr. Alex Belano, Senior Import Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 156, Riverdale, MD 20737; (301) 734–0627. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**SUPPLEMENTARY INFORMATION:**

*Title:* Importation of Baby Corn and Baby Carrots From Zambia.

*OMB Number:* 0579–0284.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. Regulations authorized by the PPA concerning the importation of fruits and vegetables into the United States from certain parts of the world are contained in ''Subpart–Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–54).

Under these regulations, baby corn and baby carrots from Zambia are subject to certain conditions before entering the United States to prevent the introduction of plant pests into the United States. The regulations include inspection at the port of first arrival and the use of a phytosanitary certificate stating that the commodity was inspected and found free of certain plant pests.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 1 hour per response.

*Respondents:* Importers and Zambian national plant protection organization officials and producers.

*Estimated annual number of respondents:* 1.

*Estimated annual number of responses per respondent:* 1.

*Estimated annual number of responses:* 1.

*Estimated total annual burden on respondents:* 1 hour. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 19th day of December 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–33209 Filed 12–27–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2011–0114]**

### Availability of an Environmental Assessment for Field Testing Swine Influenza Vaccine, RNA

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment concerning authorization to ship for the purpose of field testing, and then to field test, an unlicensed Swine Influenza Vaccine, RNA. The environmental assessment, which is based on a risk analysis prepared to assess the risks associated with the field testing of this vaccine, examines the potential effects that field testing this veterinary vaccine could have on the quality of the human environment. Based on the risk analysis, we have reached a preliminary determination that field testing this veterinary vaccine will not have a significant impact on the quality of the human environment, and that an environmental impact statement need not be prepared. We intend to authorize shipment of this vaccine for field testing following the close of the comment period for this notice unless new substantial issues bearing on the effects of this action are brought to our attention. We also intend to issue a U.S. Veterinary Biological Product license for this vaccine, provided the field test data support the conclusions of the environmental assessment and the

issuance of a finding of no significant impact and the product meets all other requirements for licensing.

**DATES:** We will consider all comments that we receive on or before January 27, 2012.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0114–0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2011–0114, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0114* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 6902817 before coming.

**FOR FURTHER INFORMATION CONTACT:** Dr. Donna Malloy, Operational Support Section, Center for Veterinary Biologics, Policy, Evaluation, and Licensing, VS, APHIS, 4700 River Road Unit 148, Riverdale, MD 20737–1231; phone (301) 734–8245, fax (301) 734–4314.

For information regarding the environmental assessment or the risk analysis, or to request a copy of the environmental assessment (as well as the risk analysis with confidential business information removed), contact Dr. Patricia L. Foley, Risk Manager, Center for Veterinary Biologics, Policy, Evaluation, and Licensing VS, APHIS, 1920 Dayton Avenue, P.O. Box 844, Ames, IA 50010; phone (515) 337–6100, fax (515) 337–6120.

**SUPPLEMENTARY INFORMATION:** Under the Virus-Serum-Toxin Act (21 U.S.C. 151 *et seq.*), a veterinary biological product must be shown to be pure, safe, potent, and efficacious before a veterinary biological product license may be issued. A field test is generally necessary to satisfy prelicensing requirements for veterinary biological products. Prior to conducting a field test on an unlicensed product, an applicant must obtain approval from the Animal and Plant Health Inspection Service (APHIS), as well as obtain APHIS' authorization to ship the product for field testing.

To determine whether to authorize shipment and grant approval for the field testing of the unlicensed product referenced in this notice, APHIS conducted a risk analysis to assess the potential effects of this product on the safety of animals, public health, and the environment. Based on the risk analysis, APHIS has prepared an environmental assessment (EA) concerning the field testing of the following unlicensed veterinary biological product:

*Requester:* Harrisvaccines, Inc.

*Product:* Swine Influenza Vaccine, RNA.

*Field Test Locations:* North Carolina, Illinois, and Nebraska.

The above-mentioned product consists of propagation-defective RNA particles that encode the hemagglutinin protein of swine influenza virus. The vaccine is for intramuscular use in healthy pigs, three weeks of age or older, as an aid in the prevention of disease caused by swine influenza virus, subtype H3.

The EA has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Unless substantial issues with adverse environmental impacts are raised in response to this notice, APHIS intends to issue a finding of no significant impact (FONSI) based on the EA and authorize shipment of the above product for the initiation of field tests following the close of the comment period for this notice.

Because the issues raised by field testing and by issuance of a license are identical, APHIS has concluded that the EA that is generated for field testing would also be applicable to the proposed licensing action. Provided that the field test data support the conclusions of the original EA and the issuance of a FONSI, APHIS does not intend to issue a separate EA and FONSI to support the issuance of the product license, and would determine that an environmental impact statement need not be prepared. APHIS intends to issue a veterinary biological product license for this vaccine following completion of the field test provided no adverse impacts on the human environment are identified and provided the product meets all other requirements for licensing.

**Authority:** 21 U.S.C. 151–159.

Done in Washington, DC, this 19th day of December 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–33205 Filed 12–27–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2011–0078]**

### Notice of Decision to Authorize the Importation of Shredded Lettuce From Egypt Into the Continental United States

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** We are advising the public of our decision to authorize the importation into the continental United States of fresh shredded lettuce from Egypt. Based on the findings of a pest risk analysis, which we made available to the public for review and comment through a previous notice, we have determined that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of fresh shredded lettuce from Egypt.

**DATES:** *Effective Date:* December 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. Marc Phillips, Import Specialist, RCC, RPM, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737; (301) 734–4394.

**SUPPLEMENTARY INFORMATION:**

## Background

Under the regulations in ''Subpart-Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–54, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

Section 319.56–4 of the regulations contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis (PRA), can be safely imported subject to one or more of the designated phytosanitary

measures listed in paragraph (b) of that section. Under that process, APHIS publishes a notice in the **Federal Register** announcing the availability of the PRA that evaluates the risks associated with the importation of a particular fruit or vegetable. Following the close of the 60-day comment period, APHIS may begin issuing permits for importation of the fruit or vegetable subject to the identified designated measures if: (1) No comments were received on the PRA; (2) the comments on the PRA revealed that no changes to the PRA were necessary; or (3) changes to the PRA were made in response to public comments, but the changes did not affect the overall conclusions of the analysis and the Administrator's determination of risk.

In accordance with that process, we published a notice [1] in the **Federal Register** on August 17, 2011 (76 FR 50992–50993, Docket No. APHIS–2011–0078), in which we announced the availability, for review and comment, of a PRA that evaluated the risks associated with the importation into the continental United States of fresh shredded lettuce (*Lactuca sativa* L.) from Egypt. The PRA consisted of a risk assessment identifying pests of quarantine significance that could follow the pathway of importation of fresh shredded lettuce from Egypt into the United States and a risk management document identifying phytosanitary measures to be applied to that commodity to mitigate the pest risk. We solicited comments on the notice for 60 days ending on October 17, 2011. We received two comments by that date.

One comment from a private citizen who opposed the importation of shredded lettuce from Egypt into the United States did not address any specific aspect of the PRA.

The other comment, submitted by an agricultural official representing the State of Florida, questioned the efficacy of the post-harvest phytosanitary measures we included in the PRA. The commenter agreed with the PRA that lettuce from Egypt is potentially a host for several species of destructive leaf miners but stated that the phytosanitary measure of shredding lettuce does not remove the risk of their introduction into the United States. The commenter requested that shipments of shredded lettuce from Egypt not be permitted entry into Florida until the shipping protocol has had time to demonstrate the effectiveness of the mitigation measures listed in the PRA.

Only commercial consignments of shredded lettuce will be allowed to be imported from Egypt. Commercial consignments, as defined in § 319.56–2, are consignments that an inspector identifies as having been imported for sale and distribution. Produce grown commercially is less likely to be infested with plant pests than noncommercial consignments. Noncommercial consignments are more prone to infestations because the commodity is often ripe to overripe, could be of a variety with unknown susceptibility to pests, and is often grown with little or no pest control.

We identified in the PRA 12 pests of quarantine significance for lettuce from Egypt that are highly unlikely to follow the pathway due to the standard post-harvest processing practices applied to commercial consignments of shredded lettuce from Egypt. Although these 11 arthropods and 1 mollusk affect lettuce leaves, we took into account the standard commercial post-harvest procedures of: (1) Removing outer leaves; (2) visual inspection and culling, with cutting; (3) shredding; and (4) washing and centrifuging. We concluded that these procedures sufficiently mitigate the risk of introducing leaf miners or other plant pests through the importation of shredded lettuce from Egypt. The commenter provided no evidence to indicate that these measures would not effectively mitigate the pest risk.

Consignments of shredded lettuce from Egypt will also be required to be accompanied by a phytosanitary certificate of inspection and pest freedom issued by the national plant protection organization (NPPO) of Egypt, with an additional declaration stating that the shredded lettuce in the consignment had been inspected and found free from quarantine pests. This condition provides additional assurances that the commercial production process has removed quarantine pests from the commodity.

For these reasons, APHIS has concluded that the mitigations described will effectively mitigate the pest risk associated with shredded lettuce imported from Egypt. Accordingly, we have determined that no changes to the PRA are necessary based on the comment.

Therefore, in accordance with the regulations in § 319.56–4(c)(2)(ii), we are announcing our decision to authorize the importation into the continental United States of fresh shredded lettuce from Egypt subject to the following phytosanitary measures:

- The shredded lettuce must be imported in commercial consignments only.
- Each consignment of shredded lettuce leaves must be accompanied by a phytosanitary certificate issued by the national plant protection organization of Egypt with an additional declaration stating the following: ''Shredded lettuce leaves in this consignment were inspected and found free from quarantine pests.''

These conditions will be listed in the Fruits and Vegetables Import Requirements database (available at *http://www.aphis.usda.gov/favir*). In addition to these specific measures, shredded lettuce from Egypt will be subject to the general requirements listed in § 319.56–3 that are applicable to the importation of all fruits and vegetables.

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 19th day of December 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–33207 Filed 12–27–11; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the notice, the PRA, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0078.*

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2010–0112]**

### Notice of Decision to Authorize Importation of Fresh Litchi From the Republic of South Africa Into the Continental United States

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** We are advising the public of our decision to authorize the importation of fresh litchi from the Republic of South Africa into the continental United States. Based on the findings in a pest risk analysis, which we made available to the public for review and comment through a previous notice, we believe that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of litchi from the Republic of South Africa.

**DATES:** *Effective Date:* December 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. Marc Phillips, Import Specialist,

Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737; (301) 734–4394.

**SUPPLEMENTARY INFORMATION:**

## Background

Under the regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–54, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

Section 319.56–4 contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis (PRA), can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. Under that process, APHIS publishes a notice in the **Federal Register** announcing the availability of the PRA that evaluates the risks associated with the importation of a particular fruit or vegetable. Following the close of the 60-day comment period, APHIS may authorize the importation of the fruit or vegetable subject to the identified designated measures if: (1) No comments were received on the PRA; (2) the comments on the PRA revealed that no changes to the PRA were necessary; or (3) changes to the PRA were made in response to public comments, but the changes did not affect the overall conclusions of the analysis and the Administrator's determination of risk.

In accordance with that process, we published a notice [1] in the **Federal Register** on February 2, 2011 (76 FR 5779–5780, Docket No. APHIS–2010–0112), in which we announced the availability, for review and comment, of a PRA that evaluates the risks associated with the importation into the continental United States of fresh litchi (*Litchi chinensis*) from the Republic of South Africa. We solicited comments on the notice for 60 days ending on April 4, 2011. We received six comments by that date, from a State agriculture agency, produce importers, a foreign agricultural research institute, and foreign produce growers. Three commenters supported the importation of litchi from South Africa into the United States. The remaining comments are discussed below by topic.

Some comments concerned the pests identified as being associated with litchi from South Africa in the PRA. One commenter stated that the pest *Cryptophlebia peltastica* is seldom found in consignments of fresh litchi and the mitigation measures recommended for this pest in the risk management document (RMD) are unnecessarily strict. Another commenter stated that, although *C. peltastica* may develop in fruit, there are indications that the pupae only develop in fruit stored for a long period after harvest. This commenter described the results of surveys showing no interception of *C. peltastica* and *Thaumatotibia leucotreta* pupae in samples of litchi taken over the course of two growing seasons.

Because *C. peltastica* and *T. leucotreta* are present in South Africa and are known pests of litchi, APHIS must verify that the litchi imported into the United States is free of these pests, particularly as the irradiation treatment we proposed to require is not approved to neutralize pupae and adults of these pests. Inspection is a sufficient mitigation for *T. leucotreta* pupae and adults. However, we have determined, based on published reports cited in the RMD, that, standard commercial culling alone (e.g. culling, packing, and sanitation) would not be sufficient to mitigate the risk of *C. peltastica* because the larvae may pupate inside the fruit. *C. peltastica* larvae produce visible holes on the fruit skin, leaving brown frass on the surface, which are easily detectable during inspection. Accordingly, the mitigation for pupae of this internal pest is the sampling, cutting, and inspection of the litchi by the national plant protection organization (NPPO) of South Africa.

However, we appreciate being made aware of the survey activities that discount the notion that under natural conditions this fruit serves as a pathway for *C. peltastica* pupae. After we have additional evidence from inspections and have had the opportunity to review the data concerning the interception of *C. peltastica* on litchi from South Africa, we will adjust the inspection requirements if we determine such an action to be warranted.

Some comments concerned the proposed treatment of litchi fruit from South Africa. One commenter stated that more research is needed on the irradiation doses required to mitigate the risk associated with *C. peltastica,* and that the circumstantial evidence, as noted in the RMD, suggests that doses well below 400 Gy are likely to be sufficient to control all stages of this pest.

Although some circumstantial evidence suggests doses below 400 Gy are likely to be sufficient to control all life stages of the pest *C. peltastica,* the dose sufficient to mitigate the risk associated with any pupae, and specifically *C. peltastica* pupae, has not been established. The lowest effective dose must be determined by scientific evidence before that dose can be used as a mitigation. We will continue to review the scientific research in this field and will update our approved doses if warranted.

One commenter stated that, because litchi fruit infested with *C. peltastica* is removed during processing in South Africa, irradiation treatment with additional inspection for *C. peltastica* pupae by APHIS inspectors is redundant. The commenter recommended that the preclearance inspection be conducted by the NPPO of South Africa or be removed from the requirements.

When a commodity is irradiated in a foreign country, APHIS inspectors are required to perform certain tasks in the exporting country as specified in the irradiation facility preclearance workplan. APHIS involvement in the exporting country includes monitoring the treatment and verifying the facility's compliance with the standard operating procedures required under the irradiation operational workplan. Meanwhile, the NPPO of the exporting country is responsible for monitoring, safeguarding, and conducting phytosanitary and pre-export inspection to certify the shipment is free of pests of concern, including pests that are not mitigated by the irradiation.

To avoid the treatment of products that would ultimately be rejected due to the presence of pests not mitigated by irradiation, APHIS performs its preclearance inspection prior to the commodity being irradiated and rejects lots containing pests not mitigated by irradiation before any treatment is applied. Because the inspections performed in South Africa by APHIS and the NPPO of South Africa have different purposes, both are necessary to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of litchi from South Africa.

One commenter recommended adoption of an alternative treatment efficacy approach for pest risk management. Another commenter described a potential method for researching the feasibility of cold treatment of litchi infested with *C. peltastica* and *T. leucotreta.* While these

[1] To view the notice, the PRA, and the comments we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0112.*

proposals are interesting, they are outside the scope of this action.

One commenter stated that the risk of introducing *C. peltastica* into the United States and the consequences of this introduction were overestimated in the PRA. This commenter also noted some typographical errors in the PRA.

Although specific information on the reproductive capacity of *C. peltastica* was not available, we reviewed reproductive information about similar species *C. illepida* and *C. ombrodelta.* The discussion of the dispersal potential for and economic impact of *C. peltastica* in the PRA was revised to include this additional information, which did not result in a change to the risk rating for *C. peltastica.*

We have also amended the RMD published with the previous notice to clarify the phytosanitary certificate and additional declaration requirements for litchi from South Africa. The revised PRA is available from the person listed under **FOR FURTHER INFORMATION CONTACT** or from the Regulations.gov Web site (see footnote 1).

Therefore, in accordance with the regulations in § 319.56–4(c)(2)(ii), we are announcing our decision to authorize the importation into the continental United States of fresh litchi from the Republic of South Africa subject to the following phytosanitary measures:

- The litchi may be imported into the continental United States in commercial consignments only.
- Each consignment must be inspected by the NPPO of the Republic of South Africa using a sampling procedure mutually agreed upon by APHIS and the NPPO. A representative sample of fruit must be drawn from each lot, cut open, inspected, and found free from any pupae of *C. peltastica.*
- The litchi must be irradiated in accordance with 7 CFR part 305 with a minimum absorbed dose of 400 Gy.
- If the irradiation treatment is applied outside the United States, each consignment of fruit must be jointly inspected by APHIS and the NPPO of the Republic of South Africa and accompanied by a phytosanitary certificate certifying that the fruit received the required irradiation treatment with an additional declaration stating that the consignment was inspected and found free of *C. peltastica.*
- If the irradiation treatment is to be applied upon arrival in the United States, each consignment of fruit must be inspected by the NPPO of the Republic of South Africa prior to departure and accompanied by a phytosanitary certificate with an additional declaration stating that the consignment was inspected and found free of *C. peltastica.*

These conditions will be listed in the Fruits and Vegetables Import Requirements database (available at *http://www.aphis.usda.gov/favir*). In addition to these specific measures, litchi from the Republic of South Africa will be subject to the general requirements listed in § 319.56–3 that are applicable to the importation of all fruits and vegetables. Further, for fruits and vegetables requiring treatment as a condition of entry, the phytosanitary treatments regulations in 7 CFR part 305 contain administrative and procedural requirements that must be observed in connection with the application and certification of specific treatments.

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 19th day of December 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–33203 Filed 12–27–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Agency Information Collection Activities: Proposed Collection; Comment Request—Special Supplemental Nutrition Program for Women, Infants and Children (WIC) Forms: FNS–698, FNS–699, and FNS–700; The Integrity Profile (TIP)

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on proposed information collections.

**DATES:** Written comments on this notice must be received on or before February 27, 2012.

**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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Debra Whitford, Director, Supplemental Food Programs Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 520, Alexandria, VA 22302. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All responses to this notice will be summarized and included in the request for OMB approval, and will become a matter of public record.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection form and instructions should be directed to Joan Carroll, (703) 305–2746.

**SUPPLEMENTARY INFORMATION:**

*Title:* WIC Financial Management and Participation Report with Addendum.

*OMB Number:* 0584–0401.

*Expiration Date:* 02–29–2012.

*Type of Request:* Extension, without change, of a Currently Approved Collection.

*Abstract:* Each year, WIC State agencies administering the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) are required by 7 CFR 246.12(j)(5) to submit to FNS an annual summary of the results of their vendor monitoring efforts in order to provide Congress, senior FNS officials, as well as the general public, assurance that every reasonable effort is being made to ensure integrity in the WIC Program. State agencies use the TIP web-based system to report the information. The number of State agencies reporting remains at 90, which includes 50 geographic State agencies, 34 Indian Tribal Organizations, the District of Columbia, Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Marianas, and the Virgin Islands. The reporting burden consists of three automated forms, the FNS–698, FNS–699 and FNS–700. The FNS–698 and FNS–699 are used to report State agency summary data, whereas the FNS–700 is used to capture information on each authorized WIC vendor. The number of vendors authorized by each WIC State agency varies from State to State. There are no changes in the burden hours associated with collection.

*Estimate of Burden:* Public reporting burden for this collection of information

is estimated to average 0.42 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.

*Affected Public:* State and Tribal Agencies.

*Respondent Type:* Directors or Administrators of WIC state agencies.

*Estimated Number of Respondents:* 90 respondents.

*Estimated Number of Responses per Respondent:* One.

*Estimated Total Annual Burden on Respondents:* 38 hours.

Dated: December 21, 2011.

**Audrey Rowe,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 2011–33241 Filed 12–27–11; 8:45 am]

**BILLING CODE 3410–30–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### National Urban and Community Forestry Advisory Council

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The National Urban and Community Forestry Advisory Council will meet in Washington, DC, on January 25–26, 2012, at the U.S. Department of Agriculture (USDA) Whitten Building. The purpose of this meeting is to discuss finalizing the Council's 2011 annual accomplishment report, recommendations for the Secretary of Agriculture, develop the 2012 plan of work, and hear public input related to urban and community forestry.

**DATES:** The meeting will be held on January 25 and 26, 2012, 9 a.m. to 5 p.m. or until Council business is completed.

**ADDRESSES:** The meeting will be held at the USDA Whitten Building, 12th and Jefferson Drive SW., Washington, DC, 20250; Phone: (202) 205–7829.

Written comments concerning this meeting should be addressed to Nancy Stremple, Executive Staff to the National Urban and Community Forestry Advisory Council, 201 14th Street SW., Yates Building (1 Central) MS–1151, Washington, DC 20250–1151. Comments may also be sent via email to *nstremple@fs.fed.us,* or via facsimile to (202) 690–5792.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. Visitors are encouraged to call ahead to facilitate entry into the Forest Service building.

**FOR FURTHER INFORMATION CONTACT:** Nancy Stremple, Executive Staff to the National Urban and Community Forestry Advisory Council, 201 14th Street SW., Yates Building (1 Central) MS–1151, Washington, DC 20250–1151, phone (202) 205–1054.

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. Those interested in attending should contact Nancy Stremple to be placed on the meeting attendance list. Council discussion is limited to Forest Service staff and Council members; however, persons who wish to bring urban and community forestry matters to the attention of the Council may file written statements with the Council staff (201 14th Street SW., Yates Building (1 Central) MS–1151, Washington, DC 20250–1151, email: *nstremple@fs.fed.us*) before or after the meeting. Public input sessions will be provided at the meeting.

Dated: December 20, 2011

**Robin L. Thompson,**

*Associate Deputy Chief, State and Private Forestry.*

[FR Doc. 2011–33216 Filed 12–27–11; 8:45 am]

**BILLING CODE 3410–11–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:* Quarterly Survey of Public Pensions.

*OMB Control Number:* 0607–0143.

*Form Number(s):* F–10.

*Type of Request:* Revision of a currently approved collection.

*Burden Hours:* 300.

*Number of Respondents:* 100.

*Average Hours Per Response:* 45 minutes.

*Needs and Uses:* Over 2.7 trillion dollars in public pension assets in the financial markets are controlled by a small number of large retirement systems. The 2007 Census of Governments identified 2,547 public retirement systems administered by state and local governments. The 100 largest systems, as measured by the system assets, account for about 90 percent of the total assets of all systems, based on the 2007 Census of Governments. The F–10 form is used to collect financial data from these 100 systems enabling policy makers and economists to follow the changing characteristics of these funds.

This survey was initiated by the U.S. Census Bureau in 1968 at the request of both the Council of Economic Advisers and the Federal Reserve Board. The most important information this survey provides is the quarterly change in composition of the securities holdings of the public retirement systems component of the economy. The Federal Reserve Board uses these data to track the public sector portion of the Flow of Funds Accounts. The Bureau of Economic Analysis (BEA) uses these data to estimate dividends received by state and local government retirement systems that, in turn, are used in preparing the National Income and Product Accounts. Additionally, these data are a significant part of the information base needed to analyze investment trends and help in the formulation of governmental economic policies and investment decisions.

Summary tables of the information collected are released quarterly on the Internet. Documentation and explanatory materials are also available on the Internet site here: *http://www.census.gov/govs/www/qpr.html.*

The Census Bureau proposes changing the name of the survey form from the Quarterly Survey of the Finances of Public Employee Retirement Systems to the Quarterly Survey of Public Pensions. The proposed change would simplify the survey name and promote the use of its data by highlighting pensions; the terminology that is most used.

A revision is being made to the section ''Earnings on Investments.'' The statement ''Net gain or loss on investments—Include both realized + unrealized gains (losses)'' will be modified for added granularity and to separate realized gains and losses from unrealized gains or losses. It will be divided into three parts: (1) Realized gains on investments at book value, (2) realized losses on investments at book value, and (3) unrealized net gains (or losses) on investments at market value.

Additionally, federally sponsored agency securities including bonds and mortgage backed securities will be moved from ''Corporate Bonds'' to

''Federal Government Securities'' in the ''Cash and Investments'' section. The decision to revise this classification was reached after multiple meetings with economists from the Federal Reserve Board. The Federal Reserve Board uses these data to track the public sector portion of the Flow of Funds Accounts. It was determined that federally sponsored agency securities were better classified under Federal Government Securities instead of Corporate Bonds.

*Affected Public:* State, local or tribal governments.

*Frequency:* Quarterly.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* Title 13 U.S.C., Section 182.

*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 email (*bharrisk@omb.eop.gov*).

Dated: December 22, 2011

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–33224 Filed 12–27–11; 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:* U.S. Census Bureau.

*Title:* Federal Statistical System Public Opinion Survey.

*OMB Control Number:* None.

*Form Number(s):* None.

*Type of Request:* New collection.

*Burden Hours:* 11.667.

*Number of Respondents:* 70,000.

*Average Hours Per Response:* 10 minutes.

*Needs and Uses:* The Census Bureau is seeking ways to reverse the decline in response rates for its ongoing surveys to avoid both increasing operational costs and potential declines in data quality. We hypothesize that members of the public would voluntarily cooperate more extensively with federal surveys if they trust the federal statistical system and the resulting federal statistics. Therefore, we propose to collect information about public awareness and attitudes towards federal statistics and the federal statistical system. The information collected will assist the Census Bureau in addressing attitudes, beliefs, and concerns the public may have regarding its trust (confidence) in federal statistics and in the collection of statistical information by the federal government from the public, as well as attitudes toward and knowledge of the statistical uses of administrative records. The data will also allow us to understand how current events influence public perception towards federal statistics.

From February 2012 through September 2013, the Census Bureau will add 25 questions nightly onto an ongoing data collection by the Gallup organization. Approximately nineteen of the 25 questions will be core questions and approximately 6 will be available for rotation. Core questions will focus on awareness of and attitudes towards federal statistics and federal statistical agencies. There will be 1–2 core questions on attitudes towards the statistical use of administrative records. Core questions will be used to explore relationships among the concepts, develop a time series and measure any ''shocks'' to the system. Shocks could include any current events that may impact awareness or attitudes towards topics being measured. They may include things like data breaches (public or private sector), elections, or any unanticipated news event that may alter public perception. By having a continual data collection, we will be able to look for changes in public perception after any of these types of events occur or look for underlying causes when we see a change in the time series.

Up to 20 times during the data collection, roughly monthly, up to 6 questions may be rotated in the survey. Rotating questions will be used for three distinct purposes:

- First, experiments will be planned for questions surrounding public opinion of statistical uses of administrative records. Topics of experiments will include public perception of the quality of such records, public perception of privacy and confidentiality implications of such use, and differentiation between types of administrative records and types of statistical uses. These experiments will be conducted using different frames around questions, varying the types of records mentioned and the methods of use in the question, willingness-to-pay/stated preference questions, and so on. These types of questions would use up to 6 questions in the nightly interview and would be fielded for a pre-specified amount of time. These experimental questions will be submitted to OMB at a later date as an addendum to this submission, although some examples are provided as illustrative examples in Attachment B.
- Second, rotating questions will be used around known, planned events to gage awareness of those events and opinions about the relationship (if any) between those events and the federal statistical system. Examples of planned events are the presidential election, release of particular statistics, and any pre-planned public awareness activities. These types of questions would add up to 3 questions in the nightly interview and would be fielded for a limited amount of time surrounding the particular event. The particular questions will be submitted to OMB at a later date as an addendum to this submission, but would ask things like awareness of the event, and opinions about the relationship (if any) between those events and the federal statistical system.
- Third, we may wish to add rotating questions very quickly after an unanticipated event to gage awareness of those events and opinions about the relationship (if any) between those events and the federal statistical system. These could be events like a data breach (public or private sector), political scandal, or any other unanticipated news event that may alter public perceptions. Gallup can add questions with as little as 48 hours notice. These types of questions would add up to 3 questions in the nightly interview and would be fielded for a limited amount of time surrounding the particular event. These questions would be submitted to OMB for a quick-turn-around approval and would be very limited in scope to address the particular unanticipated event.

These public opinion data will enable the Census Bureau to better understand public perceptions, which will provide guidance for communicating with the public and for future planning of data collection that reflects a good understanding of public perceptions and concerns. Because all federal statistical agencies are also facing these issues of declining response rates and increasing costs in a time of constrained budgets, the Census Bureau will share

the results of these surveys with other federal statistical agencies, to maximize the utility of this information collection and ultimately, the quality and efficiency of federal statistics. Specifically, the member agencies of the Interagency Council on Statistical Policy (ICSP) have expressed an interest in this effort. A subgroup of ICSP member agencies have been particularly helpful in developing this proposal. They include the National Agricultural Statistics Service, the National Center of Health Statistics, the Economic Research Service, Statistics of Income Division (IRS), and the Statistical and Science Policy Office, Office of Management and Budget. We refer to this working group as the Federal Statistical System (FSS) Team. The ICSP agencies will use results from this data collection to inform public communication and for future planning of data collection.

*Affected Public:* Individuals or households.

*Frequency:* One time.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* Title 13 U.S.C. Chapter 5.

*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 email (*bharrisk@omb.eop.gov*).

Dated: December 22, 2011.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–33268 Filed 12–27–11; 8:45 am]

**BILLING CODE 3510–07–P**

---

## DEPARTMENT OF COMMERCE

### U.S. Census Bureau

### Proposed Information Collection; Comment Request; The American Community Survey 2013 Content Changes and Internet Response Mode

**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 February 27, 2012.

**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 Cheryl Chambers, U.S. Census Bureau, American Community Survey Office, Washington, DC 20233 by FAX to (301) 763–8070 or via the internet at *ACSO.communications@census.gov*.

**SUPPLEMENTARY INFORMATION**

### I. Abstract

The American Community Survey (ACS) collects detailed population and housing data every month and provides tabulations of these data on a yearly basis. In the past, the long-form data were collected only at the time of each decennial census. After years of development and testing, the ACS began full implementation in households in January 2005 and in group quarters (GQs) in January 2006.

The ACS provides more timely information for critical economic planning by governments and the private sector. In the current information-based economy, federal, state, tribal, and local decision makers, as well as private business and non-governmental organizations, need current, reliable, and comparable socioeconomic data to chart the future. In 2006, the ACS began publishing up-to-date profiles of American communities every year, providing policymakers, planners, and service providers in the public and private sectors this information every year—not just every ten years.

The ACS released estimates of population and housing characteristics for geographic areas of all sizes in December 2010. These data products, used by federal agencies and others, are similar in scope to the Summary File 3 tables from Census 2000.

In the 2010 ACS Content Test, the Census Bureau conducted testing of two new question topics—computer and Internet usage and parental place of birth—which we are considering adding to the questionnaire starting in 2013. As authorized by the Broadband Data Improvement Act of 2008, the Federal Communications Commission sponsored the computer and Internet usage topic; it is comprised of three questions with a mix of fixed choice and open-ended responses. The Census Bureau sponsored the parental place of birth topic; it includes two open-ended questions. The 2010 Content Test results for the two new topics were presented to the Office of Management and Budget (OMB) in September 2011. Reports describing these results will be made available publicly in early 2012.

The Census Bureau believes there is added value in collecting information about parental place of birth, though some may feel that this topic is somewhat duplicative when collected in connection with existing survey questions on race, Hispanic origin, and ancestry. Adding the parental place of birth questions to the questionnaire in 2013 would be done as part of a multi-year process to further examine the relationship of the data for these topics. The ACS data would also be evaluated in connection with results from the 2010 Census Alternative Questionnaire Experiment, and this combined research would be used in determining recommendations for which questions would remain on the ACS at the conclusion of this process. The Census Bureau plans to provide various opportunities for public comment as well as dialogue with groups that are especially interested in these data as we refine the plans and share results on this cross-topical research.

In the 2010 ACS Content Test, the Census Bureau also conducted testing on five existing question topics, veteran's status and period of service, food stamps, property income and wages which we are planning to incorporate into the survey starting in 2013. The Census Bureau revised the food stamp question, at the request of the Food and Nutrition Service, to incorporate the program name change to the Supplemental Nutrition Assistance Program (SNAP). The new version will be used in all collection modes. The Census Bureau revised the wage question to improve response on property income and reporting of wages by breaking up these questions into shorter pieces to improve comprehension when the questions are asked by an interviewer. This change will be incorporated into the Computer-

assisted Telephone Interview (CATI) and Computer-assisted Personal Interview (CAPI) modes only. At the request of the Department of Veteran Affairs, the Census Bureau revised the veteran status and period of service questions to simplify the reporting categories. The new version will be used by all collection modes. The 2010 Content Test results for the five existing topics were presented to OMB in September 2011. Reports describing these results will be made available publicly in early 2012.

**II. Method of Collection**

The Census Bureau will mail survey materials to households selected for the ACS. For households that do not return a questionnaire, Census Bureau staff will attempt to conduct interviews via CATI. We will also conduct CAPI for a sub sample of nonrespondents. A content reinterview will be conducted from a small sample of respondents.

In 2011 the Census Bureau conducted two tests to assess the feasibility of providing an Internet response option to households that receive survey materials by mail. These tests evaluated various methods for providing an Internet response option. One option tested offering respondents the choice to respond by Internet or mail. Another method tested provided only instructions to respond online initially, and sent a follow-up paper questionnaire to households that did not respond online or did not have Internet access. Implementing an Internet response option may lead to cost savings for administering the ACS as well as improvements in the quality of the data provided. Depending on the results of the 2011 tests, the Census Bureau is considering implementing an Internet response option for the ACS in 2013. Reports describing the results of the April 2011 test will be made available publicly in early 2012.

For most types of GQs, Census Bureau field representatives (FRs) will conduct personal interviews with respondents to complete questionnaires or, if necessary, leave questionnaires and ask respondents to complete. Information from GQ contacts will be collected via CAPI. A GQ contact reinterview will be conducted from a sample of GQs primarily through CATI. A very small percentage of the GQ reinterviews will be conducted via CAPI.

The Census Bureau staff will provide Telephone Questionnaire Assistance (TQA) and if the respondent indicates a desire to complete the survey by telephone, the TQA interviewer conducts the interview.

**III. Data**

*OMB Control Number:* 0607–0810.

*Form Number:* ACS–1, ACS–1(SP), ACS–1(PR), ACS–1(PR)SP, ACS–1(GQ), ACS–1(PR)(GQ), GQFQ, ACS CATI (HU), ACS CAPI (HU), ACS RI (HU), and AGQ QI, AGQ RI.

*Type of Review:* Regular submission.

*Affected Public:* Individuals, households, and businesses.

*Estimated Number of Respondents:* We plan to contact the following number of respondents each year: 3,540,000 households; 200,000 persons in group quarters; 20,000 contacts in group quarters; 43,000 households for reinterview; and 1,500 group quarters contacts for reinterview.

*Estimated Time Per Response:* Estimates are 38 minutes per household, 15 minutes per group quarters contact, 25 minutes per resident in group quarters, and 10 minutes per household or GQ contact in the reinterview samples.

*Estimated Total Annual Burden Hours:* The estimate is an annual average of 2,337,900 burden hours.

*Estimated Total Annual Cost:* Except for their time, there is no cost to respondents.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* Title 13, United States Code, Section 141, 193, 221.

**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: December 22, 2011

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–33269 Filed 12–27–11; 8:45 am]

BILLING CODE 3510–07–P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Docket 60–2011, 61–2011 and 62–2011]**

### Foreign-Trade Zones 140 and 78 Applications for Subzone Authority Dow Corning Corporation, Hemlock Semiconductor Corporation and Hemlock Semiconductor, L.L.C.; Notice of Public Hearing and Extension of Comment Period

A public hearing will be held on the applications for subzone authority at the Dow Corning Corporation facility in Midland, Michigan (76 FR 63282–63283, 10/12/2011), the Hemlock Semiconductor Corporation facility in Hemlock, Michigan (76 FR 63282, 10/12/2011) and the Hemlock Semiconductor, L.L.C. facility in Clarksville, Tennessee (76 FR 63281–63282, 10/12/2011). The Commerce examiner will hold the public hearing on January 25, 2012 at 9:30 a.m., at the Department of Commerce, Room 4830, 1401 Constitution Ave. NW, Washington, DC 20230. Interested parties should indicate their intent to participate in the hearing and provide a summary of their remarks no later than January 18, 2012.

The comment period for the cases referenced above is being extended to February 27, 2012, to allow interested parties additional time in which to comment. Rebuttal comments may be submitted during the subsequent 15-day period, until March 13, 2012. Submissions (original and one electronic copy) shall be addressed to the Board's Executive Secretary at: Foreign-Trade Zones Board, U.S. Department of Commerce, Room 2111, 1401 Constitution Ave. NW, Washington, DC 20230.

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: December 21, 2011.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2011–33296 Filed 12–27–11; 8:45 am]

BILLING CODE P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[A32b–3–2011]**

### Foreign-Trade Zone 45—Portland, OR

Expansion of Manufacturing Authority;

Epson Portland Inc.

(Inkjet Ink Manufacturing), Hillsboro, OR

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Port of Portland, grantee of FTZ 45, requesting authority to expand the scope of manufacturing authority approved within Subzone 45F, on behalf of Epson Portland, Inc. (EPI), in Hillsboro, Oregon. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally filed on December 22, 2011.

Subzone 45F was approved by the Board in 2005 at the EPI plant (16.6 acres) located at 3950 NW Aloclek Place, Hillsboro, Oregon (Board Order 1406, 70 FR 55106, 9/20/2005). Activity at the facility (450 employees) includes manufacturing (injection molding, assembly, finishing), warehousing and distribution of inkjet printer cartridges.

The current request, which is being processed under Section 400.32(b)(1) of the Board's regulations, involves the use of privileged foreign (PF) status (19 CFR 146.41) inputs in manufacturing of ink for inkjet printer cartridges. Current production capacity is 9,000 barrels (210 kg per barrel) of ink per year. The finished product would be either inkjet ink (duty rate—1.8%) or inkjet printer cartridges (duty-free). New material inputs sourced from abroad (representing 75% of the value of the finished inkjet ink) include potassium hydroxide, surfactants, 1,2 hexanediol, Tri-isoproanolamine, solvents, glycerin, triethylene glycol monobutyl ether, triethylene glycol, adipic acid, emulsifiers, disodium salt dihydrate, printing ink colorants (black, cyan, brown, orange, violet, red green, magenta and other), de-foamers, solublizers, and biocides (duty rates range from duty-free to 6.5%).

This request for restricted FTZ authority would allow EPI to realize certain administrative efficiencies by allowing the admission of its foreign materials for inkjet ink manufacturing in zone status. FTZ procedures could also exempt EPI from customs duty payments on the additional PF status materials used in export production. The company anticipates that some 55 percent of the plant's shipments will be exported, either as finished inkjet ink or in inkjet cartridges. EPI would be able to defer duties on the PF status materials used in production of inkjet ink or inkjet cartridges for its domestic sales. EPI would also be exempt from duty payments on foreign materials that become scrap during the production process. FTZ designation would further allow EPI to realize logistical benefits through the use of weekly customs entry procedures. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

Section 400.32(b)(1)(iii) of the FTZ Board's regulations (15 CFR part 400) allows the Assistant Secretary for Import Administration to act for the Board in making decisions on new manufacturing authority when the zone benefits sought do not involve the election of non-privileged foreign status on items involving inverted tariffs. In accordance with the Board's regulations, Diane Finver of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings to the Executive Secretary.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is January 27, 2012. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 13, 2012.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.*

It should be noted that the applicant has concurrently requested an expansion of EPI's scope of authority to include manufacturing of inkjet ink involving foreign-sourced inputs that would be admitted to the subzone under nonprivileged foreign (NPF) status (19 CFR 146.42). The request to elect NPF status for expanded authority would be docketed separately and would be processed as a distinct proceeding. Any party wishing to submit comments for consideration regarding the request for NPF status for expanded authority would need to submit such comments pursuant to the separate notice that would be published for that request.

For further information, contact Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: December 22, 2011.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2011–33298 Filed 12–27–11; 8:45 am]

BILLING CODE P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Order No. 1805 ]**

### Reorganization of Foreign-Trade Zone 215 Under Alternative Site Framework Sebring, FL

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas,* the Board adopted the alternative site framework (ASF) in December 2008 (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09; 75 FR 71069–71070, 11/22/10) as an option for the establishment or reorganization of general-purpose zones;

*Whereas,* the Sebring Airport Authority, grantee of Foreign-Trade Zone 215, submitted an application to the Board (FTZ Docket 46–2011, filed 06/29/11) for authority to reorganize under the ASF with a service area of DeSoto, Glades, Hardee, Hendry, Highlands and Okeechobee Counties and the Cities of Belle Glade and Pahokee, Florida, within and adjacent to the Port Manatee Customs and Border Protection port of entry, and FTZ 215's existing Site 1 would be categorized as a magnet site;

*Whereas,* notice inviting public comment was given in the **Federal Register** (76 FR 39378–39379, 07/06/11) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

*Whereas,* the Board adopts the findings and recommendation of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

*Now, therefore,* the Board hereby orders:

The application to reorganize FTZ 215 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, and to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project.

Signed at Washington, DC, this 20th day of December 2011.

**Paul Piquado,**

*Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

ATTEST:

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2011–33297 Filed 12–27–11; 8:45 am]

BILLING CODE P

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### Announcing an Open Meeting of the Information Security and Privacy Advisory Board

**AGENCY:** National Institute of Standards and Technology.

**ACTION:** Notice.

**SUMMARY:** The Information Security and Privacy Advisory Board (ISPAB) will meet Wednesday, February 1, 2012, from 8 a.m. until 5 p.m., Thursday, February 2, 2012, from 8 a.m. until 5 p.m., and Friday, February 3, 2012 from 8 a.m. until 12 p.m. All sessions will be open to the public.

**DATES:** The meeting will be held on Wednesday, February 1, 2012, from 8 a.m. until 5 p.m., Thursday, February 2, 2012, from 8 a.m. until 5 p.m. Eastern time., and Friday, February 3, 2012 from 8 a.m. until 12 p.m. Eastern time.

**ADDRESSES:** The meeting will take place in the Residence Inn Washington, 1199 Vermont Avenue NW., Washington DC, 20005–3519.

**FOR FURTHER INFORMATION CONTACT:** Ms. Annie Sokol, Information Technology Laboratory, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8930, Gaithersburg, MD 20899–8930, telephone: (301) 975–2006.

**SUPPLEMENTARY INFORMATION:**

Pursuant to the Federal Advisory Committee Act, 5 U.S.C. App., notice is hereby given that the Information Security and Privacy Advisory Board (ISPAB) will meet Wednesday, February 1, 2012, from 8 a.m. until 5 p.m., Thursday, February 2, 2012, from 8 a.m. until 5 p.m., and Friday, February 3, 2012 from 8 a.m. until 12 p.m. All sessions will be open to the public. The ISPAB was established by the Computer Security Act of 1987 (Pub. L. 100–235) and amended by the Federal Information Security Management Act of 2002 (Pub. L. 107–347) to advise the Secretary of Commerce and the Director of NIST on security and privacy issues pertaining to federal computer systems. Details regarding the ISPAB's activities are available at *http://csrc.nist.gov/groups/SMA/ispab/index.html.*

**The Agenda is Expected To Include the Following Items**

—Presentation relating to legislature updates,
—Panel discussion on data storage and data location,
—Panel discussion on FedRAMP—Supply Chain and Certification,
—Discussion/updates on the National Strategy for Trusted Identities in Cyberspace (NSTIC),
—Panel discussion on derived credentials,
—Presentation on DHS updates and cybersecurity strategy,
—Panel discussion on data feedback and network,
—Panel discussion/presentation on NCIC (National Crime Information Center) System,
—Presentation/Discussion on NIST Research and Secure Mobile Devices,
—Panel Discussion on cyber R&D Strategy, and
—Update of NIST Computer Security Division.

Note that agenda items may change without notice because of possible unexpected schedule conflicts of presenters. The final agenda will be posted on the Web site indicated above. Approximately fifteen seats will be available for the public and media. No registration is required to attend this meeting.

*Public Participation:* The ISPAB agenda will include a period of time, not to exceed thirty minutes, for oral comments from the public (Friday, February 3, 2012, between 8:15 a.m. and 8:45 a.m.). Speakers will be selected on a first-come, first served basis. Each speaker will be limited to five minutes. Members of the public who are interested in speaking are asked to contact Ms. Annie Sokol at the telephone number indicated above.

In addition, written statements are invited and may be submitted to the ISPAB at any time. Written statements should be directed to the ISPAB Secretariat, Information Technology Laboratory, 100 Bureau Drive, Stop 8930, National Institute of Standards and Technology, Gaithersburg, MD 20899–8930.

Dated: December 22, 2011.

**Willie E. May,**

*Associate Director for Laboratory Programs.*

[FR Doc. 2011–33278 Filed 12–27–11; 8:45 am]

BILLING CODE 3510–13–P

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### National Conference on Weights and Measures 97th Interim Meeting

**AGENCY:** National Institute of Standards and Technology, Commerce.

**ACTION:** Notice.

**SUMMARY:** The Interim Meeting of the 97th National Conference on Weights and Measures (NCWM) will be held January 22 to 25, 2012. This notice contains information about significant items on the NCWM Committee agendas, but does not include all agenda items. As a result, the items are not consecutively numbered.

**DATES:** The meeting will be held on January 22–25, 2012.

**ADDRESSES:** The meeting will be held at the Hotel Monteleone located at 214 Royal Street, New Orleans, LA 70130–2201.

**FOR FURTHER INFORMATION CONTACT:** Ms. Carol Hockert, Chief, NIST, Office of Weights and Measures, 100 Bureau Drive, Stop 2600, Gaithersburg, MD 20899–2600. You may also contact Ms. Hockert by telephone (301) 975–5507 or by email at *Carol.Hockert@nist.gov.* The meetings are open to the public, but a paid registration is required. Please see NCWM Publication 15 ''Interim Meeting Agenda'' (www.ncwm.net or *http://www.nist.gov/pml/wmd/index.cfm*) to view the meeting agendas, registration forms and hotel reservation information.

**SUPPLEMENTARY INFORMATION:**

Publication of this notice on the NCWM's behalf is undertaken as a public service; NIST does not endorse, approve, or recommend any of the proposals contained in this notice or in the publications of the NCWM.

The NCWM is an organization of weights and measures officials of the states, counties, and cities of the United States, federal agencies, and private sector representatives. These meetings bring together government officials and representatives of business, industry, trade associations, and consumer organizations on subjects related to the field of weights and measures technology, administration and enforcement. NIST participates to promote uniformity among the states in laws, regulations, methods, and testing equipment that comprise the regulatory control of commercial weighing and measuring devices and other trade and commerce issues.

The following are brief descriptions of some of the significant agenda items that will be considered along with other issues at the NCWM Interim Meeting. Comments will be taken on these and other issues during several public comment sessions. At this stage, the items are proposals. This meeting also includes work sessions in which the Committees may also accept comments, and where they will finalize recommendations for NCWM consideration and possible adoption at its 97th Annual Meeting that will be held in Portland, Maine, on July 15–19, 2012. The Committees may withdraw or

carryover items that need additional development.

The Specifications and Tolerances Committee (S&T Committee) will consider proposed amendments to NIST Handbook 44, ''Specifications, Tolerances, and other Technical Requirements for Weighing and Measuring Devices.'' Those items address weighing and measuring devices used in commercial applications, that is, devices that are used to buy from or sell to the public or used for determining the quantity of product sold among businesses. Issues on the agenda of the NCWM Laws and Regulations Committee (L&R Committee) relate to proposals to amend NIST Handbook 130, ''Uniform Laws and Regulations in the area of Legal Metrology and Engine Fuel Quality'' and NIST Handbook 133 ''Checking the Net Contents of Packaged Goods.''

**NCWM Specifications and Tolerances Committee**

The following items are proposals to amend NIST Handbook 44:

*Item 320–4, UR.1.2. Grain Hopper Scales.*

The intent of this proposal is to add language to NIST Handbook 44 to clarify the requirement that hopper scales used to weigh grain must be Accuracy Class III weighing devices. The submitter of this proposal believes that this revision is needed to help ensure that weights and measures officials uniformly apply the handbook's tolerances and other technical and use requirements to grain hopper scales.

**Liquid Measuring Devices**

Some gasoline and fuel retailers offer a variety of discounts to consumers on fuel prices in connection with marketing services and dispensing product. The items that follow include proposals to modify Section 3.30. Liquid-Measuring Devices to require that retailers provide consumers with adequate transaction information to assist them in making value comparisons and ensure transparency when fuel purchases are discounted after a delivery.

*Item 330–1, S.1.6.4.1. Unit Price*

This proposal would modify the device specification to recognize current marketing practices that offer post delivery discounts on fuel prices and require final unit price information.

*Item 330–2, S.1.6.5.4. Selection of Unit Price*

This proposal would allow device manufacturers greater flexibility in the design and operation of customer operated controls on motor-fuel dispensers by recognizing the use of new technology in the selection of a unit price.

*Item 330–3, S.1.6.6. Agreement between Indications*

This proposal would exempt ''total money values'' displays on the dispenser and auxiliary equipment (such as the display on a remote control console in an operator's kiosk) from agreement requirements when retailers offer post delivery discounts for a fuel sale.

*Item 330–4, S.1.6.7. Recorded Representations*

This proposal would ensure that fuel dispensers provide receipts with sufficient price and other information to allow customers to understand any post delivery discounts and recognize the use of either digitally transmitted or printed receipts.

*Item 330–5, UR.3.2. Unit Price and Product Identity*

This proposal is intended to clarify the requirements for displaying or posting the final unit price of a fuel offered at a discount and periods where the highest unit price shall be displayed.

*Item 330–6, UR.3.3. Computing Device*

This proposal would require that customer receipts include adequate information to allow the customer to understand and verify any post delivery discounts the retailer provides in connection with a fuel sale.

**Vehicle Tank Meters**

*Item 331–1, T.4. Product Depletion Test*

This proposal would amend the handbook to base the product depletion test tolerances on the meter's maximum flow rate (a marking required on all meters), rather than the marked meter size (this marking is required for meters manufactured in 2009 or later). The justifications for this proposal are that it will improve the consistency of the tolerance application to older meters that are not required to be marked with the meter size and correct the application of tolerances applied to small meters.

**Electronic Livestock, Meat and Poultry Carcass Evaluation Systems**

*Item 359–1, Tentative Status of Code 5.59. Electronic Livestock, Meat, and Poultry Evaluation Systems and/or Devices*

The intent of this proposal is to make tentative Code 5.59. in Handbook 44 enforceable so that it can be used to control the accuracy and use of electronic carcass evaluation equipment. The equipment in this code is used commercially in livestock procurement operations to determine the value of the animals being purchased. Currently, there is no independent, third party verifying the accuracy of these devices. In 2010, 106.9 million hogs weighing 21.8 billion pounds with a total value of $15.7 billion were commercially purchased. Of these purchases, about 80 percent were made on a carcass yield weight basis using an electronic carcass evaluation device. The use of these devices in the beef industry is just emerging so no data on the level of use is available for that application. In addition, electronic evaluation devices are used to measure composition or quality constituents in individual cuts of meat for further sale to consumers. Studies have shown that improper use of electronic carcass evaluation equipment can change the value of livestock, meat, and poultry. The impact of calibration, machine, and formula errors is unknown. Because the revenues of livestock and poultry producers in every state are, or will be, affected by the use of these devices, adoption of a final code that defines specifications, tolerances, and other technical requirements for these devices will help ensure equity between buyer and seller and fair competition between businesses.

**NCWM Laws and Regulations Committee**

The following items are proposals to amend NIST Handbook 130 or NIST Handbook 133:

**Uniform Regulation for the Method of Sale of Commodities**

*Item 232–1., Polyethylene Products—Method of Sale Regulation—Section 2.13.4. ''Declaration of Weight.''*

The Committee will consider a proposal to revise the density values used to calculate the net weights on some packages of polyethylene products to recognize that heavier density plastics are now being used in some sheeting and bags. (See also Item 260–4, Handbook 133, Chapter 4.7.

Polyethylene Sheeting—Test Procedure—Footnote to Step 3.)

*Item 232–6, Packaged Printer Ink and Toner Cartridges*

A proposed method of sale will be considered for adoption to clarify the labeling requirements for packaged inkjet and toner cartridges to ensure that consumers are informed about the net quantity of contents of these products, and that value comparisons can be made, and quantities can be verified to ensure equity between buyer and seller and fair competition between sellers, including original equipment manufacturers and refillers.

**Uniform Engine Fuels and Automotive Lubricants Regulation**

*Item 237–9, Requirements for Hydrogen, and Item 237–10, Definition for Hydrogen Fuel for Internal Combustion Engines and Fuel Cell Vehicles*

These two proposed regulations are being considered to adopt a national quality standard for commercial hydrogen fuel and to adopt hydrogen related definitions. Both proposals would apply to hydrogen fuel when it is sold through dispensing equipment for use in fuel cell and internal combustion engine vehicles. The first proposal would add the most recent version of SAE International's Standard J2719 ''Hydrogen Fuel Quality for Fuel Cell Vehicles'' to specify the quality standards that hydrogen fuel would have to meet, and the second proposal would define the hydrogen-related terms of ''fuel cell,'' ''hydrogen fuel,'' and ''internal combustion engine.''

Dated: December 22, 2011.

**Willie E. May,**

*Associate Director for Laboratory Programs.*

[FR Doc. 2011–33276 Filed 12–27–11; 8:45 am]

BILLING CODE 3510–13–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA897**

### Fisheries of the South Atlantic and Gulf of Mexico; Southeast Data, Assessment, and Review (SEDAR); Spanish Mackerel and Cobia

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

**ACTION:** Notice of SEDAR Workshops for South Atlantic and Gulf of Mexico Spanish mackerel and cobia.

**SUMMARY:** The SEDAR assessments of the South Atlantic and Gulf of Mexico stocks of Spanish mackerel and cobia will consist of a series of workshops and webinars: a Data Workshop and webinar, an Assessment Workshop and webinars, and a Review Workshop. The data and assessment webinars will be announced in a separate notice. This is the twenty-eighth SEDAR.

**DATES:** The Data Workshop will take place February 6–10, 2012. The Assessment Workshop will take place May 7–11, 2012. The Review Workshop will take place August 6–10, 2012. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

**ADDRESSES:** The Data Workshop will be held at the Marriott Charleston, 170 Lockwood Blvd., Charleston, SC 29403; telephone: (843) 723–3000. The Assessment Workshop will be held at the Courtyard Miami Coconut Grove, 2649 South Bayshore Drive, Miami, FL 33133; telephone: (305) 858–2500. The Review Workshop will be held at the Doubletree by Hilton Atlanta—Buckhead, 3342 Peachtree Road, Atlanta, GA 30326; telephone: (404) 231–1234.

**FOR FURTHER INFORMATION CONTACT:** Kari Fenske, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366.

**SUPPLEMENTARY INFORMATION:** The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR includes three workshops: (1) Data Workshop, (2) Stock Assessment Workshop and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Stock Assessment Workshop is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Consensus Summary documenting Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and Federal agencies. SEDAR 28 Workshop Schedule:

**February 6–10, 2012; SEDAR 28 Data Workshop**

February 6, 2012: 1 p.m.–8 p.m.; February 7–9, 2012: 8 a.m.–8 p.m.; February 10, 2012: 8 a.m.–1 p.m.

An assessment data set and associated documentation will be developed during the Data Workshop. Participants will evaluate all available data and select appropriate sources for providing information on life history characteristics, catch statistics, discard estimates, length and age composition, and fishery dependent and fishery independent measures of stock abundance.

**May 7–11, 2012; SEDAR 28 Assessment Workshop**

May 7, 2012: 1 p.m.–8 p.m.; May 8–10, 2012: 8 a.m.–8 p.m.; May 11, 2012: 8 a.m.–1 p.m.

Using datasets provided by the Data Workshop, participants will develop population models to evaluate stock status, estimate population benchmarks and Sustainable Fisheries Act criteria, and project future conditions. Participants will recommend the most appropriate methods and configurations for determining stock status and estimating population parameters. Participants will prepare a workshop report, compare and contrast various assessment approaches, and determine whether the assessments are adequate for submission to the review panel.

**August 6–10, 2012; SEDAR 28 Data Workshop**

August 6, 2012: 1 p.m.–8 p.m.; August 7–9, 2012: 8 a.m.–8 p.m.; August 10, 2012: 8 a.m.–1 p.m.

The Review Workshop is an independent peer review of the assessment developed during the Data and Assessment Workshops. Workshop Panelists will review the assessment and document their comments and recommendations in a Consensus Summary.

### Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 10 business days prior to each workshop.

Dated: December 21, 2011.

**Tracey L. Thompson,**

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

[FR Doc. 2011–33159 Filed 12–27–11; 8:45 am]

**BILLING CODE 3510–22–P**

---

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**RIN 0648–XA896**

## 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:** Meeting of the South Atlantic Fishery Management Council's (Council) Golden Crab Advisory Panel (AP).

**SUMMARY:** The South Atlantic Fishery Management Council will hold a meeting of its Golden Crab AP in Ft. Lauderdale, FL.

**DATES:** The meeting will take place January 29, 2012. See **SUPPLEMENTARY INFORMATION** for specific times.

**ADDRESSES:** The meeting will be held at the Harbor Beach Marriott, 3030 Holiday Drive, Ft. Lauderdale, FL 33316; telephone: (954) 525–4000.

**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 Golden Crab AP will meet from 1 p.m.–5 p.m. on Sunday, January 29, 2012.

The Golden Crab AP will receive an overview of draft Amendment 6 to the Golden Crab Fishery Management Plan for the South Atlantic Region. The amendment includes management alternatives for establishing a catch share program for the commercial fishery. The AP will discuss alternatives in the amendment, including options for allowing new entrants into the fishery under the catch share program, and provide recommendations for Council consideration.

### Special Accommodations

The meeting is 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: December 21, 2011.

**Tracey L. Thompson,**

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

[FR Doc. 2011–33158 Filed 12–27–11; 8:45 am]

**BILLING CODE 3510–22–P**

---

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**RIN 0648–XA909**

## New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice; public meeting.

**SUMMARY:** The New England Fishery Management Council's (Council) Groundfish Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

**DATES:** The meeting will be held on Wednesday, January 18, 2012 at 9 a.m.

**ADDRESSES:** The meeting will be held at the Marriott Sable Oaks Hotel, 200 Sable Oaks Drive, South Portland, ME 04106; telephone: (207) 871–8000; fax: (207) 871–7971.

*Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

**SUPPLEMENTARY INFORMATION:** The items of discussion in the committee's agenda are as follows:

The Groundfish Oversight Committee will meet to discuss several issues related to the Northeast Multispecies Fishery Management Plan. The Committee will receive an overview of the preliminary assessments results for Gulf of Maine cod. The Committee will discuss these results and may develop a recommendation to the Council on how to incorporate the results into management. They will also begin work on two management actions that will be developed over the next year. First, the Committee will begin to address possible changes to the groundfish closed areas that will be incorporated into an omnibus habitat amendment. Second, the Committee will begin work on a framework adjustment to modify sector management provisions to improve sector operations. Other business may be discussed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: December 22, 2011.

**Tracey L. Thompson,**

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

[FR Doc. 2011–33272 Filed 12–27–11; 8:45 am]

**BILLING CODE 3510–22–P**

---

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**RIN 0648–XA908**

## Gulf of Mexico Fishery Management Council; Public Meeting

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

**ACTION:** Council to convene public meeting.

**SUMMARY:** The Gulf of Mexico Fishery Management Council (Council) will convene a conference call meeting of the Shrimp Advisory Panel (AP).

**DATES:** The conference call meeting will convene at 9 a.m. Eastern Time on

Tuesday, January 17, 2012 and is expected to end no later than 12 p.m.

**ADDRESSES:** The conference call will be accessible via telephone. Please go to the Gulf of Mexico Fishery Management Council's Web site at *www.gulfcouncil.org* for instructions.

*Council address:* Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

**FOR FURTHER INFORMATION CONTACT:** Dr. Richard Leard, Deputy Executive Director/Senior Fishery Biologist; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

**SUPPLEMENTARY INFORMATION:** The Gulf of Mexico Fishery Management Council will convene its Shrimp Advisory Panel to receive a presentation of the Biological Review of the 2011 Cooperative Texas Closure Report and a change in yield report. The Shrimp AP will then consider recommendations to the Council for a closure in 2012. Finally, the Shrimp AP will receive an update of new stock assessments being developed for shrimp stocks in the Gulf of Mexico.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630.

Although other non-emergency issues not on the agenda may come before the Shrimp AP for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions of the Shrimp AP will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

**Special Accommodations**

This conference call is accessible to people with disabilities. For assistance with any of our conference calls contact Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the webinar.

Dated: December 22, 2011.

**Tracey L. Thompson,**

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

[FR Doc. 2011–33271 Filed 12–27–11; 8:45 am]

**BILLING CODE 3510–22–P**

## COMMODITY FUTURES TRADING COMMISSION

### Agency Information Collection Activities: Notice of Intent to Renew Collection, Large Trader Reports

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice

**SUMMARY:** The Commodity Futures Trading Commission (CFTC) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, and to allow 60 days for comment in response to the notice. This notice solicits comments on requirements relating to information collected to assist the Commission in the prevention of market manipulation.

**DATES:** Comments must be submitted on or before February 27, 2012.

**ADDRESSES:** Comments may be mailed to Barry J. Goldmeier, Division of Market Oversight, U.S. Commodity Futures Trading Commission, 1155 21st Street NW., Washington, DC 20581.

**FOR FURTHER INFORMATION CONTACT:** Barry J. Goldmeier, (202) 418–5303; fax (202) 418–5527; email: *bgoldmeier@cftc.gov.*

**SUPPLEMENTARY INFORMATION:** Under the PRA, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 Section 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality of, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of collection of information on those who are to respond, including through the use of appropriate electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

**Large Trader Reports, OMB Control No. 3038–0009—Extension**

Parts 15 through 19 and 21 of the Commission's regulations under the Commodity Exchange Act (Act) require large trader reports from clearing members, futures commission merchants, and foreign brokers and traders. These rules are designed to provide the Commission with information to effectively conduct its market surveillance program, which includes the detection and prevention of price manipulation and enforcement of speculative position limits.

The Commission estimates the burden of this collection of information as follows:

ESTIMATED ANNUAL REPORTING BURDEN

| 17 CFR section | Annual number of respondents | Frequency of response | Total annual responses | Hours per response | Total hours |
|---|---|---|---|---|---|
| | 3,709 | Periodically | 76,950 | 1.88 | 22,792 |

Dated: December 21, 2011.

**David Stawick,**

*Secretary of the Commission.*

[FR Doc. 2011–33225 Filed 12–27–11; 8:45 am]

**BILLING CODE 6351–01–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 (the Corporation), has submitted a public information collection request (ICR) entitled proposed Nonprofit Capacity Building Program Progress Report 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, Jaime Renner, at (612) 334–4085 or email to *jrenner@cns.gov*. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–(800) 833–3722 between 8 a.m. and 8 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 the **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 email 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 October 20, 2011. This comment period ended December 19, 2011. Public comments were received from two Corporation grantees for this Notice. The general consensus of comments related to the challenge of tracking the output measures of the general recipients by focus areas and a need to include information on organizational support of the program. The Corporation gave full consideration to those comments and incorporated their suggested changes into the Progress Report.

*Description:* The Corporation is seeking approval of Nonprofit Capacity Building Program Progress Report which is used by Nonprofit Capacity Building Grantees semi-annually to summarize project accomplishments, challenges, resources generated, and progress toward achieving project goals and objectives. The Progress Report consists of two parts: A Progress Report Narrative and a Performance Measurement Reporting Workbook.

*Type of Review:* New.

*Agency:* Corporation for National and Community Service.

*Title:* Nonprofit Capacity Building Program Progress Report.

*OMB Number:* None.

*Agency Number:* None.

*Affected Public:* Current sponsoring organizations and subsite organizations and potential sponsoring organizations and subsite organizations.

*Total Respondents:* 15.

*Frequency:* Semi-annually.

*Average Time per Response:* Averages ten (10) hours.

*Estimated Total Burden Hours:* 150 hours.

*Total Burden Cost (capital/startup):* None.

*Total Burden Cost (operating/maintenance):* None.

Dated: December 20, 2011.

**Bruce Cline,**

*Colorado State Program Director, Nonprofit Capacity Building Program Officer.*

[FR Doc. 2011–33227 Filed 12–27–11; 8:45 am]

**BILLING CODE 6050–$$–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal Nos. 11–51]**

### 36(b)(1) Arms Sales Notification

**AGENCY:** Department of Defense, Defense Security Cooperation Agency.

**ACTION:** Notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 11–51 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: December 21, 2011.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

DEC 16 2011

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 11-51, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to Australia for defense articles and services estimated to cost $950 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

**Richard A. Genaille, Jr.**
**Acting Director**

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 11–51

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Australia
(ii) *Total Estimated Value:*

| | |
|---|---|
| Major Defense Equipment* .. | $514 million |
| Other ..... | 436 million |
| Total ..... | 950 million |

*as defined in Section 47(6) of the Arms Export Control Act.

(iii) *Description and Quantity or Quantities of Articles or Services Under Consideration for Purchase:* 10 C–27J aircraft; 23 AE2100D2 Rolls Royce engines; 12 Electronic Warfare Self Protection Suites; 12 AAR–47A(V)2 Missile Warning Systems; 12 ALE–47(V) Threat Adaptive Countermeasures Dispensing Systems; 12 APR–39 Radar Warning Receivers; 13 AN/APN–241 Radar Systems; 44 AN/ARC–210 Warrior Very High Frequency/Ultra High Frequency Communication Systems; 12 KY–100 Units; 12 HF 9550 Radios; 12 APX–119 Identification Friend or Foe (Mode 4); 14 Blue Force Trackers; 12 Portable Flight Mission Planning Systems; support and test equipment; repair and return; spare and repair parts; aircraft ferry and tanker support; personnel training and training equipment; publications and technical data; Operational Flight Simulator, Fuselage, and Maintenance trainers; U.S. Government and contractor representative engineering, logistics,

and technical support services; and other related elements of logistics and program support.

(iv) *Military Department:* Air Force. (SGU).

(v) *Prior Related Cases, if any:* None.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Articles or Defense Services Proposed to be Sold:* See Annex attached.

(viii) *Date Report Delivered to Congress:* 16 December 2011.

POLICY JUSTIFICATION

Australia—C–27J Aircraft and Related Support

The Government of Australia requested a possible sale of 10 C–27J aircraft; 23 AE2100D2 Rolls Royce engines; 12 Electronic Warfare Self Protection Suites; 12 AAR–47A(V)2 Missile Warning Systems; 12 ALE–47(V) Threat Adaptive Countermeasures Dispensing Systems; 12 APR–39B(V)2 Radar Warning Receivers; 13 AN/APN–241 Radar Systems; 44 AN/ARC–210 Warrior Very High Frequency/Ultra High Frequency Communication Systems; 12 KY–100 Units; 12 HF 9550 Radios; 12 APX–119 Identification Friend or Foe (Mode 4); 14 Blue Force Trackers; 12 Portable Flight Mission Planning Systems; support and test equipment; repair and return; spare and repair parts; aircraft ferry and tanker support; personnel training and training equipment; publications and technical data; Operational Flight Simulator, Fuselage, and Maintenance trainers; U.S. Government and contractor representative engineering, logistics, and technical support services; and other related elements of logistics and program support. The estimated cost is $950 million.

Australia is one of our most important allies in the Western Pacific. The strategic location of this political and economic power contributes significantly to ensuring peace and economic stability in the region. Australia views interoperability with U.S. Forces as an important goal and objective for equipment acquisition. On November 16, President Obama announced the deployment of a U.S. Marine Ground Air Task Force to Darwin which will also include increased rotations of U.S. aircraft to facilitate collaboration and greater opportunities for combined training and exercises. Accordingly, and in line with the overall procurement strategy, Australia seeks an acquisition FMS case that supports the procurement of the C–27J aircraft.

The proposed sale will allow the Australian Defense Force (ADF) to improve its capability to meet current and future air mobility needs and humanitarian operations and disaster relief efforts in Southeast Asia. The ADF retired its fleet of 14 DHC–4 Caribou aircraft in 2009 and will soon retire 12 C–130H aircraft. The proposed sale of C–27J's will provide the capability needed to meet operational needs and emerging requirement. Australia will have no difficulty absorbing the C–27J and support into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor will be L3 Integrated Systems Group in Waco, Texas. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Australia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 11–51

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The C–27J is a fixed wing cargo aircraft platform with multi-purposes to include: passenger and cargo movement, combat employment and sustainment, aeromedical evacuation (humanitarian assistance), special operations support and operational support airlift (airdrop operations) in support of the range of military operations. The C–27J is capable of rapid strategic delivery with a maximum payload of 26,000 lbs and a maximum takeoff weight of 67,000 lbs to support the various mission/operational support requirements to advance personnel and equipment to main operating bases or forward operating locations. The aircraft is capable of enhanced takeoff and landing performance; short field landings with a full cargo load to include unimproved landings and takeoffs. Finally, the aircraft can perform tactical airlift and airdrop missions and can also transport litters and ambulatory patients during aeromedical evacuation when required. A fully integrated electronic cockpit and advanced cargo delivery system allow a crew of four: pilot, copilot, and two loadmasters, to operate the aircraft on any type of mission.

2. The AN/ALE–47 Countermeasures Dispensing System (CMDS) is an integrated, threat-adaptive, software-programmable dispensing system capable of dispensing chaff, flares, and active radio frequency expendables. The threats countered by the CMDS include radar-directed anti-aircraft artillery, radar command-guided missiles, radar homing guided missiles, and infrared guided missiles. The system is internally mounted and may be operated as a stand-alone system or may be integrated with other on-board electronic warfare and avionics systems. CMDS uses threat data received over the aircraft interfaces to assess the threat situation and to determine a response. Expendable routines tailored to the immediate aircraft and threat environment may be dispensed using one of four operational modes. The hardware is Unclassified. The software is classified Secret. Technical data and documentation to be provided is Unclassified.

3. The AN/AAR–47 missile warning system is a small, lightweight, passive, electro-optic, threat warning device used to detect surface-to-air missiles fired at helicopters and low-flying fixed-wing aircraft and automatically provide countermeasures, as well as, audio and visual-sector warning messages to the aircrew. The basic system consists of multiple Optical Sensor Converter (OSC) units, a Computer Processor (CP) and a Control Indicator (CI). The set of OSC units, which normally consist of four, is mounted on the aircraft exterior to provide omni-directional protection.

The OSC detects the rocket plume of missiles and sends appropriate signals to the CP for processing. The CP analyzes the data from each OSC and automatically deploys the appropriate countermeasures. The CP also contains comprehensive BIT circuitry. The CI displays the incoming direction of the threat, so that the pilot can take appropriate action. The hardware is Unclassified. The software is classified Secret. Technical data and documentation to be provided is Unclassified.

4. The AN/APR–39 Radar Warning Receiver (RWR)/Electronic Warfare Management System (EWMS) is fixed on various fixed/rotary/tilt-wing aircraft. It manages the Integrated Sensors and Countermeasures (SISCM) by integrating and displaying aural and visual from onboard sensors. It also automatically initiates countermeasures or, in its semi-auto mode, is crew selectable. The SISCM provides full mission data recording to include all sensor information, as well as, other mission data such as Global Positioning

Systems (GPS), time, and maintenance activity.

5. The Blue Force Tracker (BFT 1) System is used to denote a GPS enabled system that provides military commanders and forces with location information about military forces. The BFT is a subsystem of the Force XXI Battlefield Command Brigade and Below (FBCB2). The C–27J FBCB2 and BFT is integrated on other Ground and Aviation platforms such as the UH–60H, V–22, E–8, and AH–64D weapon systems. The FBCB2 BFT system consists of four subsystems: Mobile Tracking and Messaging, GPS, Network and Digital Group, and Electronic Data Manager (EDM). The system displays the location of the host vehicle on the computer's terrain-map display, along with the locations of other platforms in their respective locations. It can also be used to send and receive simple text and imagery messages. FBCB2 BFT has a mechanism for reporting the locations of enemy forces and other battlefield conditions.

6. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 2011–33177 Filed 12–27–11; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Defense Business Board (DBB); Notice of Federal Advisory Committee Meeting

**AGENCY:** DoD.

**ACTION:** Meeting notice.

**SUMMARY:** Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces the following Federal advisory committee meeting of the Defense Business Board (DBB).

**DATES:** The public meeting of the Defense Business Board (hereafter referred to as ''the Board'') will be held on Thursday, January 19, 2012. The meeting will begin at 8 a.m. and end at 9 a.m. (Escort required; See guidance in **SUPPLEMENTARY INFORMATION**, ''Public's Accessibility to the Meeting.'')

**ADDRESSES:** Room 3E863 in the Pentagon, Washington, DC (escort required; See guidance in **SUPPLEMENTARY INFORMATION**, ''Public's Accessibility to the Meeting.'').

**FOR FURTHER INFORMATION CONTACT:** The Board's Designated Federal Officer (DFO) is Phyllis Ferguson, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *Phyllis.ferguson@osd.mil,* (703) 695–7563. For meeting information please contact Ms. Debora Duffy, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *Debora.Duffy@osd.mil,* (703) 697–2168.

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Meeting:* At this meeting, the Board will deliberate draft findings and recommendations from the ''Information Technology Modernization'' Task Group. The Board will also receive updates from the Task Groups on ''Re-engineering the Requirements Process,'' ''Leveraging Public-Private Collaboration to Augment the Department of Defense's Mission,'' and ''Promoting Veterans' Employment through Concurrent Credentialing.'' The mission of the Board is to advise the Secretary of Defense on effective strategies for implementation of best business practices of interest to the Department of Defense.

### Agenda

### Public Session

8 a.m.–8:45 a.m. Task Group Outbrief and Board Deliberation: *Information Technology Modernization.*

8:45 a.m.–9 a.m. Task Group Updates: *Re-engineering the Requirements Process, Leveraging Public-Private Collaboration to Augment the Department of Defense's Mission, Promoting Veterans' Employment through Concurrent Credentialing.*

### End of Public Session

*Availability of Materials for the Meeting:* A copy of the agenda for the January 19, 2012 meeting and the terms of reference for the Task Groups may be obtained at the meeting or from the Board's Web site at *http://dbb.defense.gov/meetings.shtml.*

*Public's Accessibility to the Meeting:* Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, part of this meeting is open to the public. Seating is limited and is on a first-come basis. All members of the public who wish to attend the public session of the meeting must contact Ms. Debora Duffy at the number listed in this notice no later than noon on Wednesday, January 11 to register and make arrangements for a Pentagon escort, if necessary. Public attendees requiring escort should arrive at the Pentagon Metro Entrance in time to complete security screening no later than 7:30 a.m. To complete security screening, please come prepared to present two forms of identification and one must be a pictured identification card.

*Special Accommodations:* Individuals requiring special accommodations to access the public meeting should contact Ms. Duffy at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

### Procedures for Providing Public Comments

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Board about its mission and topics pertaining to this public session.

Written comments should be received by the DFO at least five (5) business days prior to the meeting date so that the comments may be made available to the Board for their consideration prior to the meeting. Written comments should be submitted via email to the address for the DFO given in this notice in either Adobe Acrobat or Microsoft Word format. Please note that since the Board operates under the provisions of the Federal Advisory Committee Act, as amended, all submitted comments and public presentations will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the Board's Web site.

Dated: December 21, 2011.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2011–33202 Filed 12–27–11; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF DEFENSE

### Department of the Army; Corps of Engineers

### Chief of Engineers Environmental Advisory Board; Meeting

**AGENCY:** Department of the Army, U.S. Army Corps of Engineers, DoD.

**ACTION:** Notice of open meeting.

**SUMMARY:** In accordance with 10(a)(2) of the Federal Advisory Committee Act

(Pub. L. 92–463), announcement is made of the forthcoming meeting.

*Name of Committee:* Chief of Engineers Environmental Advisory Board (EAB).

*Date:* January 19, 2012.

*Time:* 9 a.m. through 12 p.m.

*Location:* U.S. Government Accountability Office Building, 441 G Street Northwest, Washington, DC 20548–0002 (202) 512–6000.

*Agenda:* The Board will advise the Chief of Engineers on environmental policy, identification and resolution of environmental issues and missions, and addressing challenges, problems and opportunities in an environmentally sustainable manner. Discussions and presentations during this meeting will focus on ecosystem restoration through integrated water resources management, including discussion of the potential effects of climate change. Following the discussions and presentations there will be a public comment period.

**FOR FURTHER INFORMATION CONTACT:** Mr. John C. Furry, Designated Federal Officer, Headquarters, U.S. Army Corps of Engineers, 441 G Street NW., Washington, DC 20314–1000; *john.c.furry@usace.army.mil,* Ph: (202) 761–5875.

**SUPPLEMENTARY INFORMATION:** This meeting will be open to the public. Any interested person may attend. However, anyone attending the meeting must enter at the G Street entrance of the GAO Building, present valid government issued identification, and pass through the security station. All visitors must be escorted while in the building. Although the primary purpose of this meeting is for the Chief of Engineers to receive the views of his EAB; thirty minutes will be set aside for public comment. Anyone who wishes to speak must register prior to the start of the meeting. Registration will be from 8 until 8:45 a.m. Each speaker will be limited to three minutes.

**Brenda S. Bowen,**

*Army Federal Register Liaison Officer.*

[FR Doc. 2011–33223 Filed 12–27–11; 8:45 am]

**BILLING CODE 3720–58–P**

## DEPARTMENT OF EDUCATION

### Notice of Submission for OMB Review

**AGENCY:** Department of Education.

**ACTION:** Comment Request.

**SUMMARY:** The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

**DATES:** Interested persons are invited to submit comments on or before December 28, 2011.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or emailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov*. Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: December 22, 2011.

**Darrin King,**

*Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

### Office of Planning, Evaluation and Policy Development

*Type of Review:* New.

*Title of Collection:* Evaluation of the Effectiveness of Online Learning Courses for Secondary Students.

*OMB Control Number:* Pending.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Once.

*Affected Public:* Individuals or households.

*Total Estimated Number of Annual Responses:* 888.

*Total Estimated Annual Burden Hours:* 462

*Abstract:* Given the considerable scale at which online learning is being used in schools today, it is particularly important that policymakers have research-based guidance available about how best to deploy online learning activities. However, few rigorous studies have been completed that compare K–12 student achievement in online learning to traditional, classroom-based education. Similarly, while many articles provide advice regarding the ''best'' ways to implement online learning, few report an empirical basis for recommended practices. To fill this critical gap in knowledge, this research will provide rigorous empirical data on the effectiveness of online learning for secondary students. A set of empirical studies will be conducted under this research. This Office of Management and Budget package pertains only to a study of courses offered by North Carolina Virtual Public School (NCVPS), a large-scale, statewide online learning provider. In this study, the impact of online learning for secondary students enrolled in five different courses offered by NCVPS will be compared with peers enrolled in similar courses in face-to-face instruction. The study will use a quasi-experimental design using propensity score matching. State end-of-course exams for each course and the scores on the Advanced Placement U.S. History exam will be used as the primary outcome measures. In addition to the surveys of online teachers and students, a sample of North Carolina teachers teaching similar courses in face-to-face instruction will be administered a survey to collect information on instructional practices in the comparison face-to-face courses.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4629. When you access the information collection, click on ''Download Attachments ''to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to (202) 401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information

Relay Service (FIRS) at 1-(800) 877–8339.

[FR Doc. 2011–33263 Filed 12–27–11; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF ENERGY

### Agency Information Collection Extension; Correction

**AGENCY:** U.S. Department of Energy.

**ACTION:** Submission for Office of Management and Budget (OMB) review; comment request; Correction.

**SUMMARY:** The Department of Energy (DOE) published a document in the **Federal Register** of December 16, 2011, announcing the submission of an information collection request to the OMB for extension under the provisions of the Paperwork Reduction Act of 1995. The information collection requests a three-year extension of its ''Technology Partnerships Ombudsmen Reporting Requirements'', OMB Control Number 1910–5118. This document corrects errors in that notice.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the Information collection instrument and instructions should be directed to Kathleen Binder at *kathleen.binder@hq.doe.gov.*

**Correction**

In the **Federal Register** of December 16, 2011, in FR Doc. 2011–32251, please make the following corrections:

On page 78252, first column, under the heading **SUMMARY**, the second sentence is corrected to read: The information collection requests a three-year extension of its ''Technology Partnerships Ombudsmen Reporting Requirements'', OMB Control Number 1910–5118.

On page 78252, second column, under the heading **SUPPLEMENTARY INFORMATION**, (1) is corrected to read: (1) *OMB No.* 1910–5118;

Issued in Washington, DC on December 21, 2011.

**Kathleen M. Binder,**

*Director, Office of Conflict Prevention and Resolution, Office of Hearings and Appeals.*

[FR Doc. 2011–33244 Filed 12–27–11; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Savannah River Site

**AGENCY:** Department of Energy.

**ACTION:** Notice of Open Meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Monday, January 23, 2012; 1 p.m.–5 p.m.

Tuesday, January 24, 2012; 8:30 a.m.–4:30 p.m.

**ADDRESSES:** The Westin Hotel, 2 Grasslawn Avenue, Hilton Head Island, SC 29928.

**FOR FURTHER INFORMATION CONTACT:** Gerri Flemming, Office of External Affairs, Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC, 29802; Phone: (803) 952–7886.

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

**Tentative Agenda**

*Monday, January 23, 2012*

1 p.m.; Combined Committees Session.

5 p.m.; Adjourn.

*Tuesday, January 24, 2012*

8:30 a.m.; Approval of Minutes, Agency Updates, Public Comment Session, Nuclear Materials Committee Report, Facilities Disposition and Site Remediation Committee Report, Public Comment Session.

12:30 p.m.; Lunch Break.

1:30 p.m.; Strategic and Legacy Management Committee Report, Waste Management Committee Report, Administrative Committee Report, Public Comment Session.

4:30 p.m.; Adjourn.

*Public Participation:* The EM SSAB, Savannah River Site, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Gerri Flemming at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Gerri Flemming's office at the address or telephone listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Gerri Flemming at the address or phone number listed above. Minutes will also be available at the following Web site: *http://cab.srs.gov/srs-cab.html.*

Issued at Washington, DC on December 21, 2011.

**LaTanya R. Butler,**

*Acting Deputy Committee Management Officer.*

[FR Doc. 2011–33245 Filed 12–27–11; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Western Area Power Administration

### Application of the Energy Planning and Management Program Power Marketing Initiative to the Boulder Canyon Project Post-2017 Remarketing

**AGENCY:** Western Area Power Administration, Department of Energy.

**ACTION:** Notice of Withdrawal of Decisions and Proposals.

**SUMMARY:** The Western Area Power Administration (Western), a Federal power marketing agency of the Department of Energy (DOE), is withdrawing its decisions and proposals relating to its Boulder Canyon Project (BCP) Post-2017 administrative marketing efforts announced in a notice published in the **Federal Register** on April 27, 2011, due to the enactment of the Hoover Power Allocation Act of 2011.

**DATES:** The withdrawal of Western's decisions and proposals is effective as of December 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mike Simonton, Public Utilities Specialist, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005, telephone (602) 605–2675, email *Post2017BCP@wapa.gov.* Information regarding Western's BCP Post-2017 marketing efforts, the Energy Management and Planning Program (Program), and the Conformed General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects (Conformed Criteria) published in the **Federal Register** on December 28,

1984 (49 FR 50582), are available at *http://www.wapa.gov/dsw/pwrmkt.*

**SUPPLEMENTARY INFORMATION:** In the April 27, 2011, **Federal Register** Notice (FRN) (76 FR 23583), Western announced that in marketing the BCP as of October 1, 2017, it will apply the Program's Power Marketing Initiative (PMI) and that all BCP electric service contracts resulting from this marketing effort shall have a term of thirty (30) years commencing October 1, 2017. The effective date of these decisions was designated as May 27, 2011. Subsequently, on May 24, 2011 (76 FR 30147), Western announced an extension of the effective date of these decisions to December 31, 2011.

In the April 27, 2011, FRN, Western also made proposals and sought comments on the amount of marketable contingent capacity and firm energy to be extended to existing contractors, the size of the resource pool to be created, and excess energy provisions.

On December 21, 2011 the Hoover Power Allocation Act of 2011, Public Law 112–72, was enacted into law. The Act directs Western to market contingent capacity and firm energy for delivery to existing contractors in amounts specified in the Act. Contracts shall have a fifty (50) year term, commencing October 1, 2017. The Act also directs Western to create a resource pool of contingent capacity and firm energy to be offered to new allottees. Western will implement these directives in subsequent FRNs. Since the Act supersedes Western's decisions and proposals pertaining to the BCP Post-2017 marketing effort, Western withdraws its decisions and proposals as set forth in its April 27, 2011 FRN, without further public procedure including further response to comments received related to the proposals.

Dated: December 16, 2011.

**Timothy J. Meeks,**

*Administrator.*

[FR Doc. 2011–33299 Filed 12–27–11; 8:45 am]

**BILLING CODE 6450–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OW–2008–0719, FRL–9613–4]**

## Agency Information Collection Activities; Proposed Collection; Comment Request; National Pollutant Discharge Elimination System (NPDES) Program (Renewal)

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

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that EPA is planning to submit a request to renew an existing approved Information Collection Requests (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on March 31, 2012. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

**DATES:** Comments must be submitted on or before February 27, 2012.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OW–2008–0719, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: ow-docket@epa.gov* (Identify Docket ID No. EPA–HQ–OW–2008–0719 in the subject line)
- *Mail:* Water Docket, Environmental Protection Agency, Mailcode: 4203M, 1200 Pennsylvania Ave. NW., Washington, DC 20004. Please include a total of three copies.
- *Hand Delivery:* EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments identified by the Docket ID No. EPA–HQ–OW–2008–0719. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

**FOR FURTHER INFORMATION CONTACT:** Amelia Letnes, State and Regional Branch, Water Permits Division, OWM Mail Code: 4203M, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–5627; email address: *letnes.amelia@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### How can I access the docket and/or submit comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2008–0719, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

### What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) 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. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

**What should I consider when I prepare my comments for EPA?**

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of technical information/data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **FEDERAL REGISTER** citation.

**What information collection activity or ICR does this apply to?**

*Affected Entities:* Entities potentially affected by this action are most facilities required to have NPDES permit coverage, including but not limited to publicly owned treatment works (POTWs), privately owned treatment works (PrOTWs), manufacturing and commercial dischargers, mining operation, stormwater dischargers, and vessels.

*Title:* National Pollutant Discharge Elimination System (NPDES) Program (Renewal).

*ICR Number:* EPA ICR No. 0229.20, OMB Control No. 2040–0004.

*ICR Status:* This ICR is currently scheduled to expire on March 31, 2012. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* This consolidated ICR calculates the burden and costs associated with the NPDES program, identifies the types of activities regulated under the NPDES program, describes the roles and responsibilities of state governments and the Agency, and presents the program areas that address the various types of regulated activities. It is an update of the 2008 Information Collection Request for the NPDES Program (OMB Control Number: 2040–0004; EPA ICR Number: 0229.19) that consolidated the burden and costs associated with activities previously reported in nine of the 15 NPDES program or NPDES-related ICRs administered by EPA's Water Permits Division.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 4.3 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Estimated Number of Respondents:* 398,340 (397,703 facilities and 637 States/Tribes/Territories).

*Frequency of Response:* Once, every five years, annually, semi-annually, quarterly, bimonthly, monthly, biweekly, weekly, daily, ongoing, occasionally/as needed.

*Estimated Total Annual Hour Burden:* 21,324,741 hours.

*Estimated Total Annual Cost:* $1,014,324,384 includes $211,074 annualized capital costs and $18,551,848 annualized O&M costs.

*Change in Burden:* The current burden approved by OMB for the ICRs being consolidated is 30,943,308 hours. This consolidated ICR estimates a total burden that is 9,618,566 hours less than the currently approved burden. This decrease in burden corresponds to 31 percent of the overall burden. The main reasons for the change in burden is that EPA generated a new estimate of construction sites based on data collected for the development of the final Construction Effluent Limitation Guidelines. The Agency revised its estimate of the number of large and small construction sites covered by this ICR downward from 243,076 to 84,472 sites annually. The impact of this change in the number of construction sites is a decrease of 8,051,315 hours.

Some other specific reasons for burdens changes are presented below:

- EPA's continuous effort to improve the quality of data in its electronic systems. This change could reflect more accurate data rather than a significant change in the number of permits actually administered. This change is particularly important for activities related to general permittees because in previous ICRs, EPA based the calculation on best professional estimates; whereas, for this ICR, the Agency has inventory numbers from its electronic data systems.
- All combined sewer overflow (CSO) permits or enforcement orders have fulfilled the obligation of Phase I technology-based CSO control requirements (Nine Minimum Controls)
- Previously, EPA accounted for 6 hours per concentrated aquatic agriculture production (CAAP) facilities to submit Form 2b and 0.5 hours per application per state to process and review the form. This burden from CAAP facilities and states has been transferred to the Animal Sectors ICR (OMB Control No. 2040–0250).
- In the previous ICR, EPA accounted for the state burden of 24 hours per pretreatment compliance inspection, but this burden has been transferred to the Pretreatment ICR (OMB Control No. 2040–0009).

**What is the next step in the process for this ICR?**

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice

pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: December 19, 2011.

**Randolph L. Hill,**

*Acting Director, Office of Wastewater Management.*

[FR Doc. 2011–33270 Filed 12–27–11; 8:45 am]

**BILLING CODE 6560–50–P**

---

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OARM–2011–0997; FRL–9613–8]**

## Agency Information Collection Activities; Proposed Collection; Comment Request; Contractor Cumulative Claim and Reconciliation (Renewal)

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire as follows: EPA ICR No. 0246.11 on May 31, 2012. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

**DATES:** Comments must be submitted on or before February 27, 2012.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OARM–2011–0997 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: hubbell.holly@epa.gov.*
- *Mail:* OEI Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of three (3) copies and identify the Docket ID Number EPA–HQ–OARM–2011–0997, Contractor Cumulative Claim and Reconciliation.
- *Hand Delivery:* EPA Docket Center-Attention OEI Docket, EPA West, Room B102, 1301 Constitution Ave. NW., Washington DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OARM–2011–0997. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

**FOR FURTHER INFORMATION CONTACT:** Holly Hubbell, Policy Training and Oversight Division, Office of Acquisition Management (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–1091; email address: *hubbell.holly@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### How can I access the docket and/or submit comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OARM–2011–0997, which is available for online viewing at *www.regulations.gov*, or in person viewing at the OEI Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

Use *www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

### What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) 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. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

### What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under **DATES**.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

**What information collection activity or ICR does this apply to?**

*Affected entities:* All contractors who have completed an EPA cost reimbursement type contract will be required to submit EPA Form 1900–10. These contractors represent a wide range of industries which include, but are not limited to: custom computer programming, management and consulting services, medical laboratories, and testing laboratories.

*Title:* Contractor Cumulative Claim and Reconciliation.

*ICR number:* EPA ICR No. 0246.11, OMB Control No. 2030–0016.

*ICR status:* This ICR is currently scheduled to expire on May 31, 2012.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* All contractors who have completed an EPA cost reimbursement type contract will be required to submit EPA Form 1900–10. EPA Form 1900–10 summarizes all costs incurred in performance of the contract and sets forth the final indirect rates. This form is reviewed by the contracting officer to determine the final costs reimbursable to the contractor. FAR 52.216–7 states that the Government will pay only the costs determined to be allowable by the contracting officer in accordance with FAR 31.2. Furthermore, FAR 52.216–7 states that indirect cost rates shall be established for each fiscal year at the close of a contractor's fiscal year. EPA Form 1900–10 summarizes this information for the entire contract period and provides a basis for cost review by contracting, finance, and audit personnel. As stated previously, FAR 4.804–5 mandates that the office administering the contract shall ensure that the costs and indirect cost rates are settled.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average four hours. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

*Estimated total number of potential respondents:* 20.

*Frequency of response:* at end of contract.

*Estimated total average number of responses for each respondent:* 1.

*Estimated total annual burden hours:* 4 hours.

*Estimated total annual costs to all respondents:* $8,491.00. This includes an estimated burden cost of $412.55/respondent and an estimated cost of $12.00/respondent for maintenance and operational costs. Capital investment costs are not necessary for respondents to provide the requested information.

**Are there changes in the estimates from the last approval?**

EPA estimates that the hourly burden will remain the same as reported in the previous information collection because there has been no change in the information being collected and approximately the same number of contracts remains active.

**What is the next step in the process for this ICR?**

EPA will consider the comments received and amend the ICRs as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: December 20, 2011.

**John R. Bashista,**

*Director, Office of Acquisition Management.*

[FR Doc. 2011–33257 Filed 12–27–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2004–0501; FRL–9612–2]**

## Agency Information Collection Activities; Proposed Collection; Comment Request; Reporting Requirements Under EPA's Green Power Partnership and Combined Heat and Power (CHP) Partnership, EPA ICR Number 2173.02 (Renewal)

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on June 30, 2012. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

**DATES:** Comments must be submitted on or before February 27, 2012.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0501 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: a-and-r-docket@epamail.epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket, Mailcode: 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460
- *Hand Delivery:* EPA Docket Center—Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004. Such deliveries are accepted only during the Docket's normal hours of operation, and special arrangements

should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2004–0501. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be captured automatically and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

**FOR FURTHER INFORMATION CONTACT:** Mollie Lemon, Climate Protection Partnerships Division, Office of Atmospheric Programs, MC 6202J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9859; fax number: (202) 343–2208; email address: *lemon.mollie@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## How can I access the docket and/or submit comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2004–0501, which is available for online viewing at *www.regulations.gov,* or in person viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC, 20004. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742.

Use *www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

## What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) 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. In particular, EPA is requesting comments from very small businesses (those that employ fewer than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

## What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under DATES.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

## To what information collection activity or ICR does this apply?

*Docket ID No. EPA–HQ–OAR–2004–0501*

*Affected entities:* Entities potentially affected by this action are company, institutional, and public sector organizations that voluntarily participate in the EPA's Green Power Partnership (GPP) or Combined Heat and Power Partnership (CHPP). These include service and goods providing industries, educational institutions and non-governmental organizations, commercial and industrial organizations, and local, state, or federal level government agencies.

*Title:* Reporting requirements Under EPA's Green Power Partnership and Combined Heat and Power (CHP) Partnership.

*ICR numbers:* EPA ICR No. 2173.02, OMB Control No. 2060–0532.

*ICR status:* This ICR is currently scheduled to expire on June 30, 2012. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* In 2001, EPA launched two new partnership programs with industry and other stakeholders: the Green Power Partnership (GPP) and the Combined Heat and Power Partnership (CHPP). These voluntary partnership programs encourage organizations to invest in clean, efficient energy technologies, including renewable energy and combined heat and power. To continue to be successful, it is critical that EPA collect information from GPP and CHPP Partners to ensure these organizations are meeting their renewable energy and CHP goals and to assure the credibility

of these voluntary partnership programs.

EPA has developed this ICR to obtain authorization to collect information from organizations participating in the GPP and CHPP. Organizations that join these programs voluntarily agree to the following respective actions: (1) Designating a Green Power or CHP liaison and filling out a Partnership Agreement or Letter of Intent (LOI) respectively, (2) for the GPP, reporting to EPA, on an annual basis, their progress toward their green power commitment via a 3-page reporting form; (3) for the CHP Partnership, reporting to EPA information on their existing CHP projects, new project development, and other CHP-related activities via a one-page reporting form (for projects) or via an informal email or phone call (for other CHP-related activities). EPA uses the data obtained from its Partners to assess the success of these programs in achieving their national energy and greenhouse gas (GHG) reduction goals. Partners are organizational entities that have volunteered to participate in either Partnership program.

*Burden Statement:* Please note that the following burden hour and labor rates may change in the final ICR, pending the application of survey results of Partners. The annual public reporting and recordkeeping burden for this collection of information is estimated to equal 10,407 hours for submission and processing and to average 4.79 hours per year per respondent. The average number of annual burden hours on first-year Partners for each type of one-time response is: 4.4 hours for a Partnership Agreement (a one-time burden for GPP Partners) and 2.5 hours for a Letter of Intent (a one-time burden for CHPP Partners). Annual burden hours on existing Partners for yearly reports are estimated at 2.6 hours for the Partner Yearly Report for the GPP and 3.5 hours for the Partner Yearly Report for the CHPP.

Partners from both programs may also submit voluntary updates of simple information, such as contact information or company profiles, via the EPA Web site. These updates would take from 15 minutes to 0.5 hours each. A subset of Partners may participate in brief (i.e., 15 minute) telephone calls with EPA to clarify questions pertaining to the Partnership Agreement or LOI, GPP Yearly Report or CHPP Partner project reporting. All of these activities are included in the annual burden estimate.

The estimated number of annual respondents averaged over three (3) years is 2,174 which include an average of 1,660 for the GPP and 514 respondents for the CHPP.

There are no capital or start-up costs associated with this information collection. The average annual operation and maintenance cost resulting for this collection of information is $3 per respondent. The average annual labor cost is $152.09 per respondent, pending the application of survey results of Partners. The resulting total annual cost for Partners averaged over the three year period is $337,166. In the previous ICR the total cost averaged over the 3-year period was $521,937. The total cost estimate decrease for Partners is due to a corrected downward adjustment in the labor rates used to calculate respondent burden, partially offset by an increase in the number of Partners.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

*Estimated Number of Respondents:* 2,174.

*Frequency of Response:* Annually, on Occasion, One time.

*Estimated Total Annual Hour Burden:* 10,407.

*Estimated Total Annual Cost (including Partner, EPA, and contractor costs):* $473,979, which includes $0 annualized Capital Startup costs, $6,522 annualized Operating and Maintenance (O&M) costs and $467,457 annualized Labor costs.

**Are there changes in the estimates from the last approval?**

Since the last ICR renewal, both the GPP and CHPP have introduced program efficiencies to reduce program burden by encouraging the electronic submission of documents directly to the program support contractors. The average number of hours per Partner remained the same, at 3.24 hours, pending a partner survey to determine the results of these efficiencies. The total hourly burden increased due to an increase in the number of Partners. For perspective on the magnitude of partner growth, the number of Partners at the end of 2008 was 1,286, whereas by the end of 2011 there will be an estimated 1,725. The total cost estimate over the 3-year period for this renewal ICR is $1,421,937, or an average of $473,979 per year, of which $6,522 is O&M costs. The total cost to GPP and CHPP Partners is $1,011,498 ($19,566 is O&M), or $337,166 ($6,522 is O&M) per year. In the previous 2008 ICR renewal, the total cost over the 3-year period was $1,991,978. The total cost estimate decrease for Partners is due to a corrected downward adjustment in the labor rates for respondents, partially offset by an increase in the number of Partners.

**What is the next step in the process for this ICR?**

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package then will be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: December 21, 2011.

**Elizabeth Craig,**

*Director, Climate Protection Partnerships Division.*

[FR Doc. 2011–33262 Filed 12–27–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OECA–2011–0229; FRL–9509–9]**

## Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Iron and Steel Foundry Area Sources (Renewal)

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

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request

(ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted, below describes the nature of the collection and the estimated burden and cost.

**DATES:** Additional comments may be submitted on or before January 27, 2012.

**ADDRESSES:** Submit your comments, referencing docket ID number EPA–HQ–OECA–2011–0229, to (1) EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, Mail Code 2822IT, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov*.

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 9, 2011 (76 FR 26900), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to both EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2011–0229, which is available for public viewing online at *http://www.regulations.gov* or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov*, as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

*Title:* NESHAP for Iron and Steel Foundry Area Sources (Renewal).

*ICR Numbers:* EPA ICR Number 2267.03, OMB Control Number 2060–0605.

*ICR Status:* This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for the EPA regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, and are identified on the form and/or instrument, if applicable.

*Abstract:* The final rule for National Emission Standards for Hazardous Air Pollutants (NESHAP) for Iron and Steel Foundry Area Sources (40 CFR part 63, subpart ZZZZZ) published on January 2, 2008 (73 FR 225). Potential respondents are owners or operators of any existing or new iron or steel foundry that is an area source of hazardous air pollutants (HAP) emissions. Research and development facilities are not covered by the rule. Foundries covered by the rule would not be required to obtain a Title V operating permit.

There are different requirements for foundries based on size. Small iron and steel foundries are required to comply with pollution prevention management practices for scrap materials, the removal of mercury switches, and binder formulations. Large iron and steel foundries are required to comply with the same pollution prevention management practices as small foundries in addition to emissions limitations for melting furnaces and foundry operations.

Owners or operators must submit notification that the facility is subject to the rule, notification of performance test, notification of compliance status (including results of performance tests and other initial compliance demonstrations), and the semiannual compliance report. Owners or operators of cellulose products manufacturing facilities subject to the rule must maintain a file of these measurements and retain the file for at least five years following the date of such measurements, maintenance reports, and records.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 63, subpart ZZZZZ, as authorized in section 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 16 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Iron and Steel Foundry Area Sources.

*Estimated Number of Respondents:* 427.

*Frequency of Response:* Initially, and semiannually.

*Estimated Total Annual Hour Burden:* 6,024.

*Estimated Total Annual Cost:* $429,208, which includes $420,718 in labor costs, $8,490 capital/startup costs, and no operation and maintenance (O&M) costs.

*Changes in the Estimates:* There is no change in the labor hours or cost to the respondents in this ICR compared to the previous ICR. This is due to two considerations: (1) the regulations have not changed over the past three years and are not anticipated to change over

the next three years; and (2) the growth rate according to the industry sources is very low, negative or non-existent, so there is no significant change in the overall burden. There are no new facilities expected to be constructed over the next three years of this ICR. Therefore, the labor hours and cost figures in the previous ICR reflect the current burden on the respondents and are reiterated in this ICR.

Dated: December 21, 2011.

**John Moses,**

*Director, Collection Strategies Division.*

[FR Doc. 2011–33267 Filed 12–27–11; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OECA–2011–0230; FRL–9510–1]**

## Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Gasoline Distribution Bulk Terminals, Bulk Plants, Pipeline Facilities and Gasoline Dispensing Facilities

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

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the collection and the estimated burden and cost.

**DATES:** Additional comments may be submitted on or before January 27, 2012.

**ADDRESSES:** Submit your comments, referencing docket ID number EPA–HQ–OECA–2011–0230, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2822IT, 1200 Pennsylvania Avenue NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov.*

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 9, 2011 (76 FR 26900), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to both EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2011–0230, which is available for public viewing online at *http://www.regulations.gov,* in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

*Title:* NESHAP for Gasoline Distribution Bulk Terminals, Bulk Plants, Pipeline Facilities and Gasoline Dispensing Facilities (Renewal).

*ICR Numbers:* EPA ICR Number 2237.03, OMB Control Number 2060–0620.

*ICR Status:* This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for the EPA regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, and are identified on the form and/or instrument, if applicable.

*Abstract:* The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Gasoline Distribution Bulk Terminals, Bulk Plants, Pipeline Facilities and Gasoline Dispensing Facilities was published on January 10, 2008 (73 FR 1916), and amended on January 24, 2011 (76 FR 4156). Potential respondents are owners or operators of any existing or new gasoline distribution facilities that are an area source of hazardous air pollutants (HAP) emissions.

In addition to the initial notification and notification of compliance status required by the General Provisions to 40 CFR part 63, subpart A, respondents are required to submit one-time reports of start of construction, anticipated and actual startup dates, and physical or operational changes to existing facilities. Reports of initial performance tests on control devices at gasoline distribution storage tanks, loading racks, and vapor balance systems are also required and are necessary to show that the installed control devices are meeting the emission limitations required by the NESHAP. Annual reports of storage tank inspections at all affected facilities are required. In addition, respondents must submit semiannual compliance and continuous monitoring system performance reports, and semiannual reports of equipment leaks not repaired within 15 days or loadings of cargo tanks for which vapor tightness documentation is not available.

All records are to be maintained for at least five years. All reports are to be submitted to the respondent's State or local agency, whichever has been delegated enforcement authority by the EPA. The information is to be used to determine whether all sources subject to the NESHAP are achieving the standards.

This information is being collected to assure compliance with 40 CFR part 63, subpart BBBBBB and CCCCCC, as authorized in section 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

*Burden Statement:* The annual public reporting and recordkeeping burden for

this collection of information is estimated to average 8 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities; and Gasoline Dispensing Facilities.

*Estimated Number of Respondents:* 19,120.

*Frequency of Response:* Initially, and semiannually.

*Estimated Total Annual Hour Burden:* 60,517 hrs.

*Estimated Total Annual Cost:* $6,178,409 which includes $6,068,409 in labor costs, $0 capital/startup costs, and $110,000 in operation and maintenance (O&M) costs.

*Changes in the Estimates:* There is a decrease in the labor hours in this ICR compared to the previous ICR. A large percentage of affected facilities are already complying with this rule as a result of their compliance with applicable State and local rules. We have minimized or eliminated the reporting and recordkeeping requirements under this rule for most of those sources. There are no new or reconstructed facilities expected within the larger, bulk segment of the industry and new gasoline dispensing facilities are expected to be subject to NESHAP subparts BBBBBB and CCCCCC rules. Thus, we have developed this ICR with the expectation that only existing sources will be subject to the reporting and recordkeeping requirements of the rule.

Dated: December 21, 2011.

**John Moses,**

*Director, Collection Strategies Division.*

[FR Doc. 2011–33259 Filed 12–27–11; 8:45 am]

**BILLING CODE 6560–50–P**

---

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2010–0014; FRL–9326–6]**

## Product Cancellation Order for Certain Pesticide Registrations

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

**ACTION:** Notice.

**SUMMARY:** This notice announces EPA's order for the cancellations, voluntarily requested by the registrants and accepted by the Agency, of the products listed in Tables 1 and 2 of Unit II., pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This cancellation order follows an April 27, 2011 **Federal Register** Notice of Receipt of Requests from the registrants listed in Table 3 of Unit II. to voluntarily cancel these product registrations. In the April 27, 2011 notice, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 180-day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency did not receive any comments on the notice. Further, the Agency received notice from registrants to withdraw certain cancellation requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

**DATES:** The cancellations of the products listed in Tables 1 and 2 are effective October 25, 2011.

**FOR FURTHER INFORMATION CONTACT:** Maia Tatinclaux, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 347–0123; fax number: (703) 308–8090; email address: *tatinclaux.maia@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How can I get copies of this document and other related information?*

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0014. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

### II. What action is the agency taking?

This notice announces the cancellation, as requested by registrants, of 128 products registered under FIFRA section 3 and 108 products registered under FIFRA section 24(c). These registrations are listed in sequence by registration number in Tables 1 and 2 of this unit.

Table 2 contains a list of registrations for which companies paying at one of the maintenance fee caps requested cancellation in the FY 2011 maintenance fee billing cycle. Because maintaining these registrations as active would require no additional fee, the Agency is treating these requests as voluntary cancellations under Section 6(f)(1).

TABLE 1—PRODUCT CANCELLATIONS

| Registration No. | Product name | Chemical name |
|---|---|---|
| 000432–00961 | Banol C | Chlorothalonil<br>Propamocarb hydrochloride |

TABLE 1—PRODUCT CANCELLATIONS—Continued

| Registration No. | Product name | Chemical name |
|---|---|---|
| 002749–00545 | Trifluralin Technical | Trifluralin |
| 004822–00513 | Raid FIK Formula H1A | Tetramethrin<br>Permethrin d-Allethrin |
| 007969–00161 | Dazomet Technical | Dazomet |
| 053883–00082 | CSI 30–30 | Piperonyl butoxide Permethrin |
| 053883–00083 | CSI 2–2 ULV | Piperonyl butoxide<br>Permethrin |
| 053883–00085 | CSI 4–4 ULV | Piperonyl butoxide<br>Permethrin |
| 066591–00003 | Green's Clear Wood Preservative | Zinc naphthenate |
| 068708–00008 | EC6107A | N-(coco alkyl)trimethylenediamine |
| 070299–00001 | Zerotol Algaecide Fungicide | Hydrogen peroxide |
| 070299–00002 | Oxidate Broad Spectrum Bactericide/Fungicide | Hydrogen peroxide |
| 070299–00003 | Terracite | Sodium percarbonate |
| AZ050001 | Riverdale Endurance Herbicide | Prodiamine |
| AZ050011 | Select Max Herbicide With Inside Technology | Clethodim |
| AZ060005 | Goaltender | Oxyfluorfen |
| AZ960003 | Vectobac G Biological Larvacide Granules | Bacillus thuringiensis subsp. Israelensis |
| AZ980001 | Treflan H.E.P. | Trifluralin |
| CA030009 | Merit 75 WSP | Imidacloprid |
| HI090002 | Mite Away Quick Strips | Formic acid |
| OR060026 | Rozol Pellets | Chlorophacinone |
| OR080003 | Mustang Max EC Insecticide | Zeta-Cypermethrin |
| VT900002 | Bonide Orchard Mouse Bait | Zinc phosphide (Zn3P2) |
| WA050008 | Everest 70% Water Dispersible Granular Herbicide | Flucarbazone-sodium |
| WA060001 | Manzate 200 DF Fungicide | Mancozeb |
| WA080012 | Pristine Fungicide | Pyraclostrobin Boscalid |

TABLE 2—PRODUCT CANCELLATIONS DUE TO MAINTENANCE FEES

| Registration No. | Product name | Chemical name |
|---|---|---|
| 000100–00530 | Methidathion Technical | Methidathion. |
| 000100–00835 | Thiolux Dry Flowable Micronized Sulfur | Sulfur. |
| 000100–01049 | Karate CSO Insecticide | Lambda-cyhalothrin. |
| 000228–00387 | Riverdale Magellan | Phosphorous acid. |
| 000228–00440 | Acephate Tree, Turf & Ornamental Spray 97 | Acephate. |
| 000228–00448 | Multitude 75wsp Insecticide | Acephate. |
| 000228–00487 | Imidacloprid Pco Flowable | Imidacloprid. |
| 000228–00618 | Bifenthrin G-Pro Termiticide/insecticide | Bifenthrin. |
| 000228–00661 | Acephate E-Ag 90 EG Insecticide | Acephate. |
| 000228–00662 | Acephate E 75 WP Insecticide | Acephate. |
| 000228–00667 | Lambda-Cy E-Pro OS Insecticide | Lambda-cyhalothrin. |
| 000228–00669 | Lambda-Cy E-Pro GC Insecticide | Lambda-cyhalothrin. |
| 000239–02515 | Ortho Poison Ivy and Poison Oak Control | Triclopyr,triethylamine salt. |
| 000239–02642 | Bug-B-Gon Insect Killer 1 | Cyfluthrin. |
| 000239–02649 | Bug-B-Gon Ready-Spray Insect Killer | Cyfluthrin. |
| 000239–02650 | Bug-B-Gon Insect Killer Concentrate | Cyfluthrin. |
| 000239–02667 | Grub-B-Gon Granular Insecticide | Benzoic acid,4-chloro-,2-benzoyl-2-(1,1-dimethylethyl)hydrazide. |
| 000239–02669 | Rosepride Rose & Flower Insect Killer—006% | Bifenthrin. |
| 000239–02680 | Ortho Concentrate Bug-B-Gon Multi-Purpose Insect Killer. | Esfenvalerate. |
| 000239–02693 | Ortho 0.1% Deltamethrin Granule | Deltamethrin. |
| 000241–00361 | Detail Herbicide | Imazaquin Dimethenamid. |
| 000264–00257 | Ethrel Brand Ethephon Plant Growth Regulator | Ethephon. |
| 000264–00377 | Cerone Brand Ethephon Plant Regulator | Ethephon. |
| 000264–00564 | Finish Brand Harvest Aid for Cotton | Ethephon Cyclanilide. |
| 000264–00585 | Finish Brand 6 Harvest Aid for Cotton | Ethephon. |
| 000270–00230 | Menoke Indoor-Outdoor Dog and Cat Repellent | Methylnonylketone. |
| 000270–00255 | Farnam Die Fly | Methomyl cis-9-Tricosene. |
| 000270–00293 | Repel Granular Dog and Cat Repellent | Methylnonylketone. |
| 000270–00317 | Aeh Concentrate Weed, Grass and Brush Killer | Glufosinate. |
| 000270–00318 | Aeh Ready-To-Use Weed and Grass Killer | Glufosinate. |
| 000270–00342 | Adams Pan-San | 1-Decanaminium,N,N-dimethyl-N-octyl-,chloride 1-Decanaminium,N-decyl-N,N-dimethyl-,chloride 1-Octanaminium,N,N-dimethyl-N-octyl-,chloride Alkyl *dimethylbenzylammoniumchloride* (50%$C_{14}$,40%$C_{12}$,10%$C_{16}$). |
| 000279–03345 | F6135 G Insecticide | Bifenthrin. |
| 000538–00159 | Proturf Fungicide VI | Iprodione. |

TABLE 2—PRODUCT CANCELLATIONS DUE TO MAINTENANCE FEES—Continued

| Registration No. | Product name | Chemical name |
|---|---|---|
| 000538–00163 | Scotts Super Bonus S Weed Control Plus Lawn Fertilizer. | Atrazine. |
| 000538–00236 | Private Label Feed and Weed | Mecoprop-P 2–4,D. |
| 000538–00266 | Grubex | Benzoic acid,4-chloro-,2-benzoyl-2-(1,1-dimethylethyl)hydrazide. |
| 000655–00690 | Prentox Pyronyl Horse Insecticide and Fly Repellent | Pyrethrins Butoxypolypropyleneglycol Piperonyl butoxide. |
| 000773–00066 | Ectiban Insecticide Pour-On | Permethrin. |
| 000869–00039 | Green Light Wettable Dusting Sulphur | Sulfur. |
| 000869–00239 | Green Light Com-Pleet 18% Systemic Grass & Weed Killer. | Glyphosate-isopropylammonium. |
| 000869–00240 | Green Light Com-Pleet 1.92% Systemic Grass & Weed Killer. | Glyphosate-isopropylammonium. |
| 000869–00241 | Green Light Com-Pleet Systemic Grass & Weed Killer. | Glyphosate-isopropylammonium. |
| 000869–00244 | Green Light Permethrin Dust | Permethrin. |
| 001381–00206 | Gallant 1.6l | Imidacloprid. |
| 001448–00108 | W–60–7 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00109 | W–60–6 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00110 | W–60–5 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00205 | W–15–3 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00206 | W–15–4 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00207 | W–15–5 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00208 | W–15–6 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00216 | B–7–1 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00217 | B–7–2 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00218 | B–7–3 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00234 | W–30–3 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00235 | W–30–4 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00236 | W–30–5 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00237 | W–30–6 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00302 | W–60–9 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00305 | W–60–10 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001448–00378 | Busan 1303 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyldichloride. |
| 001529–00035 | Fungitrol 334 Fungicide | Tributyltinbenzoate. |
| 001529–00039 | Nuosept 485 Preservative | 1,2–Benzisothiazolin-3-one. |
| 002217–00332 | Vapona Insecticide Dairy Cattle Spray | Dichlorvos. |
| 002724–00580 | SPI Automatic Fogger | Permethrin. |
| 002724–00581 | Speer Multi-Purpose Insecticide Spray | Permethrin. |
| 003525–00102 | Winter Tablets ''W'' | Copper sulfate pentahydrate. |
| 004822–00274 | Raid Formula 274 Insect Killer | Permethrin d-Allethrin. |
| 004822–00277 | Raid Formula 277 Insect Killer | Permethrin d-Allethrin. |
| 004822–00551 | Raid Yard Guard Pld | Permethrin d-Allethrin. |
| 005383–00119 | Polyphase 685 | Ziram Carbamic acid,butyl-,3-iodo-2-propynyl ester. |
| 005383–00131 | Micropel It 10 PVC | Octhilinone. |
| 005785–00062 | Bromo-Tabs | 2,4–Imidazolidinedione,1-bromo-3-chloro-5,5-dimethyl-. |
| 007401–00463 | Hi-Yield (r) Acephate | Acephate. |
| 007969–00122 | Basagran DF Herbicide | 3–Isopropyl-1H–2,1,3-benzothiadiazin-4(3H)-one-2,2-dioxide,sodium salt. |
| 007969–00240 | Bas 500 ST Seed Treatment Fungicide | Pyraclostrobin. |
| 009150–00010 | Cryocide Disinfecting Concentrate | Chlorinedioxide 1-Decanaminium,N-decyl-N,N-dimethyl-,chloride. |
| 009198–00152 | The Andersons PCNB Granular Plus Fertilizer | Pentachloronitrobenzene. |
| 010807–00061 | Misty Dualcide | Phenothrin Tetramethrin. |

TABLE 2—PRODUCT CANCELLATIONS DUE TO MAINTENANCE FEES—Continued

| Registration No. | Product name | Chemical name |
|---|---|---|
| 010807–00074 | Misty Delete 3% Multipurpose Spray | Resmethrin. |
| 010807–00094 | Clear Lemon 10 Disinfectant | Alkyl*dimethylbenzylammoniumchloride* ($60\%C_{14}$,$30\%C_{16}$,$5\%C_{18}$,$5\%C_{12}$) Alkyl*dimethylethylbenzylammoniumchloride* ($68\%C_{12}$,$32\%C_{14}$). |
| 010807–00099 | Misty WK–44 Liquid Weed Killer | Bromacil. |
| 010807–00104 | Misty Clear-Mint 10 | Alkyl*dimethylbenzylammoniumchloride* ($60\%C_{14}$,$30\%C_{16}$,$5\%C_{18}$,$5\%C_{12}$) Alkyl*dimethylethylbenzylammoniumchloride* ($68\%C_{12}$,$32\%C_{14}$). |
| 010807–00111 | Misty Clear-Pyne | Pineoil Alkyl*dimethylbenzylammoniumchloride* ($58\%C_{14}$,$28\%C_{16}$,$14\%C_{12}$). |
| 010807–00123 | Misty Flea Killer | Phenothrin. |
| 010807–00151 | One Shot ''foamy'' Germicidal Cleaner & Deodorizer RTU. | Alkyl*dimethylbenzylammoniumchloride* ($60\%C_{14}$,$30\%C_{16}$,$5\%C_{18}$,$5\%C_{12}$) Alkyl*dimethylethyl benzylammoniumchloride*($68\%C_{12}$,$32\%C_{14}$). |
| 010807–00178 | Misty Disinfectant and Deodorant RTU | Ethanol o-Phenylphenol 4-tert-Amylphenol. |
| 010807–00182 | Misty 5016 | Phenothrin Tetramethrin. |
| 010807–00183 | Misty 5001 | Permethrin. |
| 010807–00195 | Misty General Purpose Insect Killer with Sumithrin | Phenothrin. |
| 010807–00210 | Weed and Vegetation Killer | Bromacil. |
| 010807–00211 | Misty Gwk-Four | Bromacil. |
| 013799–00026 | Four Paws Protector Quick Kill Flea & Tick Spray | Pyrethrins Permethrin. |
| 033176–00044 | Airysol Brand Moth Sentry | Permethrin. |
| 035935–00071 | Nicosulfuron Technical | Nicosulfuron. |
| 039967–00046 | Preventol Ct-L | Sodium p-chloro-m-cresolate Octhilinone. |
| 039967–00051 | Preventol Hs 100-Cs50 | Deltamethrin. |
| 039967–00060 | TCMTB 80 | 2-(Thiocyanomethylthio)benzothiazole. |
| 039967–00067 | Preventol TC 60 | 2-(Thiocyanomethylthio)benzothiazole. |
| 039967–00072 | TCMTB 30 G | 2-(Thiocyanomethylthio)benzothiazole. |
| 039967–00078 | TCMTB 30 WB | 2-(Thiocyanomethylthio)benzothiazole. |
| 053883–00098 | Prometon 25E | Prometon. |
| 053883–00099 | Prometon 4SC | Prometon. |
| 053883–00100 | S-Methoprene Bait | S-Methoprene. |
| 053883–00235 | Weed Preventer Plus Fertilizer | Trifluralin. |
| 058779–00003 | Steris-Hydrogen Peroxide Sterilant | Hydrogen peroxide. |
| 060063–00031 | Torrent 2F | Imidacloprid. |
| 060063–00032 | Torrent 1.6F | Imidacloprid. |
| 060063–00033 | Torrent 4f | Imidacloprid. |
| 066222–00064 | Thionex Technical Insecticide | Endosulfan. |
| 066330–00218 | Linuron 4L Weed Killer | Linuron. |
| 066330–00222 | Trifluralin 4ec | Trifluralin. |
| 066330–00226 | Trifluralin 4 TSF | Trifluralin. |
| 066330–00270 | Asulam Liquid Herbicide | Asulam,sodium salt. |
| 066330–00357 | Acephate Technical | Acephate. |
| 070506–00193 | Penncap-M Microencapsulated Insecticide | Methyl Parathion. |
| AL810025 | Sencor Df 75% Dry Flowable Herbicide | Metribuzin. |
| AR070009 | Endigo ZC | Thiamethoxam Lambda-cyhalothrin. |
| AR790014 | Sencor 4 Flowable Herbicide | Metribuzin. |
| AR960006 | Prometryne 4l Herbicide | Prometryn. |
| AZ050007 | Gaucho 600 Flowable | Imidacloprid. |
| AZ060003 | Devrinol 50–DF Selective Herbicide | Napropamide. |
| AZ070008 | Talus 40 SC Insect Growth Regulator | Buprofezin. |
| CA060010 | Liberty 280 Sl Herbicide | Glufosinate. |
| CA060011 | Ignite 280 SL Herbicide | Glufosinate. |
| CA790234 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| CA840007 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| CA870039 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| CA890004 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| CA950002 | Metasystox-R Spray Concentrate | Oxydemeton-methyl. |
| CA970032 | 98–2 | Methyl Bromide. |
| CO020004 | Flufenacet DF Herbicide | Flufenacet. |
| DE080002 | Dupont Coragen Insect Control | Chlorantraniliprole. |
| FL030014 | Switch 62.5wg | Cyprodinil Fludioxonil. |
| FL040007 | Bravo Weather Stik | Chlorothalonil. |
| FL080006 | Mocap EC Nematicide—Insecticide | Ethoprop. |
| FL940005 | Orbit Fungicide | Propiconazole. |
| FL970008 | 98–2 | Methyl Bromide. |
| GA040005 | Bravo Weather Stik | Chlorothalonil. |
| GA800021 | Sencor 4 Flowable Herbicide | Metribuzin. |
| ID010019 | Axiom Df Herbicide | Metribuzin Flufenacet. |

TABLE 2—PRODUCT CANCELLATIONS DUE TO MAINTENANCE FEES—Continued

| Registration No. | Product name | Chemical name |
|---|---|---|
| ID060005 | LSP Flowable Fungicide | Thiabendazole. |
| ID810045 | Sencor 4 Flowable Herbicide | Metribuzin. |
| ID810046 | Sencor 75 Wettable Granular Herbicide | Metribuzin. |
| ID870016 | Sencor 4 Flowable Herbicide | Metribuzin. |
| ID870017 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| ID950004 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| ID990017 | Starane | Fluroxypyr. |
| IL080001 | Tree-Age | Emamectin benzoate. |
| IN080001 | Tree-Age | Emamectin benzoate. |
| KS040009 | Agrisolutions Atrazine 4l | Atrazine. |
| KS080001 | Quilt Fungicide | Propiconazole Azoxystrobin. |
| KY090029 | Tree-Age | Emamectin benzoate. |
| MD090001 | Tree-Age | Emamectin benzoate. |
| ME080002 | Dupont Coragen Insect Control | Chlorantraniliprole. |
| ME790009 | Sencor 4 Flowable Herbicide | Metribuzin. |
| MI050002 | Actellic 5 E Insecticide | Pirimiphos-methyl. |
| MI080001 | Tree-Age | Emamectin benzoate. |
| MI980002 | Transline | 3,6-Dichloro-2-pyridinecarboxylicacid,alkanolaminesalts(of ethanol and isopropanol series. |
| MN010004 | Flufenacet Df Herbicide | Flufenacet. |
| MN030016 | Fusilade DX Herbicide | Propanoic acid,2-(4-((5-(trifluoromethyl)-2-pyridinyl)oxy)phenoxy)-,butylester,(R)-. |
| MN080009 | Tree-Age | Emamectin benzoate. |
| MO080006 | Tree-Age | Emamectin benzoate. |
| MO100003 | Callisto Herbicide | Mesotrione. |
| MO840003 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| MS050017 | Bravo Weather Stik | Chlorothalonil. |
| MS060010 | Yuma 4E | Chlorpyrifos. |
| MS800002 | Sencor 4 Flowable Herbicide | Metribuzin. |
| MS970001 | Prowl 3.3 EC Herbicide | Pendimethalin. |
| MT950007 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| NC830012 | Dupont Velpar L Weed Killer | Hexazinone. |
| NC840005 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| ND040010 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| ND060004 | LSP Flowable Fungicide | Thiabendazole. |
| NE020001 | Gustafson LSP Flowable Fungicide | Thiabendazole. |
| NM950002 | Atroban 11% EC | Permethrin. |
| NM990004 | Atroban 11% EC | Permethrin. |
| NV060008 | Baythroid XL | Beta-cyfluthrin. |
| NY040001 | Sencor Df 75% Dry Flowable Herbicide | Metribuzin. |
| OK060003 | Gustafson Lsp Flowable Fungicide | Thiabendazole. |
| OR000003 | Rely Herbicide | Glufosinate. |
| OR040020 | Guthion Solupak 50% Wettable Powder Insecticide | Azinphos-methyl. |
| OR060003 | LSP Flowable Fungicide | Thiabendazole. |
| OR070029 | Define DF Herbicide | Flufenacet. |
| OR070031 | Define DF Herbicide | Flufenacet. |
| OR090004 | Nemacur 3 | Fenamiphos. |
| OR920023 | Diuron 80DF | Diuron. |
| OR940025 | Diuron 4l | Diuron. |
| OR990043 | Starane | Fluroxypyr. |
| PA090001 | Tree-Age | Emamectin benzoate. |
| RI090003 | Temik Brand 15g Aldicarb Pesticide | Aldicarb. |
| SD030002 | Trust 4EC | Trifluralin. |
| SD040008 | Journey Herbicide | Imazapic Glyphosate-isopropylammonium. |
| SD040010 | Habitat Herbicide | 2-(4,5-Dihydro-4-methyl-4-(1-methylethyl)-5-oxo-1H-imidazol-2-yl)-3-pyridinecarboxylicacid. |
| SD060007 | LSP Flowable Fungicide | Thiabendazole. |
| SD980002 | Trifluralin 4EC | Trifluralin. |
| TX030006 | Dual Magnum Herbicide | S-Metolachlor. |
| TX070011 | Talus 40 SC Insect Growth Regulator | Buprofezin. |
| VA080008 | Tree-Age | Emamectin benzoate. |
| WA000005 | Prowl 3.3 EC Herbicide | Pendimethalin. |
| WA030025 | Guthion Solupak 50% Wettable Powder Insecticide | Azinphos-methyl. |
| WA040031 | Sencor Df 75% Dry Flowable Herbicide | Metribuzin. |
| WA040033 | Sencor DF 75% Dry Flowable Herbicide | Metribuzin. |
| WA050001 | Rely Herbicide | Glufosinate. |
| WA060004 | LSP Flowable Fungicide | Thiabendazole. |
| WA810033 | Temik(r) Aldicarb Pesticide 15% Granular | Aldicarb. |
| WA900013 | Sevin Brand 80 S Carbaryl Insecticide | Carbaryl. |
| WI040005 | Echo 720 Agricultural Fungicide | Chlorothalonil. |
| WI040006 | Echo ZN Agricultural Fungicide | Chlorothalonil. |

TABLE 2—PRODUCT CANCELLATIONS DUE TO MAINTENANCE FEES—Continued

| Registration No. | Product name | Chemical name |
|---|---|---|
| WI080005 | Tree-Age | Emamectin benzoate. |
| WV080002 | Tree-Age | Emamectin benzoate. |

Table 3 of this unit includes the names and addresses of record for all registrants of the products in Tables 1 and 2 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in Tables 1 and 2 of this unit.

TABLE 3—REGISTRANTS OF CANCELLED PRODUCTS

| EPA Company No. | Company name and address |
|---|---|
| 100 | Syngenta Crop Protection, LLC., P.O. Box 18300, Greensboro, NC 27419–8300. |
| 228 | Nufarm Americas Inc., 150 Harvester Dr., Suite 200, Burr Ridge, IL 60527. |
| 239 | The Scotts Co., d/b/a The Ortho Group, P.O. Box 190, Marysville, OH 43040. |
| 241 | BASF Corp., 26 Davis Dr., P.O. Box 13528, Research Triangle Park, NC 27709–3528. |
| 264 | Bayer Cropscience LP, P.O. Box 12014, Research Triangle Park, NC 27709. |
| 270 | Farnam Companies, Inc., d/b/a Central Life Sciences, 301 West Osborn Rd., Phoenix, AZ 85013. |
| 279 | FMC Corp. Agricultural Products Group, Attn: Michael C. Zucker, 1735 Market St. Rm. 1978, Philadelphia, PA 19103. |
| 432 | Bayer Environmental Science, 2 T. W. Alexander Dr., P.O. Box 12014, Research Triangle Park, NC 27709. |
| 538 | The Scotts Co., 14111 Scottslawn Rd., Marysville, OH 43041. |
| 655 | Prentiss, LLC Agent: Pyxis Regulatory Consulting, Inc., 4110 136th Street NW., Gig Harbor, WA 98332. |
| 773 | Intervet, Inc., 556 Morris Ave., S5–2145A, Summit, NJ 07901. |
| 869 | Valent U.S.A Corp. Agent For: Green Light Co., 1101 14th St. NW., Suite 1050, Washington, DC 20005. |
| 1381 | Winfield Solutions, LLC, P.O. Box 64589, St. Paul, MN 55164–0589. |
| 1448 | Buckman Laboratories Inc., 1256 North Mclean Blvd., Memphis, TN 38108. |
| 1529 | International Specialty Products, 1361 Alps Rd., Wayne, NJ 07470. |
| 2217 | PBI/Gordon Corp., P.O. Box 014090, Kansas City, MO 64101–0090. |
| 2724 | Wellmark International, 1501 E. Woodfield Rd., Suite 200, W. Schaumburg, IL 60173. |
| 2749 | Aceto Agricultural Chemicals Corp., One Hollow Lane, Lake Success, NY 11042–1215. |
| 3525 | Qualco Inc., 225 Passaic St., Passaic, NJ 07055. |
| 4822 | S.C. Johnson & Son, Inc., 1525 Howe St., Racine, WI 53403. |
| 5383 | Troy Chemical Corp., P.O. Box 955, Florham Park, NJ 07932–4200. |
| 5785 | Great Lakes Chemical Corporation Agent: Chem Corp., 1801 Highway 52, West Lafayette, IN 47996–2200. |
| 7401 | Mandava Associates, LIC Agent For: Voluntary Purchasing Groups, Inc., 6860 N. Dallas Pkwy., Suite 200, Plano, TX 75024. |
| 7969 | BASF Corp. Agricultural Products, P.O. Box 13528, Research Triangle Park, NC 27709–3528. |
| 9150 | International Dioxcide Inc., 40 Whitecap Dr., North Kingstown, RI 02852. |
| 9198 | The Andersons Lawn Fertilizer Division, Inc., dba/Free Flow Fertilizer, P.O. Box 119, Maumee, OH 43537. |
| 10807 | Amrep, Inc., 990 Industrial Park Dr., Marietta, GA 30062. |
| 13799 | Four Paws Products Ltd., 50 Wireless Blvd., Hauppauge, NY 11788. |
| 33176 | Amrep, Inc. 990, Industrial Park Dr., Marietta, GA 30062. |
| 35935 | Nufarm Limited, PO Box 13439, Research Triangle Park, NC 27709. |
| 39967 | Lanxess Corp., 111 Ridc Park W. Dr., Pittsburgh, PA 152751112. |
| 53883 | Control Solutions, Inc., 5903 Genoa-Red Bluff Rd., Pasadena, TX 77507–1041. |
| 58779 | Steris Corp., P.O. Box 147, St. Louis, MO 63166–0647. |
| 60063 | Sipcam Agro USA, Inc., 2520 Meridian Pkwy., Suite 525, Durham, NC 27713. |
| 66222 | Makhteshim-Agan of North America, Inc., 4515 Falls of Neuse Rd., Suite 300, Raleigh, NC 27609. |
| 66330; WA050008 | Arysta Lifescience North America, LLC, 15401 Weston Pkwy., Suite 150, Cary, NC 27513. |
| 66591 | Green Products Co., 810 Market Ave., Richmond, CA 94801–1325. |
| 68708 | Nalco Company, 1601 W. Diehl Rd., Naperville, IL 60563. |
| 70299 | Biosafe Systems, LLC, 22 Meadow St., East Hartford, CT 06108. |
| 70506 | United Phosphorus, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406. |
| MS970001; SD040008; SD040010; WA000005; WA080012. | BASF Corp., P.O. Box 13528, Research Triangle Park, NC 27709–3528. |

TABLE 3—REGISTRANTS OF CANCELLED PRODUCTS—Continued

| EPA Company No. | Company name and address |
|---|---|
| AL810025; AR790014; AZ050007; CA060010; CA060011; CA790234; CA840007; CA870039; CA890004; CO020004; FL080006; GA800021; ID010019; ID060005; ID810045; ID810046; ID870016; ID870017; ID950004; ME790009; MN010004; MO840003; MS800002; MT950007; NC840005; ND040010; ND060004; NE020001; NV060008; NY040001; OK060003; OR000003; OR040020; OR060003; OR070029; OR070031; OR090004; RI090003; SD060007; WA030025; WA040031; WA040033; WA050001; WA060004; WA810033; WA900013. | Bayer Cropscience, LP, P.O. Box 12014, Research Triangle Park, NC 27709. |
| VT900002 | Bonide Products, Inc., Agent: Registrations by Design Inc., P.O. Box 1019, Salem, VA 24153–3805. |
| CA030009 | Department of Pesticide Regulation, 1001 I St., P.O. Box 4015, Sacramento, CA 95812–4015. |
| ID990017; MI980002; OR990043; AZ060005; AZ980001. | Dow Agrosciences LIC, 9330 Zionsville Rd. 308/2e, Indianapolis, IN 46268–1054. |
| DE080002; ME080002; NC830012 | E. I. Du Pont De Nemours & Co., Inc. (s300/419), Attn: Manager, US Registration, Dupont Crop Protection Wilmington, DE 19898–0001. |
| OR080003 | FMC Corporation, Agricultural Products Group, 1735 Market Street, Rm. 1978, Philadelphia, PA 19103. |
| FL040007; GA040005; MS050017 | GB Biosciences Corp., P.O. Box 18300, Greensboro, NC 27419–5458. |
| CA950002 | Gowan Co., P.O. Box 5569, Yuma, AZ 85366–5569. |
| WA060001 | Griffin L.L.C., AGENT: DuPont Crop Protection/Stine-Haskell Research Center, P.O. Box 30, Newark, DE 19714–0030. |
| CA970032; FL970008 | ICL–IP America, Inc., 95 Maccorkle Ave. SW., South Charleston, WV 25303. |
| NM950002 ; NM990004 | Intervet, Inc., 56 Livingston Ave. R–3–3153g, Roseland, NJ 70698. |
| OR060026 | Liphatech, Inc., 3600 West Elm St., Milwaukee, WI 53209. |
| TX070011; AZ070008 | Nichino America, Inc., 4550 New Linden Hill Rd., Suite 501, Wilmington, DE. |
| HI090002 | Nod Apiary Products USA, Inc., 8345 NW 66th Street #8418, Miami, FL 33166–2626. |
| AZ050001 | Nufarm Americas Inc., 150 Harvester Dr., Suite 200, Burr Ridge, IL 60527. |
| WI040005; WI040006 | Sipcam Agro USA, Inc., 2520 Meridian Pkwy., Suite 525, Durham, NC 27713. |
| AR070009; FL030014; FL940005; IL080001; IN080001; KS080001; KY090029; MD090001; MI080001; MN030016; MN080009; MO080006; MO100003; PA090001; TX030006; VA080008; WI080005; WV080002. | Syngenta Crop Protection, Inc., Attn: Regulatory Affairs, P.O. Box 18300, Greensboro, NC 27419–8300. |
| AZ060003 | United Phosphorus, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406. |
| AZ050011; AZ960003 | Valent U.S.A. Corporation, 1600 Riviera Ave., Suite 200, Walnut Creek, CA 94596. |
| AR960006; KS040009; MI050002; MS060010; OR920023; OR940025; SD030002; SD980002. | Winfield Solutions, LLC, P.O. Box 64589, St. Paul, MN 55164–0589. |

## III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the April 27, 2011 **Federal Register** notice (76 FR 23588) (FRL–8870–6) announcing the Agency's receipt of the requests for voluntary cancellations of products listed in Tables 1 and 2 of Unit II. A list of products that were included in the April 27, 2011 **Federal Register** notice, but have been omitted from this cancellation order due to previous cancellation or withdrawal by the registrant will be placed in the docket.

## IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellations of the registrations identified in Tables 1 and 2 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Tables 1 and 2 of Unit II. are cancelled. The effective date of the cancellations in Tables 1 and 2 that are subject to this notice is October 25, 2011. Any distribution, sale, or use of existing stocks of the products identified in Tables 1 and 2 of Unit II. in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI. will be a violation of FIFRA.

## V. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be cancelled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** issue of April 27, 2011. The comment period closed on October 24, 2011.

## VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The existing stocks provisions for the

products subject to this order are as follows.

*A. Registrations Listed in Table 1 of Unit II*

The registrants may continue to sell and distribute existing stocks of products listed in Table 1 of Unit II. until December 28, 2012, which is 1 year after the publication of the Cancellation Order in the **Federal Register**. Thereafter, the registrants are prohibited from selling or distributing products listed in Table 1, except for export in accordance with FIFRA section 17, or proper disposal. Persons other than the registrants may sell, distribute, or use existing stocks of products listed in Table 1 of Unit II. until existing stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled products.

*B. Registrations Listed in Table 2 of Unit II Except CA970032 and FL970008*

The registrants may sell and distribute existing stocks of these products until January 15, 2012, 1 year after the date on which the maintenance fee was due. Thereafter, the registrants are prohibited from selling or distributing the pesticides identified in Table 2 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants are allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled products.

*C. Registration Numbers CA970032 and FL970008*

Mitigation measures included as part of the Reregistration Eligibility Decision (RED) for methyl bromide are being implemented in two phases. The first phase of mitigation is required to be placed on all product labels in 2011.To ensure that all methyl bromide products in the marketplace have the same protections at the same time, the following are the existing stocks provisions for the cancellation of registration numbers CA970032 and FL970008. The registrants may sell and distribute existing stocks of these products until December 31, 2011. Thereafter, the registrants are prohibited from selling and distributing the pesticides identified in Table 2 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants are allowed to sell and distribute existing stocks through April 30, 2012. After December 28, 2011, remaining stocks may be used until such stocks are exhausted, provided that such use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled products.

**List of Subjects**

Environmental protection, Pesticides and pests.

Dated: November 17, 2011.

**Richard P. Keigwin, Jr.**

*Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2011–33252 Filed 12–27–11; 8:45 am]

BILLING CODE 6560–50–P

## GOVERNMENT ACCOUNTABILITY OFFICE

### Medicare Payment Advisory Commission Nomination Letters

**AGENCY:** Government Accountability Office (GAO).

**ACTION:** Notice on letters of nomination.

**SUMMARY:** The Balanced Budget Act of 1997 established the Medicare Payment Advisory Commission (MedPAC) and gave the Comptroller General responsibility for appointing its members. For appointments to MedPAC that will be effective May 1, 2012, I am announcing the following: Letters of nomination should be submitted between January 1 and March 8, 2011, to ensure adequate opportunity for review and consideration of nominees prior to the appointment of new members.

**ADDRESSES:** GAO: *MedPACappointments@gao.gov*. GAO: 441 G Street NW., Washington, DC 20548. MedPAC: 601 New Jersey Avenue NW., Suite 9000, Washington, DC 20001.

**FOR FURTHER INFORMATION CONTACT:** GAO: Office of Public Affairs, (202) 512–4800. 42 U.S.C. 1395b–6.

**Gene L. Dodaro,**

*Comptroller of the United States.*

[FR Doc. 2011–33226 Filed 12–27–11; 8:45 am]

BILLING CODE 1610–02–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier CMS–10249 and CMS–10409]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Administrative Requirements for Section 6071 of the Deficit Reduction Act; *Use:* Under section 6071 of the Deficit Reduction Act of 2005 (Pub. L. 109–171) subsection (c), the Secretary may require States to meet requirements and provide additional information, provisions, and assurances. Through the Operational Protocol, States provide the requirements, information, provisions and assurances which, following CMS approval, States may enroll individuals in the State's demonstration program or begin to claim for service dollars. The Act also requires the Money Follows the Person Rebalancing Demonstration (MFP) program be evaluated to determine program effectiveness. One aspect of the evaluation is determining participant quality of life and how the program affects quality of life. Medicaid enrollees who participate in the MFP program are expected to have need for long-term care services for the rest of their lives and are a particularly vulnerable population if the community setting cannot adequately meet their

needs or does not provide them a suitable quality of life.

State Operational Protocols should provide enough information that: the CMS Project Officer and other Federal officials may use it to understand the operation of the demonstration and/or prepare for potential site visits without needing additional information; the State Project Director can use it as the manual for program implementation; and external stakeholders may use it to understand the operation of the demonstration. The financial information collection will be used in CMS financial statements and shared with the auditors who validate CMS' financial position. The Maintenance of Effort forms as well as the MFP Budget Form are required each year. Submissions of MFP Demonstration Financial Forms are 90 days after the end of each Federal fiscal quarter. The MFP Finders File, MFP Program Participation Data file, and MFP Services File will be used by the national evaluation contractor to assess program outcomes. The MFP Quality of Life data will be used by the national evaluation contractor to assess program outcomes. Specifically, the evaluation will determine how participants' quality of life changes after transitioning to the community. The semi-annual progress reports will be used by the national evaluation contractor and CMS to monitor program implementation at the grantee level; *Form Number:* CMS–10249 (OCN: 0938–1053); *Frequency:* Yearly, Semi-annually, Quarterly, Once; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 43; *Total Annual Responses:* 360; *Total Annual Hours:* 9,360. (For policy questions regarding this collection contact Marybeth Ribar at (410) 786–1121. For all other issues call (410) 786–1326.)

2. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Long Term Care Hospital (LCTH) Quality Reporting Program—Pressure Ulcer Measure Data Set; *Use:* Section 3004 of the Affordable Care Act authorizes the establishment of a new quality reporting program for Long Term Care Hospitals (LTCHs). LTCHs that fail to submit quality measure data may be subject to a 2 percentage point reduction in their annual update to the standard Federal rate for discharges occurring during a rate year, beginning in FY 2014. One of the quality measures LTCHs are required to collect and submit data on is the Percent of Residents with Pressure Ulcers That Are New or Have Worsened.

Currently, there are no mandatory standardized data sets being used in LTCHs. Therefore, we have created a new data set to be used in LTCHs, which incorporates data items contained in other, well known and clinically established pressure ulcer data sets, including but not limited to the Minimum Data Set 3.0 (MDS 3.0) and CARE data set (Continuity Assessment Records & Evaluation).

Beginning on October 1, 2012, LTCHs will begin to use a data collection document entitled the ''LTCH CARE Data Set'' as the vehicle by which to collect the pressure ulcer data for the LTCH quality reporting program. This data set consists of the following components: (1) Pressure ulcer documentation; (2) selected covariates related to pressure ulcers; (3) patient demographic information; and; (4) a provider attestation section. The use of the LTCH CARE Data Set is necessary in order to allow CMS to collect LTCH quality measures data in compliance with Section 3004 of the Affordable Care Act. There are no other reasonable alternatives available to CMS for the collection and submission of pressure ulcer data.

The 60 day Federal Notice published on Friday, September 2, 2011 (76 FR 54776). Since September 2, 2011, CMS has worked on the operational aspects of the LTCH Quality Reporting Program. While performing this work, CMS determined that several non-material changes were needed on the LTCH CARE Data Set. These changes have been made merely to correct minor errors and do not increase the burden to the provider. *Form Number:* CMS–10409 (OCN: 0938–New); *Frequency:* Occasionally; *Affected Public:* Private Sector: Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 3,531; *Total Annual Responses:* 3,531; *Total Annual Hours:* 883. (For policy questions regarding this collection contact Caroline Gallaher at (410) 786–8705. For all other issues call (410) 786–1326.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at http://www.cms.hhs.gov/PaperworkReductionActof1995, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to Paperwork@cms.hhs.gov, or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *January 27, 2012.*

OMB, Office of Information and Regulatory Affairs, *Attention:* CMS Desk Officer, *Fax Number:* (202) 395–6974,

*Email: OIRA_submission@omb.eop.gov.*

Dated: December 21, 2011.

**Martique Jones,**

*Director, Regulations Development Group, Division-B, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2011–33321 Filed 12–27–11; 8:45 am]

BILLING CODE 4120–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* University Centers for Excellence in Developmental Disabilities Education, Research, and Service—Annual Report.

*OMB No.:* 0970–0289.

**Description**

Section 104 (42 U.S.C. 15004) of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act of 2000) directs the Secretary of Health and Human Services to develop and implement a system of program accountability to monitor the grantees funded under the DD Act of 2000. The program accountability system shall include the National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service (UCEDDs) authorized under Part D of the DD Act of 2000. In addition to the accountability system, Section 154 (e) (42 U.S.C. 15064) of the DD Act of 2000 includes requirements for a UCEDD Annual Report.

*Respondents:* ADD University Centers.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| UCEDD Annual Report Template | 67 | 1 | 1,412 | 94,604 |

Estimated Total Annual Burden Hours: 94,604.

**Additional Information**

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

*OMB Comment:*

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: (202) 395–7285, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 2011–33192 Filed 12–27–11; 8:45 am]

**BILLING CODE 4184–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children And Families

### Administration on Children, Youth and Families; Statement of Organization, Functions, and Delegations of Authority

**AGENCY:** Administration for Children and Families, HHS.

**ACTION:** Notice.

**SUMMARY:** Statement of Organizations, Functions, and Delegations of Authority The Administration for Children and Families (ACF) has reorganized the Administration on Children, Youth and Families (ACYF). This reorganization realigns the Children's Bureau Data and Technology Team and the Family and Youth Services Bureau Research, Data, and Evaluation Team to create the Office of Data Analysis, Research, and Evaluation. It also renames the Division of Research and Innovation to the Division of Program Innovation. It renames the Division of Youth Services to the Division of Adolescent Development and Support. It deletes the Division of Abstinence Programs. Additionally, it deletes the Mentoring Children of Prisoners program.

**FOR FURTHER INFORMATION CONTACT:** Bryan Samuels, Commissioner, Administration on Children, Youth and Families, 1250 Maryland Avenue SW., Washington, DC 20024, (202) 205–8347.

This notice amends Part K of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (HHS), Administration for Children and Families (ACF) as follows: Chapter KB, Administration on Children, Youth and Families (ACYF), as last amended 72 FR 24314–24316, May 2, 2007.

I. Under Chapter, KB, Administration on Children, Youth and Families, delete KB in its entirety and replace with the following:

*KB.00 Mission.* The Administration on Children, Youth and Families (ACYF) advises the Secretary, through the Assistant Secretary for Children and Families, on matters relating to the sound development of children, youth, and families by planning, developing, and implementing a broad range of activities that prevent or remedy the effects of trauma, abuse, and/or neglect of children and youth and promote child, adolescent, and family well-being.

ACYF administers State grant programs under titles IV–B and IV–E of the Social Security Act; manages the Adoption Opportunities program and other discretionary programs for the development and provision of child welfare services; and implements the Child Abuse Prevention and Treatment Act. It administers programs under the Runaway and Homeless Youth Act; carries out the provisions of the Family Violence Prevention and Services Act; and manages adolescent pregnancy prevention programs under the Affordable Care Act.

In concert with other components of ACF, ACYF develops and implements research, demonstration, and evaluation strategies for the discretionary funding of activities designed to improve and enrich the lives of children and youth and to strengthen families. It administers Child Welfare Services training and research and demonstration programs authorized by title IV–B of the Social Security Act and oversees promising youth development programs.

*KB.10 Organization.* The Administration on Children, Youth and Families is headed by a Commissioner, who reports directly to the Assistant Secretary for Children and Families, and consists of:

Office of the Commissioner (KBA).

Office of Management Services (KBA1).

Office of Data Analysis, Research and Evaluation (KBA3).

Children's Bureau (KBD).

Children's Bureau Regional Program Units (KBDDI–X) .

Office of Child Abuse and Neglect (KBD1).

Division of Policy (KBD2).

Division of Program Implementation (KBD3).

Division of Program Innovation (KBD4).

Division of Child Welfare Capacity Building (KBD5).

Division of State Systems (KBD6).

Family and Youth Services Bureau (KBE).

Division of Adolescent Development and Support (KBE1).

Division of Family Violence Prevention (KBE2).

*KB.20 Functions.* A. The Office of the Commissioner serves as principal advisor to the Assistant Secretary for Children and Families, the Secretary, and other officials of the Department on the sound development of children, youth, and families. It provides executive direction and management strategy to ACYF components. The Deputy Commissioner assists the Commissioner in carrying out the responsibilities of the Office.

In addition to the Immediate Office, the Office of the Commissioner contains

the Office of Management Services and the Office of Data Analysis, Research and Evaluation.

1. Office of Management Services manages the formulation and execution of the budgets for ACYF programs and for Federal administration; serves as the central control point for operational and long range planning; functions as Executive Secretariat for ACYF, including managing correspondence, correspondence systems, and electronic mail requests; reviews and manages clearance for funding opportunity announcements for ACYF; coordinates the provision of staff development and training; provides support for ACYF's personnel administration, including staffing, employee and labor relations, performance management, and employee recognition; manages procurement planning and provides technical assistance regarding procurement; oversees the discretionary grant paneling process; manages ACYF-controlled space and facilities; performs manpower planning and administration; plans for, acquires, distributes and controls ACYF supplies; provides mail and messenger services; maintains duplicating, fax, and computer and computer peripheral equipment; supports and manages automation within ACYF; provides for health and safety; and oversees travel, time and attendance, and other administrative functions for ACYF.

2. Office of Data Analysis, Research and Evaluation provides leadership and direction in program development, innovation, research and in the management of the legislatively mandated information systems used in ACYF. It conducts analysis of national data to inform the policy and program priorities of ACYF and issues regular reports. It oversees ACYF's research and evaluation strategy in support of ACYF's implementation of programs that replicate evidence-based effective program models and efforts to develop an evidence base for innovative practices.

B. The Children's Bureau (CB) is headed by an Associate Commissioner who advises the Commissioner, ACYF, on matters related to child welfare, including child abuse and neglect, child protective services, family preservation and support, adoption, foster care and independent living, and child abuse and neglect prevention. A Deputy Associate Commissioner supports the Associate Commissioner and manages the day-to-day operations of the CB. CB recommends legislative and budgetary proposals, operational planning system objectives and initiatives, and projects and issue areas for evaluation, research, and demonstration activities.

The Child and Family Services Review Team, housed in the Office of the Associate Commissioner, in partnership with the Administration for Children and Families Regional Offices, carries out reviews of child protective services, foster care, adoption, family preservation, family support, and independent living services provided by the States. CB represents ACYF in initiating and implementing interagency activities and projects affecting children and families and provides leadership and coordination for the programs, activities, and subordinate components of the Bureau. Seven units comprise the CB:

1. The Regional Program Unit is headed by a CB Regional Program Manager who reports to the Associate Commissioner, CB, within ACYF. The CB Regional Program Manager, through subordinate regional staff, in collaboration with program components, is responsible for: (1) Providing program and technical administration of CB formula, entitlement, block, and discretionary programs related to child welfare, including child abuse and neglect prevention, child protective services, family preservation and support, adoption, foster care, and independent living; (2) collaborating with the ACF Central Office, States, and grantees on all program matters for programs or issues that have significant implications for the programs; (3) providing technical assistance to entities responsible for administering CB programs to resolve identified problems; (4) ensuring that appropriate procedures and practices are adopted; (5) working with appropriate State and local officials to develop and implement outcome-based performance measures; and (6) monitoring the programs to ensure their efficiency and effectiveness, and ensuring that these entities conform to Federal laws, regulations, policies, and procedures governing the programs.

2. The Office on Child Abuse and Neglect provides leadership and direction on the issues of child maltreatment and the prevention of abuse and neglect under the Child Abuse Prevention and Treatment Act (CAPTA). It is the focal point for interagency collaborative efforts, national conferences and special initiatives related to child abuse and neglect, and for coordinating activities related to the prevention of abuse and neglect and the protection of children at risk of maltreatment. It supports activities to build networks of community-based, prevention-focused family resource and support programs through the Community-Based Child Abuse Prevention Grants. It supports improvement in the systems which handle child abuse and neglect cases, particularly child sexual abuse and exploitation- and maltreatment-related fatalities, and improvement in the investigation and prosecution of these cases through the Children's Justice Act.

3. The Division of Policy provides leadership and direction in policy development and interpretation of titles IV–B and IV–E of the Social Security Act and the Basic State Grant under CAPTA. It writes regulations and interprets policy for the Bureau's formula and entitlement grant programs, and responds to requests for policy clarification from ACF Regional Offices and other sources.

4. The Division of Program Implementation provides leadership and direction in the operation and review of programs under titles IV–B and IV–E of the Social Security Act and the Basic State Grant under CAPTA. It develops program instructions, information memoranda, and annual reports related to these programs. It analyzes State Plans and develops State profiles and other reports, and it participates in monitoring and reviewing State information systems to ensure the accuracy and relevance of the data. It is responsible for the Monitoring Team, which schedules and coordinates the monitoring of State reviews and ensures effective corrective action if necessary. It works with other agencies and organizations as appropriate on the implementation and oversight of relevant sections of the Indian Child Welfare Act. It is the focal point for financial issues, including disallowances, appeals, and the decisions of the Departmental Appeals Board (DAB). It responds to client and constituent correspondence received electronically or through other channels.

5. The Division of Program Innovation provides leadership and direction in program development, innovation and research. It defines critical issues for investigation and makes recommendations regarding subject areas for research, demonstration and evaluation. It administers the Bureau's discretionary grant programs and awards project grants to State and local agencies and organizations nationwide. It provides direction to the Crisis Nurseries and Abandoned Infants Resource Centers.

6. The Division of Child Welfare Capacity Building provides leadership and direction in the areas of training, technical assistance and information

dissemination under titles IV–B and IV–E of the Social Security Act, and under the Child Abuse Prevention and Treatment Act. Either directly or through funded Resource Centers and Implementation Centers, it provides training and technical assistance to assist service providers, State and local governments and tribes, and strengthen headquarters and regional office staff.

It manages discretionary training grants under section 426 of the Social Security Act and title IV–E training and directs the operations and activities of the Child Welfare Information Gateway. The Division identifies best practices for treating vulnerable families and preventing abuse and neglect. It participates in the development of funding opportunity announcements and manages certain discretionary grant projects. It also develops and issues a periodic newsletter, and is the focal point for conference and meeting planning activities for the Bureau.

7. The Division of State Systems (DSS) reviews, assesses, and inspects the planning, design and operation of State management information systems and approves advanced planning documents for automated data systems. The Division provides leadership for the provision of technical assistance to States on information systems projects and advances the use of computer technology in the administration of child welfare and social services programs by States. The Division reviews, analyzes, and approves/disapproves State requests for Federal financial participation for automated systems development and related activities, which support child welfare programs, including foster care and adoption. It provides assistance to States in developing or modifying automation plans to conform to Federal requirements; monitors approved State system development activities; and conducts periodic reviews to assure State compliance with regulatory requirements applicable to automated systems supported by Federal financial participation. It provides guidance to States on functional requirements for these automated information systems.

C. The Family and Youth Services Bureau (FYSB) is headed by an Associate Commissioner who recommends policy direction and programs to address issues involving vulnerable youth and their families to the Commissioner, ACYF. A Deputy Associate Commissioner supports the Associate Commissioner and manages the day-to-day operations of FYSB. The Bureau assesses policies and legislation and develops program initiatives for runaway and homeless youth, family violence prevention and services, and adolescent pregnancy prevention. It recommends budgetary and legislative proposals and subject areas for research and demonstration activities, and it coordinates efforts with and provides expert advice to departmental and other Federal agencies on issues and programs for vulnerable youth, including runaway and homeless youth; youth at risk of involvement with gangs, violence and drugs; and other youth in at-risk situations. The Bureau represents HHS on various councils, workgroups, and committees and provides leadership and coordination to other HHS programs and agencies. The Bureau is comprised of two divisions.

1. The Division of Adolescent Development and Support promotes a positive youth development approach to program services so that Bureau programs and activities meet the developmental needs of vulnerable populations of young people and their families through administering programs that impact runaway homeless youth, children whose parents are incarcerated, and youth who are pregnant, or who are at risk of becoming pregnant.

The Division administers the runaway and homeless youth program—which incorporates the basic center, street outreach, and transitional living programs. It also includes development and implementation of policy, guidelines and regulations concerning the funding and management of service projects for youth under the Runaway and Homeless Youth Act. The Division designs, develops, funds, and monitors support activities related to these programs, including but not limited to the provision of technical assistance, a monitoring system, a data collection system, the National Clearinghouse on Families and Youth, and the National Runaway Switchboard. The Division oversees the receipt and review of applications for grants in these program areas and monitors the management of these grants through the ACF Regional Offices.

The Division administers a comprehensive array of adolescent pregnancy prevention projects and grant programs that prevent teen pregnancy and the spread of sexually transmitted infections including HIV/AIDS among teens. Grant programs include evidence based comprehensive pregnancy prevention and personal responsibility education (such as maintaining healthy relationships and financial literacy) as well as programs that test innovative approaches to adolescent pregnancy prevention. The Division also administers grants that support medically accurate abstinence education programs which may include promoting abstinence through mentoring, counseling and adult supervision. The Division develops the conceptual framework for issues pertaining to adolescent pregnancy prevention, monitors funded programs, and ensures the provision of technical assistance.

The Division determines the overall conceptual and policy framework to address issues facing vulnerable families and adolescents in ACYF. It identifies problems, defines critical issues for investigation, and makes recommendations regarding subject areas for research, demonstration, and evaluation activities. Based on the outcomes of these activities, the Division disseminates information through conferences, forums, and written materials; provides assistance to service providers and state and local governments and tribes in planning, developing, implementing and evaluating programs affecting family and youth; and recommends plans and programs to increase public awareness and understanding about activities affecting vulnerable families and youth. Supervision of FYSB's regional staff is also the responsibility of this Division.

The Division of Family Violence Prevention promotes public awareness about domestic violence and its impact and prevention and intervention strategies to address the problem. The Division's programs support the prevention of family violence; provide immediate shelter and related assistance to victims of family violence and their dependents; provide for research into the most effective methods of family violence prevention, identification, and intervention; and provide training and technical assistance to family violence personnel in States, tribes, local public agencies (including law enforcement agencies, courts, social service agencies, and health care providers), and non-profit organizations.

The Division also supports the development of services to address the needs of children exposed to domestic violence. The Division is responsible for developing, updating, and implementing program regulations and policies. The Division oversees the receipt and review of applications for grants and grantee activities. It also provides guidance, review, support and assistance to States and grantees on HHS policies, regulations, procedures, and systems necessary to ensure efficient program operation at the State, territorial, and tribal levels. In addition, the Division coordinates all programs for victims and potential victims of family violence and their dependents.

Dated: November 1, 2011.

**George H. Sheldon,**

*Acting Assistant Secretary for Children and Families.*

[FR Doc. 2011–33265 Filed 12–27–11; 8:45 am]

**BILLING CODE 4184–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0912]**

### Communications and Activities Related to Off-Label Uses of Marketed Products and Use of Products Not Yet Legally Marketed; Request for Information and Comments

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; request for comments.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the establishment of a docket to assist with our evaluation of our policies on communications and activities related to off-label uses of marketed products, as well as communications and activities related to use of products that are not yet legally marketed for any use, we would like to obtain comments and information related to scientific exchange. FDA is interested in obtaining comments and information regarding scientific exchange about both unapproved new uses of products already legally marketed (''off-label'' use) and use of products not yet legally marketed for any use.

**DATES:** Submit either electronic or written information and comments by March 27, 2012.

**ADDRESSES:** Submit electronic information and comments to *http://www.regulations.gov.* Submit written information and comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane Rm. 1061, Rockville, MD 20852. Identify both electronic and written comments and any supporting documents with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:**

**For the Center for Drug Evaluation and Research**

Nicole Mueller, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 51, Rm. 6312, Silver Spring, MD 20993–0002, (301) 796–3601.

**For the Center for Biologics Evaluation and Research**

Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, (301) 827–6210.

**For the Center for Devices and Radiological Health**

Deborah Wolf, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 66, Rm. 3414, Silver Spring, MD 20993–0002, (301) 796–5732.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On July 5, 2011, a citizen petition was submitted by Ropes & Gray and Sidley Austin LLP on behalf of seven product manufacturers (Petitioners): Allergan, Inc.; Eli Lilly and Co.; Johnson & Johnson; Novartis Pharmaceuticals Corp.; Novo Nordisk, Inc.; Pfizer, Inc.; and sanofi-aventis U.S. LLC under 21 CFR 10.30. The citizen petition requested that FDA clarify its policies for drug products and devices governing certain communications and activities related to off-label uses of marketed products and use of products that are not yet legally marketed for any use.[1] Specifically, the petition requests clarification in the following areas:

1. Manufacturer responses to unsolicited requests;
2. Scientific exchange;
3. Interactions with formulary committees, payors, and similar entities; and
4. Dissemination of third-party clinical practice guidelines.

For some time, FDA has been considering these issues and is currently evaluating our policies on sponsor or investigator communications and activities related to off-label uses of marketed products and use of products that are not yet legally marketed for any use. We have been considering what actions to take in the areas specified by the petitioners with respect to manufacturer responses to unsolicited requests; interactions with formulary committees, payors, and similar entities; and the dissemination of third-party clinical practice guidelines. To assist with our evaluation of our policies on communications and activities related to off-label uses of marketed products, as well as communications and activities related to use of products that are not yet legally marketed for any use, we would like to obtain comments and information related to scientific exchange.

Under the Federal Food, Drug, and Cosmetic Act (the FD&C Act) and the Public Health Service Act (PHS Act), any person who wishes to introduce or deliver for introduction into interstate commerce any new drug (including a biological drug product) must demonstrate that the product is safe and effective for its intended uses (see sections 505(a) and 512(a) of the FD&C Act (21 U.S.C. 355(a) and 360b(a)) and section 351 of the PHS Act (42 U.S.C. 262)). Any person who wishes to introduce or deliver for introduction into interstate commerce a new medical device (including a biological device product) must either demonstrate that the device has a reasonable assurance of safety and effectiveness for its intended uses or that it is substantially equivalent to a legally marketed predicate device (see sections 510(k), 513(f), and 515(a) of the FD&C Act (21 U.S.C. 360(k), 360c(f), 360e(a)) and section 351 of the PHS Act (42 U.S.C. 262)).

The demonstrations of product safety and efficacy usually consist of data and information derived from clinical investigations and presented as part of a marketing application. The marketing application also contains information regarding the product's intended uses, the patient population (including any special conditions, restrictions, or limitations for segments of the population, such as children, pregnant women, or the elderly), potential adverse events associated with the product's use, and technical information about the product (see, e.g., 21 CFR 314.50, 514.1, 601.25, and 814.20). If FDA agrees that a product is safe and effective for its intended uses, as reflected in the marketing application, it approves the application and certain required product labeling. For devices subject to clearance through the 510(k) process, the clearance establishes the intended use(s) for which it is legal to market the product. The uses that are approved or cleared by the Agency are sometimes referred to as ''labeled'' uses because they appear in the product's required labeling. Uses that do not appear in the labeling and are not approved or cleared by the Agency are referred to as ''unapproved,'' ''unlabeled,'' ''off-label,'' or ''extra-label'' uses.

As explained previously in this document, under section 505 of the FD&C Act, a new drug (which includes a marketed drug intended for a new use) may not be introduced or delivered for introduction into interstate commerce without approval by FDA, but FDA is authorized to create regulations

[1] See Docket No. FDA–2011–P–0512 at *http://www.regulations.gov* for a copy of the citizen petition.

exempting from this requirement drugs intended for use in investigations to examine their safety or effectiveness (21 U.S.C. 355(i)). Under this authority, current FDA regulations in part 312 (21 CFR part 312) require submission of an investigational new drug application (IND) to FDA and set the other requirements for exemption. Regulations at §§ 312.22 and 312.23 contain the general principles underlying the IND submission and the general requirements for an IND's content and format. Drugs under investigation are subject to certain requirements in order to meet the terms of the exemption from approval prior to introduction into interstate commerce. One such requirement is a limitation on promotional activity, set forth in § 312.7. However, this regulation expressly states that it is not intended to restrict the full exchange of scientific information concerning the drug, including dissemination of scientific findings in scientific or lay media. Rather, its intent is to restrict promotional claims of safety or effectiveness of the drug for a use for which it is under investigation and to preclude commercialization of the drug before it is approved for commercial distribution.

There is a similar statutory and regulatory framework for investigational devices. Section 520(g) of the FD&C Act (21 U.S.C. 360j(g)) establishes the program by which sponsors may apply for investigational device exemptions (IDE), which allow for the investigational use of devices by experts qualified by scientific training and experience to investigate the safety and effectiveness of those devices and exempt the devices subject to approved IDEs from the statutory requirement that devices not otherwise exempt from premarket notification under section 510(k) of the FD&C Act be approved or cleared via premarket approval or premarket notification submissions. Regulations at 21 CFR 812.7 provide in relevant part that: ''A sponsor, investigator, or any person acting for or on behalf of a sponsor or investigator shall not:'' (1) ''Promote or test market an investigational device, until after FDA has approved the device for commercial distribution'' or (2) ''Represent that an investigational device is safe or effective for the purposes for which it is being investigated.''

FDA has made prior statements regarding scientific exchange about investigational products. For example, in the **Federal Register** of May 22, 1987 (52 FR 19466), the Agency published a final rule entitled ''Investigational New Drug, Antibiotic, and Biological Drug Product Regulations; Treatment Use and Sale'' that provided for ways in which investigational new drugs could be made available to desperately ill patients prior to general marketing and that addressed charging for investigational drugs. In the preamble to that rule, FDA stated: ''FDA's understanding of commercial promotion does not place limits on the free exchange of scientific information [regarding investigational drugs] (e.g., publishing results of scientific studies, letters to the editor in defense of public challenges, investigator conferences). However, responses by sponsors or investigators to unsolicited media inquiries or statements made in the exchange of scientific information should (1) Make clear that a drug is investigational; (2) make no claims that a drug has been proven to be safe or effective; and (3) be truthful and non-misleading when measured against available information on the drug—and fairly represent available information—as set forth in materials such as investigators' brochures and patients' informed consent sheets.'' (52 FR 19466 at 19475).

## II. FDA Is Seeking Comments on Communications and Activities Related to Off-Label Uses of Marketed Products and Use of Products Not Yet Legally Marketed

Interested persons are invited to provide detailed comment on all aspects of scientific exchange communications and activities related to off-label uses of marketed drugs, biologics, and devices and use of products that are not yet legally marketed. FDA is particularly interested in responses to the following questions.

- How should FDA define scientific exchange?
- What types of activities fall under scientific exchange?
- What types of activities do not fall under scientific exchange?
- Are there particular types and quality of data that may indicate that an activity is, or is not, scientific exchange?
- In what types of forums does scientific exchange typically occur? Should the use of certain forums be given particular significance in determining whether an activity is scientific exchange or an activity that promotes the drug or device? If so, which forums?
- What are the distinctions between scientific exchange and promotion? What are the boundaries between scientific exchange and promotion?
- Generally, who are the speakers involved in scientific exchange, and who is the audience for their communications?
- Should the identity of the participants (either speakers or audience) be given particular significance in determining whether an activity is scientific exchange or an activity that promotes the drug or device? If so, which participants would be indicative of scientific exchange and which would be indicative of promotion?
- How do companies generally separate scientific roles and promotional roles within their corporate structures?
- How should the Agency treat scientific exchange concerning off-label uses of already approved drugs and new uses of legally marketed devices? Please address whether there should be any distinctions between communications regarding uses under FDA-regulated investigation (to support potential approval) and communications regarding uses that are not under express FDA-regulated investigation.
- How should the Agency treat scientific exchange concerning use of products that are not yet legally marketed (that is, products that cannot be legally distributed for any use outside of an FDA- or institutional review board (IRB)-approved clinical trial)?
- Should investigational new drugs and investigational devices be treated the same with respect to scientific exchange? Why or why not?
- Under 21 CFR 812.7(b), an investigational device is considered to be ''commercialized'' if the price charged for it is more than is necessary to recover the costs of manufacture, research, development, and handling. Similarly, FDA considers charging a price for an investigational drug that exceeds that permitted under its regulations (generally limited to cost recovery) to constitute ''commercialization'' of the drug (see 74 FR 40872 at 40890, August 13, 2009; 52 FR 19466 at 19467). What other actions indicate the commercialization of drug and/or device products? If there are differences in the steps taken to commercialize drug products and the steps taken to commercialize device products, either before or after approval, please explain these differences.

## III. Submission of Information and Comments

Interested persons may submit information and comments to the Division of Dockets Management (see **ADDRESSES**) in electronic or written form. It is only necessary to send one set of comments. Identify comments with

the docket number found in brackets in the heading of this document. Except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 21, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–33188 Filed 12–27–11; 8:45 am]

**BILLING CODE 4160–01–P**

---

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–D–0652]**

### Draft Guidance for Industry and Food and Drug Administration Staff; the 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications [510(k)]; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled ''Draft Guidance for Industry and Food and Drug Administration Staff; The 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications [510(k)].'' FDA developed this draft guidance document to provide a contemporary perspective on how FDA reviews premarket notification (510(k)) submissions as well as on the Special and Abbreviated 510(k) programs. This guidance addresses the major aspects of the 510(k) decision-making process and updates FDA's policies with respect to the Special and Abbreviated 510(k) programs. This draft guidance is not final nor is it in effect at this time.

**DATES:** Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by April 26, 2012.

**ADDRESSES:** Submit written requests for single copies of the draft guidance document entitled ''Draft Guidance for Industry and Food and Drug Administration Staff; The 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications [510(k)]'' to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4613, Silver Spring, MD 20993–0002 or to the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to (301) 847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:**

Jonette Foy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1676, Silver Spring, MD 20993–0002, (301) 796–6328;

or

Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852, (301) 827–6210.

**SUPPLEMENTARY INFORMATION**

### I. Background

This draft guidance serves to update FDA's perspective on the Agency's approach to the 510(k) program, which began in 1976. Since that time, FDA has periodically published guidance that described its approach and any changes therein, to the 510(k) program. On June 30, 1986, FDA published a Blue Book Memorandum titled ''Guidance on the CDRH Premarket Notification Review Program, 510(k) Memorandum #K86–3,'' a document which discussed general points regarding the process of determining substantial equivalence between a new device and a predicate device. On March 20, 1998, FDA published another guidance document titled ''The New 510(k) Paradigm—Alternate Approaches to Demonstrating Substantial Equivalence in Premarket Notifications.'' This guidance introduced two new 510(k) programs—the Special 510(k) and the Abbreviated 510(k)—as optional approaches available to device manufacturers. This guidance also renamed the original 510(k) program that had been in place since 1976 to the ''Traditional 510(k).'' Traditional, Special, and Abbreviated 510(k)s differ with respect to the scope and content of information that are included within the submission. The Special 510(k) is an option for a manufacturer who has made certain changes to a medical device that was previously found substantially equivalent. With this option, the manufacturer relies on conformance with design controls under the Quality System Regulation (21 CFR 820.30) to support substantial equivalence. The Abbreviated 510(k) is an option for manufacturers who rely on guidance documents, special controls, and/or recognized consensus standards to support substantial equivalence. These alternate approaches were intended to streamline FDA's review process and simplify for manufacturers the preparation of a 510(k) that was eligible for these programs. It is noted that the 1986 guidance was issued as final guidance prior to the February 27, 1997, implementation of FDA's Good Guidance Practices (GGPs). Neither guidance has been updated since its initial publication. Upon its issuance as a final guidance document, this new guidance will replace both of those guidances.

In recent years, concerns have been raised both within and outside of FDA about whether the 510(k) program optimally achieves its intended goals. In September 2009, FDA's Center for Devices and Radiological Health (CDRH) convened an internal 510(k) Working Group to conduct a comprehensive assessment of the 510(k) process. The 510(k) Working Group evaluated the 510(k) program with the goal of strengthening the program and improving the predictability, consistency, and transparency of the Agency's decision-making process. On February 18, 2010, the 510(k) Working Group held a public meeting to solicit comments from the public regarding the strengths and challenges associated with the 510(k) program. In August 2010, CDRH published two documents in consideration of the comments made at the public meeting and the Agency's preliminary assessment of the program. These documents are titled ''CDRH Preliminary Internal Evaluations—Volume I: 510(k) Working Group Preliminary Report and Recommendations'' and ''CDRH Preliminary Internal Evaluations—Volume II: Task Force on the Utilization of Science in Regulatory Decision Making Preliminary Report and

Recommendations.'' In January 2011, CDRH published the ''Plan of Action for Implementation of 510(k) and Science Recommendations,'' denoting as one of the action items to update the 1998 510(k) Paradigm Guidance.

FDA recognizes and supports efforts for global convergence of regulatory systems, and in particular, through its participation in the Global Harmonization Task Force which published the ''Summary Technical Documentation for Demonstrating Conformity to the Essential Principles of Safety and Performance of Medical Devices (STED)'' on February 21, 2008. The Agency has specifically considered the STED principles in the FDA Guidance titled ''Guidance for Industry and FDA Staff: Format for Traditional and Abbreviated 510(k)s'' and has also incorporated those principles in this guidance as appropriate. FDA is specifically interested in seeking comment with respect to how these principles may be further applied in this guidance document and to 510(k) submissions and review generally.

## II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on the 510(k) decision-making process and policies with respect to the 510(k) program. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

## III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov* or from CBER at *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm.*

To receive ''Draft Guidance for Industry and Food and Drug Administration Staff; The 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications [510(k)],'' you may either send an email request to dsmica@fda.hhs.gov to receive an electronic copy of the document or send a fax request to (301) 847–8149 to receive a hard copy. Please use the document number 1766 to identify the guidance you are requesting.

## IV. Paperwork Reduction Act of 1995

This draft guidance refers to currently approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073; the collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; the collections of information in 21 CFR 807 subpart E have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 56.115 have been approved under OMB control number 0910–0130; the collections of information found in 21 CFR part 814 have been approved under OMB control number 0910–0231; the collections of information in 21 CFR part 803 have been approved under OMB control number 0910–0437; and the collections of information in 21 CFR part 801 have been approved under OMB control number 0910–0485.

## V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 21, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–33232 Filed 12–27–11; 8:45 am]

BILLING CODE 4160–01–P

---

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–D–0893]**

### Draft Guidance for Industry and Food and Drug Administration Staff; Center for Devices and Radiological Health Appeals Processes; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled ''Center for Devices and Radiological Health (CDRH) Appeals Processes.'' This document describes the processes available to outside stakeholders to request additional review of decisions and actions by CDRH employees. The document also provides general information about each process as well as guidance on how to submit related requests to CDRH and FDA. This draft guidance is not final nor is it in effect at this time.

**DATES:** Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by April 26, 2012.

**ADDRESSES:** Submit written requests for single copies of the draft guidance document entitled ''Center for Devices and Radiological Health (CDRH) Appeals Processes'' to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 66, rm. 4613, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to (301) 847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** David S. Buckles, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 66, rm. G414, Silver Spring, MD 20993–0002, (301) 796–5447.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The draft guidance for industry and FDA staff entitled ''Center for Devices and Radiological Health (CDRH) Appeals Processes'' revises, updates, and combines two previous guidance documents: ''Medical Device Appeals and Complaints: Guidance for Dispute

Resolution,'' dated February 1998, and ''Resolving Scientific Disputes Concerning the Regulation of Medical Devices, A Guide to Use of the Medical Devices Dispute Resolution Panel; Final Guidance for Industry and FDA,'' dated July 2001. When finalized, ''Center for Devices and Radiological Health (CDRH) Appeals Processes'' is intended to supersede the previously listed two guidance documents.

The draft document is intended to provide clarity to internal and external audiences regarding CDRH's appeal processes. Individuals outside of FDA who disagree with a decision or action taken by CDRH and wish to have it reviewed or reconsidered have several processes for resolution from which to choose, including requests for supervisory review of an action, petitions, and hearings. In most cases, it is up to the party seeking resolution of an adverse action or resolution of a difference of opinion to determine the appropriate process for a given circumstance or issue. The guidance describes these mechanisms and includes the following topics: (1) Appealable actions (i.e., warning letters, post-approval study requirements, premarket decisions, deficiency letters, or requests for additional information); (2) paths and options available at different stages of appeals; (3) use of expedited or ''paper'' appeals versus appeal meetings or teleconferences; (4) recommended format for appeals; (5) appeal authorities; (6) appeal conflicts; and (7) issues that are appropriate for dispute resolution.

## II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on CDRH's appeals processes. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

## III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*. Guidance documents are also available at *http://www.regulations.gov*. To receive ''Center for Devices and Radiological Health (CDRH) Appeals Processes'' you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to (301) 847–8149 to receive a hard copy. Please use the document number 1742 to identify the guidance you are requesting.

## IV. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

*Draft Guidance for Industry and Food and Drug Administration Staff; Center for Devices and Radiological Health (CDRH) Appeals Processes*

This draft guidance is intended to describe the processes available to outside stakeholders to request additional review of decisions and actions by CDRH employees. There are several processes for resolution, including a request for supervisory review of an action, petitions, and hearings. The proposed information collection seeks approval for the reporting burden associated with requests for additional review of decisions and actions by CDRH employees under this guidance. The draft guidance also refers to currently approved information collections found in FDA regulations.

The collections of information in 21 CFR 10.30 are approved under OMB control number 0910–0437; the collections of information in 21 CFR 10.33 are approved under OMB control number 0910–0485; the collections of information in 21 CFR 10.35 are approved under OMB control number 0910–0078; the collections of information in 21 CFR part 12 are approved under OMB control number 0910–0231; and the collections of information under 21 CFR part 900 are approved under OMB control number 0910–0309.

*Description of Respondents:* The respondents to this collection of information are manufacturers, applicants, sponsors, or any other interested persons requesting additional review of decisions and actions taken by CDRH employees. The Agency estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| Guidance title | No. of respondents | No. of responses per respondents | Total annual responses | Average burden per responses | Total hours |
|---|---|---|---|---|---|
| Center for Devices and Radiological Health (CDRH) Appeals Processes | 50 | 1 | 50 | 8 | 400 |

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

FDA estimates it will receive 50 requests annually from outside stakeholders requesting additional review of decisions and actions by CDRH employees. The Agency reached this estimate based on data collected about requests received over the last 2 years. FDA estimates it will take outside stakeholders approximately 8 hours to prepare a request based on the Agency's experience with past requests.

Before the proposed information collection provisions contained in this draft guidance become effective, FDA will publish a notice in the **Federal Register** announcing OMB's decision to approve, modify, or disapprove the information collection provisions. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

### V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 21, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–33230 Filed 12–27–11; 8:45 am]

BILLING CODE 4160–01–P

---

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–D–0313]**

### Guidance for Industry: Prevention of *Salmonella* Enteritidis in Shell Eggs During Production, Storage, and Transportation; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Prevention of *Salmonella* Enteritidis in Shell Eggs During Production, Storage, and Transportation.'' The document provides guidance to egg producers on how to comply with certain provisions contained in FDA's final rule ''Prevention of *Salmonella* Enteritidis in Shell Eggs During Production, Storage, and Transportation'' (the final rule), including how to implement *Salmonella* Enteritidis (SE) prevention measures, how to sample for SE., and how to maintain records documenting compliance with the final rule.

**DATES:** Submit either electronic or written comments on Agency guidances at any time.

**ADDRESSES:** Submit written requests for single copies of the guidance to the Division of Plant and Dairy Food Safety/Office of Food Safety, Center for Food Safety and Applied Nutrition (HFS–315), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Nancy Bufano, Center for Food Safety and Applied Nutrition (HFS–316), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, (240) 402–1493.

**SUPPLEMENTARY INFORMATION:**

### I. Background

In the **Federal Register** of July 9, 2009 (74 FR 33030), FDA issued a final rule requiring shell egg producers to implement measures to prevent SE from contaminating eggs on the farm and from further growth during storage and transportation, to maintain records concerning their compliance with the final rule, and to register with FDA. This final rule became effective September 8, 2009. In the **Federal Register** of August 12, 2010 (75 FR 48973), FDA made available a draft guidance entitled ''Prevention of *Salmonella* Enteritidis in Shell Eggs During Production, Storage, and Transportation'' and gave interested parties an opportunity to submit comments by October 12, 2010. The Agency reviewed and evaluated these comments and has modified the guidance where appropriate.

The guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on how to comply with certain SE prevention measures, how to sample for SE., and how to maintain records documenting compliance with the final rule. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternate approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

### II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 118.5, 118.6, 118.10, and 118.11 have been approved under OMB control number 0910–0660.

### III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding the guidance. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

### IV. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.fda.gov/FoodGuidances* or *http://www.regulations.gov.* Always access an FDA document using the FDA Web site listed previously to find the most current version of the guidance.

Dated: December 22, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–33292 Filed 12–27–11; 8:45 am]

BILLING CODE 4160–01–P

---

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0002]**

### Cellular, Tissue, and Gene Therapies Advisory Committee; Notice of Meeting

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

This notice announces a forthcoming teleconference meeting of a public advisory committee of the Food and Drug Administration (FDA). At least one

portion of the meeting will be closed to the public.

*Name of Committee:* Cellular, Tissue, and Gene Therapies Advisory Committee.

*General Function of the Committee:* To provide advice and recommendations to the Agency on FDA's regulatory issues.

*Date and Time:* The teleconference meeting will be held on February 10, 2012, from 2 p.m. to 5 p.m. EST

*Location:* National Institutes of Health (NIH), 9000 Rockville Pike, Bldg. 29B, Conference Room A–B, Bethesda, MD 20892. The public is welcome to attend the meeting at the specified location where a speakerphone will be provided. Public participation in the meeting is limited to the use of the speakerphone in the conference room. Important information about transportation and directions to the NIH campus, parking and security procedures is available on the Internet at *http://www.nih.gov/about/visitor/index.htm.* (FDA has verified the Web site address, but FDA is not responsible for any subsequent changes to the Web site after this document publishes in the **Federal Register**.) Visitors must show two forms of identification, one of which must be a government-issued photo identification such as a Federal employee badge, driver's license, passport, green card, etc. Detailed information about security procedures is located at *http://www.nih.gov/about/visitorsecurity.htm.* Due to the limited available parking, visitors are encouraged to use public transportation.

*Contact Person:* Gail Dapolito or Sheryl Clark, Center for Biologics Evaluation and Research (HFM–71), Food and Drug Administration, 1401 Rockville Pike, Rockville MD 20852, (301) 827–0314, or FDA Advisory Committee Information Line, 1–(800) 741–8138 (301) 443–0572 in the Washington, DC area), code 3014512389. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

*Agenda:* On February 10, 2012, the committee will meet in open session to hear updates of the research programs in the Cellular and Tissue Branch, Office of Cellular, Tissue and Gene Therapies, Center for Biologics Evaluation and Research, FDA.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

*Procedure:* On February 10, 2012, from 2 p.m. to 4:15 p.m. (EST) the meeting is open to the public. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before February 3, 2012. Oral presentations from the public will be scheduled between approximately 3:15 p.m. and 4:15 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before January 26, 2012. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by January 27, 2012.

*Closed Committee Deliberations:* On February 10, 2012, from 4:15 p.m. to 5 p.m., the meeting will be closed to permit discussion where disclosure would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. 552b(c)(6)). The committee will discuss a report of intramural research programs and make recommendations regarding personnel staffing decisions.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Gail Dapolito at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 21, 2011.

*Leslie Kux,*

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–33220 Filed 12–27–11; 8:45 am]

BILLING CODE 4160–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer at (301) 443–1129.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the Agency; (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:* Area Health Education Centers Project on the Mental and Behavioral Health and Substance Abuse Issues of Veterans/Service

Members and Their Families (OMB No. 0915-xxxx) – [NEW].

The Area Health Education Centers (AHEC) Program consists of interdisciplinary, community-based, primary care training programs where academic and community-based leaders work to improve the distribution, diversity, supply, and quality of health care personnel. The AHEC Program grantees include schools of medicine or osteopathic medicine, an incorporated consortium of such schools, or the parent institution of such schools. In a State with no AHEC program in operation, a school of nursing is eligible to apply. AHEC grantees contract with community-based AHEC centers to implement educational activities that involve several health professions disciplines and expose students to primary care and the needs of underserved areas and health disparity populations. The training of primary care personnel is a central focus of AHEC programs, where emphasis is placed on training individuals in primary care delivery sites (in both rural and other underserved areas). The AHEC programs and centers, along with State and local partners, implement student training programs, continuing education for healthcare providers, and health careers outreach activities that are responsive to the current healthcare workforce and service needs of underserved areas and health disparity populations of a state or region.

The AHEC Program is implementing a project to provide high quality, culturally competent care to veterans/service members and their families by providing continuing education (CE) to civilian primary care, mental and behavioral health, and other healthcare providers. The purpose of these data collection instruments, including the CE Evaluation Results Form and the CE Evaluation Follow-Up Form, is to provide data to inform and support the evaluation of the project, assess the extent to which the CE provided affected a provider's clinical or administrative practice, and provide aggregate information about the providers trained and project activities.

| Instrument | Number of respondents | Responses per respondent | Total responses | Hours per response | Total burden hours |
|---|---|---|---|---|---|
| CE Evaluation Results Form | 10,000 | 1 | 10,000 | .5 | 5,000 |
| CE Evaluation Follow-Up Form | 2,000 | 1 | 2,000 | .17 | 340 |
| Total | [1] 10,000 | | | | 5,340 |

[1] The CE Evaluation Follow-Up Form will only be completed by a sample of the total CE participants. Thus, the 2,000 respondents will not be unique respondents, but instead a sub-set of the CE Evaluation Results Form respondents.

The annual estimate of burden is as follows:

Email comments to *paperwork@hrsa.gov* or mail the HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

December 21, 2011.

**Reva Harris,**

*Acting Director, Division of Policy and Information Coordination.*

[FR Doc. 2011–33295 Filed 12–27–11; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### National Advisory Council on the National Health Service Corps; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), notice is hereby given of the following meeting:

*Name:* National Advisory Council on the National Health Service Corps (NHSC).

*Dates and Times:* January 19, 2012: 8:30 a.m.–4:30 p.m. January 20, 2012: 8 a.m.–12 p.m.

*Place:* Hilton Washington DC/Rockville Hotel & Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852, Phone: (301) 468–1100.

*Status:* The meeting will be open to the public.

*Agenda:* The Council is convening in Rockville, Maryland, to hear updates from the Health Resources and Services Administration and the NHSC program, as well as to discuss evidence-based strategies for clinician retention, negotiated rule-making, and the current state of primary care workforce programs. A portion of the meeting will be open for public comments and questions.

**FOR FURTHER INFORMATION CONTACT:** Njeri Jones, Bureau of Clinician Recruitment and Service, Health Resources and Services Administration, Parklawn Building, Room 13–64, 5600 Fishers Lane, Rockville, MD 20857; email: *NJones@hrsa.gov;* telephone: (301) 443–2541.

Dated: December 20, 2011.

**Reva Harris,**

*Acting Director, Division of Policy and nformation Coordination.*

[FR Doc. 2011–33294 Filed 12–27–11; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel Member Conflict: Erythropoiesis and Thrombosis

*Date:* January 9–10, 2012.

*Time:* 9 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting)

*Contact Person:* Larry Pinkus, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892, (301) 435–1214, *pinkusl@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 20, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–33251 Filed 12–27–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2011–0111]**

## Homeland Security Advisory Council

**AGENCY:** The Office of Policy, DHS.

**ACTION:** Closed Federal Advisory Committee Meeting.

**SUMMARY:** The Homeland Security Advisory Council (HSAC) will meet on January 9, 2012, in Arlington, Virginia. The meeting will be closed to the public. A notice of the meeting of the Homeland Security Advisory Council is being published in the **Federal Register** on December 27, 2011, 14 days prior to the meeting due to holiday scheduling conflicts. Although the meeting notice will be published in the **Federal Register** late, we've extended public comment until one day prior to the meeting.

**DATES:** The HSAC will meet on Monday, January 9, 2012, from 8:50 a.m. to 3:30 p.m. EST.

**ADDRESSES:** The meeting will be held in Town Hall (1) at the Transportation Security Administration, 601 South 12th Street, (East Building), Arlington, VA 22202. Written comments must be submitted and received by January 8, 2012. Comments must be identified by Docket No. DHS 2011–0111 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: HSAC@dhs.gov.* Include docket number in the subject line of the message.
- *Fax:* (202) 282–9207
- *Mail:* Homeland Security Advisory Council, Department of Homeland Security, Mailstop 0450, 245 Murray Lane SW., Washington, DC 20528.

*Instructions:* All submissions received must include the words ''Department of Homeland Security'' and DHS–2011–0111, the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received by the DHS Homeland Security Advisory Council, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** HSAC Staff at *hsac@dhs.gov* or (202) 447–3135.

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. The HSAC provides independent, objective advice and recommendations for the consideration of the Secretary of the Department of Homeland Security on matters related to homeland security. The Council is comprised of leaders of local law enforcement, first responders, state and local government, the private sector, and academia.

The HSAC will meet for the purpose of receiving sensitive operational information from senior DHS leadership. The meeting will address threats to our homeland security, border security, examine U.S. Coast Guard counterterrorism efforts; provide an operational update of the Transportation Security Administration's (TSA) Frequent Traveler Program; examine evolving threats in cyber security; and provide information on the threat of an electromagnetic pulse attack and its associated vulnerabilities.

### Summary of the Agenda

Sensitive Threat Briefings against the Homeland.

Briefing on Strategic Implementation Plan to Counter Violent Extremism Domestically.

Update on Border Security and Evolving Threats.

US Coast Guard, Update on Counterterrorism Efforts Around the World.

TSA Frequent Travelers Program Operational Update.

Electromagnetic Pulse (EMP) Threat—Lessons Learned and Areas of Vulnerability, and

Evolving Threats in Cyber Security.

*Basis for Closure:* In accordance with Section 10(d) of the Federal Advisory Committee Act, it has been determined that the meeting requires closure as the premature disclosure of the information would not be in the public interest.

The HSAC will receive briefings on domestic and international threats to the homeland from DHS Intelligence and Analysis and other senior leadership, and a briefing on threats at the Southwest Border and joint operations with Mexican law enforcement from U.S. Customs and Border Protection. That material, and a discussion of it, entails information the premature disclosure of which would not be in the public interest. Specifically, there will be material presented regarding the latest viable threats against the United States, and how DHS and other Federal agencies plan to address those threats. Under 5 U.S.C. 552b(c)(7)(E)&(F), disclosure of that information could reveal investigative techniques and procedures not generally available to the public, allowing those with interests against the United States to circumvent the law, thereby endangering the life or physical safety of law enforcement personnel. Additionally, under 5 U.S.C. 552b(c)(9)(B), disclosure of these techniques and procedures could frustrate the successful implementation of protective measures designed to keep our country safe.

The DHS Office of Counterterrorism will present a briefing on the Department's implementation plan to counter domestic violent extremism. Providing this information to the public would provide terrorists with a road map regarding the Department's plan to counter their actions, and thus, allow them to take different actions to avoid counterterrorism efforts. Under 5 U.S.C. 552b(c)(7)(E)&(F), disclosure of that information could endanger the life or physical safety of law enforcement personnel. Additionally, under 5 U.S.C. 552b(c)(9)(B), disclosure of this plan could frustrate the successful implementation of measures designed to counter terrorist acts.

The members of the HSAC will receive a briefing on the Transportation Security Administration's (TSA) frequent travelers program that will include lessons learned, the enhanced security the new program provides, and screening techniques associated with this program. The briefing will include Sensitive Security Information within the meaning of 49 U.S.C. § 114 and 49 C.F.R. part 1520, which requires nondisclosure of security activities if disclosure would be detrimental to the security of transportation. DHS has determined that public disclosure of this information would significantly compromise the operational security of the nation's transportation system if disclosed, by exposing the existing vulnerabilities and the physical limitations of the program. As a result, this briefing must be closed under the authority of 5 U.S.C. 552b(c)(3)(A).

The members will also receive a briefing on recent Cyber attacks and the potential threat of an electromagnetic pulse attack. Both will include lessons learned and potential vulnerabilities of infrastructure assets, as well as potential methods to improve the Federal response to a cyber or electromagnetic pulse attack. Disclosure of this information would be a road map to those who wish to attack our infrastructure, and hence, would certainly frustrate the successful implementation of preventive and counter measures to protect our cyber and physical infrastructure. Therefore, this portion of the meeting is required to be closed under U.S.C. 552b(c)(9)(B). Accordingly, this meeting will be closed to the public.

Dated: December 21, 2011.

**Becca Sharp,**

*Executive Director, Homeland Security Advisory Council, DHS.*

[FR Doc. 2011–33196 Filed 12–27–11; 8:45 am]

**BILLING CODE 9110–9–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2011–0074]**

## Submission for Review and Comment: ''The Menlo Report: Ethical Principles Guiding Information and Communication Technology Research'' (''Menlo Report'') for the Department of Homeland Security (DHS), Science and Technology, Cyber Security Division (CSD), Protected Repository for the Defense of Infrastructure Against Cyber Threats (PREDICT)

**AGENCY:** Science and Technology Directorate, DHS.

**ACTION:** 60-day Notice and request for comment.

**SUMMARY:** DHS invites the public to comment on the Menlo Report in support of PREDICT, DHS S&T sponsored work on ethics in Information and Communication Technology Research (ICTR). This notice is to elicit feedback from the public.

**DATES:** Submit comments on or before February 27, 2012.

**ADDRESSES:** The Menlo Report may be found at: *http://www.cyber.st.dhs.gov/wp-content/uploads/2011/12/MenloPrinciplesCORE-20110915-r560.pdf* Interested persons are invited to submit comments, identified by docket number DHS–2011–0074, by accessing Federal eRulemaking Portal: *http://www.regulations.gov.* Please follow the instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** DHS S&T CSD, Email *Menlo_Report@dhs.gov.*

**SUPPLEMENTARY INFORMATION:** The DHS S&T, CSD is interested in comments applicable to privacy issues and applicability of ethics with respect to human subjects in ICTR.

### Overview of This Information Collection

(1) *Type of Information Collection:* Feedback comments.

(2) *Title of the Form/Collection:* Science and Technology, ''The Menlo Report: Ethical Principles Guiding Information and Communication Technology Research'' (''Menlo Report'') review and comments.

(3) *Agency Form Number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* N/A

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals, consisting of federal, state and local law enforcement, private sector and academia practitioners.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

a. Estimate of the total number of respondents: N/A.

b. An estimate of the time for an average respondent to respond: N/A.

c. An estimate of the total public burden (in hours) associated with the collection: N/A.

Dated: December 14, 2011.

**Tara O'Toole,**

*Under Secretary for Science and Technology.*

[FR Doc. 2011–33231 Filed 12–27–11; 8:45 am]

**BILLING CODE 9110–9F–P**

## DEPARTMENT OF HOMELAND SECURITY

## U.S. Citizenship and Immigration Services

## Agency Information Collection Activities: Form I–131, Revision of an Existing Information Collection; Comment Request

**ACTION:** 60-Day Notice of Information Collection Under Review: Form I–131, Application for Travel Document.

The Department of Homeland Security, U.S. Citizenship and Immigration Services will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until February 27, 2012.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to (202) 272–0997, or via email at *uscisfrcomment@dhs.gov.* When submitting comments by email, please add the OMB Control Number 1615–0013 in the subject box.

Written comments and suggestions from the public and affected agencies concerning the 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 functions of the agency, including whether the information will have practical utility;

(2) 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;

(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 Collection

(1) *Type of Information Collection:* Revision of an existing information collection.

(2) *Title of the Form/Collection:* Application for Travel Document.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–131. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as brief abstract: Primary:* Individuals or

households. Certain aliens, namely permanent or conditional residents, refugees or asylees and aliens abroad use this information collection to apply for a travel document to lawfully enter or reenter the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 338,940 responses at 1.9 hours (1 hour and 55 minutes) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 643,986 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit the USCIS Web site at: *http://www.regulations.gov/fdmspublic/component/main.*

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020, telephone number (202) 272–8377.

Dated: December 22, 2011.

**Constance Carter,**

*Deputy Chief, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2011–33264 Filed 12–27–11; 8:45 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### Notice of Issuance of Final Determination Concerning Laser-Based Multi-Function Office Machines

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of final determination.

**SUMMARY:** This document provides notice that U.S. Customs and Border Protection (''CBP'') has issued a final determination concerning the country of origin of laser-based multi-function office machines. Based upon the facts presented, CBP has concluded in the final determination that the assembly and programming operations together convey the essential character of the laser-based multi-function office machine, and it is at their assembly and programming where the last substantial transformation occurs. Therefore, when the laser-based multi-function office machines are assembled and programmed in Mexico, the country of origin for purposes of U.S. government procurement is Mexico.

**DATES:** The final determination was issued on December 21, 2011. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination on or before January 27, 2012.

**FOR FURTHER INFORMATION CONTACT:** Christina Kopitopoulos, Valuation and Special Programs Branch: (202) 325–0217.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that on December 21, 2011, pursuant to subpart B of part 177, Customs Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of laser-based multi-function office machines which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, HQ H185775, was issued under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that, based upon the facts presented, the assembly and programming of the office machines together convey the essential character of the laser-based multi-function office machines and it is at their assembly and programming where the last substantial transformation occurs. Therefore, when the laser-based multi-function office machines are assembled and programmed in Mexico, the country of origin for purposes of U.S. government procurement is Mexico.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: December 21, 2011.

**Sandra L. Bell,**

*Executive Director, Regulations and Rulings, Office of International Trade.*

Attachment

HQ H185775

December 21, 2011

OT:RR:CTF:VS H185775 CK

CATEGORY: Marking

Carlos Halasz, Hewlett-Packard Company, 8501 SW 152 Street, Palmetto Bay, Florida 33157

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. § 2511); Subpart B, Part 177, CBP Regulations; laser-based multi-function office machine

Dear Mr. Halasz:

This is in response to your correspondence of September 13, 2011, requesting a final determination on behalf Hewlett-Packard, pursuant to subpart B of part 177, U.S. Customs and Border Protection (''CBP'') Regulations (19 C.F.R. § 177.21 et seq.). Under the pertinent regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of HP LaserJet Enterprise 500 MFP M525 (''M525''). We note that Hewlett-Packard is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination.

FACTS:

The finished M525 is a laser-based multi-function office machine that incorporates multiple functions, including printing, scanning, copying and faxing.

The major component of the M525 is the incomplete Print Engine. The complete print engine is the central mechanism of the M525 that performs printing. The incomplete print engine which is produced in Vietnam and is non-functional in this form consists of a metal frame, plastic skins, motors, controller board (supplier provided firmware), a laser scanning system, fuser, paper trays, cabling paper transport rollers, miscellaneous sensing and imaging systems.

The following assemblies are added to the incomplete print engine in Mexico to form the finished unit.

Formatter Board: The printer formatter is the main controller of the printer. It consists of a printed circuit board, industry standard components, and customized integrated circuits. The main function of the formatter is to receive input data from remote devises via different input ports, translate that data into a format that the print engine understands, and then send the data onto the print engine enabling the information to be successfully printed onto paper. The formatter is also responsible for providing command and control signals allowing the engine to start, run and stop motors in a manner that allows the paper to move from input devices to the designated output bin of the printer, while at the same time, putting the printed image on the paper. The image is constructed by the firmware that runs on the formatter, which tells the lasers how to place the image on the paper for proper resolution and image quality. The formatter operates the HP Embedded Web Server, which allows remote PC users to view the printer settings and make adjustments. It creates and stores critical and printer-unique calibration and configuration data, which ensure that the sub-systems have consistent measurements for paper size, page break,

color reproduction and other standards. The country of origin of the formatter is China.

Scanner/Automatic Document Feeder (ADF): This subsystem controls scanning functions based on communication from the formatter. It consists of metal frames, plastic skins, paper transport rollers and control surfaces, controller/motor driver printed circuit assemblies, motors, imaging assembly, glass, cabling, and miscellaneous sensors. The scanner is designed and developed in the US and the assembly is produced in the US.

Control Panel: This assembly controls the user interface panel and accepts user inputs through the touch screen interaction. The panel also provides interface ports with other forms of customer interaction. It consists of a plastic frame, LCD screen, touch panel, controller board (the firmware is developed and written at HP in the US) miscellaneous buttons, connectors, and cabling. The control panel communicates with the formatter to execute user commands. It is designed in the US and the panel is manufactured in China.

Fax Card: This consists of a printed circuit board, industry standard components (modem with supplier furnished firmware) and speaker. The fax card allows the M525 to be connected to a phone line and to transmit or receive fax messages.

Hard Disk Drive/Solid State Drive: This is where data is stored. The hard disk drive is produced in Malaysia, the solid state drive in China. The drives consist of a metal frame, disk media or solid state memory, and a controller board (supplier provided firmware).

Firmware: The term refers to fixed internal programs that control electronic devices. The firmware that is installed in Mexico is what enables all of the M525's functionality, whether hardware or software. The machine is non-functional without the firmware. The firmware includes both programs for lower level hardware control and higher level operating system functionality. The control panel, formatter and other sub-systems have their own firmware for operation. The firmware installed in Mexico is developed and written in the US, although testing and de-bugging is carried out outside the US.

Minor components and accessories that are also part of the process in Mexico include: keyboard (some units only), stapler (some units only), cables, fasteners, nameplates and labels, plastics, power supply, toner cartridge, and CD's/manuals, all of which are sourced from various countries.

The foregoing assemblies and components are processed in Mexico by skilled labor:

- Formatter sub-assembly:
  - The formatter printed circuit assembly may be integrated onto a sheet metal tray with multiple screws.
  - The external memory device is installed onto the formatter.
  - The fax card is installed onto the formatter
  - Cables are routed.
- Using a lift the incomplete print engine is loaded on a pallet.
- The scanner/ADF assembly is set into place atop the engine assembly. The two units are mated together using screws and cables.
- The hinge assembly between the engine and the scanner/ADF assembly is secured with screws and side panels are installed.
- The control panel is attached to a hinge on the scanner/ADF assembly, and the panel is cabled to the engine.
- The formatter assembly is installed onto the engine with several screws, and then connected with cables.
- When needed a keyboard is attached to the unit.
- The firmware for all sub-systems (engine, scanner, ADF, fax, control panel, output devices) is downloaded onto the hard drive or solid state drive.

Testing is done with skilled labor and consists of:

- The finished units are moved to test stations and are connected to computers. The testing software is developed and written in the US. Some tests are automated and some performed by people.
- As part of the testing process, hardware components are verified, the firmware is updated as necessary, the functionality is checked, print and copy quality are examined.
- The M525's operating system- a type of firmware is installed onto the hard and solid state drives. Settings for the product are made according to the option and country the unit is intended to be shipped to.

Configuration settings are made for language, paper, and functionality.

The following packaging and accessories are performed also:

- The finished unit is inspected for correct assembly, cosmetic issues, print/copy quality, etc.
- Shipping locks and tape are added to the unit.
- The printer is bagged and shipping foam is added.
- Accessories (e.g., manuals, CD's, power supply) are added to the packaging.
- The finished product and the accessories are packaged in a box container.
- Box containers are palletized and loaded into containers for shipment to a distribution center.

ISSUE:

What is the country of origin of the HP LaserJet Enterprise 500 MFP M525 for the purpose of U.S. government procurement?

LAW AND ANALYSIS:

Pursuant to subpart B of part 177, 19 C.F.R. § 177.21 et seq., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also, 19 C.F.R. § 177.22(a).

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, extent and nature of post-assembly inspection and testing procedures, and the degree of skill required during the actual manufacturing process may be relevant when determining whether a substantial transformation has occurred. No one factor is determinative.

In HQ H125975 (January 19, 2011), CBP examined the country of origin of an electronic data storage system that ensured data integrity and availability. The system consisted of an operating system/firmware developed in the United States, a controller assembly, a mounting assembly, hard drives, slot drive module assembly and cabinet assembly. These units and components were assembled in Mexico, where the US-origin software was downloaded onto the finished unit. Testing was also conducted in Mexico. CBP, in determining the country of origin was Mexico, focused on the final assembly and the fact that the various components originated from multiple countries.

In HQ H082476 (May 11, 2010), CBP addressed the country of origin of certain mass data storage devices. The devices included a central processing unit, an application specific integrated circuit, a capacitor and resistors, an electrically erasable programmable read-only memory, a motherboard, a hard drive, chassis, memory module and other components. The items were assembled in the US, where US-developed proprietary application and firmware was also installed. The country of origin was determined to be the US.

In this case, nonfunctioning assemblies and components from various countries are shipped to Mexico. In Mexico the assemblies and components are assembled and production on the finished product is conducted by skilled laborers. The US-origin firmware is downloaded and the M525 is programmed, so that it becomes functional. The assembled finished product is tested in Mexico, and prepared for shipping to its ultimate destination. Applying the above-cited precedent, to the facts in this case, we find that a substantial transformation of the various components occurs in Mexico, and that the assembly of the materials from various countries results in the HP LaserJet Enterprise 500 MFP M525. Therefore, the country of origin of the M525 is Mexico.

HOLDING:

Based on the facts provided, the assembly and programming operations performed in Mexico on the components of the M525 give rise to a new and different article, the HP LaserJet Enterprise 500 MFP M525. As such, the M525 is to be considered a product of Mexico for purposes of U.S. Government procurement.

Notice of this final determination will be given in the **Federal Register**, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell,

*Executive Director, Regulations and Rulings, Office of International Trade.*

[FR Doc. 2011–33213 Filed 12–27–11; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR 5481–N–22]**

### Notice of Proposed Information Collection for Public Comment; Continuum of Care Homeless Assistance Program Registration

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, U.S. Department of Housing and Urban Development (HUD).

**ACTION:** Notice of proposed information collection.

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* February 27, 2012.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control number and should be sent to: Colette Pollard, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Room 4160, Washington, DC 20410–5000; telephone (202) 402–3400, (this is not a toll-free number) or email Ms. *Pollard at Colette_Pollard@hud.gov* for a copy of proposed forms, or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

**FOR FURTHER INFORMATION CONTACT:** Ann Marie Oliva, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7262, Washington, DC 20410; telephone (202) 708–1590 (This is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *i.e.,* permitting electronic submission of responses.

This Notice also lists the following information:

*Title of Proposal:* Continuum of Care Homeless Assistance Program Registration. Description of the need for the information proposed: This submission is to request a reinstatement with revisions of an expired information collection for the reporting burden associated with registration requirements that Continuum of Care Homeless Assistance (CoC) program lead agencies will be expected to complete. This submission is limited to the reporting burden under the CoC program, formerly including the Supportive Housing Program, the Shelter Plus Care program, and the Section 8 and Single Room Occupancy Program, and changed to match the new inclusive program name created through the HEARTH Act.

*Agency Form Numbers:*

*Members of the affected public:* CoC Lead Agency representatives.

*Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:*

The CoC Registration will be completed by all 450 Continuums of Care and will require approximately one hour to complete. The registration will occur once per year prior to the release of the annual CoC Notice of Funding Availability. The total number of hours needed for all reporting per year is 450 hours.

*Status of proposed information collection:* Reinstatement, with change, of previously approved collection for which approval has expired.

**Authority:** Section 3506 of the Paperwork Reduction act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 19, 2011.

**Clifford Taffet,**

*General Deputy Assistant Secretary for Community Planning and Development.*

[FR Doc. 2011–33320 Filed 12–27–11; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR 5481–N–23]**

### Notice of Proposed Information Collection for Public Comment; Rural Housing Stability Program Registration

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, U.S. Department of Housing and Urban Development (HUD).

**ACTION:** Notice of proposed information collection.

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* February 27, 2012.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control number and should be sent to: Colette Pollard, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4160, Washington, DC 20410–5000; telephone (202) 402–3400, (this is not a toll-free number) or email Ms. Pollard at *Colette_Pollard@hud.gov* for a copy of

proposed forms, or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

**FOR FURTHER INFORMATION CONTACT:** Ann Marie Oliva, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7262, Washington, DC 20410; telephone (202) 708–1590 (This is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; *i.e.,* permitting electronic submission of responses.

This Notice also lists the following information:

*Title of Proposal:* Rural Housing Stability Program Registration.

*Description of the need for the information proposed:* This submission is to request a new collection for the reporting burden associated with registration requirements that Rural Housing Stability Program (RHSP) applicants will be expected to complete prior to actual application. This submission is limited to the reporting burden under the RHSP program, created through the HEARTH Act. The statutory provisions and the implementing interim regulations that govern RHSP require these registration data elements.

*Agency Form Numbers*:

*Members of the affected public:* RHSP applicant representatives.

*Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response*:

Approximately 230 rural counties, deemed eligible by HUD, will complete the RHSP Registration which will require approximately 1 hour to complete. The registration will occur once per year prior to the release of the annual RHSP Notice of Funding Availability. The approximate total number of hours needed for all applicants reporting per year is 230 hours.

*Status of proposed information collection:* New Collection for the implementation of a related (to the former CoC-based programs) but new program created under the HEARTH Act.

*Authority:* Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 19, 2011.

**Clifford Taffet,**

*General Deputy Assistant Secretary for Community Planning and Development.*

[FR Doc. 2011–33331 Filed 12–27–11; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

### Vendor Outreach Workshop for Historically Underutilized Business (HUB) Zone Small Businesses

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

**ACTION:** Notice.

**SUMMARY:** The Office of Small and Disadvantaged Business Utilization of the Department of the Interior are hosting a Vendor Outreach Workshop for HUB Zone small businesses that are interested in doing business with the Department. This outreach workshop will review market contracting opportunities for the attendees. Business owners will be able to share their individual perspectives with Contracting Officers, Program Managers and Small Business Specialists from the Department.

**DATES:** The workshop will be held on February 3, 2012, from 7 p.m. to 9 p.m.

**ADDRESSES:** The workshop will be held at the Main Interior Auditorium at 1849 C Street NW., Washington, DC 20240. Register online at: *www.doi.gov/osdbu.*

**FOR FURTHER INFORMATION CONTACT:** Mark Oliver, Director, Office of Small and Disadvantaged Business Utilization, 1951 Constitution Ave. NW., MS–320 SIB, Washington, DC 20240, telephone 1–(877) 375–9927 (Toll-Free).

**SUPPLEMENTARY INFORMATION:** In accordance with the Small Business Act, as amended by Public Law 95–507, the Department has the responsibility to promote the use of small and small disadvantaged business for its acquisition of goods and services. The Department is proud of its accomplishments in meeting its business goals for small, small disadvantaged, 8(a), woman-owned, HUBZone, and service-disabled veteran-owned businesses. In Fiscal Year 2011, the Department awarded over 50 per cent of its $2.7 billion in contracts to small businesses, and in Fiscal Year 2010 also awarded over 50 percent of its $4.4 billion in contracts to small businesses.

This fiscal year, the Office of Small and Disadvantaged Business Utilization are reaching out to our internal stakeholders and the Department's small business community by conducting several vendor outreach workshops. The Department's presenters will focus on contracting and subcontracting opportunities and how small businesses can better market services and products. Over 300 small businesses have been targeted for this event. If you are a small business interested in working with the Department, we urge you to register online at: *www.doi.gov/osdbu* and attend the workshop.

These outreach events are a new and exciting opportunity for the Department's bureaus and offices to improve their support for small business. Additional scheduled events are posted on the Office of Small and Disadvantaged Business Utilization Web site at *www.doi.gov/osdbu.*

**Mark Oliver,**

*Director, Office of Small and Disadvantaged Business Utilization.*

[FR Doc. 2011–33323 Filed 12–27–11; 8:45 am]

**BILLING CODE 4210–RK–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Information Collection for Native Employment Training Grant (NET Grant) Program; Comment Request

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of Proposed Information Collection.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Office of Indian Energy and Economic Development (IEED) is seeking comments on a proposed information collection related to grants to fund tribal

job placement and training programs. Federally recognized Indian tribes and Alaska federally recognized tribal entities may apply for the funding by providing certain information. All federally recognized tribes and Alaska federally recognized tribal entities are eligible for these grants, including those that do not participate in the Public Law 102–477 Workforce Development Program. Grants shall only be disbursed on a tribe-by-tribe basis and will be unavailable for training programs that are national or regional in scope absent submission of a duly-enacted tribal resolution from the governing body of each participating federally recognized tribe or Alaska federally recognized tribal entity. Timely-submitted applications will be competed, juried, and evaluated based on their potential to provide tribal members or Alaskan Natives with sustainable employment on or near Native communities.

Applicants receiving funding must provide quarterly and final reports summarizing the progress of its Native Employment Training (NET Grant) program, including the number of tribal members trained, the identities and locations of employers from whom they have obtained jobs, and the direct assistance and case management services which have facilitated employment placement for training graduates. This notice requests comments on the information collection associated with the application and final report.

**DATES:** Interested persons are invited to submit comments on or before *February 27, 2012.*

**ADDRESSES:** You may submit comments on the information collection to James West, Department of the Interior, Office of Indian Energy and Economic Development, Room 20—South Interior Building, 1951 Constitution Avenue NW., Washington, DC 20245, fax (202) 208–6310; email: *JimR.West@bia.gov*.

**FOR FURTHER INFORMATION CONTACT:** You may request further information or obtain copies of the information collection request submission from James West, Department of the Interior, Office of Indian Energy and Economic Development. Telephone (202) 208–6310.

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

The IEED established the Native Employment Training Grant program (NET Grant) Program to fund on a competitive basis federally recognized American Indian tribes and Alaska federally recognized tribal entities to retain labor and union organizations, private consulting firms, non-academic/non-profit entities, or others to conduct job development assistance programs. These programs will empower American Indian tribes and Alaska federally recognized tribal entities to reduce joblessness and improve the quality of life in their communities by providing: Job and skills training combined with intensive case management and supportive services; job start up and placement services; and, sustained support for the first year of employment for unemployed and underemployed tribal members and Alaskan Natives.

The Native Employment Training Grant (NET Grant) program will serve tribal members and Alaskan Natives seeking to acquire or upgrade their job skills in order to obtain employment or find more sustainable work. Grants may encompass terms of up to three years and include various kinds of workforce development related assistance, including but not limited to participant supportive services such as transportation assistance, provision of clothing, and fulfillment of job-start-up needs such as obtaining a drivers license, drug testing, physicals, etc.

Grants may also fund the purchase, lease, or rentals of job training sites. All federally recognized tribes and Alaska federally recognized tribal entities are eligible for these grants, including tribes and Alaska federally recognized tribal entities that do not participate in the Public Law 102–477 Workforce Development Program. Grants shall be unavailable for training programs that are national or regional in scope absent submission of a duly-enacted tribal resolution by each participating federally recognized tribe or Alaska federally recognized entity.

This is an annual program whose primary objective is to create jobs and foster economic activity within tribal communities. When funding is available, IEED will solicit proposals for grants. To receive these funds, tribes may use the contracting mechanism established by Public Law 93–638, the Indian Self-Determination Act or may obtain adjustments to their funding from the Office of Self-Governance. See 25 U.S.C. 450 et seq.

### Applicants Must Submit

- A duly-enacted, signed resolution of the governing body of each tribe or Alaska federally recognized tribal entity participating in the project.
- A Statement of Work identifying the entity the applicant seeks to retain to conduct training and case management services; the entity's qualifications for conducting such training and a record of its past performance; the training project's planned activities and deliverable products; the number of jobs expected to be filled by the training program's graduates; the identities and locations of those expected to employ them; the number of Native Americans who will be trained; whether potential trainees will be drug tested or screened in other ways prior to their acceptance into the training program; and, the kinds of direct assistance and case management services that will be offered to graduates of training programs to place them into jobs and enable them to retain those jobs.
- A budget indicating the funding amount requested and how, with particularity, it will be spent. The IEED expressly retains the authority to reduce or otherwise modify proposed budgets and funding amounts.

Timely-submitted applications will be competed, juried, and evaluated based on their potential to provide sustainable employment for tribal members or Alaskan Natives on or near Native communities. Selection criteria will also include the training entity's professional credentials, its record of past performance, and its ability and willingness to offer direct assistance and case management services both before and after training has been completed.

## II. Request for Comments

The IEED requests that you send your comments on this collection to the location listed in the **ADDRESSES** section. Your comments should address: (a) The necessity of the information collection for the proper performance of the agencies, including whether the information will have practical utility; (b) the accuracy of our estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility and clarity of the information to be collected; and, (d) ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or conduct, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number. It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section during the hours of 9 a.m.–5 p.m., Eastern Time, Monday through Friday except for legal holidays. Before including your address, phone number, email address or other personally identifiable information, be

advised that your entire comment—including your personally identifiable information—may be made public at any time. While you may request that we withhold your personally identifiable information, we cannot guarantee that we will be able to do so.

**III. Data**

*OMB Control Number:* 1076–0XXX.

*Type of Review:* New.

*Title:* Native Employment Training Grant (NET Grant) Program.

*Brief Description of Collection:* Indian tribes and Alaska federal recognized tribal entities that wish to apply for the Native Employment Training Grant (NET) Program must submit an application that includes certain information. A complete application must contain:

- A duly-enacted, signed resolution of the governing body of each tribe or Alaska federally recognized tribal entity participating in the project;
- A Statement of Work identifying the training project's planned activities and deliverable products; the number of jobs expected to be filled by training program graduates; the identities and locations of those expected to employ them; the number of Native Americans who will be trained; whether potential trainees will be drug tested or screened in other ways prior to their acceptance into a training program; and the kinds of direct assistance and case management services that will be offered to graduates of training programs to enable them to be placed into sustainable jobs;
- The identity of the labor and union organization, private consultant, non-profit/non-academic entity, or other entity the tribe has chosen to perform skill development training; and,
- A detailed budget estimate, including contracted personnel costs; travel estimates; data collection and analysis costs; costs of purchasing; renting or leasing equipment, clothing, and training sites; and, other expenses. The IEED reserves the authority to reduce or otherwise modify this budget.

The IEED requires this information to ensure that the Native Employment Training Grant (NET Grant) program only funds projects likely to train and place into employment tribal members and members of federally recognized Alaska tribal entities on or near a Native community. Upon completion of the funded project, the grantee must submit a final report summarizing events, accomplishments, results, and obstacles in executing the project. The IEED estimates that approximately 40 tribes will submit at least one application each year, and that IEED will accept approximately all 40 into the program annually.

*Respondents:* All federally recognized tribes and Alaska federally recognized tribal entities.

*Number of Respondents:* 80 applicants per year; 46 project participants each year.

*Estimated Time per Response:* 40 hours per application; 1.5 hours report.

*Frequency of Response:* Once per year for applications and final report.

*Total Annual Burden to Respondents:* 3,269 hours (3,200 for applications and 69 for final reports).

Dated: December 21, 2011.

**Alvin Foster,**

*Assistant Director for Information Resources.*

[FR Doc. 2011–33221 Filed 12–27–11; 8:45 am]

BILLING CODE 4310–4J–P

---

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLWO600000.12X.L18200000.XH0000]**

### Proposed Information Collection; Federal Advisory Committee Background Information Nomination Form

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** 60-Day Notice and Request for Comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) invites comments on a proposed collection of information from applicants for membership in advisory committees. After the close of the comment period, the BLM will submit the proposed information collection to the Office of Management and Budget (OMB) for review and approval.

**DATES:** Submit comments on the proposed information collection by February 27, 2012.

**ADDRESSES:** Comments may be submitted by mail, fax, or electronic mail.

*Mail:* U.S. Department of the Interior, Bureau of Land Management, 1849 C Street, NW., Room 2134LM, Attention: Jean Sonneman, Washington, DC 20240.

*Fax:* to Jean Sonneman at (202) 245–0050.

*Electronic mail:* *Jean_Sonneman@blm.gov.*

Please indicate ''Attn: 1004–XXXX'' regardless of the form of your comments.

**FOR FURTHER INFORMATION CONTACT:** Allison Sandoval, at (202) 208–4294. Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339, to leave a message for Ms. Sandoval.

**SUPPLEMENTARY INFORMATION:** OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act, 44 U.S.C. 3501–3521, require that interested members of the public and affected agencies be given an opportunity to comment on proposed information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that the BLM will submit to OMB for approval. The Paperwork Reduction Act provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

The BLM will request a 3-year term of approval for this information collection activity. Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) The accuracy of the agency's burden estimates; (3) Ways to enhance the quality, utility and clarity of the information collection; and (4) Ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany our submission of the information collection requests to OMB.

The following information is provided for the information collection:

*Title:* Federal Advisory Committee Background Information Nomination Form.

*Forms:*

- Resource Advisory Council Background Information Nomination Form.

*OMB Control Number:* 1004–XXXX.

*Abstract:* The BLM seeks to collect information to determine education, training, and experience related to possible service on advisory committees established under the authority of Section 309 of the Federal Land Policy and Management Act (43 U.S.C. 1739) and the Federal Advisory Committee Act, 5 U.S.C. App. 2. This information is necessary to ensure that each advisory committee is structured to provide fair membership balance, both geographic and interest-specific, in terms of the functions to be performed and points of view to be represented, as prescribed by its charter.

*Frequency of Collection:* On occasion

*Estimated Number and Description of Respondents:* 200 applicants annually

for possible service on advisory committees.

*Estimated Reporting and Recordkeeping ''Hour'' Burden:* 800 hours annually.

*Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden:* None.

Before including your address, telephone number, email address, or other personal identifying information in your comments, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

**Jean Sonneman,**

*Information Collection Clearance Officer, Bureau of Land Management.*

[FR Doc. 2011–33233 Filed 12–27–11; 8:45 am]

**BILLING CODE 4310–84–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[F–40206, F–40207; LLAK965000–L14100000–KC0000–P]**

### Alaska Native Claims Selection

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Decision Approving Lands for Conveyance.

**SUMMARY:** As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision will be issued by the Bureau of Land Management (BLM) to Doyon, Limited. The decision approves conveyance of the surface and subsurface estates in the lands described below pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq*). The lands are in the vicinity of Healy Lake, Alaska, and are located in:

**Fairbanks Meridian, Alaska**

T. 7 S., R. 17 E.,
Secs. 12 and 13;
Secs. 24, 25, and 26;
Sec. 36.
Containing 3,840 acres.
T. 7 S., R. 18 E.,
Secs. 7 and 8;
Secs. 17 to 20, inclusive;
Secs. 29 to 32, inclusive.
Containing 6,315 acres.
Aggregating 10,155 acres.

Notice of the decision will also be published four times in the *Fairbanks Daily-News Miner.*

**DATES:** Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until January 27, 2012 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

3. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

**ADDRESSES:** A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

**FOR FURTHER INFORMATION, CONTACT:** The BLM by phone at (907) 271–5960 or by email at *ak.blm.conveyance@blm.gov.* Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 to contact the BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

**Authority:** 43 CFR 2650.7(d).

**Joe J. Labay,**

*Land Transfer Resolution Specialist, Land Transfer Adjudication II Branch.*

[FR Doc. 2011–33236 Filed 12–27–11; 8:45 am]

**BILLING CODE 4310–JA–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[MTM 41264]**

### Public Land Order No. 7786; Revocation of Secretarial Order Dated October 8, 1907; Montana

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order revokes a withdrawal in its entirety created by a Secretarial Order dated October 8, 1907, as it affects the remaining 46.68 acres of National Forest System land withdrawn for use by the United States Forest Service as an administrative site. This order also opens the land to appropriation and use of all kinds under the public land laws, excluding the mining laws, subject to other segregations of record.

**DATES:** *Effective Date:* December 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Scott Bixler, U.S. Forest Service, Region 1, P.O. Box 7669, Missoula, Montana 59807, (406) 329–3655, *sbixler@fs.fed.us*, or Sandra Ward, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669, (406) 896–5052, *sward@mt.blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 to contact either of the above individuals during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with either of the above individuals. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The Forest Service determined that this land is no longer needed for administrative site purposes and has requested the withdrawal revocation. The land will remain segregated from the mining laws due to a pending exchange proposal.

### Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, it is ordered as follows:

1. The withdrawal created by a Secretarial Order dated October 8, 1907, which withdrew National Forest System land from appropriation and use of all kinds under the public land laws, and reserved them for use as an addition to Administrative Site No. 12, is hereby revoked in its entirety as to the following described land:

**Gallatin National Forest**

*Principal Meridian, Montana*

T. 3 S., R. 7 E.,
Sec. 22, lot 1.

The area described contains 46.68 acres in Park County.

2. At 9 a.m. on December 28, 2011, the land described in Paragraph 1 will be opened to appropriation and use of all kinds under the public land laws, including such forms of disposition as may by law be made of National Forest System lands, excluding the mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law.

**Authority:** 43 CFR 2091.6.

Dated: December 13, 2011.

**Anne J. Castle,**

*Assistant Secretary—Water and Science.*

[FR Doc. 2011–33238 Filed 12–27–11; 8:45 am]

**BILLING CODE 4310–DN–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[UTW0000000–LR14300000–ET0000; UTU–65685]**

### Notice of Proposed Withdrawal Extension and Notification of a Public Meeting; Utah

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The Assistant Secretary of the Interior proposes to extend the duration of Public Land Order (PLO) No. 6941, for an additional 20-year term. PLO No. 6941 withdrew 30,203.56 acres of public land from settlement, sale, location, or entry under the general land laws, including the United States mining laws, to protect the Bonneville Salt Flats (BSF). This notice also corrects the acreage figure in PLO No. 6941 which should read 30,203.06 acres. This notice gives an opportunity for the public to comment on the proposed withdrawal extension and announces the date, time, and location of a public meeting.

**DATES:** Comments must be received on or before March 27, 2012. Notice is hereby given that a public meeting will be held on February 13, 2012.

**ADDRESS:** Comments should be sent to the Utah State Director, Bureau of Land Management, P.O. Box 45155, Salt Lake City, Utah 84145–0155.

**FOR FURTHER INFORMATION CONTACT:** Shauna Derbyshire, Bureau of Land Management, Utah State Office, (801) 539–4132, *Shauna_Derbyshire@blm.gov.*

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The withdrawal created by PLO No. 6941 (57 FR 34685 (1992)), will expire on August 5, 2012, unless it is extended. PLO No. 6941 is incorporated herein by reference. The Bureau of Land Management (BLM) filed a petition/application to extend PLO No. 6941 for an additional 20-year term. The PLO withdrew 30,203.56 acres of public land from settlement, sale, location, or entry under the general land laws, including the United States mining laws, but not from leasing under the mineral leasing laws, to protect the BSF. As a result of a review by the BLM Utah State Office Cadastral Surveyor, that acreage figure was determined to be incorrect and is hereby corrected to read 30,203.06 acres.

The purpose of the proposed extension is to continue the protection of the BSF and its unique geologic, visual, historic, and recreational resources and to continue to manage the BSF as a resource of national and international significance for land speed record events of many types, commercial filming and photography, sight-seeing, and other appropriate recreational activities.

The use of a right-of-way, interagency, or cooperative agreement, Special Recreation Management Area designation, or Area of Critical Environmental Concern designation would not provide adequate protection.

There are no suitable alternative sites available.

Water will not be needed to fulfill the purpose of the requested withdrawal extension.

On or before March 27, 2012, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal extension may present their views in writing to the BLM Utah State Director at the address above. Electronic mail, facsimile, or telephone comments will not be considered properly filed.

Comments, including names and street addresses of respondents, and records relating to the application will be available for public review at the BLM Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah, during regular business hours.

Before including your address, phone number, email address, or other personal identifying information in your comments, be advised 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 from public review your personal identifying information, we cannot guarantee that we will be able to do so. Individual respondents may request confidentiality.

Notice is hereby given that a public meeting in conjunction with the proposed withdrawal extension will be held on February 13, 2012 at the BLM Salt Lake Field Office, 2370 South 2300 West, Salt Lake City, Utah. A notice of the time and place will also be published in at least one newspaper of local jurisdiction no less than 30 days before the scheduled meeting date. Interested parties may make oral statements and may file written statements at the meeting. All statements received will be considered before any final action is taken on the proposed extension.

The application will be processed in accordance with the regulations set forth in 43 CFR 2310.4.

**Authority:** 43 CFR 2310.3–1.

**Juan Palma,**

*State Director.*

[FR Doc. 2011–33237 Filed 12–27–11; 8:45 am]

**BILLING CODE 4310–DQ–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLAZP02000.L54100000.FR0000. LVCLA10A5180.241A; AZA 35501]**

### Notice of Realty Action: Conveyance of Federally Owned Mineral Interests in Pinal County, AZ

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The surface owner, Lotocka, LLC, filed an application on September 22, 2010, for the conveyance of the federally owned mineral interests of a 459.60 acre tract of land in Pinal County, Arizona. Publication of this notice temporarily segregates the Federal mineral interests in the land covered by the application from appropriation under the public land laws, including the mining laws, for up to 2 years while the application is being processed.

**DATES:** Interested persons may submit written comments to the Bureau of Land Management (BLM) at the address listed below. Comments must be received no later than February 13, 2012.

**ADDRESSES:** BLM, Phoenix District Office, 21605 N. 7th Avenue, Phoenix, Arizona 85027. Detailed information concerning this application is available for review at this address.

**FOR FURTHER INFORMATION CONTACT:** Matthew Magaletti, Realty Specialist, BLM, Phoenix District Office, 21605 N. 7th Avenue, Phoenix, Arizona 85027, or phone (623) 580–5590. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 to contact the above individual during normal business

hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question for the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The tract of land referred to in this notice consists of 459.6 acres, situated in Pinal County, Arizona, and is described as follows:

**Gila and Salt River Base and Meridian**

T. 8 S., R. 10 E.,
Sec. 35, lots 1 to 4, inclusive, E½W½NW¼, N½S½, NE¼NW¼, S½NE¼, and SE¼NW¼.

The area described contains 459.60 acres in Pinal County.

Under certain conditions, Section 209(b) of the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. 1719 authorizes the sale and conveyance of the federally owned mineral interests in land when the surface estate is not federally owned. The objective is to allow consolidation of the surface and mineral interests when either one of the following conditions exist: (1) There are no known mineral values in the land; or (2) Where continued Federal ownership of the mineral interests interferes with or precludes appropriate non-mineral development and such development is a more beneficial use of the land than mineral development.

An application was filed for the sale and conveyance of the federally owned mineral interests in the above-described tract of land. Subject to valid existing rights, on December 28, 2011 the federally owned mineral interests in the land described above are hereby segregated from all forms of appropriation under the public land laws, including the mining laws, while the application is being processed to determine if either one of the two specified conditions exists and, if so, to otherwise comply with the procedural requirements of 43 CFR part 2720. The segregative effect shall terminate upon: (1) Issuance of a patent or other document of conveyance as to such mineral interests; (2) Final rejection of the application; or December 30, 2013, whichever occurs first.

*Comments:* Your comments are invited. Please submit all comments in writing to Matthew Magaletti at the address listed above. Include your address, phone number, email address, or other personal identifying information in your comment. You should be aware that your entire comment, including your personal identifying information, may be made available to the public at any time. While you can ask 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 2720.1–1(b).

**Angelita Bulletts,**
*District Manager.*

[FR Doc. 2011–33242 Filed 12–27–11; 8:45 am]

**BILLING CODE 4310–32–P**

## DEPARTMENT OF THE INTERIOR

## Bureau of Land Management

**[LLNM932000.L1430000 ES0000; OKNM–119333]**

## Notice of Realty Action: Recreation and Public Purposes Act Classification of Public Land, Comanche County, Oklahoma

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Realty Action.

**SUMMARY:** The Bureau of Land Management (BLM) has examined and found suitable for classification for lease and/or conveyance under the provisions of the Recreation and Public Purposes (R&PP) Act, as amended, approximately 8.45 acres of public land in Comanche County, Oklahoma. The Town of Medicine Park proposes to use the land for a public recreational park.

**DATES:** Interested parties may submit written comments to the BLM at the address stated below. Comments must be received by no later than February 27, 2012.

**ADDRESSES:** Comments may be submitted to Steve Tryon, Bureau of Land Management, Oklahoma Field Office, 7906 W. 33rd Street, Suite 101, Tulsa, OK 74133.

**FOR FURTHER INFORMATION CONTACT:** Gilda Fitzpatrick, Realty Specialist, P.O. Box 27115, Santa Fe, New Mexico 87502–0115, by phone at (505) 954–2197, or by email at gfitzpat@blm.gov. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The following described public land in Comanche County, Oklahoma, has been examined and found suitable for classification for lease and/or conveyance under the provisions of the R&PP Act of June 14, 1926, as amended (43 U.S.C. 869 *et seq.*) and 43 CFR part 2740. The parcel of land is described as:

**Indian Meridian**

T. 3 N., R. 12 W.,
Sec. 19, that portion of the N½ of the NE¼, in Comanche County, Oklahoma being more particularly described by metes bounds as follows:

Beginning at a point being the intersection of the north boundary line of said Section 19 with the center line of Medicine Bluff Creek, said point being 1820 feet west of the Northeast corner of said Section 19, N89°46′28″ W; Thence southeastwardly with the center line of said Creek N40°34′08″ E a distance of 779.20 feet to its intersection with the North right-of-way line of Oklahoma State Highway No. 49; Thence northwestwardly with said right-of-way line N83°59′09″ W a distance of 271.57 feet; Thence continuing northwestwardly with said right-of-way line on a curve to the right having a radius of 1372.69 feet for a distance of 863.68 feet; Thence continuing northwestwardly with said right-of-way line N42°03′51″ E a distance of 20.00 feet; Thence continuing northwestwardly with said right-of-way line N47°56′09″ W a distance of 306.74 feet to the north line of said Section 19; Thence east with said north line S89°46′28″ E a distance of 753.48 feet to the point of beginning.

The area described contains 8.45 acres, more or less.

In accordance with the R&PP Act, the Town of Medicine Park has filed an application and plan of development in which it proposes to use the above described public land for development of a recreation park. The land is not needed for any other Federal purpose. The classification for lease and or conveyance pursuant to the R&PP Act is consistent with the Oklahoma Resource Management Plan, dated January 12, 1994, and is in the public interest. Detailed information concerning the proposed actions, including but not limited to documentation relating to compliance with applicable environmental and cultural resource laws, is available for review at the BLM, Oklahoma Field Office, 1906 E. 33rd Street, Suite 101, 74145, telephone: (918) 621–4100.

The lease and/or conveyance will be subject to the provisions of the R&PP Act, applicable regulations of the Secretary of the Interior, and will be subject to the following terms, conditions, and reservations:

1. Reservation of a right-of-way to the United States for ditches and canals pursuant to the Act of August 30, 1890, 43 U.S.C. 945;

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine and remove the minerals under applicable laws and regulations established by the Secretary of the Interior;

3. The land conveyed shall revert to the United States upon a finding, and after notice and opportunity for a hearing, that the patentee has not substantially developed the land in accordance with the approved plan of development on or before the date 5 years after the date of conveyance. No portion of the land shall under any circumstance revert to the United States if any such portion has been used for solid waste disposal or for any other purpose which may result in the disposal, placement, or release of any hazardous substance; and

4. All valid existing rights of record, including those documented on the official public land records at the time of lease and/or patent issuance.

On December 28, 2011, the above described lands will be segregated from settlement, sale, location and entry under the general land laws, including the United States mining laws, except for lease and/or conveyance under the R&PP Act and leasing under the mineral leasing laws.

Interested parties may submit comments involving the suitability of the lands for lease and/or conveyance for the public recreation park. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

Interested parties may submit comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision to lease and/or convey under the R&PP Act, or any other factor not directly related to the suitability of the land for a recreational park.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will able to do so. In the absence of any adverse comments, the classification of the land described in this notice will become effective on February 27, 2012. The land will not be available for lease and/or conveyance until after the classification becomes effective.

**Authority:** 43 CFR 2741.5(h).

**Debby Lucero,**

*Acting Deputy State Director.*

[FR Doc. 2011–33239 Filed 12–27–11; 8:45 am]

**BILLING CODE 4310–FB–P**

## NATIONAL INDIAN GAMING COMMISSION

### Notice of Tribal Consultations; Schedule Update

**AGENCY:** National Indian Gaming Commission.

**ACTION:** Notice of tribal consultations; schedule update.

**SUMMARY:** On November 18, 2010, the National Indian Gaming Commission (NIGC) published a Notice of Inquiry and Notice of Consultation, 75 FR 70680. The Commission announced to the public a comprehensive review of all its regulations, sought responses to many general and specific questions about its regulations, and announced a schedule of consultations. This notice adds two consultations to the schedule for January 2012. Should any further changes to the consultation schedule be necessary, the Commission will announce them in the **Federal Register** and on its Web site, *www.nigc.gov.*

**DATES:** See **SUPPLEMENTARY INFORMATION** below for the updated and revised dates, times, and locations of consultation meetings.

**FOR FURTHER INFORMATION CONTACT:** National Indian Gaming Commission, 1441 L Street NW., Suite 9100 Washington, DC 20005. Telephone: (202) 632–7003; email: *reg.review@nigc.gov.*

**SUPPLEMENTARY INFORMATION:**

The Commission will hold two additional tribal consultations on the following dates, at the following times, and in the following locations:

| Consultation Date | Event | Location | Regulation Group(s) |
|---|---|---|---|
| January 25, 2012 | NIGC Consultation—Southeast | Seminole Hard Rock Hotel, 1 Seminole Way, Hollywood, Florida. | 1, 2, 4, 5 |
| January 30, 2012 | NIGC Consultation—California | Agua Caliente, Casino/Conference Center, 100 North Indian Drive, Palm Springs, California. | 1, 2, 4, 5 |

For additional information on consultation locations and times, please refer to the Web site of the National Indian Gaming Commission, *http://www.nigc.gov.* Please RSVP at *consultation.rsvp@nigc.gov.*

Dated: December 21, 2011.

**Dawn M. Houle,**

*Deputy Chief of Staff.*

[FR Doc. 2011–33190 Filed 12–27–11; 8:45 am]

**BILLING CODE 7565–01–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–800]**

### Certain Wireless Devices with 3G Capabilities and Components Thereof; Determination Not to Review Initial Determination Granting Motion for Leave to Amend the Complaint and Notice of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (''ALJ'') initial determination (''ID'') (Order No. 5) granting Complainants' motion for leave to amend the complaint and notice of investigation.

**FOR FURTHER INFORMATION CONTACT:** Panyin A. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202)

205–3042. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on August 31, 2011, based on a complaint filed by InterDigital Communications, LLC of King of Prussia, Pennsylvania; InterDigital Technology Corporation of Wilmington, Delaware; and IPR Licensing, Inc. of Wilmington, Delaware (collectively, ''InterDigital''). 76 FR. 54252 (Aug. 31, 2011). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain wireless devices with 3G capabilities and components thereof by reason of infringement of certain claims of United States Patent Nos. 7,349,540; 7,502,406; 7,536,013; 7,616,970; 7,706,332; 7,706,830; and 7,970,127. The complaint named the following entities as respondents: Huawei Technologies Co., Ltd. of Guangdong Province, China; FutureWei Technologies, Inc. d/b/a Huawei, Technologies (USA) of Plano, Texas; Nokia Corporation of Espoo, Finland; Nokia Inc. of White Plains, New York; ZTE Corporation of Guangdong Province, China; and ZTE (USA) Inc. of Richardson, Texas.

On October 5, 2011, InterDigital filed a motion for leave to amend the complaint and notice of investigation to allege infringement of claims 1–7, 6–9, and 29–31 of recently issued United States Patent No. 8,009,636 (''the '636 patent'') against all respondents, and to add the following entities as respondents: LG Electronics, Inc. of Seoul Korea; LG Electronics U.S.A., Inc. of Englewood Cliffs, New Jersey; and LG Electronics Mobilecomm U.S.A., Inc. of San Diego, California (collectively, ''LG'').

On December 5, 2011, the ALJ issued the subject ID, granting the motion. The ALJ found that, pursuant to Commission Rule 210.14(b) (19 CFR 210.14(b)), good cause exists to amend the complaint and notice of investigation. None of the parties petitioned for review of the ID.

The Commission has determined not to review the ID. Accordingly, an allegation of infringement of claims 1–7, 6–9, and 29–31 of the '636 patent is included in this investigation, and the LG entities are added as respondents to this investigation.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.
Issued: December 21, 2011.

**James R. Holbein,**
*Secretary to the Commission.*

[FR Doc. 2011–33189 Filed 12–27–11; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### United States v. Exelon Corporation, et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Exelon Corporation, et al.,* Civil Action No. 1:11–cv–02276. On December 21, 2011, the United States filed a Complaint alleging that the proposed acquisition by Exelon Corporation of Constellation Energy Group, Inc., would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed the same time as the Complaint, requires Exelon Corporation to divest three electric generation plants (Brandon Shores, H.A. Wagner, and C.P. Crane in Maryland).

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: (202) 514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to William H. Stallings, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, Department of Justice, Washington, DC 20530, (telephone: (202) 514–9323).

**Patricia A. Brink,**
*Director of Operations.*

### United States District Court for the District of Columbia

*United States of America, U.S. Department of Justice, Antitrust Division, 450 5th Street NW., Suite 8000, Washington, DC 20001,* Plaintiff, v. *Exelon Corporation, 10 South Dearborn Street, Chicago, IL 60603 and Constellation Energy Group Inc., 100 Constellation Way, Baltimore, MD 21202,* Defendants.
Case: 1:11–cv–02276.
Assigned To: Sullivan, Emmet G.
Assign. Date: 12/21/2011.
Description: Antitrust.

### Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the merger of Exelon Corporation (''Exelon'') and Constellation Energy Group, Inc. (''Constellation'') and alleges as follows:

1. On April 28, 2011, Exelon entered into an Agreement and Plan of Merger with Constellation. The transaction would create one of the largest electricity companies in the United States with total assets of $72 billion and annual revenues of $33 billion.

2. Exelon and Constellation sell wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.

3. Exelon's merger with Constellation would eliminate significant competition between them in two smaller regions within this broad area and give the merged firm the incentive and the ability to raise wholesale electricity prices, resulting in increased retail electricity prices for millions of residential, commercial, and industrial customers in these areas.

4. Accordingly, the merger would substantially lessen competition in

violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

## I. Jurisdiction and Venue

5. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

6. Exelon and Constellation are engaged in interstate commerce and in activities substantially affecting interstate commerce. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

7. Exelon and Constellation transact business and are found in the District of Columbia. Venue is therefore proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(c).

## II. The Defendants and the Transaction

8. Defendant Exelon is a Pennsylvania corporation, with its headquarters in Chicago, Illinois. Exelon owns Exelon Generation Company, LLC, which owns electric generating plants located primarily in the Mid-Atlantic and the Midwest and has a total generating capacity of more than 25,000 megawatts (''MW''). Exelon also owns two distribution companies: PECO Energy Company, a gas and electric utility that serves customers in the Philadelphia area, and Commonwealth Edison Company, an electric utility that serves customers in the Chicago area.

9. Defendant Constellation is a Maryland corporation, with its headquarters in Baltimore, MD. Constellation owns Constellation Power LLC, which owns electric generating plants, located primarily in Maryland, with a total generating capacity of more than 11,000 MW. Constellation also owns a distribution company, Baltimore Gas and Electric, an electric and gas utility that serves customers in the Baltimore area.

10. Following Exelon's merger with Constellation, the combined company would be known as Exelon Corporation, with its corporate headquarters in Chicago, Illinois.

## III. Trade and Commerce

### *A. Background*

11. Electricity supplied to retail customers is generated at electric generating plants, which consist of one or more generating units. An individual generating unit uses any one of several types of generating technologies (including hydroelectric turbine, wind turbine, steam turbine, combustion turbine, or combined cycle) to transform the energy in fuels or the force of wind or flowing water into electricity. The fuels used by a generating unit include uranium, coal, oil, or natural gas.

12. Generating units vary considerably in their operating costs, which are determined primarily by the cost of fuel and the efficiency of the technology in transforming the energy in fuel into electricity. ''Baseload'' units—which typically include nuclear and very efficient coal-fired steam turbine units—have relatively low operating costs. ''Peaking'' units—which typically include oil- and gas-fired combustion turbine units—have relatively high operating costs. ''Mid-merit'' units—which typically include combined-cycle and less efficient and thus higher-cost coal-fired steam turbine units—have costs lower than those of peaking units but higher than those of baseload units.

13. Once electricity is generated at a plant, an extensive set of interconnected high-voltage lines and equipment, known as the transmission grid, transports the electricity to lower voltage distribution lines that relay the power to homes and businesses. Transmission grid operators must closely monitor the grid to prevent too little or too much electricity from flowing over the grid, either of which might damage lines or generating units connected to the grid. For example, to prevent such damage and to prevent widespread blackouts from disrupting electricity service, a grid operator will manage the grid to prevent additional electricity from flowing over a transmission line as that line approaches its operating limit (a ''transmission constraint'').

14. In the Mid-Atlantic, the transmission grid is overseen by PJM Interconnection, LLC (''PJM''), a private, non-profit organization whose members include transmission line owners, generation owners, distribution companies, retail customers, and wholesale and retail electricity suppliers. The transmission grid administered by PJM is the largest in the United States, providing electricity to approximately 58 million people in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia (the ''PJM control area'').

15. PJM oversees two auctions for the sale and purchase of wholesale electricity: a day-ahead auction that clears the day before the electricity is required, and a real-time auction that clears the day the electricity is required. Generation owners sell through these auctions to electricity retailers that provide retail electric service in the PJM control area. Buyers and sellers of wholesale electricity may also enter into contracts for the sale and purchase of electricity with each other, or third parties, outside of the PJM auction process; prices for these bilateral contracts generally reflect expected auction prices.

16. In the day-ahead auction, each buyer typically submits to PJM the amount of electricity the buyer expects to need each hour of the next day. PJM then adds up the amount of electricity buyers will need to determine how much electricity will be demanded each hour. Each seller submits to PJM an offer to sell electricity indicating the amount of electricity it is willing to sell the next day and the price at which it is willing to sell. PJM then sorts the offers to sell from lowest to highest offer price to determine how much electricity will be supplied each hour at any given price.

17. Subject to the physical limitations of the transmission grid, PJM seeks to have generating units operated in ''merit'' order, from lowest to highest offer. In the day-ahead auction, as long as transmission constraints are not expected, PJM takes the least expensive offer first and then continues to accept offers to sell at progressively higher prices until the needs for each hour the next day are covered. In this way, PJM minimizes the total cost of generating electricity required for the next day. The clearing price for any given hour essentially is determined by the generating unit with the highest offer price that is needed for that hour, and all sellers for that hour receive that price regardless of their offer price or their units' costs. In the real-time auction, which accounts for differences between anticipated and actual supply and demand, PJM accepts sellers' offers in merit order, subject to the physical and engineering limitations of the transmission grid, until there is a sufficient quantity of electricity to meet actual demand.

18. At times, transmission constraints prevent the generating units with the lowest offers from meeting demand in a particular area within the PJM control area. A particular geographic area within the PJM control area may be affected by more than one set of transmission constraints. When that happens, PJM's primary response is to call on more expensive units located within the smaller area bounded by the transmission constraints (a ''constrained area''), and prices to the buyers in that

area adjusts accordingly. Because more expensive units are required to meet demand, prices in a constrained area will be higher than they would be absent the transmission constraints.

19. *PJM Mid-Atlantic North.* One historically constrained area within the PJM control area includes the densely populated areas of eastern Pennsylvania, eastern Maryland, Delaware, and the District of Columbia. This area (''PJM Mid-Atlantic North'') is defined by a set of major transmission lines that divides this area from the rest of the PJM control area. The most important of these lines is the ''5004/5005 Interface,'' which includes the Keystone-Juniata 5004 line and the Conemaugh-Juniata 5005 line.

20. When these transmission lines are constrained, PJM has limited ability to supply additional demand located east of the constraints with electricity from generating units located west of the constraints. PJM often responds to constraints on these lines by calling on additional generating units east of the constraint to run. When the units east of the constraint are called to run, prices in PJM Mid-Atlantic North rise.

21. In PJM Mid-Atlantic North during 2010, more than $11 billion of wholesale electricity was sold to over 20 million people.

22. *PJM Mid-Atlantic South.* A second constrained area in PJM also includes eastern Pennsylvania and eastern Maryland as well as the District of Columbia, Delaware, and most of Virginia. This area (''PJM Mid-Atlantic South'') is defined by a set of major transmission lines that divides this area from the rest of the PJM control area. The most important of these lines is the ''AP South Interface,'' which includes the Mt. Storm-Doubs 512 line, the Greenland Gap-Meadowbrook 540 line, the Mt. Storm-Valley 550 line, and the Mt. Storm-Meadowbrook (TrAIL) line.

23. When these transmission lines are constrained, PJM is limited in its ability to supply additional demand located east of the constraints with electricity from generating units located west of the constraints. PJM often responds to constraints on these lines by calling on additional generating units east of the constraints to run. When the units east of the constraint are called to run, prices in PJM Mid-Atlantic South rise.

24. In PJM Mid-Atlantic South during 2010, more than $13 billion of wholesale electricity was sold to over 30 million people.

*B. Relevant Product Market*

25. Wholesale electricity is a relevant product market and a line of commerce within the meaning of Section 7 of the Clayton Act. In the event of a small but significant increase in the price of wholesale electricity, insufficient purchasers would switch away to make that increase unprofitable.

*C. Relevant Geographic Markets*

26. When the 5004–5005 Interface is constrained, purchasers of wholesale electricity for use in PJM Mid-Atlantic North have limited ability to turn to generation outside of PJM Mid-Atlantic North. At such times, the amount of electricity that could be obtained by consumers from outside PJM Mid-Atlantic North is insufficient to deter generators located in PJM Mid-Atlantic North from seeking a small but significant price increase.

27. PJM Mid-Atlantic North is a relevant geographic market and a section of the country within the meaning of Section 7 of the Clayton Act.

28. When the AP South Interface is constrained, purchasers of wholesale electricity in PJM Mid-Atlantic South have limited ability to turn to generation outside of PJM Mid-Atlantic South. At such times, the amount of electricity that could be obtained by consumers from areas outside PJM Mid-Atlantic South is insufficient to deter generators located in PJM Mid-Atlantic South from seeking a small but significant price increase.

29. PJM Mid-Atlantic South is a relevant geographic market and a section of the country within the meaning of Section 7 of the Clayton Act.

## IV. Market Structure and Anticompetitive Effects

*A. Market Shares and Concentration*

30. The relevant markets are moderately concentrated and would become more concentrated as a result of the proposed transaction.

31. As articulated in the 2010 Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission (''Guidelines''), the Herfindahl-Hirschman Index (''HHI'') is a measure of market concentration. Market concentration is often one useful indicator of the likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition harming consumers. The Guidelines consider markets in which the HHI is between 1,500 and 2,500 points to be moderately concentrated. Under the Guidelines, transactions that increase the HHI by more than 100 points in moderately concentrated markets potentially raise significant competitive concerns.

32. Exelon owns or controls approximately 18 percent of the generating capacity in PJM Mid-Atlantic North. Constellation owns or controls approximately 10 percent of the generating capacity in PJM Mid-Atlantic North. After the merger, Exelon would own or control approximately 28 percent of the total generating capacity in PJM Mid-Atlantic North. Exelon's merger with Constellation would yield a post-merger HHI in PJM Mid-Atlantic North of about 1,600, representing an increase of almost 400.

33. Exelon owns or controls approximately 14 percent of the generating capacity in PJM Mid-Atlantic South. Constellation owns or controls approximately 9 percent of the generating capacity in PJM Mid-Atlantic South. After the merger, Exelon would own or control over 22 percent of the total generating capacity in PJM Mid-Atlantic South. Exelon's merger with Constellation would yield a post-merger HHI in PJM Mid-Atlantic South of approximately 1,800, representing an increase of approximately 250.

*B. Effect of Transaction*

34. In addition to owning or controlling a significant share of overall generating capacity in PJM Mid-Atlantic North and PJM Mid-Atlantic South, the merged firm will own or control generating units with a wide range of operating costs, including low-cost baseload units that provide the incentive to exercise market power and higher-cost units that provide the ability and incentive to exercise market power. The combination of Exelon's and Constellation's generating units would enhance Exelon's ability and incentive to reduce output and raise prices in PJM Mid-Atlantic North and PJM Mid-Atlantic South.

35. The merger would enhance Exelon's ability to reduce output and raise price in PJM Mid-Atlantic North and PJM Mid-Atlantic South by increasing its share of higher-cost capacity in those markets. With a greater share of higher-cost capacity, Exelon would more often be able to reduce output and raise clearing prices by withholding capacity. Exelon could withhold capacity in several ways, such as by submitting high offers in the PJM auctions for some of the capacity from its higher-cost units such that they are not called on to produce electricity. By reducing its output, Exelon could force PJM to turn to more expensive units to meet demand, resulting in higher

clearing prices in PJM Mid-Atlantic North and PJM Mid-Atlantic South.

36. The merger would enhance Exelon's incentive to reduce output and raise price in PJM Mid-Atlantic North and PJM Mid-Atlantic South by increasing the amount of baseload capacity it owns or controls in these markets. With a greater amount of baseload capacity, Exelon would more often find it profitable to reduce output and raise market-clearing prices by withholding capacity. For example, as clearing prices increased due to its withholding of its higher-cost capacity, Exelon would earn those higher prices on its expanded post-merger baseload capacity, making it more likely that the benefit of increased revenues on its baseload capacity would outweigh the cost of withholding higher-cost capacity.

37. Increasing Exelon's incentive and ability to profitably withhold output increases the likelihood that Exelon will exercise market power after its merger with Constellation, resulting in significant harm to competition and increased prices. Thus, the effect of the merger may be substantially to lessen competition in violation of Section 7 of the Clayton Act.

**V. Entry**

38. Entry into the wholesale electricity market through the addition of new generating capacity in PJM Mid-Atlantic North or PJM Mid-Atlantic South or the addition of new transmission capacity that would relieve the constraints that limit the flow of electricity into PJM Mid-Atlantic North or PJM Mid-Atlantic South would generally take many years, especially considering the necessary environmental, safety, and zoning approvals.

39. Entry into the PJM Mid-Atlantic North or PJM Mid-Atlantic South wholesale electricity market would not be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract an anticompetitive price increase resulting from the merger.

**VI. Violation Alleged**

40. The effect of Exelon's proposed merger with Constellation, if it were consummated, may be substantially to lessen competition for wholesale electricity in PJM Mid-Atlantic North and PJM Mid-Atlantic South in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Unless restrained, the transaction would likely have the following effects, among others:

(a) competition in the market for wholesale electricity in PJM Mid-Atlantic North would be substantially lessened;

(b) prices for wholesale electricity in PJM Mid-Atlantic North would increase;

(c) competition in the market for wholesale electricity in PJM Mid-Atlantic South would be substantially lessened; and

(d) prices for wholesale electricity in PJM Mid-Atlantic South would increase.

**VII. Requested Relief**

41. Plaintiff requests that this Court:

(a) Adjudge Exelon's proposed merger with Constellation to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) Permanently enjoin and restrain Defendants from consummating the proposed merger of Exelon and Constellation or from entering into or carrying out any contract, agreement, plan, or understanding, the effect of which would be to combine Exelon and Constellation;

(c) Award the United States its costs for this action; and

(d) Award the United States such other and further relief as the Court deems just and proper.

Dated: December 21, 2011.

Respectfully submitted,

For Plaintiff United States:

/s/Sharis A. Pozen
Sharis A. Pozen
(*DC Bar #446732*).
*Acting Assistant Attorney General.*

/s/Leslie C. Overton/
Leslie C. Overton
(*DC Bar #454493*)
*Deputy Assistant Attorney General.*

/s/Patricia A. Brink
Patricia A. Brink,
*Director of Civil Enforcement.*

/s/William H. Stallings
*William H. Stallings*
(*DC Bar #444924*)
*Chief, Transportation, Energy & Agriculture Section.*

/s/Tracy Fisher
Tracy Fisher
Michele B. Cano
J. Chandra Mazumdar
Janet R. Urban
*Trial Attorneys, U.S. Department of Justice, Antitrust Division, Transportation, Energy & Agriculture Section, 450 5th Street NW., Suite 8000, Washington, DC 20001. Telephone: (202) 616–1650. Facsimile: (202) 616–2441.*

**United States District Court for the District Of Columbia**

*United States of America*, Plaintiff, v. *Exelon Corporation* and *Constellation Energy Group, Inc.,* Defendants.
*Case:* 1:11-cv-02276.
*Assigned to:* Sullivan, Emmet G.
*Assign. Date:* 12/21/2011.
*Description:* Antitrust.

**Competitive Impact Statement**

Plaintiff United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

**I. Nature and Purpose of the Proceeding**

Defendant Exelon Corporation (''Exelon'') and Defendant Constellation Energy Group, Inc. (''Constellation'') entered into an Agreement and Plan of Merger, dated April 28, 2011, under which Exelon would merge with Constellation. The United States filed a civil antitrust Complaint on December 21, 2011 seeking to enjoin the proposed merger. The Complaint alleges that the likely effect of this merger would be to lessen competition substantially for wholesale electricity in sections of the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. This loss of competition likely would increase wholesale electricity prices, raising retail electricity prices for millions of residential, commercial, and industrial customers in parts of the Mid-Atlantic states.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (''Stipulation'') and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the merger. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest three electric generating plants (collectively the ''Divestiture Assets''). The Stipulation and proposed Final Judgment require Defendants to take certain steps to ensure that these assets are preserved and maintained and that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof. Defendants have also stipulated that they will comply with the terms of the Stipulation and the proposed Final Judgment from the date of the signing of the Stipulation, pending entry of the proposed Final Judgment by the Court and the required divestiture. Should the Court decline to enter the proposed

Final Judgment, Defendants have also committed to abide by its requirements and those of the Stipulation until the expiration of the time for appeal.

## II. Description of the Events Giving Rise to the Alleged Violation

### *A. The Defendants and the Proposed Transaction*

Defendant Exelon is a Pennsylvania corporation, with its headquarters in Chicago, Illinois; it owns Exelon Generation Company, LLC, which owns electric generating plants located primarily in the Mid-Atlantic and the Midwest with a total generating capacity of more than 25,000 megawatts (''MW'') and annual revenues in 2010 of about $18.6 billion. Defendant Constellation is a Maryland corporation, with its headquarters in Baltimore, MD; it owns Constellation Power LLC, which owns electric generating plants located primarily in Maryland with a total generating capacity of more than 11,000 MW and annual revenues in 2010 of about $14.3 billion. By combining the generating plants owned by Exelon and Constellation, the proposed merger would enhance the ability and incentive of the merged firm to reduce output and raise wholesale electricity prices in areas of the Mid-Atlantic where Defendants are significant generators of electricity. Thus, the transaction as originally proposed would lessen competition substantially in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

### *B. Wholesale Electricity in the Mid-Atlantic*

Electricity supplied to retail customers is generated at electric generating plants, which consist of one or more generating units. An individual generating unit uses any one of several types of generating technologies (including hydroelectric turbine, wind turbine, steam turbine, combustion turbine, or combined cycle) to transform the energy in fuels or the force of wind or flowing water into electricity. Generating units typically are fueled by uranium, coal, oil, or natural gas.

Generating units vary considerably in their operating costs, which are determined primarily by the cost of fuel and the efficiency of the unit's technology in transforming the energy in fuel into electricity. ''Baseload'' units—which typically include nuclear and very efficient coal-fired steam turbine units—have relatively low operating costs. ''Peaking'' units—which typically include oil- and gas-fired combustion turbine units—have relatively high operating costs. ''Mid-merit'' units—which typically include combined cycle and less efficient and thus higher-cost coal-fired steam turbine units—have costs lower than those of peaking units but higher than those of baseload units.

Once electricity is generated at a plant, an extensive set of interconnected high-voltage lines and equipment, known as the transmission grid, transports the electricity to lower voltage distribution lines that relay the power to homes and businesses. Transmission grid operators must closely monitor the grid to prevent too little or too much electricity from flowing over the grid, either of which might damage lines or generating units connected to the grid. For example, to prevent such damage and to prevent widespread blackouts from disrupting electricity service, a grid operator will manage the grid to prevent additional electricity from flowing over a transmission line as that line approaches its operating limit (a ''transmission constraint'').

In the Mid-Atlantic, the transmission grid is overseen by PJM Interconnection, LLC (''PJM''), a private, non-profit organization whose members include transmission line owners, generation owners, distribution companies, retail customers, and wholesale and retail electricity suppliers. The transmission grid administered by PJM is the largest in the United States, providing electricity to approximately 58 million people in an area encompassing all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia (the ''PJM control area'').

PJM oversees two auctions for the sale and purchase of wholesale electricity: (1) a day-ahead auction that clears the day before electricity is to be generated and delivered and (2) a real-time auction that clears the day electricity is delivered. In these auctions, generation owners submit offers to sell electricity and electricity retailers submit bids to purchase electricity. Buyers submit bids that indicate the amount of electricity they are willing to buy at different prices. Sellers submit offers that indicate the amount of electricity they are willing to sell at different prices. PJM adds up the bids and offers to determine the total demand and supply for electricity. The amount of electricity that actually is generated and delivered is determined by the PJM auctions. Buyers and sellers of wholesale electricity may also enter into contracts with each other or with third parties, outside of the PJM auction process; the prices of these contracts generally reflect expected auction prices.

Subject to the physical limitations of the transmission grid, PJM generally attempts to minimize the total cost of generating electricity required for the next day by operating generation in ''merit'' order. As a result, PJM ''calls'' the generation with the lowest offers in the day-ahead auction, accepting the least expensive offer first and then continuing to accept offers to sell generation output at progressively higher prices until PJM has called enough generation to meet anticipated demand for each hour of the next day. The ''clearing price'' for any given hour is essentially determined by the highest-priced generation offer that is accepted by PJM for that hour, and all sellers for that hour receive that price, regardless of their offer or their costs. In PJM's real-time auction, which accounts for differences between the generation called to meet the day-ahead projections and that needed to meet actual demand, PJM likewise accepts additional sellers' offers in merit order until there is a sufficient quantity of additional electricity to meet actual demand. If generation is withheld from the auctions, such as by submitting a significantly higher offer than is warranted by the generation's costs, additional generation with higher offers must be called by PJM, leading to higher overall prices for the PJM system.

At times when transmission constraints prevent the generation with the lowest offers from meeting demand in a particular area, PJM calls additional generation in that area that is not already running. In addition to satisfying demand, the additional energy from this generation also acts to relieve the constraints by helping to limit the amount of energy that otherwise would have to flow across the constraints. The effectiveness of a particular generating unit for relieving a constraint is a function of where the generating unit is located on the transmission grid in relation to that constraint and is measured by the ''shift factor'' of that generating unit with respect to that constraint. Generally, generating units with the highest shift factors and thus the greatest impact for relieving the constraint receive the highest prices. In the mid-Atlantic area of PJM, for example, electricity generally flows from west to east. This means that generation to the east of the major transmission constraints tends to relieve congestion and receives relatively high prices, whereas generation to the west of the major transmission constraints tends to exacerbate congestion and receives

relatively low prices. A particular geographic area within the PJM control area may be affected by more than one set of transmission constraints.

*PJM Mid-Atlantic North.* One historically constrained area within the PJM control area includes the densely populated areas of eastern Pennsylvania, eastern Maryland, Delaware, and Washington DC This area, referred to in the Complaint as ''PJM Mid-Atlantic North,'' is defined by a set of major transmission lines that divides this area from the rest of the PJM control area. The most important of these lines is the ''5004/5005 Interface,'' which includes the Keystone-Juniata 5004 line and the Conemaugh-Juniata 5005 line. The Exelon generation in eastern Pennsylvania is particularly well suited to relieve congestion on these transmission lines, though the Constellation generation in Maryland also provides some relief to these transmission lines. When these transmission lines are constrained, PJM is limited in its ability to meet additional demand located east of the constraint with electricity from generation located west of the constraint. PJM often responds to constraints on these transmission lines by calling on additional generation east of the constraint to run, generally resulting in higher prices in PJM Mid-Atlantic North.

*PJM Mid-Atlantic South.* Another constrained area in PJM also includes eastern Pennsylvania, eastern Maryland, Washington DC, Delaware, and most of Virginia. This area is defined by a set of major transmission lines that divides this area from the rest of the PJM control area. The most important of these lines is the ''AP South Interface,'' which includes the Mt. Storm-Doubs 512 line, the Greenland Gap-Meadowbrook 540 line, the Mt. Storm-Valley 550 line, and the Mt. Storm-Meadowbrook (TrAIL) line. The Constellation generation in eastern Maryland is particularly well suited to relieve congestion on these transmission lines, though the Exelon generation in Pennsylvania also provides some relief to these transmission lines. When these transmission lines are constrained, PJM is limited in its ability to supply additional demand located east of the constraint with electricity from generation located west of the constraint. PJM often responds to constraints on these lines by calling on additional generation east of the constraint to run, generally resulting in higher prices in PJM Mid-Atlantic South.

*C. Product Market*

The Complaint alleges that wholesale electricity, electricity that is generated and sold for resale, is a relevant antitrust product market. Wholesale electricity demand is a function of retail electricity demand: electricity retailers, who buy wholesale electricity to serve their customers, must provide exactly the amount of electricity their customers require. Retail electricity consumers' demand, however, is largely insensitive to changes in retail price; thus, an increase in retail prices due to an increase in wholesale prices will have little effect on the quantity of retail electricity demanded and little effect on the quantity of wholesale electricity demanded. As a result, a small but significant increase in the wholesale price of electricity would not cause a significant number of retail electricity consumers to substitute other energy sources for electricity or otherwise reduce their consumption of electricity.

*D. Geographic Markets*

The Complaint alleges that ''PJM Mid-Atlantic North'' and ''PJM Mid-Atlantic South'' are relevant antitrust geographic markets defined by transmission lines in the PJM control area: PJM Mid-Atlantic North is defined by transmission lines that include the 5004–5005 Interface, and PJM Mid-Atlantic South is defined by transmission lines that include the AP South Interface. When these lines approach their operating limits, purchasers of electricity have limited ability to purchase electricity generated outside the relevant geographic market to meet their needs. Shift factors affect which generating units on the transmission grid are likely to be called when constraints occur. At such times, the amount of electricity that could be obtained from outside PJM Mid-Atlantic North or PJM Mid-Atlantic South by consumers located within those areas is insufficient to deter generators located in PJM Mid-Atlantic North or PJM Mid-Atlantic South from seeking a small but significant price increase. Thus, PJM Mid-Atlantic North and PJM Mid-Atlantic South are relevant antitrust geographic markets.

*E. Market Shares and Concentration*

The Complaint alleges that Exelon's proposed merger with Constellation would eliminate competition between them and give the merged firm the incentive and ability profitably to raise wholesale electricity prices, resulting in increased retail prices for millions of residential, commercial, and industrial customers in the PJM control area. In PJM Mid-Atlantic North during 2010, more than $11 billion of wholesale electricity was sold; in PJM Mid-Atlantic South during 2010, more than $13 billion of wholesale electricity was sold. In PJM Mid-Atlantic North and PJM Mid-Atlantic South, the merged firm would own or control a substantial share of total generating capacity in markets that would be moderately concentrated after the merger. More importantly, in both geographic markets the merged firm would own or control low-cost baseload units that provide incentive to raise prices and higher-cost units that provide ability to raise prices.

*Market shares in PJM Mid-Atlantic North and PJM Mid-Atlantic South.* In PJM Mid-Atlantic North, Exelon currently owns or controls approximately 18 percent of the generating capacity and Constellation currently owns or controls approximately 10 percent of the generating capacity. After the merger, Exelon would own or control approximately 28 percent of the total generating capacity in PJM Mid-Atlantic North. In PJM Mid-Atlantic South, Exelon currently owns or controls approximately 14 percent of the generating capacity and Constellation currently owns or controls approximately 9 percent of the generating capacity. After the merger, Exelon would own or control over 22 percent of the total generating capacity in PJM Mid-Atlantic South.

*Concentration in PJM Mid-Atlantic North and PJM Mid-Atlantic South.* As articulated in the *2010 Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission (''Guidelines''), the Herfindahl-Hirschman Index (''HHI'') is a measure of market concentration.[1] Market concentration is often one useful indicator of the likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in

[1] *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines 5.3 (2010), available at *http://www.justice.gov/atr/public/guidelines/hmg-2010.html* The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 (302 + 302 + 202 + 202 = 2,600). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

competition harming consumers. The Guidelines consider markets in which the HHI is between 1,500 and 2,500 points to be moderately concentrated. Under the Guidelines, transactions that increase the HHI by more than 100 points in moderately concentrated markets potentially raise significant competitive concerns. Exelon's merger with Constellation would yield a post-merger HHI in PJM Mid-Atlantic North of approximately 1,600 points, representing an increase of almost 400. Exelon's merger with Constellation would yield a post-merger HHI in PJM Mid-Atlantic South of approximately 1,800 points, representing an increase of approximately 250 points. Thus, the proposed merger potentially raises significant competitive concerns in PJM Mid-Atlantic North and PJM Mid-Atlantic South.

*F. Competitive Effects of the Transaction*

The Complaint alleges that the proposed merger would substantially lessen competition. The combination of Constellation and Exelon's generation would increase the merged firm's ability and incentive to withhold selected output, forcing PJM to turn to more expensive generation to meet demand, resulting in higher clearing prices in PJM.[1]

In determining the competitive effects of a firm potentially withholding electricity, we consider the operating cost, offer, technology, and shift factor of generating units.[2] Specifically, these concepts impact (1) the cost to the PJM system of PJM calling substitute generation when there is withholding and (2) the benefits and losses to the post-merger firm from the potential withholding strategy.

Baseload units, such as nuclear and efficient coal-fired steam, typically generate electricity around the clock during most of the year; certain lower-cost mid-merit units, including some coal-fired steam units, generate electricity for a substantial number of hours during the year. When they are running, such baseload and mid-merit units are positioned to benefit from an increase in wholesale electricity prices. Because they run so frequently, these units provide a relatively significant incentive to withhold output and raise prices.

Higher-cost units provide ability to withhold output to increase the market-clearing price. Higher-cost units can have costs that are close to clearing prices for a substantial number of hours during the year. Where their costs are close to clearing prices, the opportunity cost of withholding output from these units—the lost profit on the withheld output—is smaller than it would be for low-cost baseload units.

Here, by giving post-merger Exelon an increased amount of relatively lower-cost capacity, combined with an increased share of higher-cost capacity, the merger substantially increases the likelihood that Exelon would find it profitable to withhold output and raise price. With its increased share of higher-cost capacity, the merged firm would more often be able to reduce output and raise market-clearing prices at relatively low cost to it. And with its increased amount of lower-cost capacity, the merger would make it more likely that the increased revenue on this capacity would outweigh the cost of withholding its higher-cost capacity. In other words, as clearing prices increased due to its withholding of its higher-cost capacity, Exelon would earn those higher prices on its expanded post-merger baseload capacity, making it more likely that the benefit of increased revenues on its baseload capacity would outweigh the cost of withholding higher-cost capacity. Thus the merger increases Exelon's incentive and ability to reduce output and raise market prices.

*G. Entry*

The Complaint alleges that entry through the construction of new generation or transmission capacity would not be timely, likely, and sufficient to deter or counteract an anticompetitive price increase. Given the necessary environmental, safety, and zoning approvals required, it would generally take many years for sufficient new entry to take place.

## III. Explanation of the Proposed Final Judgment

The proposed Final Judgment would preserve the competition that would have been lost in PJM Mid-Atlantic North and PJM Mid-Atlantic South had Exelon's merger with Constellation gone forward as proposed without divestitures. Within 150 days after consummation of their merger, subject to two thirty-day extensions of that period of time by the United States, Defendants must sell all of their rights, titles, and interests in the Divestiture Assets. The assets and interests will be sold to purchasers acceptable to the United States in its sole discretion. In addition, the Final Judgment prohibits the merged company from reacquiring or controlling any of the Divestiture Assets.

*A. Divestiture*

The Complaint alleges that the merger would significantly enhance the merged firm's ability and incentive profitably to reduce output and raise prices in PJM Mid-Atlantic North and PJM Mid-Atlantic South. The divestiture requirements of the proposed Final Judgment will maintain competition for wholesale energy in these geographic markets by allowing one or more independent competitors to acquire the Divestiture Assets. The Divestiture Assets are three generating plants located in PJM Mid-Atlantic North and PJM Mid-Atlantic South:

- Brandon Shores Power Plant, 2030 Brandon Shores Road, Baltimore, MD 21226
- H.A. Wagner Power Plant, 3000 Brandon Shores Road, Baltimore MD 21226
- CP Crane Power Plant, 1001 Carroll Island Road, Baltimore, MD 21220

*Effect of divestiture on ability and incentive profitably to withhold output and raise prices.* Although the divestiture will reduce market shares and concentration levels compared to the levels that would have prevailed absent divestiture, the purpose of the divestiture is to preserve competition, not merely maintain HHIs or market shares at their pre-merger levels.[2] Accordingly, the proposed Final Judgment seeks to restore effective competition by depriving Exelon of key assets that would have made it profitable for it to withhold output and raise prices in PJM Mid-Atlantic North and PJM Mid-Atlantic South. Capacity at all three divestiture plants consists primarily of coal-fired units which, depending on demand levels, would have increased either the incentive or

[1] The competitive effects described in this section are closely analogous to the competitive effects described in the Horizontal Merger Guidelines, 6.3, Example 20.

[2] Shift factors inform both the substitutability of generation and the price increases the merging parties receive from withholding at times of constraint. The cost to the PJM system of using a unit to relieve a constraint is a function of both the generating unit's shift factor with respect to the constraint and the unit's offer as submitted by the unit owner. In general, and holding constant for the offer, the greater a generating unit's shift factor with respect to relieving a transmission constraint, the greater the economic effect of withholding a generating unit when that transmission line is constrained. This is because, if the most effective generation is not available, PJM must call more generation, at a greater overall cost to the system, in order to limit the amount of energy that flows across the constraint. Thus mergers may be more problematic where the shift factors of the parties' generation indicate that one party's generation is a meaningful substitute for the other party's generation with respect to a given major constraint.

[2] U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies I (June 2011), *available at http://www.usdoj.gov/atr/public/guidelines/272350.htm* (''[E]ffectively preserving competition is the key [principle] to an appropriate merger remedy.'').

the ability of Exelon to exercise market power. Divestiture of the three plants eliminates that increased ability and incentive. In this way, the proposed Final Judgment assures that the merger is not likely to lead to consumer harm.

*Requirements regarding divestiture.* Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers. Defendants must also provide acquirers information relating to personnel that are or have been involved, at any time since July 1, 2011, in the operation of, or provision of generation services by, the Divestiture Assets. Defendants further must refrain from interfering with any negotiations by the acquirer or acquirers to employ any of the personnel that are or have been involved in the operation of any of the Divestiture Assets. Moreover, the proposed Final Judgment restricts Defendants from reacquiring any of the Divestiture Assets during the term of the proposed Final Judgment.

*B. Use of a Divestiture Trustee*

In the event that Defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all the costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. If either (1) the trustee has not entered into definitive contracts for sale of the Divestiture Assets within ninety (90) days after the appointment of the trustee or (2) the trustee has not accomplished the divestitures within six (6) months after the appointment of the trustee, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The divestiture provisions will eliminate the anticompetitive effects of the merger in wholesale electricity markets in PJM Mid-Atlantic North and PJM Mid-Atlantic South.

## IV. Explanation of the Hold Separate Stipulation and Order

The Stipulation entered into by the United States and Defendants ensures that the Divestiture assets are preserved and maintained and that competition is maintained during the pendency of the ordered divestiture. First, the Stipulation includes terms requiring that Defendants maintain the Divestiture Assets as economically viable and competitive facilities. Second, the Stipulation includes terms ensuring that Defendants do not withhold output from the wholesale electricity market. In particular, the Stipulation requires that Defendants offer the output from certain generating units into the PJM auctions at no more than specified price levels until the Divestiture Assets are sold. The Stipulation also requires the Defendants (1) to submit certain data about their offers to the Division, (2) to grant permission for the Division to discuss that data and related information with PJM and the PJM Market Monitor, (3) to submit certain proposed contracts for the output of generating assets not owned by the Defendants to the United States for review, and (4) if required to do so by the Division in its sole discretion, to hire an auditor to ensure that Defendants are offering their units at the specified price levels and are not withholding generation to raise prices. These requirements seek to ensure that Defendants will not offer their generation into the PJM auctions in ways that allows Defendants to raise market prices.

Requiring Defendants to hold the Divestiture Assets separate and distinct, a typical requirement in Antitrust Division hold separate stipulation and orders, would not have prevented competitive harm in the interim period from consummation to divestiture. The operator of the Divestiture Assets would have recognized that reducing their output would increase the clearing price and benefit Defendants' remaining generating units. Therefore, the Stipulation requires that Defendants maintain offers for output of the Divestiture Assets at the specified levels. Defendants are relieved of the requirement to offer their units at no more than specified levels if they transfer to a third party the rights to offer and receive the revenues from the sale of the complete output of the Divestiture Assets.

## V. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

## VI. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: William H. Stallings, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20001.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

## VII. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final

Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Exelon's acquisition of certain Constellation assets. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the market for wholesale electricity in PJM Mid-Atlantic North and PJM Mid-Atlantic South. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

## VIII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60)-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the Court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.'').[3]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See Microsoft, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); see also Microsoft, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel,* 648 F.2d at 666 (emphasis added) (citations omitted).[4] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' SBC Commc'ns, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' Microsoft, 56 F.3d at 1459; see also *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60. As this Court recently confirmed in *SBC*

[3] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[4] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

*Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[5]

## IX. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 21, 2011.

Respectfully submitted,

*/s/Tracy Fisher* Tracy Fisher, U.S. Department of Justice, Antitrust Division, Transportation, Energy & Agriculture Section, 450 5th Street, NW., Suite 8000, Washington, DC 20001. Telephone: (202) 616–1650, Facsimile: (202) 616–2441.

[5] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

**United States District Court for the District of Columbia**

*United States of America, Plaintiff,* v. *Exelon Corporation* and *Constellation Energy Group, Inc.,* Defendants.

Case: 1:11-cv-02276.
Assigned To: Sullivan, Emmet G.
Assign. Date: 12/21/2011.
Description: Antitrust.

## Proposed Final Judgment

*Whereas,* Plaintiff, United States of America, filed its Complaint on December 21, 2011, the United States and Defendants, Defendant Exelon Corporation (''Exelon'') and Defendant Constellation Energy Group, Inc. (''Constellation''), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

*And whereas,* Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

*And whereas,* the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by Defendants to assure that competition is not substantially lessened;

*And whereas,* the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

*And whereas,* Defendants have represented to the United States that the divestitures required below can and will be made, subject to receipt of necessary regulatory approvals, and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

*Now therefore,* before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged, and decreed:*

## I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

## II. Definitions

As used in this Final Judgment:

A. ''Acquire'' means obtain any interest in any electricity generating facility, including real property, deeded development rights to real property, capital equipment, buildings, or fixtures.

B. ''Acquirer'' or ''Acquirers'' means the entity or entities to whom Defendants divest any of the Divestiture Assets or with whom Defendants have entered into definitive contracts to sell any of the Divestiture Assets.

C. ''Constellation'' means Constellation Energy Group, Inc., a Maryland corporation headquartered in Baltimore, Maryland, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

D. ''Control'' means have the ability, directly or indirectly, to set the level of, to dispatch, or to Offer the output of one or more units of an electricity generating facility or to operate one or more units of an electricity generating facility.

E. ''Divestiture Assets'' means the following facilities: (1) Brandon Shores Power Plant, 2030 Brandon Shores Road, Baltimore, MD 21226; (2) H.A. Wagner Power Plant, 3000 Brandon Shores Road, Baltimore, MD 21226; (3) CP Crane Power Plant, 1001 Carroll Island Road, Baltimore, MD 21220; and for each of those facilities, all of Defendants' rights, titles, and interests in any tangible and intangible assets relating to the generation, dispatch, and offering of electricity at the facility; including the land; buildings; fixtures; equipment; fixed assets; supplies; personal property; non-consumable inventory on site as of December 1, 2011; furniture; licenses, permits, and authorizations issued by any governmental organization relating to the facility (including environmental permits and all permits from federal or state agencies and all work in progress on permits or studies undertaken in order to obtain permits); plans for design or redesign of the facility or any assets at the facility; agreements, leases, commitments, and understandings pertaining to the facility and its operation; records relating to the facility or its operation, wherever kept and in whatever form (excluding records of past offers submitted to PJM); all equipment associated with connecting the facility to PJM (including automatic generation control equipment); all remote start capability or equipment located on site; and all other interests, assets, or improvements at the facility customarily used in the generation, dispatch, or offer of electricity from the facility; provided, however, that ''Divestiture Assets'' shall not include (i) electric and gas distribution or transmission assets located in, or appurtenant to, the boundaries of the facility, or (ii) any communications

links between the facility and Defendants, which will be disconnected. To the extent that any licenses, permits, or authorizations described above are nontransferable, Defendants will use their best efforts to obtain the necessary consent for assignment to the Acquirer or Acquirers of the license, permit, or authorization.

F. ''Exelon'' means Exelon Corporation, a Pennsylvania corporation headquartered in Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

G. ''Exelon/Constellation Transaction'' means the merger of Exelon and Constellation that is the subject of the ''Agreement and Plan of Merger'' between Exelon and Constellation dated April 28, 2011.

H. ''Good Utility Practice'' means any of the practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods, and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision is made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition. ''Good Utility Practice'' is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather is intended to include acceptable practices, methods, or acts generally accepted in the region.

I. ''Including'' means including but not limited to.

J. ''Offer'' or ''Offers'' means an offer to sell energy submitted into the PJM Market pursuant to the version of PJM ''Amended and Restated Operating Agreement of PJM Interconnection, LLC,'' Section 6.4, available at *www.pjm.com*, in effect at the time the offer is made.

K. ''Person'' means any natural person, corporation, association, firm, partnership, or other business or legal entity.

L. ''PJM'' means PJM Interconnection, LLC, 995 Jefferson Ave., Norristown, PA 19403.

## III. Applicability

A. This Final Judgment applies to Defendants Exelon and Constellation, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their electricity generating facilities in Maryland, Pennsylvania, Delaware, the District of Columbia, New Jersey, or Virginia, or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirers of the Divestiture Assets.

## IV. Divestitures

A. Defendants are hereby ordered and directed to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion. Defendants shall enter into definitive contracts for sale of the Divestiture Assets within 150 days after consummation of the Exelon/Constellation Transaction. Defendants shall use their best efforts to, as expeditiously as possible, (1) enter into these contracts, and (2) after obtaining the United States' approval of the Acquirers, seek the necessary approvals of the sale of the Divestiture Assets from regulatory agencies. The United States, in its sole discretion, may agree to up to two thirty (30) day extensions of this time period, not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants shall consummate the contracts for sale no later than thirty (30) calendar days after receiving, for each Divestiture Asset, the last necessary regulatory approval required for that Divestiture Asset.

B. In accomplishing the divesture ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability for sale of the Divestiture Assets. Defendants shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide such person with a copy of this Final Judgment. Defendants shall also offer to furnish to all prospective Acquirers who have been invited to submit binding bids, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide the Acquirers and the United States the name and most recent contact information (if known) for each individual who is currently, or who, to the best of Defendants' knowledge, has, at any time since July 1, 2011, been stationed at a specific Divestiture Asset or involved in the operation, dispatch, or offering of the output, of that Divestiture Asset to be purchased by the Acquirer to enable the Acquirers to make offers of employment. Defendants will not interfere with any negotiations by the Acquirers to employ such persons.

D. Subject to customary confidentiality assurances, Defendants shall permit prospective Acquirers who have been invited to submit binding bids for the Divestiture Assets to have reasonable access to personnel and to make inspection of the physical facilities of the Divestiture Assets; access to any and all environmental, zoning and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendants agree to preserve the Divestiture Assets in a condition and state of repair at least equal to their condition and state of repair as of the date the Complaint was filed, ordinary wear and tear excepted, and consistent with Good Utility Practice.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

G. Defendants shall warrant to the Acquirers of the Divestiture Assets that each asset will be operational, consistent with Good Utility Practice, on the date of sale, subject to legal or regulatory restrictions on any of the Divestiture Assets in existence on the date of sale.

H. Defendants shall warrant to the Acquirers of the Divestiture Assets that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

I. Unless the United States otherwise consents in writing, the divestitures pursuant to Section IV, or by the trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion,

that the Divestiture Assets can and will be used by the Acquirers as part of a viable, ongoing business engaged in the provision of electric generation services. Divestiture of the Divestiture Assets may be made to one or more Acquirers, provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

(1) shall be made to Acquirers that, in the United States' sole judgment, have the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the business of the provision of electric generation services; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirers and Defendants give Defendants the ability unreasonably to raise the Acquirers' costs, to lower the Acquirers' efficiency, or otherwise to interfere in the ability of the Acquirers to compete effectively.

**V. Appointment of Trustee**

A. If Defendants have not entered into definitive contracts for sale of the Divestiture Assets within the time specified in Section IV(A), Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets, including prosecuting any applications for required regulatory approvals. Until such time as a trustee is appointed, Defendants shall continue their efforts to effect the sale of the Divestiture Assets as specified in Section IV.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to Acquirers acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestitures.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of Defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Defendants, and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which they are accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture, including their best efforts to effect all necessary regulatory approvals. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and assets at the Divestiture Assets, and Defendants shall develop financial and other information relevant to the Divestiture Assets as the trustee may reasonably request, subject to reasonable protection for confidential research, development, or commercial information. Subject to customary confidentiality assurances, Defendants shall permit prospective Acquirers who have been invited to submit binding bids for the Divestiture Assets to have reasonable access to personnel and to make inspection of the physical facilities of the Divestiture Assets; access to any and all environmental, zoning and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestitures.

G. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

H. If the trustee either (1) has not entered into definitive contracts for sale of the Divestiture Assets within ninety (90) calendar days after its appointment or (2) has not accomplished the divestitures ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestitures; (2) the reasons, in the trustee's judgment, why definitive contracts have not been reached or why the required divestitures have not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of this Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

**VI. Notice of Proposed Divestitures**

A. Within two (2) business days following execution of a definitive contract for sale of any of the Divestiture Assets, Defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Sections IV or V of this Final Judgment, and submit to the United States a copy of the proposed contract for sale and any other agreements with the Acquirer relating to the Divestiture Assets. If the trustee is responsible, it shall similarly notify Defendants. The notice shall set

forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirers, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirers, and any other potential Acquirers. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirers, any third party, and the trustee, whichever is later, the United States shall provide written notice to Defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture, provided, however, that the United States may extend the period for its review up to an additional thirty (30) calendar days. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

**VII. Financing**

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

**VIII. Hold Separate**

Until the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by the Court. Defendants shall take no action that would jeopardize the divestiture ordered by the Court.

**IX. Affidavits**

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, Defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Sections IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

**X. Compliance Inspection**

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice Antitrust Division, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

1. Access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

**XI. No Reacquisition**

Defendants may not acquire or control any of the Divestiture Assets during the term of this Final Judgment.

**XII. Retention of Jurisdiction**

This Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

**XIII. Expiration of Final Judgment**

Unless the Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

**XIV. Public Interest Determination**

The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: _____

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16]

_____

[TO BE SIGNED AFTER SUCH PROCEDURES]

United States District Judge

[FR Doc. 2011–33283 Filed 12–27–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF LABOR

### Request for Comments Under E.O. 12898

**AGENCY:** Office of the Assistant Secretary of Policy, Labor.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is committed to Environmental Justice (EJ). President Obama has renewed agencies' Environmental Justice planning by reinvigorating Executive Order 12898 (EO 12898), which tasked Cabinet Level Federal agencies with making Environmental Justice part of their mission. The agencies were directed to do so by identifying and addressing, as appropriate, the disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations. In August 2011, agencies listed in EO 12898 signed a Memorandum of Understanding (EJ MOU), which, among other things, commits agencies to develop a final Environmental Justice Strategy.

The purpose of this notice is to invite public comment on DOL's draft Environmental Justice Strategy.

**DATES:** Comments must be received on or before January 20, 2012.

**ADDRESSES:** You may submit comments through *http://dolenvironmentaljustice.ideascale.com/.*

All comments will be available for public inspection at *http://dolenvironmentaljustice.ideascale.com/.*

**FOR FURTHER INFORMATION CONTACT:** e. christi cunningham, Associate Assistant Secretary for Regulatory Policy, U.S. Department of Labor, 200 Constitution Avenue NW., Room S–2312, Washington, DC 20210, *cunningham.christi@dol.gov,* (202) 693–5959, (this is not a toll-free number). Individuals with hearing impairments may call 1–800–877–8339 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:** Executive Order 12898 did not create a new legal remedy. As an internal management tool of the Executive Branch, the Order directs Federal agencies to put in place procedures and take actions to make achieving environmental justice part of their basic mission. President Clinton explained that Federal agencies have the responsibility to promote ''nondiscrimination in Federal programs substantially affecting human health and the environment.'' Accordingly, agencies must implement actions to identify and address disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority, Native American, and low-income populations.

The Department views Environmental Justice from a workplace training, health and safety perspective. The Department is developing an Environmental Justice Strategy that is in line with the mission of the Department and Secretary Solis' vision for the future: *Good Jobs for Everyone.* The vision of good jobs for everyone includes ensuring that workplaces are safe and healthy; helping workers who are in low-wage jobs or out of the labor market find a path into middle-class jobs; and helping middle-class families remain in the middle class. The Department's draft Environmental Justice Strategy focuses on agencies directly involved with worker training, health and safety issues, and measurement—the Bureau of Labor Statistics (BLS), the Employment Training Administration (ETA), the Mine Safety and Health Administration (MSHA), the Office of Recovery for Automotive Communities and Workers (ORACW), the Occupational Safety and Health Administration (OSHA), and the Office of Workers' Compensation Programs (OWCP).

*Request for Comments:* As part of our development of the DOL Environmental Justice Strategy, we are soliciting public comment. Your input is important to us. Please provide responses that are supported with specific examples and data, where possible.

This request for public input will inform development of the Department of Labor's draft Environmental Justice Strategy. To facilitate receipt of the information, the Department has created an Internet portal specifically designed to capture your input and suggestions, *http://dolenvironmentaljustice.ideascale.com/.* The portal contains a series of questions designed to gather information on how DOL can best meet the requirements of the Executive Order. The portal is open to receive comments through January 20, 2012.

*Questions for the Public:* The Department of Labor intends the questions on the portal to be for discussion of the draft Environmental Justice Strategy. The questions are meant to initiate public dialogue, and are not intended to restrict the issues that may be raised or addressed. The questions were developed with the intent to probe a range of areas.

When addressing these questions, the Department of Labor requests that commenters identify with specificity the program, policy, regulation or reporting requirement at issue, providing legal citation(s) where available. The Department also requests that submitters provide, in as much detail as possible, an explanation of why a program, policy, regulation or reporting requirement should be modified, streamlined, expanded, or repealed as well as specific suggestions of ways the Department of Labor can better achieve Environmental Justice. Whenever possible, please provide empirical evidence and data to support your response.

The Department of Labor is issuing this request solely to seek useful information as it develops its strategy. While responses to this request do not bind the Department of Labor to any further actions related to the response, all submissions will be made available to the public on *http://dolenvironmentaljustice.ideascale.com/.*

**Authority:** Executive Order 12898, ''Federal Actions to Address Environmental

Justice in Minority Populations and Low-Income Populations,'' February 11, 1994. 59 FR 7629 (Feb. 16, 1994).

Dated: December 20, 2011.

**William E. Spriggs,**

*Assistant Secretary for Policy.*

[FR Doc. 2011–33214 Filed 12–27–11; 8:45 am]

**BILLING CODE P**

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Arts; Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue NW., Washington, DC, 20506 as follows (ending times are approximate):

*Media Arts (application review):* January 24–26, 2012 in Room 716. A portion of this meeting, from 3 p.m. to 4:30 p.m. on January 26th, will be open to the public for a policy discussion. The remainder of the meeting, from 9 a.m. to 6 p.m. on January 24th and 25th, and from 9 a.m. to 3 p.m. on January 26th, will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 15, 2011, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman. If you need any accommodations due to a disability, please contact the Office of Accessibility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TDY–TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506, or call 202/682–5691.

Dated: December 21, 2011.

**Kathleen M. Edwards,**

*Director, Administrative Services, National Endowment for the Arts.*

[FR Doc. 2011–33215 Filed 12–27–11; 8:45 am]

**BILLING CODE 7537–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2011–0006]**

### Sunshine FEDERAL REGISTER Notice

**AGENCY HOLDING THE MEETINGS:** Nuclear Regulatory Commission.

**DATE:** Weeks of December 26, 2011, January 2, 9, 16, 23, 30, 2012.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

**Week of December 26, 2011**

There are no meetings scheduled for the week of December 26, 2011.

**Week of January 2, 2012—Tentative**

There are no meetings scheduled for the week of January 2, 2012.

**Week of January 9, 2012—Tentative**

Wednesday, January 11, 2012

1 p.m.

Briefing on Proposed Rule to Revise the Environmental Review for Renewal of Nuclear Power Plant Operating Licenses (Part 51) (Public Meeting) (Contact: Jeremy Susco, (301) 415–2927).

This meeting will be webcast live at the Web address—www.nrc.gov.

**Week of January 16, 2012—Tentative**

There are no meetings scheduled for the week of January 16, 2012.

**Week of January 23, 2012—Tentative**

There are no meetings scheduled for the week of January 23, 2012.

**Week of January 30, 2012—Tentative**

There are no meetings scheduled for the week of January 30, 2012.

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at (301) 415–6200, TDD: (301) 415–2100, or by e-mail at *william.dosch@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301) 415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: December 22, 2011.

**Rochelle C. Bavol,**

*Policy Coordinator, Office of the Secretary.*

[FR Doc. 2011–33433 Filed 12–23–11; 4:15 pm]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 72–1037; NRC–2011–0294; EA–11–268]**

### In the Matter of ZIONSOLUTIONS, LLC; Zion Nuclear Power Station; Independent Spent Fuel Storage Installation; Order Modifying License (Effective Immediately)

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Issuance of order for implementation of additional security measures and fingerprinting for unescorted access to Zion*Solutions,* LLC.

**FOR FURTHER INFORMATION CONTACT:** L. Raynard Wharton, Senior Project Manager, Licensing and Inspection Directorate, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Rockville, MD 20852. Telephone: (301) 492–3316; fax number: (301) 492–3348; email: *Raynard.Wharton@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

Pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) 2.106, NRC (or the Commission) is providing notice, in the matter of Zion Nuclear

Power Station Independent Spent Fuel Storage Installation (ISFSI) Order Modifying License (Effective Immediately).

## II. Further Information

*I*

NRC has issued a general license to Zion*Solutions,* LLC (ZS), authorizing the operation of an ISFSI, in accordance with the Atomic Energy Act of 1954, as amended, and 10 CFR part 72. This Order is being issued to ZS because it has identified near-term plans to store spent fuel in an ISFSI under the general license provisions of 10 CFR part 72. The Commission's regulations at 10 CFR 72.212(b)(5), 10 CFR 50.54(p)(1), and 10 CFR 73.55(c)(5) require licensees to maintain safeguards contingency plan procedures to respond to threats of radiological sabotage and to protect the spent fuel against the threat of radiological sabotage, in accordance with 10 CFR part 73, Appendix C. Specific physical security requirements are contained in 10 CFR 73.51 or 73.55, as applicable.

Inasmuch as an insider has an opportunity equal to, or greater than, any other person, to commit radiological sabotage, the Commission has determined these measures to be prudent. Comparable Orders have been issued to all licensees that currently store spent fuel or have identified near-term plans to store spent fuel in an ISFSI.

*II*

On September 11, 2001, terrorists simultaneously attacked targets in New York, NY, and Washington, DC, using large commercial aircraft as weapons. In response to the attacks and intelligence information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility. On October 16, 2002, the Commission issued Orders to the licensees of operating ISFSIs, to place the actions taken in response to the Advisories into the established regulatory framework and to implement additional security enhancements that emerged from NRC's ongoing comprehensive review. The Commission has also communicated with other Federal, State, and local government agencies and industry representatives to discuss and evaluate the current threat environment in order to assess the adequacy of security measures at licensed facilities. In addition, the Commission has conducted a comprehensive review of its safeguards and security programs and requirements.

As a result of its consideration of current safeguards and security requirements, as well as a review of information provided by the intelligence community, the Commission has determined that certain additional security measures (ASMs) are required to address the current threat environment, in a consistent manner throughout the nuclear ISFSI community. Therefore, the Commission is imposing requirements, as set forth in Attachments 1 and 2 of this Order, on all licensees of these facilities. These requirements, which supplement existing regulatory requirements, will provide the Commission with reasonable assurance that the public health and safety, the environment, and common defense and security continue to be adequately protected in the current threat environment. These requirements will remain in effect until the Commission determines otherwise.

The Commission recognizes that licensees may have already initiated many of the measures set forth in Attachments 1 and 2 to this Order, in response to previously issued Advisories, or on their own. It also recognizes that some measures may not be possible or necessary at some sites, or may need to be tailored to accommodate the specific circumstances existing at ZS's facility, to achieve the intended objectives and avoid any unforeseen effect on the safe storage of spent fuel.

Although the ASMs implemented by licensees in response to the Safeguards and Threat Advisories have been sufficient to provide reasonable assurance of adequate protection of public health and safety, in light of the continuing threat environment, the Commission concludes that these actions must be embodied in an Order, consistent with the established regulatory framework.

To provide assurance that licensees are implementing prudent measures to achieve a consistent level of protection to address the current threat environment, licenses issued pursuant to 10 CFR 72.210 shall be modified to include the requirements identified in Attachments 1 and 2 to this Order. In addition, pursuant to 10 CFR 2.202, I find that, in light of the common defense and security circumstances described above, the public health, safety, and interest require that this Order be effective immediately.

*III*

Accordingly, pursuant to Sections 53, 103, 104, 147, 149, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Parts 50, 72, and 73, *it is hereby ordered, effective immediately, that your general license is modified as follows:*

A. ZS shall comply with the requirements described in Attachments 1 and 2 to this Order, except to the extent that a more stringent requirement is set forth in the Zion Nuclear Power Station's physical security plan. ZS shall demonstrate its ability to comply with the requirements in Attachments 1 and 2 to the Order no later than 365 days from the date of this Order or 90 days before the first day that spent fuel is initially placed in the ISFSI, whichever is earlier. ZS must implement these requirements before initially placing spent fuel in the ISFSI. Additionally, ZS must receive written verification from the NRC that it has adequately demonstrated compliance with these requirements before initially placing spent fuel in the ISFSI.

B. 1. ZS shall, within twenty (20) days of the date of this Order, notify the Commission: (1) if it is unable to comply with any of the requirements described in Attachments 1 and 2; (2) if compliance with any of the requirements is unnecessary, in its specific circumstances; or (3) if implementation of any of the requirements would cause ZS to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide ZS's justification for seeking relief from, or variation of, any specific requirement.

2. If ZS considers that implementation of any of the requirements described in Attachments 1 and 2 to this Order would adversely impact the safe storage of spent fuel, ZS must notify the Commission, within twenty (20) days of this Order, of the adverse safety impact, the basis for its determination that the requirement has an adverse safety impact, and either a proposal for achieving the same objectives specified in Attachments 1 and 2 requirements in question, or a schedule for modifying the facility, to address the adverse safety condition. If neither approach is appropriate, ZS must supplement its response, to Condition B.1 of this Order, to identify the condition as a requirement with which it cannot comply, with attendant justifications, as required under Condition B.1.

C. 1. ZS shall, within twenty (20) days of this Order, submit to the Commission, a schedule for achieving compliance with each requirement described in Attachments 1 and 2.

2. ZS shall report to the Commission when it has achieved full compliance with the requirements described in Attachments 1 and 2.

D. All measures implemented or actions taken in response to this Order shall be maintained until the Commission determines otherwise.

ZS's response to Conditions B.1, B.2, C.1, and C.2, above, shall be submitted in accordance with 10 CFR 72.4. In addition, submittals and documents produced by ZS as a result of this Order, that contain Safeguards Information as defined by 10 CFR 73.22, shall be properly marked and handled, in accordance with 10 CFR 73.21 and 73.22.

The Director, Office of Nuclear Material Safety and Safeguards, may, in writing, relax or rescind any of the above conditions, for good cause.

*IV*

In accordance with 10 CFR 2.202, ZS must, and any other person adversely affected by this Order may, submit an answer to this Order within 20 days of its publication in the **Federal Register**. In addition, ZS and any other person adversely affected by this Order may request a hearing on this Order within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be made, in writing, to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

The answer may consent to this Order. If the answer includes a request for a hearing, it shall, under oath or affirmation, specifically set forth the matters of fact and law on which ZS relies and the reasons as to why the Order should not have been issued. If a person other than ZS requests a hearing, that person shall set forth with particularity the manner in which his/her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov*, or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through Electronic Information Exchange (EIE), users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary of the Commission, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a

document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

If a hearing is requested by ZS or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), ZS may, in addition to requesting a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the grounds that the Order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions as specified in Section III shall be final twenty (20) days from the date this Order is published in the **Federal Register**, without further Order or

proceedings. If an extension of time for requesting a hearing has been approved, the provisions as specified in Section III, shall be final when the extension expires, if a hearing request has not been received. An answer or a request for hearing shall not stay the immediate effectiveness of this order.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 20th day of December, 2011.

**Daniel H. Dorman,**

*Acting Director, Office of Nuclear Material Safety and Safeguards.*

Attachment 1—Additional Security Measures (ASMs) for Physical Protection of Dry Independent Spent Fuel Storage Installations (ISFSIs) contains Safeguards Information and is not included in the **Federal Register** Notice.

**Attachment 2—Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations, Dated June 3, 2010**

*A. General Basis Criteria*

1. These additional security measures (ASMs) are established to delineate an independent spent fuel storage installation (ISFSI) licensee's responsibility to enhance security measures related to authorization for unescorted access to the protected area of an ISFSI in response to the current threat environment.

2. Licensees whose ISFSI is collocated with a power reactor may choose to comply with the U.S. Nuclear Regulatory Commission (NRC)-approved reactor access authorization program for the associated reactor as an alternative means to satisfy the provisions of sections B through G below. Otherwise, licensees shall comply with the access authorization and fingerprinting requirements of section B through G of these ASMs.

3. Licensees shall clearly distinguish in their 20-day response which method they intend to use in order to comply with these ASMs.

*B. Additional Security Measures for Access Authorization Program*

1. The licensee shall develop, implement and maintain a program, or enhance its existing program, designed to ensure that persons granted unescorted access to the protected area of an ISFSI are trustworthy and reliable and do not constitute an unreasonable risk to the public health and safety for the common defense and security, including a potential to commit radiological sabotage.

a. To establish trustworthiness and reliability, the licensee shall develop, implement, and maintain procedures for conducting and completing background investigations, prior to granting access. The scope of background investigations must address at least the past three years and, as a minimum, must include:

i. Fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check (CHRC). Where an applicant for unescorted access has been previously fingerprinted with a favorably completed CHRC, (such as a CHRC pursuant to compliance with orders for access to safeguards information) the licensee may accept the results of that CHRC, and need not submit another set of fingerprints, provided the CHRC was completed not more than three years from the date of the application for unescorted access.

ii. Verification of employment with each previous employer for the most recent year from the date of application.

iii. Verification of employment with an employer of the longest duration during any calendar month for the remaining next most recent two years.

iv. A full credit history review.

v. An interview with not less than two character references, developed by the investigator.

vi. A review of official identification (e.g., driver's license; passport; government identification; state-, province-, or country-of-birth issued certificate of birth) to allow comparison of personal information data provided by the applicant. The licensee shall maintain a photocopy of the identifying document(s) on file, in accordance with ''Protection of Information,'' in Section G of these ASMs.

vii. Licensees shall confirm eligibility for employment through the regulations of the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, and shall verify and ensure, to the extent possible, the accuracy of the provided social security number and alien registration number, as applicable.

b. The procedures developed or enhanced shall include measures for confirming the term, duration, and character of military service for the past three years, and/or academic enrollment and attendance in lieu of employment, for the past five years.

c. Licensees need not conduct an independent investigation for individuals employed at a facility who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government-granted security clearance (i.e., Top Secret, Secret, or Confidential).

d. A review of the applicant's criminal history, obtained from local criminal justice resources, may be included in addition to the FBI CHRC, and is encouraged if the results of the FBI CHRC, employment check, or credit check disclose derogatory information.

The scope of the applicant's local criminal history check shall cover all residences of record for the past three years from the date of the application for unescorted access.

2. The licensee shall use any information obtained as part of a CHRC solely for the purpose of determining an individual's suitability for unescorted access to the protected area of an ISFSI.

3. The licensee shall document the basis for its determination for granting or denying access to the protected area of an ISFSI.

4. The licensee shall develop, implement, and maintain procedures for updating background investigations for persons who are applying for reinstatement of unescorted access. Licensees need not conduct an independent reinvestigation for individuals who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

5. The licensee shall develop, implement, and maintain procedures for reinvestigations of persons granted unescorted access, at intervals not to exceed five years. Licensees need not conduct an independent reinvestigation for individuals employed at a facility who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

6. The licensee shall develop, implement, and maintain procedures designed to ensure that persons who have been denied unescorted access authorization to the facility are not allowed access to the facility, even under escort.

7. The licensee shall develop, implement, and maintain an audit program for licensee and contractor/vendor access authorization programs that evaluate all program elements and include a person knowledgeable and practiced in access authorization program performance objectives to assist in the overall assessment of the site's program effectiveness.

*C. Fingerprinting Program Requirements*

1. In a letter to the NRC, the licensee must nominate an individual who will review the results of the FBI CHRCs to make trustworthiness and reliability determinations for unescorted access to an ISFSI. This individual, referred to as the ''reviewing official,'' must be someone who requires unescorted access to the ISFSI. The NRC will review the CHRC of any individual nominated to perform the reviewing official function. Based on the results of the CHRC, the NRC staff will determine whether this individual may have access. If the NRC determines that the nominee may not be granted such access, that individual will be prohibited from obtaining access.[1] Once the NRC approves a reviewing official, the reviewing official is the only individual permitted to make access determinations for other individuals who have been identified by the licensee as having the need for unescorted access to the ISFSI, and have been fingerprinted and have had a CHRC in accordance with these ASMs. The reviewing official can only make access determinations for other individuals, and therefore cannot approve other individuals to act as reviewing officials. Only the NRC can approve a reviewing official. Therefore, if the licensee wishes to have a new or additional reviewing official, the NRC must approve that individual before he or she can act in the capacity of a reviewing official.

2. No person may have access to Safeguards Information (SGI) or unescorted access to any facility subject to NRC regulation, if the NRC has determined, in accordance with its administrative review process based on fingerprinting and an FBI identification and CHRC, that the person may not have access to SGI or unescorted access to any facility subject to NRC regulation.

3. All fingerprints obtained by the licensee under this Order, must be submitted to the Commission for transmission to the FBI.

4. The licensee shall notify each affected individual that the fingerprints will be used to conduct a review of his/her criminal history record and inform the individual of the procedures for revising the record or including an explanation in the record, as specified in the ''Right to Correct and Complete Information,'' in section F of these ASMs.

5. Fingerprints need not be taken if the employed individual (e.g., a licensee employee, contractor, manufacturer, or supplier) is relieved from the fingerprinting requirement by 10 CFR 73.61, has a favorably adjudicated U.S. Government CHRC within the last five (5) years, or has an active Federal security clearance. Written confirmation from the Agency/employer who granted the Federal security clearance or reviewed the CHRC must be provided to the licensee. The licensee must retain this documentation for a period of three years from the date the individual no longer requires access to the facility.

*D. Prohibitions*

1. A licensee shall not base a final determination to deny an individual unescorted access to the protected area of an ISFSI solely on the basis of information received from the FBI involving: an arrest more than one (1) year old for which there is no information of the disposition of the case, or an arrest that resulted in dismissal of the charge, or an acquittal.

2. A licensee shall not use information received from a CHRC obtained pursuant to this Order in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall the licensee use the information in any way that would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

*E. Procedures for Processing Fingerprint Checks*

1. For the purpose of complying with this Order, licensees shall, using an appropriate method listed in 10 CFR 73.4, submit to the NRC's Division of Facilities and Security, Mail Stop TWB–05B32M, one completed, legible standard fingerprint card (Form FD–258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual seeking unescorted access to an ISFSI, to the Director of the Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by calling (301) 415–5877, or by email to *forms@nrc.gov*. Practicable alternative formats are set forth in 10 CFR 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards because of illegible or incomplete cards.

2. The NRC will review submitted fingerprint cards for completeness. Any Form FD–258 fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one re-submission if the initial submission is returned by the FBI because the fingerprint impressions cannot be classified. The one free re-submission must have the FBI Transaction Control Number reflected on the re-submission. If additional submissions are necessary,

[1] The NRC's determination of this individual's unescorted access to the ISFSI, in accordance with the process, is an administrative determination that is outside the scope of the Order.

they will be treated as initial submittals and will require a second payment of the processing fee.

3. Fees for processing fingerprint checks are due upon application. The licensee shall submit payment of the processing fees electronically. To be able to submit secure electronic payments, licensees will need to establish an account with Pay.Gov (*https://www.pay.gov*). To request an account, the licensee shall send an email to *det@nrc.gov.* The email must include the licensee's company name, address, point of contact (POC), POC email address, and phone number. The NRC will forward the request to Pay.Gov; who will contact the licensee with a password and user lD. Once the licensee has established an account and submitted payment to Pay.Gov, they shall obtain a receipt. The licensee shall submit the receipt from Pay.Gov to the NRC along with fingerprint cards. For additional guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at (301) 492–3531. Combined payment for multiple applications is acceptable. The application fee (currently $26) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an NRC processing fee, which covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission will directly notify licensees who are subject to this regulation of any fee changes.

4. The Commission will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for CHRCs, including the FBI fingerprint record.

*F. Right to Correct and Complete Information*

1. Prior to any final adverse determination, the licensee shall make available to the individual the contents of any criminal history records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the licensee for a period of one (1) year from the date of notification.

2. If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537–9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The licensee must provide at least 10 days for an individual to initiate an action challenging the results of a FBI CHRC after the record is made available for his/her review. The licensee may make a final access determination based on the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on access to an ISFSI, the licensee shall provide the individual its documented basis for denial. Access to an ISFSI shall not be granted to an individual during the review process.

*G. Protection of Information*

1. The licensee shall develop, implement, and maintain a system for personnel information management with appropriate procedures for the protection of personal, confidential information. This system shall be designed to prohibit unauthorized access to sensitive information and to prohibit modification of the information without authorization.

2. Each licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures, for protecting the record and the personal information from unauthorized disclosure.

3. The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining suitability for unescorted access to the protected area of an ISFSI. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have the appropriate need to know.

4. The personal information obtained on an individual from a CHRC may be transferred to another licensee if the gaining licensee receives the individual's written request to re-disseminate the information contained in his/her file, and the gaining licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

5. The licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

[FR Doc. 2011–33254 Filed 12–27–11; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[NRC–2010–0255]**

## Office of New Reactors; Notice of Availability of the Final Staff Guidance; Section 13.5.1.1, Revision 1 on Administrative Procedures—General

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of availability.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing its final Revision 1 to NUREG–0800, ''Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition,'' Section 13.5.1.1, Revision 1 on ''Administrative Procedures—General'' (Agencywide Documents Access and Management System (ADAMS) Accession No. ML112730402).

The NRC staff issues revisions to SRP sections to facilitate timely implementation of the current staff guidance and to facilitate reviews to amendments to licenses for operating reactors or for activities associated with review of applications for early site permits and combined licenses for the Office of New Reactors. The NRC staff will also incorporate Revision 1 of SRP Section 13.5.1.1 into the next revisions of the Regulatory Guide 1.206, ''Combined License Applications for Nuclear Power Plants (LWR Edition),'' and related guidance documents.

*Disposition:* On February 9, 2011, the NRC staff issued the proposed Revision 1 on SRP Section 13.5.1.1 on ''Administrative Procedures—General,'' ADAMS Accession No. ML110100193. There were no comments received on the proposed revision. Therefore, the guidance is issued as final without

changes to the proposed notification as above.

**Congressional Act Review**

In accordance with the Congressional Review Act, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of the Office of Management and Budget.

**ADDRESSES:** The NRC maintains ADAMS, which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC Public Document Room reference staff at 1-(800) 397–4209, (301) 415–4737, or by email at *pdr.resource@nrc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy E. Cubbage, Chief, Policy Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone at (301) 415–2875 or email at *amy.cubbage@nrc.gov*.

**SUPPLEMENTARY INFORMATION:** The NRC posts its issued staff guidance on the NRC external web page (*http://www.nrc.gov/reading-rm/doc-collections/isg/*).

Dated at Rockville, Maryland, this 19th day of December 2011.

For the Nuclear Regulatory Commission.

**Amy E. Cubbage,**

*Chief, Policy Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors.*

[FR Doc. 2011–33258 Filed 12–27–11; 8:45 am]

**BILLING CODE 7590–01–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. A2012–90; Order No. 1063]**

## Post Office Closing

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** This document informs the public that an appeal of the closing of the Alexander, Kansas post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

**DATES:** January 4, 2012, 4:30 p.m., Eastern Time: Deadline for Petitioner's Form 61; January 24, 2012, 4:30 p.m., Eastern Time: Deadline for answering brief in support of the Postal Service. *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 the **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 November 30, 2011 the Commission received a petition for review of the Postal Service's determination to close the Alexander post office in Alexander, Kansas. The petition for review was filed by the City of Alexander (Petitioners) and is postmarked November 24, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012- 90 to consider Petitioners' appeal. If Petitioners would like to further explain their position with supplemental information or facts, Petitioners may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than January 4, 2012.

Notwithstanding the Postal Service's determination to close this post office, on December 15, 2011, the Postal Service advised the Commission that it ''will delay the closing or consolidation of any Post Office until May 15, 2012'' [1]. The Postal Service further indicated that it ''will proceed with the discontinuance process for any Post Office in which a Final Determination was already posted as of December 12, 2011, including all pending appeals.'' *Id.* It stated that the only ''Post Offices'' subject to closing prior to May 16, 2011 are those that were not in operation on, and for which a Final Determination was posted as of, December 12, 2011. It affirmed that it ''will not close or consolidate any other Post Office prior to May 16, 2012.'' *Id.* Lastly, the Postal Service requested the Commission ''to continue adjudicating appeals as provided in the 120-day decisional schedule for each proceeding.'' *Id.*

The Postal Service's Notice outlines the parameters of its newly announced discontinuance policy. Pursuant to the Postal Service's request, the Commission will fulfill its appellate responsibilities under 39 U.S.C. 404(d)(5).

*Categories of issues apparently raised.* Petitioners contend that (1) the Postal Service failed to consider the effect of the closing on the community (*see* 39 U.S.C. 404(d)(2)(A)(i)); and (2) the Postal Service failed to consider whether it will continue to provide a maximum degree of effective and regular postal services to the community (*see* 39 U.S.C. 404(d)(2)(A)(iii)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those 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 applicable administrative record is within 15 days after the date in which the petition for review was filed with the Commission. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service is also within 15 days after the date in which the petition for review was filed with the Commission.

*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 participant's submissions also will be posted on the 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., Eastern Time, 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,

[1] United States Postal Service Notice of Status of the Moratorium on Post Office Discontinuance Actions, December 15, 2011, (Notice).

*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, *http://www.prc.gov,* or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

*Intervention.* Persons, other than the Petitioners and respondents, 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 January 17, 2012. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, *http://www.prc.gov,* 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 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 procedural schedule listed below is hereby adopted.

2. Pursuant to 39 U.S.C. 505, Getachew Mekonnen is designated officer of the Commission (Public Representative) to represent the interests of the general public.

3. The Secretary shall arrange for publication of this notice and order and Procedural Schedule in the **Federal Register**.

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

PROCEDURAL SCHEDULE

| | |
|---|---|
| November 30, 2011 | Filing of Appeal. |
| December 15, 2011 | Deadline for the Postal Service to file the applicable administrative record in this appeal. |
| December 15, 2011 | Deadline for the Postal Service to file any responsive pleading. |
| January 17, 2012 | Deadline for notices to intervene (*see* 39 CFR 3001.111(b)). |
| January 4, 2012 | Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)). |
| January 24, 2012 | Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)). |
| February 8, 2012 | Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)). |
| February 15, 2012 | 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). |
| March 23, 2012 | Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)). |

[FR Doc. 2011–33287 Filed 12–27–11; 8:45 am]

BILLING CODE 7710–FW–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66018; File No. SR–FINRA–2011–072]**

## Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend a TRACE Pilot Program

December 21, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2011, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b-4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to extend the pilot program in FINRA Rule 6730(e)(4) to October 26, 2012. The pilot program exempts from reporting to the Trade Reporting and Compliance Engine (''TRACE'') transactions in TRACE–Eligible Securities that are executed on a facility of the NYSE in accordance with NYSE Rules 1400, 1401 and 86 and reported to NYSE in accordance with NYSE's applicable trade reporting rules and disseminated publicly by NYSE.

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 6730(e)(4) to extend the pilot program, which is scheduled to expire on January 27, 2012, to October 26, 2012.[4] The pilot program exempts from

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 54768 (November 16, 2006), 71 FR 67673 (November 22, 2006) (Order Approving Proposed Rule Change; File No. SR–NASD–2006–110) (pilot program in FINRA Rule 6730(e)(4), subject to the execution of a data sharing agreement addressing relevant transactions, became effective on January 9, 2007); Securities

Continued

reporting to TRACE transactions in TRACE–Eligible Securities that are executed on a facility of NYSE in accordance with NYSE Rules 1400, 1401 and 86 and reported to NYSE in accordance with NYSE's applicable trade reporting rules and disseminated publicly by NYSE, provided that a data sharing agreement between FINRA and NYSE related to transactions covered by the Rule remains in effect.

FINRA is proposing to extend the pilot program until October 26, 2012 to continue to exempt transactions in TRACE–Eligible Securities on an NYSE facility (and as to which all the other conditions of the exemption are met) from the TRACE reporting requirements.[5] The extension will provide additional time to analyze the impact of the exemption. Without the extension, members would be subject to both FINRA's and NYSE's trade reporting requirements with respect to these securities.

The proposed rule change would not expand or otherwise change the pilot. FINRA notes that the success of the pilot program remains dependent on FINRA's ability to effectively continue to conduct surveillance on corporate debt trading in the over-the-counter market. In this regard, FINRA Rule 6730(e)(4) would continue to require that the exemption be predicated on the data agreement between FINRA and NYSE to share data related to the transactions covered by the Rule remaining in effect. However, FINRA supports a regulatory construct that, in the future, consolidates all last sale transaction information to provide better price transparency and a more efficient means to engage in market surveillance of TRACE-Eligible Securities transactions. The extension proposed herein will allow the pilot program to continue to operate without interruption while FINRA and the NYSE continue to assess the effect of the exemption and issues regarding the consolidation of market data, market surveillance and price transparency.

FINRA has filed the proposed rule change for immediate effectiveness. The implementation date will be January 27, 2012.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[6] 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 extension of the exemptive provision protects investors and the public because transactions will be reported, transparency will be maintained for these transactions, and NYSE's agreement to share data with FINRA allows FINRA, at this time, to conduct surveillance in the corporate debt securities market.

*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[7] and Rule 19b–4(f)(6) thereunder.[8]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2011–072 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–2011–072. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only

Exchange Act Release No. 59216 (January 8, 2009), 74 FR 2147 (January 14, 2009) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change; File No. SR–FINRA–2008–065) (pilot program extended to January 7, 2011); Securities Exchange Act Release No. 63673 (January 7, 2011), 76 FR 2739 (January 14, 2011) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change; File No. SR–FINRA–2011–002) (pilot program extended to July 8, 2011); Securities Exchange Act Release No. 64665 (June 14, 2011), 76 FR 35933 (June 20, 2011) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change; File No. SR–FINRA–2011–025) (pilot program extended to January 27, 2012).

[5] The exemption in FINRA Rule 6730(e)(4) is conditioned, among other things, upon a data sharing agreement between FINRA and NYSE remaining in effect. A data sharing agreement between FINRA and NYSE related to transactions covered by Rule 6730(e)(4) remains in effect.

[6] 15 U.S.C. 78*o*–3(b)(6).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has complied with this requirement.

information that you wish to make available publicly.

All submissions should refer to File Number SR–FINRA–2011–072 and should be submitted on or before January 18, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2011–33217 Filed 12–27–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66021; File No. SR–FINRA–2011–063]**

## Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating to Amendments to the Order Audit Trail System Rules

December 21, 2011.

### I. Introduction

On October 28, 2011, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] to amend its Order Audit Trail System (''OATS'') rules to require certain information be reported to OATS and to specify the time OATS reports must be transmitted to FINRA. Notice of the proposal was published for comment in the **Federal Register** on November 10, 2011.[3] The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

### II. Description of the Proposal

FINRA is proposing to amend (i) FINRA Rules 5320 and 7440 to require that members report to OATS, information barriers put into place by the member in reliance on Supplementary Material .02 to FINRA Rule 5320; (ii) FINRA Rule 7440 to require that members report customer instructions regarding the display of a customer's limit order in any OATS-eligible security; and (iii) FINRA Rule 7450 to codify the specific time OATS reports must be transmitted to FINRA.

*(1) Customer Order Protection*

First, FINRA is proposing to require members to identify on OATS reports information barriers that the member has in place to permit the member to qualify for the No-Knowledge Exception in Supplementary Material .02 to FINRA Rule 5320. Under FINRA Rule 5320, a member that accepts and holds an order in an equity security from its own customer, or a customer of another broker-dealer, without immediately executing the order is prohibited from trading that security on the same side of the market for its own proprietary account at a price that would satisfy the customer order unless the member immediately thereafter executes the customer order up to the size and at a price that is the same as, or better, than the price at which the member traded for its proprietary account.

The No-Knowledge Exception in Supplementary Material .02 to FINRA Rule 5320 provides, in part, that with respect to NMS stocks, if a firm implements and uses an effective system of internal controls—such as appropriate information barriers—that operate to prevent one trading unit from obtaining knowledge of customer orders held by a separate trading unit, those other trading units may trade in a proprietary capacity at prices that would satisfy the customer orders held by the separate, walled-off trading unit. Supplementary Material .02 to FINRA Rule 5320 also contains an additional No-Knowledge Exception for OTC equity securities. The proposed rule change would amend FINRA Rules 5320 and 7440 to require firms relying on the No-Knowledge Exception to identify the information barriers to FINRA in their OATS reports.

*(2) Limit Order Display*

FINRA Rule 7440(b)(14) requires OATS Reporting Members to identify ''any request by a customer that an order not be displayed, or that a block size order be displayed, pursuant to Rule 604(b) of SEC Regulation NMS.'' These customer requests are identified in the OATS system through a ''Customer Instruction Flag'' that indicates whether the customer has requested that the firm handle its limit order in a specified way. Because of the reference in FINRA Rule 7440(b)(14) to SEC Regulation NMS, members are only required to populate the Customer Instruction Flag when the order involves a security subject to SEC Regulation NMS.

On June 22, 2010, the Commission approved FINRA Rule 6460,[4] which became effective on May 9, 2011.[5] FINRA Rule 6460 generally requires OTC market makers to display a customer limit order in an OTC equity security held by the OTC market maker that is at a price that would improve the bid or offer of the OTC market maker in the security or that would represent more than a de minimis change in relation to the size associated with the OTC market maker's bid or offer. FINRA Rule 6460(b) includes exceptions to the display requirement for OTC equity securities that mirror the exceptions in Rule 604(b) of SEC Regulation NMS.[6]

FINRA is proposing to require that OATS Reporting Members indicate on all OATS reports for customer limit orders, including for OTC equity securities, whether the customer has instructed the member not to display the limit order or to display a limit order of block size. As a result, OATS Reporting Members would be required to populate the Customer Instruction Flag for all limit orders, not just those involving NMS stocks.

*(3) Order Data Transmission Requirements*

FINRA Rule 7450 requires members to report order information recorded pursuant to FINRA Rule 7440. Paragraph (a) of the rule imposes the general requirement that members report applicable order information to FINRA that the member is required to record by FINRA Rule 7440. Paragraph (b) of the rule addresses the form the order data must take and the timing of order reports. Paragraph (c) concerns the use of reporting agent agreements that a member may use to allow a third party to report information to OATS on behalf of the member. The proposed rule change amends paragraph (b) of FINRA Rule 7450 to codify the specific time OATS reports must be transmitted to FINRA, which is the same time that currently is required under the *OATS Reporting Technical Specifications.*

Under the proposed rule, all order events that occur on a particular OATS Business Day must be transmitted to FINRA by 8 a.m. Eastern Time on the calendar day following the end of the OATS Business Day. For purposes of the rule, an ''OATS Business Day'' begins at 4:00:01 p.m. Eastern Time on one market day and ends at 4:00 p.m.

[9] 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. 65692 (Nov. 4, 2011), 76 FR 70195.

[4] *See* Securities Exchange Act Release No. 62359 (June 22, 2010), 75 FR 37488 (June 29, 2010).

[5] *See Regulatory Notice* 10–42 (September 2010).

[6] *See* FINRA Rule 6460(b)(2), (b)(4).

Eastern Time on the next market day.[7] FINRA is retaining the exception for information that is not available by the time the report must be transmitted; in such cases, the report must be transmitted on the day that the information becomes available.

The effective date of the proposed rule change will be no later than 120 days after Commission approval.

## III. Discussion

After careful review, 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 association.[8] In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[9] which requires, among other things, that FINRA rules 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 as the changes should make FINRA's surveillance more efficient.

The proposed rule change should make FINRA's surveillance more efficient because both the existence of information barriers and the customer's instructions regarding the display of limit orders for all OATS securities will be captured in OATS, so that such transactions will not create ''false positive'' results that FINRA must review to ensure that the transactions do not violate the rule. This should enable FINRA to focus its resources on transactions that are not permitted under the rules. The Commission believes that codifying the time by which OATS reports must be submitted should provide greater clarity to FINRA members of their reporting obligations under the rules.

## IV. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–FINRA–2011–063) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2011–33218 Filed 12–27–11; 8:45 am]

**BILLING CODE 8011–01–P**

[7] Thus, for example, assuming no holidays, if an order is received at 5:00 p.m. Eastern Time on Wednesday, the order event occurs on the OATS Business Day ending Thursday at 4:00 p.m. Eastern Time. Receipt of the order (and any subsequent event(s) regarding the order until Thursday at 4:00 p.m. Eastern Time) must be reported by 8:00 a.m. on Friday. Order events occurring on market days during regular market hours (*i.e.,* before 4:00:01 p.m. Eastern Time) are reported by 8:00 a.m. Eastern Time on the following calendar day.

[8] In approving this rule proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78*o*–3(b)(6).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

---

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66022; File No. SR–Phlx–2011–136]**

## Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Approving Proposed Rule Change Relating To Transfer of Exchange House Accounts

December 21, 2011.

## I. Introduction

On October 19, 2011, NASDAQ OMX PHLX LLC (''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 codify current Exchange policy with respect to the transfer of Exchange house accounts. The proposed rule change was published in the **Federal Register** on November 8, 2011.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

## II. Description of Proposal

The Exchange proposes to adopt new Exchange Rule 912, Transfer of Accounts. The proposed rule would provide the process when an Exchange member or member organization transfers Exchange house accounts to another Exchange member or member organization. According to the Exchange, the house accounts are assigned by the Exchange's Membership Department and are not customer accounts. Rather, these Exchange house accounts are used by Exchange members or member organizations to transact business on the Exchange.

Specifically, the proposed rule would provide that transferor and transferee members or member organizations must notify the Exchange's Membership Department in writing of the intent to transfer Exchange house account(s) in accordance with the rules prescribed by the Membership Department. Further, the transferor and transferee members or member organizations must execute and provide a Letter of Indemnity to the Exchange. According to the Exchange, the Letter of Indemnity is a standard form that the Exchange requires members to complete for transfers of Exchange house accounts.

## III. Commission Findings and Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act,[4] and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[5] which requires, among other things, that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.[6]

The Exchange's proposal would govern how an Exchange member or member organization would transfer Exchange house accounts. The Commission believes that the proposal clarifies to members and member organizations the process required to transfer such accounts. In requiring that members or member organizations execute a Letter of Indemnity in connection with a transfer of accounts, the proposed rule also delineates which firm has responsibility for liabilities associated with those accounts. Accordingly, the Commission finds that the proposal would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market, and is consistent with the requirements of the Act.[7]

## IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 65667 (November 2, 2011), 76 FR 69316.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] The Commission notes, however, that this order does not approve any prior transfer of Exchange house accounts that may have been inconsistent with the approved rules of the Exchange then in effect.

[8] 15 U.S.C. 78s(b)(2).

proposed rule change (SR–Phlx–2011–136) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2011–33246 Filed 12–27–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66023; File No. SR–Phlx–2011–118]**

## Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Approving Proposed Rule Change Relating to Transfer of Positions Off the Floor

December 21, 2011.

### I. Introduction

On October 20, 2011, NASDAQ OMX PHLX LLC (''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 codify current Exchange policy with respect to the transfer of option positions between accounts, individuals, or entities off the floor. The proposed rule change was published in the **Federal Register** on November 8, 2011.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

### II. Description of Proposal

The Exchange proposes to adopt new Exchange Rule 1058, Transfer of Positions. The proposed rule would govern the process when an Exchange member or member organization transfers positions off the floor in any class of options listed on its books. The proposed rule would allow transfers in one or more of the following events: (1) The dissolution of a joint account in which the remaining member or member organization assumes the positions of the joint account; (2) the dissolution of a corporation or partnership in which a former nominee of that corporation or partnership assumes the positions; (3) positions transferred as part of a member or member organization's capital contribution to a new joint account, partnership, or corporation; (4) the donation of positions to a not-for-profit corporation; (5) the transfer of positions to a minor under the Uniform Gifts to Minors Act; (6) a merger or acquisition resulting in a continuity of ownership or management; or (7) consolidation of accounts within a member or member organization.

The proposed rule would further require members and member organizations to notify the Exchange in writing prior to effecting an off the floor transfer. This written notification must indicate the positions to be transferred and the reason for the transfer. Finally, the proposed rule would require all positions to be transferred at the same prices that appear on the books of the transferring member or member organization, so that the positions would retain the same cost basis. The transfer must indicate the original trading date, cannot net the transferred position against another position (for example, a long position that would net against an existing offsetting short position could not be transferred), and each member or member organization that is a party to the transfer must make and retain records related to the nature of the transaction, the name of the counter-party, and any other information required by the Exchange.

### III. Commission Findings and Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act,[4] and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[5] which requires, among other things, that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.[6]

The Exchange's proposal would govern when and how an Exchange member or member organization could transfer option positions off the floor. The Commission believes that the proposal would clarify to an Exchange member or member organization the process required to transfer these positions, and the specific instances in which such a transfer is permitted. The Commission also notes that the proposed rule is substantially similar to the rules of other options exchanges.[7] Accordingly, the Commission finds that the proposal would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market, and is consistent with the requirements of the Act.[8]

### IV. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (SR–Phlx–2011–118) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2011–33219 Filed 12–27–11; 8:45 am]

**BILLING CODE 8011–01–P**

[9] 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. 65666 (November 2, 2011), 76 FR 69314.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] *See, e.g.,* Chicago Board Options Exchange, Incorporated Rule 6.49A and NYSE Arca, Inc. Rule 6.78.

[8] The Commission notes, however, that this order does not approve any prior transfer of option positions off the floor that may have been inconsistent with the approved rules of the Exchange then in effect.

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration # 12940 and # 12941]**

## New Mexico Disaster Number NM–00024

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of New Mexico (FEMA–4047–DR), dated 11/23/2011.

*Incident:* Flooding.

*Incident Period:* 08/19/2011 through 08/24/2011.

**EFFECTIVE DATE:** 12/16/2011.

*Physical Loan Application Deadline Date:* 01/23/2012.

*Economic Injury (EIDL) Loan Application Deadline Date:* 08/23/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance,

U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of New Mexico, dated 11/23/2011, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Los Alamos, Pueblo of Cochiti.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–33212 Filed 12–27–11; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF STATE

**[Public Notice 7742]**

### Notice of Information Collection Under Emergency Review: 60-Day Notice of Proposed Information Collection: DS–234, Special Immigrant Visa Biodata Form, Bureau of Population, Refugees, and Migration, Office of Admissions (PRM/A)

**AGENCY:** Department of State.

**ACTION:** Notice of request for emergency OMB approval.

**SUMMARY:** The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the emergency review procedures of the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Special Immigrant Visa Biodata Form.
- *OMB Control Number:* none.
- *Type of Request:* Emergency Review.
- *Originating Office:* Bureau of Population, Refugees, and Migration, Office of Admissions (PRM/A).
- *Form Number:* DS–234.
- *Respondents:* Iraqi and Afghan Special Immigrant Visa Applicants.
- *Estimated Number of Respondents:* 12,000 per year.
- *Estimated Number of Responses:* 12,000 per year.
- *Average Hours per Response:* 20 minutes.
- *Total Estimated Burden:* 4000 hours.
- *Frequency:* Once per applicant.
- *Obligation to respond:* Required to Obtain or Retain a Benefit.

The proposed information collection is published to obtain comments from the public and affected agencies. Emergency review and approval of this collection has been requested from OMB by February 29, 2012. If granted, the emergency approval is only valid for 180 days. 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:

- *Email: 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.

During the first 60 days of the emergency approval period, a regular review of this information collection is also being undertaken. The submitting agency requests written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Comments will be accepted until 60 days from the date that this notice is published in the **Federal Register**.

You may submit comments by any of the following methods:

- *Email: ssiram@state.gov.*
- *Mail (paper, disk, or CD–ROM submissions):* Office of Admissions, PRM, US. Department of State, 2025 E Street NW., Washington, DC 20522.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

**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 Sumitra Siram, who may be reached on (202) 453–9250 or at *SiramS@state.gov.*

**SUPPLEMENTARY INFORMATION:** We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of 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, including the use of automated collection techniques or other forms of technology.

*Abstract of proposed collection:*

Form DS–234 elicits information used to determine the eligibility of Iraqis and Afghan nationals who are applying for special immigrant visas to receive refugee resettlement benefits.

*Methodology:*

The SIV Biodata information form (DS–234) is submitted electronically by the applicant to the National Visa Center, which will forward the forms to the Refugee Processing Center of the Bureau of Population, Refugees and Migration.

*Additional Information:*

Dated: December 21, 2011.

**Kelly A. Gauger,**

*Deputy Director, Office of Admissions, Bureau of Population, Refugees, and Migration, Department of State.*

[FR Doc. 2011–33286 Filed 12–27–11; 8:45 am]

**BILLING CODE 4710–33–P**

## DEPARTMENT OF STATE

**[Public Notice 7743]**

### 60–Day Notice of Proposed Information Collection: Department of State Acquisition Regulation (DOSAR)

**ACTION:** Notice of request for public comments.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Department of State Acquisition Regulation (DOSAR).
- *OMB Control Number:* 1405–0050.
- *Type of Request:* Extension of Currently Approved Collection.
- *Originating Office:* Bureau of Administration, Office of the Procurement Executive (A/OPE).
- *Form Number:* N/A.
- *Respondents:* Any business, other for-profit, individual, not-for-profit, or household organizations wishing to receive Department of State contracts.
- *Estimated Number of Respondents:* 3,166.
- *Estimated Number of Responses:* 3,166.
- *Average Hours per Response:* Varies.
- *Total Estimated Burden:* 275,970 hours.
- *Frequency:* On occasion.
- *Obligation To Respond:* Voluntary.

**DATES:** The Department will accept comments from the public up to 60 days from December 28, 2011.

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

- *Email: LatvanasBA@state.gov* You must include the information collection title and OMB control number in the subject line of your message.
- *Mail (paper, disk, or CD–ROM submissions):* Barbara Latvanas, Procurement Analyst, Department of State, Office of the Procurement Executive, 2201 C Street, NW., Suite 900, State Annex Number 27, Washington, DC 20522.
- *Fax:* (703) 875–6155.
- *Hand Delivery or Courier:* Barbara Latvanas, Procurement Analyst, Department of State, Office of the Procurement Executive, 1000 Wilson Boulevard, Suite 900, Arlington, VA 22209. You must include the information collection title and OMB control number in any correspondence.

**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 Barbara Latvanas, Procurement Analyst, Office of the Procurement Executive, Department of State, Washington, DC 20522, who may be reached on (703) 516–1755.

**SUPPLEMENTARY INFORMATION:** We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of 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, including the use of automated collection techniques or other forms of technology.

*Abstract of proposed collection:* This information collection covers pre-award and post-award requirements of the DOSAR. During the pre-award phase, information is collected to determine which bids or proposals offer the best value to the U.S. Government. Post-award actions include monitoring the contractor's performance; issuing modifications to the contract; dealing with unsatisfactory performance; issuing payments to the contractor; and closing out the contract upon its completion.

*Methodology:* Information is collected from prospective offerors to evaluate their proposals. The responses provided by the public are part of the offeror's proposals in response to Department solicitations. This information may be submitted electronically (through fax or email), or may require a paper submission, depending upon complexity. After contract award, contractors are required to submit information, on an as-needed basis, and relate to the occurrence of specific circumstances.

Dated: December 19, 2011.

**Corey M. Rindner,**

*Procurement Executive, Bureau of Administration, Department of State.*

[FR Doc. 2011–33288 Filed 12–27–11; 8:45 am]

**BILLING CODE 4710–24–P**

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### 2012 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Request for written submissions from the public and announcement of public hearing.

**SUMMARY:** Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242) requires the United States Trade Representative (USTR) to identify countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. (The provisions of Section 182 are commonly referred to as the ''Special 301'' provisions of the Trade Act.). The USTR is required to determine which, if any, of these countries should be identified as Priority Foreign Countries. Acts, policies, or practices that are the basis of a country's identification as a Priority Foreign Country can be subject to the procedures set out in sections 301–305 of the Trade Act.

In addition, USTR has created a ''Priority Watch List'' and ''Watch List'' to assist the Administration in pursuing the goals of the Special 301 provisions. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons relying on intellectual property. Trading partners placed on the Priority Watch List are the focus of increased bilateral attention concerning the problem areas.

USTR chairs an interagency team that reviews information from many sources, and that consults with and makes recommendations to the USTR on issues arising under Special 301. Written submissions from interested persons are a key source of information for the Special 301 review process. In 2012, USTR will conduct a public hearing as part of the review process.

USTR is hereby requesting written submissions from the public concerning foreign countries' acts, policies, or practices that are relevant to the decision as to whether a particular trading partner should be identified as a priority foreign country under Section 182 of the Trade Act, or be placed on the Priority Watch List or Watch List. Interested parties, including foreign governments, wishing to testify at the public hearing must submit a request to testify at the hearing and a short hearing statement. The deadlines for these procedures are set out below.

**DATES:** The schedule for the 2012 Special 301 review is set forth below.

Friday, February 10, 2012—For interested parties, except for foreign governments: Submit written comments, requests to testify at the Special 301 Public Hearing, and hearing statements.

Friday, February 17, 2012—For foreign governments: Submit written comments, requests to testify at the Special 301 Public Hearing, and hearing statements.

Thursday, February 23, 2012—Special 301 Committee Public Hearing for interested parties, including representatives of foreign governments, will be held at the offices of USTR, 1724 F Street NW., Washington, DC 20508. Any change in the date or location of the hearing will be announced on *http://www.ustr.gov*.

On or about April 30, 2011—In accordance with statutory requirements, USTR will publish the 2012 Special 301 Report on or about April 30, 2012.

**ADDRESSES:** All written comments, requests to testify, and hearing statements should be sent electronically via *http://www.regulations.gov*, docket number USTR–2011–0021. Submissions should contain the term ''2011 Special 301 Review'' in the ''Type comment'' field on *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Paula Karol Pinha, Director for Intellectual Property and Innovation, Office of the United States Trade Representative, at (202) 395–5419. Further information about Special 301 can be found at *http://www.ustr.gov*.

**SUPPLEMENTARY INFORMATION:**

**1. Background**

USTR requests that interested persons identify those countries that deny adequate and effective protection for intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. USTR requests that, where relevant, submissions mention particular regions, provinces, states, or other subdivisions of a country in which an act, policy, or practice is believed to warrant special attention.

Section 182 contains a special rule regarding actions of Canada affecting United States cultural industries. The USTR must identify any act, policy or practice of Canada that affects cultural industries, is adopted or expanded after December 17, 1992, and is actionable under Article 2106 of the North American Free Trade Agreement (NAFTA). USTR must make the above-referenced identifications within 30 days after publication of the National Trade Estimate (NTE) report, i.e., approximately April 30, 2012.

**2. Public Comments**

*a. Written Comments*

The Special 301 Committee invites written submissions from the public concerning foreign countries' acts, policies, or practices that are relevant to the decision whether a particular trading partner should be identified under Section 182 of the Trade Act. As noted above, interested parties, except for foreign governments, must submit any written comments by February 10, 2012. Interested foreign governments must submit any written comments by February 17, 2012.

*b. Requirements for Comments*

Written comments should include a description of the problems experienced by the submitter and the effect of the acts, policies, and practices on U.S. industry. Comments should be as detailed as possible and should provide all necessary information for assessing the effect of the acts, policies, and practices. Any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses. Comments must be in English. All comments should be sent electronically via *http://www.regulations.gov*, docket number USTR–2011–0021.

To submit comments to *http://www.regulations.gov*, find the docket by entering the number USTR–2011–0021 in the ''Enter Keyword or ID'' window at the *http://www.regulations.gov* home page and click ''Search.'' The site will provide a search—results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search—results page, and click on the link entitled ''Submit a comment.'' (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How to Use This Site'' on the left side of the home page).

The *http://www.regulations.gov* site provides the option of providing comments by filling in a ''Type comment'' field, or by attaching a document. It is USTR's preference that comments be provided in an attached document. If a document is attached, please type ''2012 Special 301 Review'' in the ''Type comment'' field. USTR prefers submissions in Microsoft Word® (.doc) or Adobe Acrobat® (.pdf) formats. If the submission is in application format other than Microsoft Word® or Adobe Acrobat® (.pdf), please indicate the name of the relevant application in the ''Type comment'' field.

**3. Public Hearing**

*a. Notice of Public Hearing*

The Special 301 Committee will hold a public hearing at the offices of USTR, 1724 F Street NW., Washington, DC 20508 for interested parties, including representatives of foreign governments, on February 23, 2012. The hearing will be open to the public, and a transcript of the hearing will be made available on *http://www.ustr.gov*. Any change in the date or location of the hearing will be announced on *http://www.ustr.gov*.

*b. Submission of Requests To Testify at the Public Hearing and Hearing Statements*

Oral testimony before the Special 301 Committee must be provided in person and in English. Each presentation of oral testimony will be limited to five minutes. Questions from the Special 301 Committee may follow oral testimony.

All interested parties, except foreign governments, wishing to testify at the hearing must submit, by February 10, 2012, a ''Notice of Intent to Testify'' and ''Hearing Statement'' to *http://www.regulations.gov* (following the procedures set forth in ''Requirements for Comments'' above). The Notice of Intent to Testify must include the name of the witness, name of the organization (if applicable), address, telephone number, fax number, and email address. A Hearing Statement must accompany the Notice of Intent to Testify.

All interested foreign governments who wish to testify at the hearing must submit, by February 17, 2012, a ''Notice of Intent to Testify'' to *http://www.regulations.gov* (following the procedures set forth in ''Requirements for Comments'' above). The Notice of Intent to Testify must include the name of the witness, name of the organization (if applicable), address, telephone number, fax number, and email address. A Hearing Statement may accompany the Notice of Intent to Testify.

**4. Business Confidential Information**

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such, the submission must be marked ''Business Confidential'' at the top and bottom of the cover page and each succeeding page, and the submission should indicate, via brackets, the specific information that is confidential. Additionally, ''Business Confidential'' should be included in the ''Type comment'' field. Anyone submitting a comment containing business confidential information must also submit as a separate submission a non-confidential version of the confidential submission, indicating where confidential information has been redacted. The non-confidential summary will be placed in the docket and open to public inspection.

**5. Inspection of Comments**

USTR will maintain a docket on the 2012 Special 301 Review, accessible to the public. The public file will include non-confidential comments, notices of intent to testify, and hearing statements received by USTR from the public, including foreign governments, with respect to the 2012 Special 301 Review. Comments will be placed in the docket and open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15. Comments may be viewed on the *http://www.regulations.gov* Web site by entering docket number USTR–2011–0021 in the search field on the home page.

**Stanford K. McCoy,**

*Assistant U.S. Trade Representative for Intellectual Property and Innovation.*

[FR Doc. 2011–33289 Filed 12–27–11; 8:45 am]

**BILLING CODE 3190–W2–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

### Release of Waybill Data

The Surface Transportation Board has received a request from the Association of American Railroads (WB463–14—12/7/11) for permission to use certain data from the Board's Carload Waybill Samples. A copy of this request may be obtained from the Office of Economics.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

*Contact:* Scott Decker, (202) 245–0330.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2011–33160 Filed 12–27–11; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

December 22, 2011.

The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

**DATES:** Comments should be received on or before January 27, 2012 to be assured of consideration.

**ADDRESSES:** Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 11020, Washington, DC 20220, or on-line at *www.PRAComment.gov.*

**FOR FURTHER INFORMATION CONTACT:** Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov,* or the entire information collection request maybe found at *www.reginfo.gov.*

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–0295.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Notice 210 Preparation Instruction for Media Labels.

*Abstract:* Notice 210, Preparation Instructions for Media Labels, instructs the filers on how to prepare their own pressure sensitive label. This label must be attached to each and every piece of magnetic media to identify specific items needed so that the media can be processed by the Internal Revenue Service.

*Affected Public:* Private Sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 12,765.

*OMB Number:* 1545–1002.

*Type of Review:* Revision of a currently approved collection.

*Title:* Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund.

*Form:* 8621.

*Abstract:* Form 8621 is filed by a U.S. shareholder who owns stock in a foreign investment company. The form is used to report income, make an election to extend the time for payment of tax, and to pay an additional tax and interest amount. The IRS uses Form 8621 to determine if these shareholders have correctly reported amounts of income, made the election correctly, and have correctly computed the additional tax and interest amount.

*Affected Public:* Private Sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 62,172.

*OMB Number:* 1545–1031.

*Type of Review:* Revision of a currently approved collection.

*Title:* Internet Computation Under the Look-Back Method for Completed Long-Term Contracts.

*Form:* 8697.

*Abstract:* Taxpayers required to account for all or part of any long-term contract entered into after February 28, 1986, under the percentage of completion method must use Form 8697 to compute and report interest due or to be refunded under IRC section 460(b)(3). The IRS uses Form 8697 to determine if the interest has been figured correctly. Taxpayers may compute interest using the actual method (Part I) or the Simplified Marginal Impact Method (Part II).

*Affected Public:* Private Sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 72,578.

*OMB Number:* 1545–1150.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Short Form Return of Organization Exempt From Income Tax.

Forms: 990–EZ and schedules.

*Abstract:* Form 990–EZ is needed to determine that IRS section 501(a) tax-exempt organizations fulfill the operating conditions within the limitations of their tax exemption. IRS uses the information from this form to determine if the filers are operating within the rules of their exemption.

*Affected Public:* Private Sector: Not-for-profit institutions.

*Estimated Total Burden Hours:* 43,656,636.

*OMB Number:* 1545–1418.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* REG–154000–04 Diesel Fuel and Kerosene Excise Tax; Dye Injection (NPRM).

*Abstract:* The regulations relate to the diesel fuel and kerosene excise tax and reflect changes made by the American Jobs Creation Act of 2004 (Act) regarding mechanical dye injection systems. Under the Act, diesel fuel and kerosene that are to be used in a nontaxable use must be indelibly dyed by use of a mechanical dye injection system that satisfies the requirements set forth in the regulations.

*Affected Public:* Private Sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 1,400.

*OMB Number:* 1545–1500.

*Type of Review:* Revision of a currently approved collection.

*Title:* Pre-Screening Notice and Certification Request for the Work Opportunity and Welfare-to-Work Credits.

*Form:* 8850.

*Abstract:* A job applicant completes and signs, under penalties of perjury, the top portion of the form to indicate that he or she is a member of a targeted group. If the employer has a belief that the applicant is a member of a targeted group, the employer signs the other portion of the form under penalties of perjury and submits it to their state workforce agency (SWA) as part of a written request for certification.

*Affected Public:* Private Sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 3,941,600.

*OMB Number:* 1545–1661.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* REG–106010–98 (Final) Qualified Lessee Construction Allowance for Short-Term Leases.

*Abstract:* The regulations provide guidance with respect to Sec. 110, which provides a safe harbor whereby it will be assumed that a construction allowance provided by a lessor to a lessee is used to construct or improve lessor property when long-term property is constructed or improved and used pursuant to a short-term lease. The regulations also provide a reporting requirement that ensures that both the lessee and lessor consistently treat the property subject to the construction allowance as nonresidential real property owned by the lessor.

*Affected Public:* Private Sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 10,000.

*OMB Number:* 1545–1686.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Material Advisors of Reportable Transactions Must Keep Lists of Advisee's, etc.; Requirement to Maintain Lists of Potentially Abusive Tax Shelters (T.D. 9352).

*Form:* 13976.

*Abstract:* The regulations provide guidance on the requirement under section 6112 to maintain a list of investors in potentially abusive tax shelters. Per section 301.6112–1(b)(1), the form provides material advisors a format for preparing and maintaining the itemized statement component of the list with respect to a reportable transaction. This form contains space for all of the elements required by regulations section 301.6112–1(b)(3)(i). Material advisors may use this form as a template for creating a similar form on a software program used by the material advisor. If a material advisor is required to maintain a list under a prior version of the regulations, this form may be modified or a similar form containing all the information required under the prior version of the regulations may be created and used.

*Affected Pubic:* Private Sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 50,000.

*OMB Number:* 1545–1791.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Tax Check Waiver.

*Forms:* 12339, 12339–B, 12339–C, 13775.

*Abstract:* The tax check waiver is necessary for the purpose of ensuring that all panel members are tax compliant. Information provided will be used to qualify or disqualify individuals to serve as panel members. The information will be used as appropriate by the Taxpayer Advocate service staff, and other appropriate IRS personnel.

*Affected Public:* Private Sector: Businesses or other for-profits; Individuals and Households.

*Estimated Total Burden Hours:* 492.

*OMB Number:* 1545–1910.

*Type of Review:* Revision of a currently approved collection.

*Title:* Information Return of U.S. Persons With Respect To Foreign Disregarded Entities (Form 8858); and Transactions Between Foreign Disregarded Entity of a Foreign Tax Owner and the Filer on Other Related Entities (Schedule M—Form 8858).

*Abstract:* Form 8858 and Schedule M (Form 8858) are used by certain U.S. persons that own a foreign disregarded entity (FDE) directly or, in certain circumstances, indirectly or constructively.

*Affected Public:* Private Sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 1,832,500.

*OMB Number:* 1545–1941.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Consumer Cooperative Exemption Application.

*Form:* 3491.

*Abstract:* A cooperative uses Form 3491 to apply for exemption from filing information returns (Forms 1099–PATR) on patronage distributions of $10 or more to any person during the calendar year.

*Affected Public:* Private Sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 148.

*OMB Number:* 1545–2103.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* REG–146895–05—Election to Expense Certain Refineries (Final).

*Abstract:* The regulations provide guidance with respect to section 179C, which provides a taxpayer can elect to treat 50% of the cost of ''qualified refiner property'' as a deductible expense not chargeable to capital account. The taxpayer may not claim a deduction under section 179C for any taxable year unless the taxpayer files a report with the Secretary containing information with respect to the operation of the taxpayer's refinery. The report must specify (i) The name and address of the refinery; (ii) which production capacity requirement under section 179C(e) the taxpayer's qualified refinery qualifies under; (iii) whether the production capacity requirements of section 179C(e)(1) or 179C(e)(2) have been met. The regulations also provide that if the taxpayer is a cooperative described in section 1381, and one or more persons directly holding an ownership interest in the taxpayer are organizations described in section 1381, the taxpayer/cooperative can elect to allocate all or a portion of the deduction allowable under section 179C to those persons. If the taxpayer cooperative makes such an election, it must provide written notice of the amount of the allocation to any owner receiving an allocation by written notice on Form 1099–PAT ''Taxable Distributions Received from Cooperatives.'' The collection of information in the regulations involves a written notice.

*Affected Public:* Private Sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 120.

*OMB Number:* 1545–2212.

*Type of Review:* Revision of a currently approved collection.

*Title:* IRS Taxpayer Burden Survey.

*Abstract:* The data collected from this survey of individual taxpayers will be used as an input to a micro-simulation model that estimates taxpayer burden. The IRS will also publish the relevant updated burden estimates in tax form instructions to inform taxpayers. Three types of questions will be asked: questions framing the activities to be measured, burden measurement questions, and questions to better inform taxpayer needs related to their compliance burden. The information collected via the IRS Burden Surveys will be used by IRS to support or achieve several important goals: (1) Fulfill its mission to provide top quality service to taxpayers; (2) Better understand taxpayer time and out-of-pocket burden; (3) Improve the accuracy and comparability of the information collection budget estimates it provides under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*); (4) Provide data to be used in micro-simulation models to allow estimation of the impact of proposed legislation on taxpayer burden before the legislation is enacted; (5) Support ongoing analysis of the role of compliance costs in influencing taxpayer behavior and identifying taxpayer needs; (6) Provide information to the Executives and Operating Divisions for assessing the impact of programs on taxpayer burden; (7) Support tax analysis in the Treasury Department Offices, and (8) Assist the IRS in evaluating the effectiveness and associated impact on taxpayer costs and behavior.

*Affected Public:* Private Sector: Businesses or other for-profits; Not-for-profit institutions, Individuals and Households.

*Estimated Total Burden Hours:* 16,824.

**Dawn D. Wolfgang,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2011–33274 Filed 12–27–11; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

December 22, 2011

The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

**DATES:** Comments should be received on or before January 27, 2012 to be assured of consideration.

**ADDRESSES:** Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at OIRA_Submission@OMB.EOP.GOV and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 11020, Washington, DC 20220, or on-line at *www.PRAComment.gov.*

**FOR FURTHER INFORMATION CONTACT:** Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov*, or the entire information collection request maybe found at *www.reginfo.gov.*

### Office of Foreign Assets Control

*OMB Number:* 1505–0168.

*Type of Review:* Revision a currently approved collection.

*Title:* Travel Service Provider and Carrier Service Provider Submission.

*Abstract:* The information is required of persons who have been authorized by the Office of Foreign Assets Control of the Department of the Treasury (OFAC) to handle travel arrangements to, from, and or within Cuba or to provide charter air service to Cuba. Travel service providers are required to collect information on persons traveling on direct flights to Cuba and forward that information to carrier service providers, for ultimate submission to OFAC.

*Affected Public:* Private Sector: Businesses or other for-profits; Individuals and Households.

*Estimated Total Annual Burden Hours:* 33,334.

**Dawn D. Wolfgang,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2011–33277 Filed 12–27–11; 8:45 am]

BILLING CODE 4810–25–P

# FEDERAL REGISTER

Vol. 76 Wednesday,

No. 249 December 28, 2011


Part II

## Federal Communications Commission

47 CFR Parts 0, 1, 20, et al.
Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Final Rule

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Parts 0, 1, 20, 36, 51, 54, 61, 64, and 69**

**[WC Docket Nos. 10–90, 07–135, 05–337, 03–109; GN Docket No. 09–51; CC Docket Nos. 01–92, 96–45; WT Docket No. 10–208; FCC 11–161]**

# Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; policy statement.

**SUMMARY:** In a rule published November 29, 2011, the Federal Communications Commission (Commission) comprehensively reformed and modernized the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation. The Commission adopted fiscally responsible, accountable, incentive-based policies to transition these outdated systems to the Connect America Fund, ensuring fairness for consumers and addressing the communications infrastructure challenges of today and tomorrow. The Commission uses measured but firm glide paths to provide industry with certainty and sufficient time to adapt to a changed regulatory landscape, and establish a framework to distribute universal service funding in the most efficient and technologically neutral manner possible, through market-based mechanisms such as competitive bidding. This document provides additional information to the final rule document published on November 29, 2011.

**DATES:** Effective December 29, 2011.

**FOR FURTHER INFORMATION CONTACT:** Amy Bender, Wireline Competition Bureau, (202) 418–1469, Victoria Goldberg, Wireline Competition Bureau, (202) 418–7353, and Margaret Wiener, Wireless Telecommunications Bureau, (202) 418–2176 or TTY: (202) 418–0484.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Report and Order (R&O) in WC Docket Nos. 10–90, 07–135, 05–337, 03–109; GN Docket No. 09–51; CC Docket Nos. 01–92, 96–45; WT Docket No. 10–208; FCC 11–161, released on November 18, 2011. The executive summary of the R&O, and the final rules adopted by the R&O were published in the **Federal Register** on November 29, 2011, 76 FR 73830. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street SW., Washington, DC 20554. Or at the following Internet address: *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.pdf.*

## I. Adoption of a New Principle for Universal Service

1. In November 2010, the Federal-State Joint Board on Universal Service (Joint Board) recommended that the Commission ''specifically find that universal service support should be directed where possible to networks that provide advanced services, as well as voice services,'' and adopt such a principle pursuant to its 47 U.S.C. 254(b)(7) authority. The Joint Board believes that this principle is consistent with 47 U.S.C. 254(b)(3) and would serve the public interest. The Commission agrees. 47 U.S.C. 254(b)(3) provides that consumers in rural, insular and high-cost areas should have access to ''advanced telecommunications and information services * * * that are reasonably comparable to those services provided in urban areas.'' 47 U.S.C. 254(b)(2) likewise provides that ''Access to advanced telecommunications and information services should be provided in all regions of the Nation.'' Providing support for broadband networks will further all of these goals.

2. Accordingly, the Commission adopts ''support for advanced services'' as an additional principle upon which the Commission will base policies for the preservation and advancement of universal service, and thereby act on one of the Joint Board's 2010 recommendations. For the reasons discussed above, the Commission finds, per 47 U.S.C. 254(b)(7), that this new principle is ''necessary and appropriate.'' Consistent with the Joint Board's recommendation, the Commission defines this principle as: ''Support for Advanced Services—Universal service support should be directed where possible to networks that provide advanced services, as well as voice services.''

## II. Goals

3. *Discussion.* The Commission adopts five performance goals to preserve and advance service in high cost, rural, and insular areas through the Connect America Fund and existing support mechanisms. The Commission also adopts performance measures for the first, second, and fifth of these goals, and direct the Wireline Competition Bureau and the Wireless Telecommunications Bureau (Bureaus) to further develop other measures. The Commission delegates authority to the Bureaus to finalize performance measures as appropriate consistent with these goals.

4. *Preserve and Advance Voice Service.* The first performance goal is to preserve and advance universal availability of voice service. In doing so, the Commission reaffirms its commitment to ensuring that all Americans have access to voice service while recognizing that, over time, voice service will increasingly be provided over broadband networks.

5. As a performance measure for this goal, the Commission will use the telephone penetration rate, which measures subscription to telephone service. The telephone penetration rate has historically been used by the Commission as a proxy for network deployment and, as a result, will be a consistent measure of the universal service program's effects. The Commission will also continue to use the Census Bureau's Current Population Survey (CPS) to collect data regarding telephone penetration. Although CPS data does not specifically break out wireless, VoIP, or over-the-top voice options available to consumers, a better data set is not currently available. In recognition of the limitations of existing data, the Commission is considering revising the types of data it collects, and the Commission anticipates further Commission action in this proceeding, which may provide more complete information that can be used to evaluate this performance goal.

6. *Ensure Universal Availability of Voice and Broadband to Homes, Businesses, and Community Anchor Institutions.* The second performance goal is to ensure the universal availability of modern networks capable of delivering broadband and voice service to homes, businesses, and community anchor institutions as now defined in 47 CFR 54.5. All Americans in all parts of the nation, including those in rural, insular, and high-cost areas, should have access to affordable modern communications networks capable of supporting the necessary applications that empower them to learn, work, create, and innovate. The Commission uses the term ''modern networks'' because supported equipment and services are expected to change over time to keep up with technological advancements.

7. As an outcome measure for this goal, the Commission will use the number of residential, business, and community anchor institution locations

that newly gain access to broadband service. As an efficiency measure, the Commission will use the change in the number of homes, businesses, and community anchor institutions passed or covered per million USF dollars spent. To collect data, the Commission will use the National Broadband Map and/or Form 477. The Commission will also require CAF recipients to report on the number of community anchor institutions that newly gain access to fixed broadband service as a result of CAF support. Although these measures are imperfect, the Commission believes that they are the best available. Other options, such as the Mercatus Centers' suggestion of using an assessment of what might have occurred without the programs, are not administratively feasible at this time. But the Bureaus are directed to revisit these measures at a later point, and to consider refinements and alternatives.

8. *Ensure Universal Availability of Mobile Voice and Broadband Where Americans Live, Work, or Travel.* The third performance goal is to ensure the universal availability of modern networks capable of delivering mobile broadband and voice service in areas where Americans live, work, or travel. Like the preceding parallel goal, the third performance goal is designed to help ensure that all Americans in all parts of the nation, including those in rural, insular, and high-cost areas, have access to affordable technologies that will empower them to learn, work, create, and innovate. But the Commission believes that ensuring universal advanced mobile coverage is an important goal on its own, and that the Commission will be better able track program performance if the Commission measures it separately.

9. The Commission declines to adopt performance measures for this goal at this time but direct the Wireless Telecommunications Bureau to develop one or more appropriate measures for this goal.

10. *Ensure Reasonably Comparable Rates for Broadband and Voice Services.* The fourth performance goal is to ensure that rates are reasonably comparable for voice as well as broadband service, between urban and rural, insular, and high cost areas. Rates must be reasonably comparable so that consumers in rural, insular, and high cost areas have meaningful access to these services.

11. The Commission also declines to adopt measures for this goal at this time. Although the Commission proposed one outcome measure and asked about others in the *USF/ICC Transformation NPRM,* 75 FR 26906, May 13, 2010, the Commission received only limited input on that proposal. The Mercatus Center agrees that ''[t]he ratio of prices to income is an intuitively sensible way of defining 'reasonably comparable''' but cautions that, again, the real challenge is crafting measures that distinguish how the programs affect rates apart from other factors. The Bureaus may seek to further develop the record on the performance and efficiency measures suggested by the Mercatus Center, the Commission's original proposals, and any other measures commenters think would be appropriate. In undertaking this analysis, the Commission directs the Bureau to develop separate measures for (1) broadband services for homes, businesses, and community anchor institutions; and (2) mobile services.

12. *Minimize Universal Service Contribution Burden on Consumers and Businesses.* The fifth performance goal is to minimize the overall burden of universal service contributions on American consumers and businesses. With this performance goal, the Commission seeks to balance the various objectives of 47 U.S.C. 254(b) of the Act, including the objective of providing support that is sufficient but not excessive so as to not impose an excessive burden on consumers and businesses who ultimately pay to support the Fund. As the Commission has previously recognized, ''if the universal service fund grows too large, it will jeopardize other statutory mandates, such as ensuring affordable rates in all parts of the country, and ensuring that contributions from carriers are fair and equitable.''

13. As a performance measure for this goal, the Commission will divide the total inflation-adjusted expenditures of the existing high-cost program and CAF (including the Mobility Fund) each year by the number of American households and express the measure as a monthly dollar figure. This calculation will be relatively straightforward and rely on publicly available data. As such, the measure will be transparent and easily verifiable. By adjusting for inflation and looking at the universal service burden, the Commission will be able to determine whether the overall burden of universal service contribution costs is increasing or decreasing for the typical American household. As an efficiency measure, the Mercatus Center suggests comparing the estimate of economic deadweight loss associated with the contribution mechanism to the deadweight loss associated with taxation. The Commission anticipates that the Bureaus may seek further input on this option and any others commenters believe would be appropriate.

14. *Program Review.* Using the adopted goals and measures, the Commission will, as required by GPRA, monitor the performance of the universal service program as the Commission modernizes the current high-cost program and transition to the CAF. If the programs are not meeting these performance goals, the Commission will consider corrective actions. Likewise, to the extent that the adopted measures do not help us assess program performance, the Commission will revisit them as well.

## III. Legal Authority

15. *47 U.S.C. 254.* The principle that all Americans should have access to communications services has been at the core of the Commission's mandate since its founding. Congress created this Commission in 1934 for the purpose of making ''available * * * to all the people of the United States * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.'' In the 1996 Act, Congress built upon that longstanding principle by enacting 47 U.S.C. 254. Section 254 of the Act sets forth six principles upon which the Commission must ''base policies for the preservation and advancement of universal service.'' Among these principles are that ''[q]uality services should be available at just, reasonable, and affordable rates,'' that ''[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation,'' and that ''[c]onsumers in all regions of the Nation * * * should have access to telecommunications and information services, including * * * advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas'' and at reasonably comparable rates.

16. Under 47 U.S.C. 254, the Commission has express statutory authority to support telecommunications services that the Commission has designated as eligible for universal service support. Section 254(c)(1) of the Act defines ''[u]niveral service'' as ''an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.'' As discussed more fully below, in this R&O, the Commission adopts the proposal to simplify how the Commission describes the various

supported services that the Commission historically has defined in functional terms (*e.g.,* voice grade access to the PSTN, access to emergency services) into a single supported service designated as ''voice telephony service.'' To the extent carriers offer traditional voice telephony services as telecommunications services over traditional circuit-switched networks, the authority to provide support for such services is well established.

17. Increasingly, however, consumers are obtaining voice services not through traditional means but instead through interconnected VoIP providers offering service over broadband networks. As AT&T notes, ''[c]ircuit-switched networks deployed primarily for voice service are rapidly yielding to packet-switched networks,'' which offer voice as well as other types of services.'' The data bear this out. As the Commission observed in the *USF/ICC Transformation NPRM,* ''[f]rom 2008 to 2009, interconnected VoIP subscriptions increased by 22 percent, while switched access lines decreased by 10 percent.'' Interconnected VoIP services, among other things, allow customers to make real-time voice calls to, and receive calls from, the PSTN, and increasingly appear to be viewed by consumers as substitutes for traditional voice telephone services. Our authority to promote universal service in this context does not depend on whether interconnected VoIP services are telecommunications services or information services under the Communications Act.

18. Section 254 grants the Commission the authority to support not only voice telephony service but also the facilities over which it is offered. Section 254(e) makes clear that ''[a] carrier that receives such [universal service] support shall use that support only for the provision, maintenance, and upgrading of *facilities and services* for which the support is intended.'' By referring to ''facilities'' and ''services'' as distinct items for which federal universal service funds may be used, the Commission believes Congress granted the Commission the flexibility not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in 47 U.S.C. 254(b) and any other universal service principle that the Commission may adopt under 47 U.S.C. 254(b)(7). For instance, under the longstanding ''no barriers'' policy, the Commission allows carriers receiving high-cost support ''to invest in infrastructure capable of providing access to advanced services'' as well as supported voice services. That policy furthers the policy Congress set forth in 47 U.S.C. 254(b) of ''ensuring access to advanced telecommunications and information services throughout the nation.'' While this policy was enunciated in an Order adopting rule changes for rural incumbent carriers, by its terms it is not limited to such carriers. The ''no-barriers'' policy has applied, and will continue to apply, to all eligible telecommunications carriers (ETCs), and the Commission codifies it in the rules. Section 254(e) thus contemplates that carriers may receive federal support to enable the deployment of broadband facilities used to provide supported telecommunications services as well as other services.

19. The Commission further concludes that the authority under 47 U.S.C. 254 allows the Commission to go beyond the ''no barriers'' policy and require carriers receiving federal universal service support to invest in modern broadband-capable networks. Nothing in 47 U.S.C. 254 requires the Commission simply to provide federal funds to carriers and hope that they will use such support to deploy broadband facilities. To the contrary, the Commission has a ''mandatory duty'' to adopt universal service policies that advance the principles outlined in 47 U.S.C. 254(b), and the Commission has the authority to ''create some inducement'' to ensure that those principles are achieved. Congress made clear in 47 U.S.C. 254 that the deployment of, and access to, information services—including ''advanced'' information services—are important components of a robust and successful federal universal service program. Furthermore, the Commission adopts the recommendation of the Federal-State Joint Board on Universal Service to establish a new universal service principle pursuant to 47 U.S.C. 254(b)(7) that universal service support should be directed where possible to networks that provide advanced services, as well as voice services.'' In today's communications environment, achievement of these principles requires, at a minimum, that carriers receiving universal service support invest in and deploy networks capable of providing consumers with access to modern broadband capabilities, as well as voice telephony services. Accordingly, as explained in greater detail below, the Commission will exercise the authority under 47 U.S.C. 254 to require that carriers receiving support—both CAF support, including Mobility Fund support, and support under the existing high-cost support mechanisms—offer broadband capabilities to consumers. The Commission concludes that this approach is sufficient to ensure access to voice and broadband services and, therefore, the Commission does not, at this time, add broadband to the list of supported services, as some have urged.

20. *47 U.S.C. 1302.* The Commission also has independent authority under 47 U.S.C. 1302 of the Telecommunications Act of 1996 to fund the deployment of broadband networks. In 47 U.S.C. 1302, Congress recognized the importance of ubiquitous broadband deployment to Americans' civic, cultural, and economic lives and, thus, instructed the Commission to ''encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'' Of particular importance, Congress adopted a definition of ''advanced telecommunications capability'' that is not confined to a particular technology or regulatory classification. Rather, '''advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video communications using any technology.'' Section 1302 of the Act further requires the Commission to ''determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion'' and, if the Commission concludes that it is not, to ''*take immediate action* to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.'' The Commission has found that broadband deployment to all Americans has not been reasonable and timely and observed in its most recent broadband deployment report that ''too many Americans remain unable to fully participate in our economy and society because they lack broadband.'' This finding triggers the duty under 47 U.S.C. 1302(b) to ''remov[e] barriers to infrastructure investment'' and ''promot[e] competition in the telecommunications market'' in order to accelerate broadband deployment throughout the Nation.

21. Providing support for broadband networks helps achieve 47 U.S.C. 1302(b)'s objectives. First, the Commission has recognized that one of the most significant barriers to investment in broadband infrastructure

is the lack of a ''business case for operating a broadband network'' in high-cost areas ''[i]n the absence of programs that provide additional support.'' Extending federal support to carriers deploying broadband networks in high-cost areas will thus eliminate a significant barrier to infrastructure investment and accelerate broadband deployment to unserved and underserved areas of the Nation. The deployment of broadband infrastructure to all Americans will in turn make services such as interconnected VoIP service accessible to more Americans.

22. Second, supporting broadband networks helps ''promot[e] competition in the telecommunications market,'' particularly with respect to voice services. As the Commission has long recognized, ''interconnected VoIP service 'is increasingly used to replace analog voice service.''' Thus, the Commission previously explained that requiring interconnected VoIP providers to *contribute* to federal universal service support mechanisms promoted competitive neutrality because it ''reduces the possibility that carriers with universal service obligations will compete directly with providers without such obligations.'' Just as ''we do not want contribution obligations to shape decisions regarding the technology that interconnected VoIP providers use to offer voice services to customers or to create opportunities for regulatory arbitrage,'' the Commission does not want to create regulatory distinctions that serve no universal service purpose or that unduly influence the decisions providers will make with respect to how best to offer voice services to consumers. The ''telecommunications market''—which includes interconnected VoIP and by statutory definition is broader than just telecommunications services—will be more competitive, and thus will provide greater benefits to consumers, as a result of the decision to support broadband networks, regardless of regulatory classification.

23. By exercising the authority under 47 U.S.C. 1302 in this manner, the Commission furthers Congress's objective of ''accelerat[ing] deployment'' of advanced telecommunications capability ''to all Americans.'' Under the approach, federal support will not turn on whether interconnected VoIP services or the underlying broadband service falls within traditional regulatory classifications under the Communications Act. Rather, the approach focuses on accelerating broadband deployment to unserved and underserved areas, and allows providers to make their own judgments as to how best to structure their service offerings in order to make such deployment a reality.

24. The Commission disagrees with commenters who assert that the Commission lacks authority under 47 U.S.C. 1302(b) to support broadband networks. While 47 U.S.C. 1302(a) imposes a general duty on the Commission to encourage broadband deployment through the use of ''price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,'' 47 U.S.C. 1302(b) is triggered by a specific finding that broadband capability is not being ''deployed to all Americans in a reasonable and timely fashion.'' Upon making that finding (which the Commission has done), 47 U.S.C. 1302(b) requires the Commission to ''take immediate action to accelerate'' broadband deployment. Given the statutory structure, the Commission reads 47 U.S.C. 1302(b) as conferring on the Commission the additional authority, beyond what the Commission possesses under 47 U.S.C. 1302(a) or elsewhere in the Act, to take steps necessary to fulfill Congress's broadband deployment objectives. Indeed, it is hard to see what additional work 47 U.S.C. 1302(b) does if it is not an independent source of statutory authority.

25. The Commission also rejects the view that providing support for broadband networks under 47 U.S.C. 1302(b) conflicts with 47 U.S.C. 254, which defines universal service in terms of telecommunications services. Information services are not excluded from 47 U.S.C. 254 because of any policy judgment made by Congress. To the contrary, Congress contemplated that the federal universal service program would promote consumer access to both advanced telecommunications and advanced information services ''in all regions of the Nation.'' When Congress enacted the 1996 Act, most consumers accessed the Internet through dial-up connections over the PSTN, and broadband capabilities were provided over tariffed common carrier facilities. Interconnected VoIP services had only a nominal presence in the marketplace in 1996. It was not until 2002 that the Commission first determined that one form of broadband—cable modem service—was a single offering of an information service rather than separate offerings of telecommunications and information services, and only in 2005 did the Commission conclude that wireline broadband service should be governed by the same regulatory classification. Thus, marketplace and technological developments and the Commission's determinations that broadband services may be offered as information services have had the effect of removing such services from the scope of the explicit reference to ''universal service'' in 47 U.S.C. 254(c). Likewise, Congress did not exclude interconnected VoIP services from the federal universal service program; indeed, there is no reason to believe it specifically anticipated the development and growth of such services in the years following the enactment of the 1996 Act.

26. The principles upon which the Commission ''shall base policies for the preservation and advancement of universal service'' make clear that supporting networks used to offer services that are or may be information services for purposes of regulatory classification is consistent with Congress's overarching policy objectives. For example, 47 U.S.C. 254(b)(2)'s principle that ''[a]ccess to advanced telecommunications and *information services* should be provided in all regions of the Nation'' dovetails comfortably with 47 U.S.C. 1302(b)'s policy that ''advanced telecommunications capability [be] deployed to all Americans in a reasonable and timely fashion.'' Our decision to exercise authority under 47 U.S.C. 1302 does not undermine 47 U.S.C. 254's universal service principles, but rather ensures their fulfillment. By contrast, limiting federal support based on the regulatory classification of the services offered over broadband networks as telecommunications services would exclude from the universal service program providers who would otherwise be able to deploy broadband infrastructure to consumers. The Commission sees no basis in the statute, the legislative history of the 1996 Act, or the record of this proceeding for concluding that such a constricted outcome would promote the Congressional policy objectives underlying 47 U.S.C. 254 and 1302.

27. Finally, the Commission notes the limited extent to which the Commission is relying on 47 U.S.C. 706(b) in this proceeding. Consistent with the longstanding policy of minimizing regulatory distinctions that serve no universal service purpose, the Commission is not adopting a separate universal service framework under 47 U.S.C. 1302(b). Instead, the Commission is relying on 47 U.S.C. 1302(b) as an alternative basis to 47 U.S.C. 254 to the extent necessary to ensure that the

federal universal service program covers services and networks that could be used to offer information services as well as telecommunications services. Carriers seeking federal support must still comply with the same universal service rules and obligations set forth in 47 U.S.C. 254 and 214, including the requirement that such providers be designated as eligible to receive support, either from state commissions or, if the provider is beyond the jurisdiction of the state commission, from this Commission. In this way, the Commission ensures that exercise of 47 U.S.C. 1302(b) authority will advance, rather than detract from, the universal service principles established under 47 U.S.C. 254 of the Act.

## IV. Public Interest Obligations

### *A. Voice Service*

28. *Discussion.* The Commission determines that it is appropriate to describe the core functionalities of the supported services as ''voice telephony service.'' Some commenters support redefining the voice functionalities as voice telephony services, while others oppose the change, arguing that the current list of functionalities remains important today, the term ''voice telephony'' is too vague, and such a modification may result in a lower standard of voice service. Given that consumers are increasingly obtaining voice services over broadband networks as well as over traditional circuit switched telephone networks, the Commission agrees with commenters that urge the Commission to focus on the functionality offered, not the specific technology used to provide the supported service.

29. The decision to classify the supported services as voice telephony should not result in a lower standard of voice service: Many of the enumerated services are universal today, and the Commission requires eligible providers to continue to offer those particular functionalities as part of voice telephony. Rather, the modified definition simply shifts to a technologically neutral approach, allowing companies to provision voice service over any platform, including the PSTN and IP networks. This modification will benefit both providers (as they may invest in new infrastructure and services) and consumers (who reap the benefits of the new technology and service offerings). Accordingly, to promote technological neutrality while ensuring that the new approach does not result in lower quality offerings, the Commission amends 47 CFR 54.101 of the Commission rules to specify that the functionalities of eligible voice telephony services include voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; toll limitation to qualifying low-income consumers; and access to the emergency services 911 and enhanced 911 services to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems. The Commission finds that changes in the marketplace allow for the elimination of the requirements to provide single-party service, operator services, and directory assistance.

30. Today, all ETCs, whether designated by a state commission or this Commission, are required to offer the supported service—voice telephony service—throughout their designated service area. ETCs also must provide Lifeline service throughout their designated service area. In the *USF/ICC Transformation FNPRM,* the Commission seeks comment on modifying incumbent ETCs' obligations to provide voice service in situations where the incumbent's high-cost universal service funding is eliminated, for example as a result of a competitive bidding process in which another ETC wins universal support for an area and is subject to accompanying voice and broadband service obligations. (Throughout this R&O, unless otherwise specified, the term ''ETC'' does not include ETCs that are designated only for the purposes of the low income program.)

31. As a condition of receiving support, the Commission requires ETCs to offer voice telephony as a standalone service throughout their designated service area, meaning that consumers must not be required to purchase any other services (*e.g.,* broadband) in order to purchase voice service. As indicated above, ETCs may use any technology in the provision of voice telephony service.

32. Additionally, consistent with the 47 U.S.C. 254(b) principle that ''[c]onsumers in all regions of the Nation * * * should have access to telecommunications and information services * * * that are available at rates that are reasonably comparable to rates charged for similar services in urban areas,'' ETCs must offer voice telephony service, including voice telephony service offered on a standalone basis, at rates that are reasonably comparable to urban rates. The Commission finds that these requirements are appropriate to help ensure that consumers have access to voice telephony service that best fits their particular needs.

33. The Commission declines to preempt state obligations regarding voice service, including COLR obligations, at this time. Proponents of such preemption have failed to support their assertion that state service obligations are inconsistent with federal rules and burden the federal universal service mechanisms, nor have they identified any specific legacy service obligations that represent an unfunded mandate that make it infeasible for carriers to deploy broadband in high-cost areas. Carriers must therefore continue to satisfy state voice service requirements.

34. That said, the Commission encourages states to review their respective regulations and policies in light of these changes and revisit the appropriateness of maintaining those obligations for entities that no longer receive federal high-cost universal service funding, just as the Commission intends to explore the necessity of maintaining ETC obligations when ETCs no longer are receiving funding. For example, states could consider providing state support directly to the incumbent LEC to continue providing voice service in areas where the incumbent is no longer receiving federal high-cost universal service support or, alternatively, could shift COLR obligations from the existing incumbent to another provider who is receiving federal or state universal service support in the future.

35. *Voice Rates.* The Commission will consider rural rates for voice service to be ''reasonably comparable'' to urban voice rates under 47 U.S.C. 254(b)(3) if rural rates fall within a reasonable range of urban rates for reasonably comparable voice service. Consistent with the existing precedent, the Commission will presume that a voice rate is within a reasonable range if it falls within two standard deviations above the national average.

36. Because the data used to calculate the national average price for voice service is out of date, the Commission directs the Wireline Competition Bureau and the Wireless Telecommunications Bureau to develop and conduct an annual survey of voice rates in order to compare urban voice rates to the rural voice rates that ETCs will be reporting to us. The results of this survey will be published annually. For purposes of conducting the survey, the Bureaus should develop a methodology to survey a representative sample of facilities-based fixed voice service providers taking into account the relative categories of fixed voice providers as determined in the most recent FCC Form 477 data collection. In the *USF/*

*ICC Transformation FNPRM,* the Commission seeks comment on whether to collect separate data on fixed and mobile voice rates and whether fixed and mobile voice services should have different benchmarks for purposes of determining reasonable comparability.

*B. Broadband Service*

37. As a condition of receiving federal high-cost universal service support, all ETCs, whether designated by a state commission or the Commission, will be required to offer broadband service in their supported area that meets certain basic performance requirements and to report regularly on associated performance measures. Although the Commission does not at this time require it, the Commission expects that ETCs that offer standalone broadband service in any portion of their service territory will also offer such service in all areas that receive CAF support. By standalone service, the Commission means that consumers are not required to purchase any other service (*e.g.,* voice or video) in order to purchase broadband service. ETCs must make this broadband service available at rates that are reasonably comparable to offerings of comparable broadband services in urban areas.

38. In developing these performance requirements, the Commission seeks to ensure that the performance of broadband available in rural and high cost areas is ''reasonably comparable'' to that available in urban areas. All Americans should have access to broadband that is capable of enabling the kinds of key applications that drive efforts to achieve universal broadband, including education (*e.g.,* distance/online learning), health care (*e.g.,* remote health monitoring), and person-to-person communications (*e.g.,* VoIP or online video chat with loved ones serving overseas).

1. Broadband Performance Metrics

39. Broadband services in the market today vary along several important dimensions. As discussed more fully below, the Commission focuses on speed, latency, and capacity as three core characteristics that affect what consumers can do with their broadband service, and the Commission therefore includes requirements related to these three characteristics in defining ETCs' broadband service obligations.

40. For each of these characteristics, the Commission requires that funding recipients offer service that is reasonably comparable to comparable services offered in urban areas. By limiting reasonable comparability to ''comparable services,'' the Commission is intending to ensure that fixed broadband services in rural areas are compared to fixed broadband services in urban areas and mobile broadband services in rural areas are compared to mobile broadband services in rural areas. The actual download and upload speeds, latency, and usage limits (if any) for providers' broadband must be reasonably comparable to the typical speeds, latency, and usage limits (if any) of comparable broadband services in urban areas. Funding recipients may use any wireline, wireless, terrestrial, or satellite technology, or combination of technologies, to deliver service that satisfies this requirement.

41. *Speed.* Users and providers commonly refer to the bandwidth of a broadband connection as its ''speed.'' The bandwidth (speed) of a connection indicates the rate at which information can be transmitted by that connection, typically measured in bits, kilobits (kbps), or megabits per second (Mbps). The speed of consumers' broadband connections affects their ability to access and utilize Internet applications and content. To ensure that consumers are getting the full benefit of broadband, the Commission requires funding recipients to provide broadband that meets performance metrics for actual speeds, measured as described below, rather than ''advertised'' or ''up to'' metrics.

42. In the past two Broadband Progress Reports, the Commission found that the availability of residential broadband connections that actually enable an end user to download content from the Internet at 4 Mbps and to upload such content at 1 Mbps over the broadband provider's network was a reasonable benchmark for the availability of ''advanced telecommunications capability,'' defined by the statute as ''high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.'' This conclusion was based on the Commission's examination of overall Internet traffic patterns, which revealed that consumers increasingly are using their broadband connections to view high-quality video, and want to be able to do so while still using basic functions such as email and web browsing. The evidence shows that streaming standard definition video in near real-time consumes anywhere from 1–5 Mbps, depending on a variety of factors. This conclusion also was drawn from the National Broadband Plan, which, based on an analysis of user behavior, demands this usage places on the network, and recent experience in network evolution, recommended as a national broadband availability target that every household in America have access to affordable broadband service offering actual download speeds of at least 4 Mbps and actual upload speeds of at least 1 Mbps.

43. Given the foregoing, other than for the Phase I Mobility Fund, the Commission adopts an initial minimum broadband speed benchmark for CAF recipients of 4 Mbps downstream and 1 Mbps upstream. Broadband connections that meet this speed threshold will provide subscribers in rural and high cost areas with the ability to use critical broadband applications in a manner reasonably comparable to broadband subscribers in urban areas. Requiring 4 Mbps/1 Mbps to be provided to all locations, including the more distant locations on a landline network and regardless of the served location's position in a wireless network, implies that customers located closer to the wireline switch or wireless tower will be capable of receiving service in excess of the this minimum standard.

44. Some commenters, including DSL and mobile wireless broadband providers, observe that the 1 Mbps upload speed requirement in particular could impose costs well in excess of the benefits of 1 Mbps versus 768 kilobits per second (kbps) upstream. In general, the Commission expects new installations to provide speeds of at least 1 Mbps upstream. However, to the extent a CAF recipient can demonstrate that support is insufficient to enable 1 Mbps upstream for all locations, temporary waivers of the upstream requirement for some locations will be available. The Commission delegates authority to the Wireline Competition Bureau and Wireless Telecommunications Bureau to address such waiver requests. The Commission expects that those facilities that are not currently capable of providing the minimum upstream speed will eventually be upgraded, consistent with the build-out requirements adopted below, with scalable technology capable of meeting future speed increases.

45. *Latency.* Latency is a measure of the time it takes for a packet of data to travel from one point to another in a network. Because many communication protocols depend on an acknowledgement that packets were received successfully, or otherwise involve transmission of data packets back and forth along a path in the network, latency is often measured by round-trip time in milliseconds. Latency affects a consumer's ability to use real-time applications, including interactive

voice or video communication, over the network. The Commission requires ETCs to offer sufficiently low latency to enable use of real-time applications, such as VoIP. The Commission's broadband measurement test results showed that most terrestrial wireline technologies could reliably provide latency of less than 100 milliseconds.

46. *Capacity.* Capacity is the total volume of data sent and/or received by the end user over a period of time. It is often measured in gigabytes (GB) per month. Several broadband providers have imposed monthly data usage limits, restricting users to a predetermined quantity of data, and these limits typically vary between fixed and mobile services. The terms of service may include an overage fee if a consumer exceeds the monthly limit. Some commenters recommended the Commission specifies a minimum usage limit.

47. Although at this time the Commission declines to adopt specific minimum capacity requirements for CAF recipients, the Commission emphasizes that any usage limits imposed by an ETC on its USF-supported broadband offering must be reasonably comparable to usage limits for comparable broadband offerings in urban areas (which could include, for instance, use of a wireless data card if it can provide the performance characteristics described herein). In particular, ETCs whose support is predicated on offering of a fixed broadband service—namely, all ETCs other than recipients of the Phase I Mobility Funds—must allow usage at levels comparable to residential terrestrial fixed broadband service in urban areas. The Commission defines terrestrial fixed broadband service as one that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer or other Internet access device to the network. This term includes fixed wireless broadband services (including those offered over unlicensed spectrum).

48. In 2009, residential broadband users who subscribed to fixed broadband service with speeds between 3 Mbps and 5 Mbps used, on average, 10 GB of capacity per month, and annual per-user growth was between 30 and 35 percent. AT&T's DSL usage limit is 150 GB and its U-Verse offering has a 250 GB limit. Since 2008, Comcast has had a 250 GB monthly data usage threshold on residential accounts. Without endorsing or approving of these or other usage limits, the Commission provides guidance by noting that a usage limit significantly below these current offerings (*e.g.,* a 10 GB monthly data limit) would not be reasonably comparable to residential terrestrial fixed broadband in urban areas. (This should not be interpreted to mean that the Commission intends to regulate usage limits.) A 250 GB monthly data limit for CAF-funded fixed broadband offerings would likely be adequate at this time because 250 GB appears to be reasonably comparable to major current urban broadband offerings. The Commission recognizes, however, that both pricing and usage limitations change over time. The Commission delegates authority to the Wireline Competition Bureau and Wireless Telecommunications Bureau to monitor urban broadband offerings, including by conducting an annual survey, in order to specify an appropriate minimum for usage allowances, and to adjust such a minimum over time.

49. Similarly, for Mobility Fund Phase I, the Commission declines to adopt a specific minimum capacity requirement that supported providers must offer mobile broadband users. However, the Commission emphasizes that any usage limits imposed by a provider on its mobile broadband offerings supported by the Mobility Fund must be reasonably comparable to any usage limits for mobile comparable broadband offerings in urban areas.

50. *Areas with No Terrestrial Backhaul.* Recognizing that satellite backhaul may limit the performance of broadband networks as compared to terrestrial backhaul, the Commission relaxes the broadband public interest obligation for carriers providing fixed broadband that are compelled to use satellite backhaul facilities. The Regulatory Commission of Alaska reports that ''for many areas of Alaska, satellite links may be the only viable option to deploy broadband.'' Carriers seeking relaxed public interest obligations because they lack the ability to obtain terrestrial backhaul—either fiber, microwave, or other technology—and are therefore compelled to rely exclusively on satellite backhaul in their study area, must certify annually that no terrestrial backhaul options exist, and that they are unable to satisfy the broadband public interest obligations adopted above due to the limited functionality of the available satellite backhaul facilities. Any such funding recipients must offer broadband service speeds of at least 1 Mbps downstream and 256 kbps upstream within the supported area served by satellite middle-mile facilities. Latency and capacity requirements discussed above will not apply to this subset of providers. Buildout obligations—which are dependent on the mechanism by which a carrier receives funding—remain the same for this class of carriers. The Commission will monitor and review the public interest obligations for satellite backhaul areas. To the extent that new terrestrial backhaul facilities are constructed, or existing facilities improve sufficiently to meet the public interest obligations, the Commission requires funding recipients to satisfy the relevant broadband public interest obligations in full within twelve months of the new backhaul facilities becoming commercially available. This limited exemption is only available to providers that have no access in their study area to any terrestrial backhaul facilities, and does not apply to any providers that object to the cost of backhaul facilities. Similarly, providers relying on terrestrial backhaul facilities today will not be allowed this exemption if they elect to transition to satellite backhaul facilities.

51. *Community Anchor Institutions.* The Commission expects that ETCs will likely offer broadband at greater speeds to community anchor institutions in rural and high cost areas, although the Commission does not set requirements at this time, as the 4 Mbps/1 Mbps standard will be met in the more rural areas of an ETC's service territory, and community anchor institutions are typically located in or near small towns and more inhabited areas of rural America. There is nothing in this R&O that requires a carrier to provide broadband service to a community anchor institution at a certain rate, but the Commission acknowledges that community anchor institutions generally require more bandwidth than a residential customer, and expect that ETCs would provide higher bandwidth offerings to community anchor institutions in high-cost areas at rates that are reasonably comparable to comparable offerings to community anchor institutions in urban areas.

52. The Commission also expects ETCs to engage with community anchor institutions in the network planning stages with respect to the deployment of CAF-supported networks. The Commission requires ETCs to identify and report on the community anchor institutions that newly gain access to fixed broadband service as a result of CAF support. In addition, the Wireline Competition Bureau will invite further input on the unique needs of community anchor institutions as it develops a forward-looking cost model to estimate the cost of serving locations, including community anchor locations, in price cap territories.

53. *Broadband Buildout Obligations.* All CAF funding comes with obligations to build out broadband within an ETC's service area, subject to certain limitations. The timing and extent of these obligations varies across the different CAF mechanisms. However, all broadband buildout obligations for fixed broadband are conditioned on not spending the funds to serve customers in areas already served by an ''unsubsidized competitor.'' The Commission defines an unsubsidized competitor as a facilities-based provider of residential terrestrial fixed voice and broadband service. The best data available at this time to determine whether broadband is available from an unsubsidized competitor at speeds at or above the 4 Mbps/1 Mbps speed threshold will likely be data on broadband availability at 3 Mbps downstream and 768 kbps upstream, which is collected for the National Broadband Map and through the Commission's Form 477. Such data may therefore be used as a proxy for the availability of 4 Mbps/1 Mbps broadband. Depending on the anticipated reform to the Form 477 data collection, the Commission may have additional data in the future upon which the Commission may rely.

54. The Commission limits this definition to fixed, terrestrial providers because the Commission thinks these limitations will disqualify few, if any, broadband providers that meet CAF speed, capacity, or latency minimums for all locations within relevant areas of comparison, while significantly easing administration of the definition. For example, the record suggests that satellite providers are generally unable to provide affordable voice and broadband service that meets the minimum capacity requirements without the aid of a subsidy: Consumer satellite services have limited capacity allowances today, and future satellite services appear unlikely to offer capacity reasonably comparable to urban offerings in the absence of universal service support. Likewise, while 4G mobile broadband services may meet the speed requirements in many locations, meeting minimum speed and capacity guarantees is likely to prove challenging over larger areas, particularly indoors. And because the performance offered by mobile services varies by location, it would be very difficult and costly for a CAF recipient or the Commission to evaluate whether such a service met the performance requirements at all homes and businesses within a study area, census block, or other required area. A wireless provider that currently offers mobile service can become an ''unsubsidized competitor,'' however, by offering a fixed wireless service that guarantees speed, capacity, and latency minimums will be met at all locations with the relevant area. Taken together, these considerations persuade us that the advantages of limiting the definition of unsubsidized providers outweigh any potential concerns that the Commission may unduly disqualify service providers that otherwise meet the performance requirements. As mobile and satellite services develop over time, the Commission will revisit the definition of ''unsubsidized competitor'' as warranted. Recognizing the benefits of certainty, however, the Commission does not anticipate changing the definition for the next few years.

55. Because most of these funding mechanisms are aimed at immediately narrowing broadband deployment gaps, both fixed and mobile, their performance benchmarks reflect technical capabilities and user needs that are expected at this time to be suitable for today and the next few years. However, the Commission must also lay the groundwork for longer-term evolution of CAF broadband obligations, as the Commission expects technical capabilities and user needs will continue to evolve. The Commission therefore commits to monitoring trends in the performance of urban broadband offerings through the survey data the Commission will collect and rural broadband offerings through the reporting data the Commission will collect, and to initiating a proceeding no later than the end of 2014 to review the performance requirements and ensure that CAF continues to support broadband service that is reasonably comparable to broadband service in urban areas.

56. In advance of that future proceeding, the Commission relies on its predictive judgment to provide guidance to CAF recipients on metrics that will satisfy the expectation that they invest the public's funds in robust, scalable broadband networks. The National Broadband Plan estimated that by 2017, average advertised speeds for residential broadband would be approximately 5.76 Mbps downstream. Applying growth rates measured by Akamai, one finds a projected average actual downstream speed by 2017 of 5.2 Mbps, and a projected average actual peak downstream speed of 6.86 Mbps.

57. Based on these projections, the Commission establishes a benchmark of 6 Mbps downstream and 1.5 Mbps upstream for broadband deployments in later years of CAF Phase II.

2. Measuring and Reporting Broadband

58. The Commission will require recipients of funding to test their broadband networks for compliance with speed and latency metrics and certify to and report the results to the Universal Service Administrative Company (USAC) on an annual basis. These results will be subject to audit. In addition, as part of the federal-state partnership for universal service, the Commission expects and encourage states to assist us in monitoring and compliance and therefore require funding recipients to send a copy of their annual broadband performance report to the relevant state or Tribal government.

59. Commenters generally supported testing and reporting of broadband performance. While some preferred only certifications without periodic testing, the Commission finds that requiring ETCs to submit verifiable test results to USAC and the relevant state commissions will strengthen the ability of this Commission and the states to ensure that ETCs that receive universal service funding are providing at least the minimum broadband speeds, and thereby using support for its intended purpose as required by 47 U.S.C. 254(e).

60. The Commission adopts the proposal in the *USF/ICC Transformation NPRM* that actual speed and latency be measured on each ETC's access network from the end-user interface to the nearest Internet access point. The end-user interface end-point would be the modem, the customer premise equipment typically managed by a broadband provider as the last connection point to the managed network, while the nearest Internet access point end-point would be the Internet gateway, the closest peering point between the broadband provider and the public Internet for a given consumer connection. The results of Commission testing of wired networks suggest that ''broadband performance that falls short of expectations is caused primarily by the segment of an ISP's network from the consumer gateway to the ISP's core network.''

61. In the *USF/ICC Transformation FNPRM,* the Commission seeks further comment on the specific methodology ETCs should use to measure the performance of their broadband services subject to these general guidelines, and the format in which funding recipients should report their results. The Commission directs the Wireline Competition Bureau, the Wireless Telecommunications Bureau, and the Office of Engineering and Technology to work together to refine the methodology

for such testing, which the Commission anticipates will be implemented in 2013.

3. Reasonably Comparable Rates for Broadband Service

62. As with voice services, for broadband services the Commission will consider rural rates to be ''reasonably comparable'' to urban rates under 47 U.S.C. 254(b)(3) if rural rates fall within a reasonable range of urban rates for reasonably comparable broadband service. However, the Commission has never compared broadband rates for purposes of 47 U.S.C. 254(b)(3), and therefore the Commission directs the Bureaus to develop a specific methodology for defining that reasonable range, taking into account that retail broadband service is not rate regulated and that retail offerings may be defined by price, speed, usage limits, if any, and other elements. In the *USF/ICC Transformation FNPRM,* the Commission seeks comment on how specifically to define a reasonable range.

63. The Commission also delegates to the Wireline Competition Bureau and Wireless Telecommunications Bureau the authority to conduct an annual survey of urban broadband rates, if necessary, in order to derive a national range of rates for broadband service. The Commission does not currently have sufficient data to establish such a range for broadband pricing, and are unaware of any adequate third-party sources of data for the relevant levels of service to be compared. The Commission therefore delegates authority to the Bureaus to determine the appropriate components of such a survey. By conducting its own survey, the Commission believes it will be able to tailor the data specifically to the need to satisfy the statutory obligation. The Commission requires recipients of funding to provide information regarding their pricing for service offerings, as described more fully below. The Commission also encourages input from the states and other stakeholders as the Bureaus develop the survey.

## V. Establishing the Connect America Fund

### *A. The Budget*

64. *Discussion.* For the first time, the Commission now establishes a defined budget for the high-cost component of the universal service fund. For purposes of this budget, the term ''high-cost'' includes all support mechanisms in place as of the date of this order, specifically, high-cost loop support, safety net support, safety valve support, local switching support, interstate common line support, high cost model support, and interstate access support, as well as the new Connect America Fund, which includes funding to support and advance networks that provide voice and broadband services, both fixed and mobile, and funding provided in conjunction with the recovery mechanism adopted as part of intercarrier compensation reform.

65. The Commission believes the establishment of such a budget will best ensure that the Commission has in place ''specific, predictable, and sufficient'' funding mechanisms to achieve the universal service objectives. The Commission is taking important steps to control costs and improve accountability in USF, and the estimates of the funding necessary for components of the CAF and legacy high-cost mechanisms represent its predictive judgment as to how best to allocate limited resources at this time. The Commission anticipates that it may revisit and adjust accordingly the appropriate size of each of these programs by the end of the six-year period the Commission budgets for today, based on market developments, efficiencies realized, and further evaluation of the effect of these programs in achieving the goals.

66. Importantly, establishing a CAF budget ensures that individual consumers will not pay more in contributions due to these reforms. Indeed, were the CAF to significantly raise the end-user cost of services, it could undermine the broader policy objectives to promote broadband and mobile deployment and adoption.

67. The Commission therefore establishes an annual funding target, set at the same level as the current estimate for the size of the high-cost program for FY 2011, of no more than $4.5 billion. The $4.5 billion budget includes only disbursements of support and does not include administrative expenses, which will continue to be collected consistent with past practices. Similarly, the $4.5 billion budget does not include prior period adjustments associated with support attributable to years prior to 2012. To the extent that those true-ups result in increased support for 2010, those disbursements would not apply to the budget discussed here.

68. This budgetary target will remain in place until changed by a vote of the Commission. The Commission believes that setting the budget at this year's support levels will minimize disruption and provide the greatest certainty and predictability to all stakeholders. The Commission does not find that amount to be excessive given the reforms the Commission adopts today, which expand the high-cost program in important ways to promote broadband and mobility; facilitate intercarrier compensation reform; and preserve universal voice connectivity. At the same time, the Commission does not believe a higher budget is warranted, given the substantial reforms the Commission concurrently adopts to modernize the legacy funding mechanisms to address long-standing inefficiencies and wasteful spending. The Commission concludes that it is appropriate, in the first instance, to evaluate the effect of these reforms before adjusting the budget.

69. The total $4.5 billion budget will include CAF support resulting from intercarrier compensation reform, as well as new CAF funding for broadband and support for legacy programs during a transitional period. As part of this budget, the Commission will provide $500 million per year in support through the Mobility Fund, of which up to $100 million in funding will be reserved for Tribal lands. Throughout this document, ''Tribal lands'' include any federally recognized Indian tribe's reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688), and Indian Allotments, 47 CFR 54.400(e), as well as Hawaiian Home Lands—areas held in trust for native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920, Act July 9, 1921, 42 Stat. 108, *et seq.,* as amended. The Commission adopts a definition of ''Tribal lands'' that includes Hawaiian Home Lands, as the term was used in the *USF/ICC Transformation NPRM.* The Commission notes that Hawaiian Home Lands were not included within the Tribal definition in the 2007 order that adopted an interim cap on support for competitive eligible telecommunications carriers, with an exemption of Tribal lands from that cap. The Commission agrees with the State of Hawaii that Hawaiian Home Lands should be included in the definition of Tribal lands in the context of these comprehensive reforms for the universal service program.

70. The Commission will also provide at least $100 million to subsidize service in the highest cost areas. The remaining amount—approximately $4 billion—will be divided between areas served by price cap carriers and areas served by rate-of-return carriers, with no more than $1.8 billion available annually for price cap territories after a transition period and up to $2 billion available annually for rate-of-return territories,

including, in both instances, intercarrier compensation recovery. The Commission also institutes a number of safeguards in this new framework to ensure that carriers that warrant additional funding have the opportunity to petition for such relief. Although the Commission expects that in some years CAF may distribute less than the total budget, and in other years slightly more, the Commission adopts mechanisms later in this R&O to keep the contribution burden at no more than $4.5 billion per year, plus administrative expenses, notwithstanding variations on the distribution side. Meanwhile, the Commission will closely monitor the CAF mechanisms for longer-term consistency with the overall budget goal, while ensuring the budget remains at appropriate levels to satisfy the statutory mandates.

*B. Providing Support in Areas Served by Price Cap Carriers*

1. Immediate Steps To Begin Rationalizing Support Levels for Price Cap Carriers

71. *Discussion.* Effective January 1, 2012, the Commission freezes all support under the existing high-cost support mechanisms, HCLS, forward-looking model support (HCMS), safety valve support, LSS, IAS, and ICLS, on a study area basis for price cap carriers and their rate-of-return affiliates. On an interim basis, the Commission will provide this ''frozen high-cost support'' to such carriers equal to the amount of support each carrier received in 2011 in a given study area. Frozen high-cost support amounts will be calculated by USAC, and will be equal to the amount of support disbursed in 2011, without regard to prior period adjustments related to years other than 2011 and as determined by USAC on January 31, 2012. USAC shall publish each carrier's frozen high-cost support amount 2011 support, as calculated, on its Web site, no later than February 15, 2012. As a consequence of this action, rate-of-return operating companies that will be treated as price cap areas will no longer be required to perform cost studies for purposes of calculating HCLS or LSS, as their support will be frozen on a study area basis as of year-end 2011.

72. Frozen high-cost support will be reduced to the extent that a carrier's rates for local voice service fall below an urban local rate floor that the Commission adopts below to limit universal service support where there are artificially low rates. In addition to frozen high-cost support, the Commission will distribute up to $300 million in ''incremental support'' to price cap carriers and their rate of return affiliates using a simplified forward-looking cost estimate, based on the existing cost model.

73. This simplified, interim approach is based on a proposal in the record from several carriers. Support will be determined as follows: First, a forward-looking cost estimate will be generated for each wire center served by a price cap carrier. Our existing forward-looking cost model, designed to estimate the costs of providing voice service, generates estimates only for wire centers served by non-rural carriers; it cannot be applied to areas served by rural carriers without obtaining additional data from those carriers. The simplest, quickest, and most efficient means to provide support solely based on forward-looking costs for both rural and non-rural price cap carriers is to extend the existing cost model by using an equation designed to reasonably predict the output of the existing model for wire centers it already applies to, and apply it to data that are readily available for wire centers in all areas served by price cap carriers and their affiliates, including areas the current model does not apply to. Three price cap carriers submitted an estimated cost equation that was derived through a regression analysis of support provided under the existing high-cost model, and they submitted, under protective order, the data necessary to replicate their analysis. No commenter objected to the proponents' cost-estimation function. Following its own assessment of the regression analysis and the proposed cost-estimation function, the Commission concludes that the proposed function will serve the purpose well to estimate costs on an interim basis in wire centers now served by rural price cap carriers, and the Commission adopts it. That cost-estimation function is defined as:

$$\begin{aligned}\ln(\text{Total cost}) = {} & 7.08 + 0.02 * \ln(\text{distance to nearest central office in feet} + 1) \\ & - 0.15 * \ln(\text{number of households + businesses in the wire center} + 1) \\ & + 0.22 * \ln(\text{total road feed in wire center} + 1) \\ & + 0.06 * (\ln(\text{number of households + businesses in wire center} + 1)) \wedge 2 \\ & - 0.01 * (\ln(\text{number of businesses in wire center} + 1)) - 2 \\ & - 0.07 * \ln((\text{number of households + businesses})/\text{square miles}) + 1)\end{aligned}$$

74. The output of the cost-estimation function will be converted into dollars and then further converted into a per-location cost in the wire center. The resulting per-location cost for each wire center will be compared to a funding threshold, which, as explained below, will be determined by the budget constraint. Support will be calculated based on the wire centers where the cost for the wire center exceeds the funding threshold. Specifically, the amount by which the per-location cost exceeds the funding threshold will be multiplied by the total number of household and business locations in the wire center.

75. The funding threshold will be set so that, using the distribution process described above, all $300 million of incremental support potentially available under the mechanism would be allocated. The Commission delegates to the Wireline Competition Bureau the task of performing the calculations necessary to determine the support amounts and selecting any necessary data sources for that task. In the event the Wireline Competition Bureau concludes that appropriate data are not readily available for these purposes for certain areas, such as some or all U.S. territories served by price cap carriers, the Bureau may exclude such areas from the analysis for this interim mechanism, which would result in the carriers in such areas continuing to receive frozen support. The Bureau will announce incremental support amounts via Public Notice; the Commission anticipates the Bureau will complete its work and announce such support amounts on or before March 31, 2012. USAC will disburse CAF Phase I funds on its customary schedule.

76. The Commission intends for CAF Phase I to enable additional deployment beyond what carriers would otherwise undertake, absent this reform. Thus, consistent with the other reforms, the Commission will require carriers that accept incremental support under CAF Phase I to meet concrete broadband deployment obligations. The Commission acknowledges that the existing cost model, on which the distribution mechanism for CAF Phase I incremental funding is based, calculates the cost of providing voice service rather than broadband service, although the Commission is requiring carriers to meet broadband deployment obligations if they accept CAF Phase I incremental funding. The Commission finds that using estimates of the cost of deploying voice service, even though the Commission imposes broadband deployment obligations, is reasonable in the context of this interim support mechanism.

77. Specifically, the Bureau will calculate, on a holding company basis, how much CAF Phase I incremental support price cap carriers are eligible for. Carriers may elect to receive all, none, or a portion of the incremental support for which they are eligible. A

carrier accepting incremental support will be required to deploy broadband to a number of locations equal to the amount it accepts divided by $775. For example, a carrier projected to receive $7,750,000 will be permitted to accept up to that amount of incremental support. If it accepts the full amount, it will be required to deploy broadband to at least 10,000 unserved locations; if it accepts $3,875,000, it will be required to deploy broadband to at least 5,000 unserved locations. To the extent incremental support is declined, it may be used in other ways to advance the broadband objectives pursuant to the statutory authority. For instance, the funds could be held as part of accumulated reserve funds that would help minimize budget fluctuations in the event the Commission grants some petitions for waiver. Also, a number of parties have urged us to use high-cost funding to advance adoption programs. The Commission notes that the Commission has an open proceeding to reform the low income assistance programs, which specifically contemplates broadband pilots in the Lifeline and LinkUp programs. To the extent that savings were available from CAF programs, the Commission could reallocate that funding for broadband adoption programs, consistent with the statutory authority, while still remaining within the budget target. Alternatively, savings could be used to reduce the contribution burden.

78. Our objective is to articulate a measurable, enforceable obligation to extend service to unserved locations during CAF Phase I. For this interim program, the Commission is not attempting to identify the precise cost of deploying broadband to any particular location. Instead, the Commission is trying to identify an appropriate standard to spur immediate broadband deployment to as many unserved locations as possible, given the budget constraint. In this context, the Commission finds that a one-time support payment of $775 per unserved location for the purpose of calculating broadband deployment obligations for companies that elect to receive additional support is appropriate.

79. To develop that performance obligation, the Commission considered broadband deployment projects undertaken by a mid-sized price cap carrier under the Broadband Initiatives Program (BIP). The average per-location cost of deployment for those projects—including both the public contribution and the company's own capital contribution—was $557, significantly lower than $775 per-location—which does not include any company contribution. Analysis indicated that the per-location cost for deployments funded through the BIP program varied considerably. In addition, the BIP program's requirements differ from these requirements. Specifically, carriers could obtain BIP funding for improving service to underserved locations as well as deploying to unserved locations, while carriers can meet their CAF Phase I deployment obligations only by deploying broadband to unserved locations. For these reasons, while the Commission finds this average per-location cost to be relevant, the Commission declines to set the requirement at a per-location cost of $557.

80. In addition, the Commission considered data from the analysis done as part of the National Broadband Plan. The cost model used in developing the National Broadband Plan estimated that the median cost of upgrading existing unserved homes is approximately $650 to $750, with approximately 3.5 million locations whose upgrade cost is below that figure.

81. Commission staff also conducted an analysis using the ABC plan cost model, which calculates the cost of deploying broadband to unserved locations on a census block basis. Commission staff estimated that the median cost of a brownfield deployment of broadband to low-cost unserved census blocks is $765 per location (*i.e.,* there are 1.75 million unserved, low-cost locations in areas served by price cap carriers with costs below $765); the cost of deploying broadband to the census block at the 25th percentile of the cost distribution is approximately $530 per location (under this analysis, there are 875,000 such locations whose cost is below $530). Although the Commission does not adopt the proposed cost model to calculate support amounts for CAF Phase II, these estimates provide additional data points to consider.

82. In addition, the Commission notes that several carriers placed estimates of the per-location cost of extending broadband to unserved locations in their respective territories into the record. While several carriers claim that the cost to serve unserved locations is higher than the figure the Commission adopts, those estimates did not provide supporting data sufficient to fully evaluate them.

83. Taking into account all of these factors, including the cost estimates developed in the course of BIP applications as well as the flexibility the Commission provides to carriers accepting such funding to determine where to deploy and the expectation that carriers will supplement incremental support with their own investment, the Commission concludes that the $775 per unserved location figure represents a reasonable estimate of an interim performance obligation for this one-time support. The Commission also emphasizes that CAF Phase I incremental support is optional—carriers that cannot meet the broadband deployment requirement may decline to accept incremental support or may choose to accept only a portion of the amount for which they are eligible.

84. The Commission find that, in this interim support mechanism, setting the broadband deployment obligations based on the costs of deploying to lower-cost wire centers that would not otherwise be served, even though the Commission bases support on the predicted costs of the highest-cost wire centers, is reasonable because the Commission is trying to expand voice and broadband availability as much and as quickly as possible. The Commission distributes support based on the costs of the highest-cost wire centers because the ultimate goal of the reforms is to ensure that *all* areas get broadband-capable networks, whether through the operation of the market or through support from USF. In this interim mechanism, the Commission distributes funding to those carriers that provide service in the highest-cost areas because these are the areas where the Commission can be most confident, based on available information, that USF support will be necessary in order to realize timely deployment. Thus, the Commission can be confident the Commission is allocating support to carriers that will need it to deploy broadband in some portion of their service territory. At the same time, to promote the most rapid expansion of broadband to as many households as possible, the Commission wishes to encourage carriers to use the support in lower-cost areas where there is no private sector business case for deployment of broadband, to the extent carriers also serve such areas. Although at this time the Commission lacks data sufficient to identify these areas, the Commission can encourage this use of funding by setting the deployment requirement based on the overall estimate of upgrade costs in lower cost unserved areas, while providing carriers flexibility to allocate funding to these areas, rather than the highest cost wire centers identified by the cost-estimation equation. Accordingly, while the Commission allocates CAF Phase I support on the basis of carriers' service to the highest-cost areas, the

Commission allows carriers to use that support in lower-cost areas, and sizes their deployment obligations accordingly. The Commission notes that, historically, carriers have always been able to use support in wire centers other than the ones for which support is paid, and nothing in the Act constrains that flexibility such that it applies only within state boundaries. Accordingly, in the context of this interim mechanism, the Commission will permit carriers to continue to have such flexibility.

85. Within 90 days of being informed of the amount of incremental support it is eligible to receive, each carrier must provide notice to the Commission, the Administrator, the relevant state or territorial commission, and any affected Tribal government, identifying the amount of support it wishes to accept and the areas by wire center and census block in which the carrier intends to deploy broadband to meet its obligation, or stating that the carrier declines to accept incremental support for that year. Carriers accepting incremental support must make the following certifications. First, the carrier must certify that deployment funded through CAF Phase I incremental support will occur in areas shown on the most current version of the National Broadband Map as unserved by fixed broadband with a minimum speed of 768 kbps downstream and 200 kbps upstream, and that, to the best of the carrier's knowledge, are, in fact, unserved by fixed broadband at those speeds. Second, the carrier must certify that the carrier's current capital improvement plan did not already include plans to complete broadband deployment to that area within the next three years, and that CAF Phase I incremental support will not be used to satisfy any merger commitment or similar regulatory obligation.

86. Carriers must complete deployment to no fewer than two-thirds of the required number of locations within two years, and all required locations within three years, after filing their notices of acceptance. Carriers must provide a certification to that effect to the Commission, the Administrator, the relevant state or territorial commission, and any affected Tribal government, as part of their annual certifications pursuant to new 47 CFR 54.313 of the rules, following both the two-thirds and completion milestones. To fulfill their deployment obligation, carriers must offer broadband service of at least 4 Mbps downstream and 1 Mbps upstream, with latency sufficiently low to enable the use of real-time communications, including VoIP, and with usage limits, if any, that are reasonably comparable to those for comparable services in urban areas. Carriers failing to meet a deployment milestone will be required to return the incremental support distributed in connection with that deployment obligation and will be potentially subject to other penalties, including additional forfeitures, as the Commission deems appropriate. If a carrier fails to meet the two-thirds deployment milestone within two years and returns the incremental support provided, and then meets its full deployment obligation associated with that support by the third year, it will be eligible to have support it returned restored to it.

87. Our expectation is that CAF Phase II will begin on January 1, 2013. However, absent further Commission action, if CAF Phase II has not been implemented to go into effect by that date, CAF Phase I will continue to provide support as follows. Annually, no later than December 15, the Bureau will announce via Public Notice CAF Phase I incremental support amounts for the next term of incremental support, indicating whether support will be allocated for the full year or for a shorter term. The Commission delegates to the Wireline Competition Bureau the authority to adjust the term length of incremental support amounts, and to pro-rate obligations as appropriate, to the extent Phase II CAF is anticipated to be implemented on a date after the beginning of the calendar year. The amount of incremental support to be distributed during a term will be calculated in the manner described above, based on allocating $300 million through the incremental support mechanism, but that amount will be reduced by a factor equal to the portion of a year that the term will last. Within 90 days of the beginning of each term of support, carriers must provide notice to the Commission, the relevant state commission, and any affected Tribal government, identifying the amount of support it wishes to accept and the areas by wire center and census block in which the carrier intends to deploy broadband or stating that the carrier declines to accept incremental support for that term, with the same certification requirements described above. For purposes of this R&O, a carrier accepting incremental support in terms after 2012 will be required to deploy broadband to a number of locations equal to the amount of incremental support it accepts divided by $775, similar to the obligation for accepting support in 2012.

88. CAF Phase I will also begin the process of transitioning all federal high-cost support to price cap carriers to supporting modern communications networks capable of supporting voice and broadband in areas without an unsubsidized competitor. Consistent with the goal of providing support to price cap companies on a forward-looking cost basis, rather than based on embedded costs, the Commission will, for the purposes of CAF Phase I, treat as price cap carriers the rate-of-return operating companies that are affiliated with holding companies for which the majority of access lines are regulated under price caps. That is, the Commission will freeze their universal service support and consider them as price cap areas for the purposes of the new CAF Phase I distribution mechanism. Effective January 1, 2012, the Commission requires carriers to use their frozen high-cost support in a manner consistent with achieving universal availability of voice and broadband. If CAF Phase II has not been implemented to go into effect on or before January 1, 2013, the Commission will phase in a requirement that carriers use such support for building and operating broadband-capable networks used to offer their own retail service in areas substantially unserved by an unsubsidized competitor.

89. Specifically, in 2013, all carriers receiving frozen high-cost support must use at least one-third of that support to build and operate broadband-capable networks used to offer the provider's own retail broadband service in areas substantially unserved by an unsubsidized competitor. For 2014, at least two-thirds of the frozen high-cost support must be used in such fashion, and for 2015 and subsequent years, all of the frozen high-cost support must be spent in such fashion. Carriers will be required to certify that they have spent frozen high-cost support consistent with these requirements in their annual filings pursuant to new 47 CFR 54.313 of the rules.

90. These interim reforms to the support mechanisms for price cap carriers are an important step in the transition to full implementation of the Connect America Fund. While the Commission intends to complete implementation of the CAF rapidly, the Commission finds that these interim reforms offer immediate improvements over the existing support mechanisms. First, existing support for price cap carriers will be frozen and no longer calculated based on embedded costs. Rather, the Commission begins the process of transitioning all high-cost support to forward-looking costs and

market-based mechanisms, which will improve incentives for carriers to invest efficiently. Second, these reforms begin the process of eliminating the distinction, for the purposes of calculating high-cost support, between price cap carriers that are classified as rural and those that are classified as non-rural, a classification that has no direct or necessary relation to the cost of providing voice and broadband services. In this way, the support mechanisms will be better aligned with the text of 47 U.S.C. 254, which directs us to focus on the needs of consumers in ''rural, insular, and high cost *areas*'' but makes no reference to the classification of the *company* receiving support. In addition, the Commission notes that the reforms the Commission adopts today, which include providing immediate support to spur broadband deployment, can be implemented quickly, without the need to overhaul an admittedly dated cost model that does not reflect modern broadband network architecture. Thus, although the simplified interim mechanism is imperfect in some respects, it will allow us to begin providing additional support to price cap carriers on a more efficient basis, while spurring immediate and material broadband deployment pending implementation of CAF competitive bidding- and model-based support for price cap areas.

91. *No Effect on Interstate Rates.* Historically, IAS was intended to replace allowable common line revenues that otherwise are not recovered through SLCs, while some carriers received frozen ICLS because, due to the timing of their conversion to price cap regulation, they could not receive IAS. The Commission notes that many price cap carriers did not object to the elimination of the IAS mechanism, as long is it did not occur before the implementation of CAF. The Commission has no indication that these price cap carriers expect to raise their SLCs, presubscribed interexchange carrier charges, or other interstate rates as a result of any reform that would eliminate IAS. For clarity, however, the Commission specifically notes that while carriers receive support under CAF Phase I, the amount of their frozen high cost support equal to the amount of IAS for which each carrier was eligible in 2011 as being received under IAS, including, but not limited to, for the purposes of calculating interstate rates will be treated as IAS for purposes of the existing rules. To the extent that a carrier believes that it cannot meet its obligations with the revenues it receives under the CAF and ICC reforms, it may avail itself of the total cost and earnings review process described below.

92. *Elimination of State Rate Certification Filings.* Under 47 CFR 54.316 of the existing rules, states are required to certify annually whether residential rates in rural areas of their state served by non-rural carriers are reasonably comparable to urban rates nationwide. As part of these reforms, however, the Commission requires carriers to file rate information directly with the Commission. For this reason, the Commission concludes that continuing to impose this obligation on the states is unnecessary, and the Commission relieves state commissions of their obligations under that provision.

93. *Hawaiian Telcom Petition for Waiver.* Hawaiian Telcom, a non-rural price cap incumbent local exchange carrier, previously sought a waiver of certain rules relating to the support to which it would be entitled under the high-cost model. As Hawaiian Telcom explained, it received no high-cost model support at all because support under the model was based not on the estimated costs of individual wire centers but rather the statewide average of the costs of all individual wire centers included in the model. In its petition, Hawaiian Telcom requested that its support under the model be determined on a wire center basis, without regard to the statewide average of estimated costs calculated under the high-cost model.

94. In light of these reforms for support to price cap carriers, the Commission denies the Hawaiian Telcom petition. These reforms are largely consistent with the thrust of Hawaiian Telcom's petition. Phase II support will not involve statewide averaging of costs determined by a model, but instead will be determined on a much more granular basis. In Phase I, the Commission adopts, on an interim basis, a new method for distributing support to price cap carriers. While the Commission freezes existing support, the Commission provides incremental support to price cap carriers through a mechanism that, consistent with Hawaiian Telcom's proposal, identifies carriers serving the highest-cost wire centers but does not average wire center costs in a state. The Commission therefore believes that these reforms will achieve the relief Hawaiian Telcom seeks in its waiver petition and that, to the extent they do not, Hawaiian Telcom may seek additional targeted support through a request for waiver.

2. New Framework for Ongoing Support in Price Cap Territories

a. Budget for Price Cap Areas

95. Within the total $4.5 billion annual budget, the Commission sets the total annual CAF budget for areas currently served by price cap carriers at no more than $1.8 billion for a five-year period. For purposes of CAF Phase II, consistent with the approach in CAF Phase I, the Commission will treat as price cap carriers the rate-of-return operating companies that are affiliated with holding companies for which the majority of access lines are regulated under price caps. A ''price cap territory'' therefore includes a study area served by a rate-of-return operating company affiliated with price cap companies.

96. In 2010, the most recent year for which complete disbursement data are available, price cap carriers and their rate-of-return affiliates received approximately $1.076 billion in support. Collectively, more than 83 percent of the unserved locations in the nation are in price cap areas, yet such areas currently receive approximately 25 percent of high-cost support.

97. The Commission concludes that increased support to areas served by price cap carriers, coupled with rigorous, enforceable deployment obligations, is warranted in the near term to meet the universal service mandate to unserved consumers residing in these communities. At the same time, the Commission seeks to balance many competing demands for universal service funds, including the need to extend advanced mobile services and to preserve and advance universal service in areas currently served by rate-of-return companies. Budgeting up to $1.8 billion for price cap territories, in the judgment, represents a reasonable balance of these considerations. The Commission also stresses that these subsidies will go to carriers serving price cap areas, not necessarily incumbent price cap carriers. Before 2018, the Commission will re-evaluate the need for ongoing support at these levels and determine how best to drive support to efficient levels, given consumer demand and technological developments at that time.

b. Price Cap Public Interest Obligations

98. Price cap ETCs that accept a state-level commitment must provide broadband service that is reasonably comparable to terrestrial fixed broadband service in urban America. Specifically, price cap ETCs that receive model-based CAF support will be required, for the first three years they receive support, to offer broadband at

actual speeds of at least 4 Mbps downstream and 1 Mbps upstream, with latency suitable for real-time applications, such as VoIP, and with usage capacity reasonably comparable to that available in comparable offerings in urban areas. By the end of the third year, ETCs must offer at least 4 Mbps/1 Mbps broadband service to at least 85 percent of their high-cost locations—including locations on Tribal lands—covered by the state-level commitment, as described below. By the end of the fifth year, price cap ETCs must offer at least 4 Mbps/1 Mbps broadband service to all supported locations, and at least 6 Mbps/1.5 Mbps to a number of supported locations to be specified.

99. The Commission establishes the 85 percent third-year milestone to ensure that recipients of funding remain on track to meet their performance obligations. While a number of parties agreed generally with the concept of setting specific, enforceable interim milestones to safeguard the use of public funds, there are few concrete suggestions in the record on what those intermediate deadlines should be. The Commission agrees with the State Members of the Joint Board that there should be intermediate milestones for the required broadband deployment obligations. The Commission sets an initial requirement of offering broadband to at least 85 percent of supported locations by the end of the third year, and to all supported locations by the end of the fifth year. As set forth more fully below, recipients of funding will be required annually to report on their progress in extending broadband throughout their areas and must meet the interim deadline established for the third year, or face loss of support.

100. Before the end of the fifth year, the Commission expects to have reviewed the minimum broadband performance metrics in light of expected increases in speed, and other broadband characteristics, in the intervening years. Based on the information before us today, the Commission expects that consumer usage of applications, including those for health and education, may evolve over the next five years to require speeds higher than 4 Mbps downstream/1 Mbps upstream. For this reason, the Commission expects ETCs to build robust, scalable networks that will provide speeds of at least 6 Mbps/1.5 Mbps to a number of supported locations to be determined in the model development process, as set forth more fully below.

101. After the end of the five-year term of CAF Phase II, the Commission expects to be distributing all CAF support in price cap areas pursuant to a market-based mechanism, such as competitive bidding. However, if such a mechanism is not implemented by the end of the five-year term of CAF Phase II, the incumbent ETCs will be required to continue providing broadband with performance characteristics that remain reasonably comparable to the performance characteristics of terrestrial fixed broadband service in urban America, in exchange for ongoing CAF Phase II support.

c. Methodology for Allocating Support

102. *Discussion.* The Commission concludes that the Connect America Fund should ultimately rely on market-based mechanisms, such as competitive bidding, to ensure the most efficient and effective use of public resources. However, the CAF is not created on a blank slate, but rather against the backdrop of a decades-old regulatory system. The continued existence of legacy obligations, including state carrier of last resort obligations for telephone service, complicate the transition to competitive bidding. In the transition, the Commission seeks to avoid consumer disruption—including the loss of traditional voice service—while getting robust, scalable broadband to substantial numbers of unserved rural Americans as quickly as possible. Accordingly, the Commission adopts an approach that enables competitive bidding for CAF Phase II support in the near-term in some price cap areas, while in other areas holding the incumbent carrier to broadband and other public interest obligations over large geographies in return for five years of CAF support.

103. Specifically, the Commission adopts the following methodology for providing CAF support in price cap areas. First, the Commission will model forward-looking costs to estimate the cost of deploying broadband-capable networks in high-cost areas and identify at a granular level the areas where support will be available. Second, using the cost model, the Commission will offer each price cap LEC annual support for a period of five years in exchange for a commitment to offer voice across its service territory within a state and broadband service to supported locations within that service territory, subject to robust public interest obligations and accountability standards. Third, for all territories for which price cap LECs decline to make that commitment, the Commission will award ongoing support through a competitive bidding mechanism.

104. The Commission anticipates adoption of the selected model by the end of 2012 for purposes of providing support beginning January 1, 2013.

105. *Determination of Eligible Areas.* The Commission will use a forward-looking cost model to determine, on a census block or smaller basis, areas that will be eligible for CAF Phase II support. In doing so, the Commission will allocate the budget of no more than $1.8 billion for price cap areas to maximize the number of expensive-to-serve residences, businesses, and community anchor institutions that will have access to modern networks providing voice and robust, scalable broadband. Specifically, the Commission will use the model to identify those census blocks where the cost of service is likely to be higher than can be supported through reasonable end-user rates alone, and, therefore, should be eligible for CAF support. The Commission will also use the model to identify, from among these, a small number of extremely high-cost census blocks that should receive funding specifically set aside for remote and extremely high-cost areas, as described below, rather than receiving CAF Phase II support, in order to keep the total size of the CAF and legacy high-cost mechanisms within the $4.5 billion budget.

106. This methodology balances the desire to extend robust, scalable broadband to all Americans with the recognition that the very small percentage of households that are most expensive to serve via terrestrial technology represent a disproportionate share of the cost of serving currently unserved areas. In light of this fact, the State Members of the Joint Board propose that universal service support be limited to not more than $100 per high-cost location per month, which they suggest is somewhat higher than the prevailing retail price of satellite service. Similarly, ABC Plan proponents recommend an alternative technology benchmark of $256 per month based on the plan proponents' cost model—the CostQuest Broadband Analysis Tool (CQBAT)—which would limit support per location to no more than $176 per month ($256–$80 cost benchmark). The Commission agrees that the highest cost areas are more appropriately served through alternative approaches, and in the *USF/ICC Transformation FNPRM* the Commission seeks comment on how best to utilize at least $100 million in annual CAF funding to maximize the availability of affordable broadband in such areas. Here, the Commission adopts a methodology for calculating support that will target support to areas that exceed a specified cost benchmark, but not provide support for areas that

exceed an ''extremely high cost'' threshold.

107. The Commission delegates to the Wireline Competition Bureau the responsibility for setting the extremely high-cost threshold in conjunction with adoption of a final cost model. The threshold should be set to maintain total support in price cap areas within the up to $1.8 billion annual budget.

108. In determining the areas eligible for support, the Commission will also exclude areas where, as of a specified future date as close as possible to the completion of the model and to be determined by the Wireline Competition Bureau, an unsubsidized competitor offers affordable broadband that meets the initial public interest obligations that the Commission establishes in this R&O for CAF Phase I, *i.e.,* speed, latency, and usage requirements. The model scenarios submitted by the ABC Plan proponents excluded areas already served by a cable company offering broadband. State Members propose, at a minimum, excluding areas with unsubsidized wireline competition, and suggested that areas with reliable 4G wireless service could also be excluded. In an ''Amended ABC Plan,'' NCTA proposes to exclude areas where there is an unsupported wireline or wireless broadband competitor, and areas that received American Recovery and Reinvestment Act stimulus funding from Rural Utilities Service (RUS) or NTIA to build broadband facilities. The Commission concludes, on balance, that it would be appropriate to exclude any area served by an unsubsidized competitor that meets the initial performance requirements, and the Commission delegates to the Wireline Competition Bureau the task of implementing the specific requirements of this rule.

109. *State-Level Commitment.* Following adoption of the cost model, which the Commission anticipates will be before the end of 2012, the Bureau will publish a list of all eligible census blocks associated with each incumbent price cap carrier within each state. After the list is published, there will be an opportunity for comments and data to be filed to challenge the determination of whether or not areas are unserved by an unsubsidized competitor. Each incumbent carrier will then be given an opportunity to accept, for each state it serves, the public interest obligations associated with all the eligible census blocks in its territory, in exchange for the total model-derived annual support associated with those census blocks, for a period of five years. The model-derived support amount associated with each census block will be the difference between the model-determined cost in that census block, provided that cost is below the highest-cost threshold, and the cost benchmark used to identify high-cost areas. If the incumbent accepts the state-level broadband commitment, it shall be subject to the public interest obligations described above for all locations for which it receives support in that state, and shall be the presumptive recipient of the model-derived support amount for the five-year CAF Phase II period. In meeting its obligation to serve a particular number of locations in a state, an incumbent that has accepted the state-level commitment may choose to serve some census blocks with costs above the highest cost threshold instead of eligible census blocks (*i.e.,* census blocks with lower costs), provided that it meets the public interest obligations in those census blocks, and provided that the total number of unserved locations and the total number of locations covered is greater than or equal to the number of locations in the eligible census blocks.

110. Carriers accepting a state-level commitment will receive funding for five years. At the end of the five-year term, in the areas where the price cap carriers have accepted the five-year state level commitment, the Commission expects to use competitive bidding to award CAF support on a going-forward basis, and may use the competitive bidding structure adopted by the Commission for use in areas where the state-level commitment is declined.

111. The Commission concludes that the state-level commitment framework the Commission adopts is preferable to the right of first refusal approach proposed by the Commission in the *USF/ICC Transformation NPRM,* which would have been offered at the study area level, and to a right of first refusal offered at the wire center level, as proposed by some commenters. Both of these approaches would have allowed price cap carriers to pick and choose on a granular basis the areas where they would receive model-based support within a state. This would allow the incumbent to cherry pick the most attractive areas within its service territory, leaving the least desirable areas for a competitive process. This concern was greatest with the ABC proposal, under which carriers would have been able to exercise a right of first refusal on a wire center basis, but also applies to the study area proposal in the *USF/ICC Transformation NPRM.* Although for some price cap carriers, their study areas are their entire service area within a state, other carriers still have many study areas within a state. These carriers may have acquired various properties over time and chosen to keep them as separate study areas for various reasons, including potentially to maximize universal service support. Rather than enshrine such past decisions in the new CAF, the Commission concludes that it is more equitable to treat all price cap carriers the same and require them to offer service to all high-cost locations between an upper and lower threshold within their service territory in a state, consistent with the public interest obligations described above, in exchange for support. Requiring carriers to accept or decline a commitment for all eligible locations in their service territory in a state should reduce the chances that eligible locations that may be less economically attractive to serve, even with CAF support, get bypassed, and increase the chance such areas get served along with eligible locations that are more economically attractive.

112. In determining how best to award CAF support in price cap areas, the Commission carefully weighed the risks and benefits of alternatives, including using competitive bidding everywhere, without first giving incumbent LECs an opportunity to enter a state-level service commitment. The Commission concludes that, on balance, the approach the Commission adopts will best ensure continued universal voice service and speed the deployment of broadband to all Americans over the next several years, while minimizing the burden on the Universal Service Fund.

113. In particular, several considerations support the determination not to immediately adopt competitive bidding everywhere for the distribution of CAF support. Because the Commission excludes from the price cap areas eligible for support all census blocks served by an unsubsidized competitor, the Commission will generally be offering support for areas where the incumbent LEC is likely to have the only wireline facilities, and there may be few other bidders with the financial and technological capabilities to deliver scalable broadband that will meet the requirements over time. In addition, it is the predictive judgment that the incumbent LEC is likely to have at most the same, and sometimes lower, costs compared to a new entrant in many of these areas. The Commission also weighs the fact that incumbent LECs generally continue to have carrier of last resort obligations for voice services. While some states are beginning to re-evaluate those obligations, in many states the incumbent carrier still has the continuing obligation to provide voice service and cannot exit the marketplace

absent state permission. On balance, the Commission believes that that the approach best serves consumers in these areas in the near term, many of whom are receiving voice services today supported in part by universal service funding and some of whom also receive broadband, and will speed the delivery of broadband to areas where consumers have no access today.

114. The Commission disagrees with commenters who assert that the principle of competitive neutrality precludes the Commission from giving incumbent carriers an opportunity to commit to deploying broadband throughout their service areas in a state in exchange for five years of funding. The principle of competitive neutrality states that ''[u]niversal service support mechanisms and rules should be competitively neutral,'' which means that they should not ''unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.'' The competitive neutrality principle does not require all competitors to be treated alike, but ''only prohibits the Commission from treating competitors differently in 'unfair' ways.'' Moreover, neither the competitive neutrality principle nor the other 47 U.S.C. 254(b) principles impose inflexible requirements for the Commission's formulation of universal service rules and policies. Instead, the ''promotion of any one goal or principle should be tempered by a commitment to ensuring the advancement of each of the principles'' in 47 U.S.C. 254(b).

115. As an initial matter, the Commission notes that the USF reforms generally advance the principle of competitive neutrality by limiting support to only those areas of the nation that lack unsubsidized providers. Thus, providers that offer service without subsidy will no longer face competitors whose service in the same area is subsidized by federal universal service funding. Especially in this light, the Commission concludes that any departure from strict competitive neutrality occasioned by affording incumbent LECs an opportunity to commit to deploying broadband in their statewide service areas is outweighed by the advancement of other 47 U.S.C. 254(b) principles, in particular, the principles that ''[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation,'' and that consumers in rural areas should have access to advanced services comparable to those available in urban areas. Although other classes of providers may be well situated to make broadband commitments with respect to relatively small geographic areas such as discrete census blocks, the purpose of the five-year commitment is to establish a limited, one-time opportunity for the rapid deployment of broadband services over a large geographic area. The fact that incumbent LECs' have had a long history of providing service throughout the relevant areas—including the fact that incumbent LECs generally have already obtained the ETC designation necessary to receive USF support throughout large service areas—puts them in a unique position to deploy broadband networks rapidly and efficiently in such areas. The Commission sees nothing in the record that suggests a more competitively neutral way of achieving that objective quickly, without abandoning altogether the goal of obtaining large-area build-out commitments or substantially ballooning the cost of the program.

116. Moreover, it is important to emphasize the limited scope and duration of the state-level commitment procedure. Incumbent LECs are afforded only a one-time opportunity to make a commitment to build out broadband networks throughout their service areas within a state. If the incumbent declines that opportunity in a particular state, support to serve the unserved areas located within the incumbent's service area will be awarded by competitive bidding, and all providers will have an equal opportunity to seek USF support, as described below. Furthermore, even where the incumbent LEC makes a state-level commitment, its right to support will terminate after five years, and the Commission expects that support after such five-year period will be awarded through a competitive bidding process in which all eligible providers will be given an equal opportunity to compete. Thus, the Commission anticipates that funding will soon be allocated on a fully competitive basis. In light of all these considerations, the Commission concludes that adhering to strict competitive neutrality at the expense of the state-level commitment process would unreasonably frustrate achievement of the universal service principles of ubiquitous and comparable broadband services and promoting broadband deployment, and unduly elevate the interests of competing providers over those of unserved and under-served consumers who live in high-cost areas of the country, as well as of all consumers and telecommunications providers who make payments to support the Universal Service Fund.

117. *Competitive Bidding.* In areas where the incumbent declines a state-level commitment, the Commission will use a competitive bidding mechanism to distribute support. In the *USF/ICC Transformation FNPRM,* the Commission proposes to design this mechanism in a way that maximizes the extent of robust, scalable broadband service subject to the budget. Assigning support in this way should enable us to identify those providers that will make most effective use of the budgeted funds, thereby extending services to as many consumers as possible. The Commission proposes to use census blocks as the minimum geographic unit eligible for competitive bidding and seek comment on ways to allow aggregation of such blocks. Although the Commission proposes using the same areas identified by the CAF Phase II model as eligible for support, the Commission also seeks comment on other approaches—for example, excluding areas served by any broadband provider, or using different cost thresholds. The Commission also seeks targeted comment on other issues, including bidder eligibility, auction design, and auction process.

118. *Transition to New Support Levels.* Support under CAF Phase II will be phased in, in the following manner. For a carrier accepting the state-wide commitment, in the first year, the carrier will receive one-half the full amount the carrier will receive under CAF Phase II and one-half the amount the carrier received under CAF Phase I for the previous year (which would be the frozen amount if the carrier declines Phase I or the frozen amount plus the incremental amount if the carrier accepts Phase I); in the second year, each carrier accepting the state-wide commitment will receive the full CAF Phase II amount. To the extent a carrier will receive less money from CAF Phase II than it will receive under frozen high-cost support, there will be an appropriate multi-year transition to the lower amount. It is premature to specify the length of that transition now, before the cost model is adopted, but it will be addressed in conjunction with finalization of the cost model that will be developed with public input.

119. For a carrier declining the state-wide commitment, the carrier will continue to receive support in an amount equal to its CAF Phase I support amount until the first month that the winner of any competitive process receives support under CAF Phase II; at that time, the carrier declining the state-wide commitment will cease to receive high-cost universal service support. No additional broadband obligations apply to funds received during the transition period. That is, carriers accepting the

state-wide commitment are obliged to meet the Phase II broadband obligations described above, while carriers declining the state-wide commitment will be required to meet their pre-existing Phase I obligations, but will not be required to deploy additional broadband in connection with their receipt of transitional funding.

d. Forward-Looking Cost Model

120. *Discussion.* Although the Commission agrees with both the State Members and the ABC Plan proponents that the Commission should use a forward-looking model to assist in setting support levels in price cap territories, the Commission does not adopt the CQBAT cost model proposed by the ABC Coalition, nor does the Commission accept the State Board's proposal that the Commission simply update the existing cost model. Instead, the Commission initiates a public process to develop a robust cost model for the Connect America Fund to accurately estimate the cost of a modern voice and broadband capable network, and delegate to the Wireline Competition Bureau the responsibility of completing it.

121. In light of the limited opportunity the public has received to review and modify the ABC Coalition's proposed CQBAT model, the Commission rejects the group's suggestion that the Commission adopts that model at this time. The Commission has previously held that before any cost model may be ''used to calculate the forward-looking economic costs of providing universal service in rural, insular, and high cost areas,'' the ''model and all underlying data, formulae, computations, and software associated with the model must be available to all interested parties for review and comment. All underlying data should be verifiable, engineering assumptions reasonable, and outputs plausible.'' The Commission sees no reason to depart from this conclusion here, and the CQBAT model, as presented to the Commission at this time, does not meet this requirement.

122. The Commission likewise rejects the State Members' proposal to modify the Commission's existing cost model to estimate the costs of modern voice and broadband-capable network. The Commission's existing cost model does not fully reflect the costs associated with modern voice and broadband networks because the model calculates cost based on engineering assumptions and equipment appropriate to the 1990s. In addition, modeling techniques and capabilities have advanced significantly since 1998, when the Commission's existing high cost model was developed, and the new techniques could significantly improve the accuracy of modeled costs in a new model relative to an updated version of the Commission's existing model. For example, new models can estimate the costs of efficient routing along roads in a way that the older model cannot. The Commission sees the benefits of leveraging the existing model to rapidly deploy interim support, and does just that for Phase I of the CAF. For the longer-term disbursement of support, however, the Commission concludes that it is preferable to use a more accurate, up to date model based on modern techniques.

123. To expedite the process of finalizing the model to be used as part of the state-level commitment, the Commission delegates to the Wireline Competition Bureau the authority to select the specific engineering cost model and associated inputs, consistent with this R&O. For the reasons below, the model should be of wireline technology and at a census block or smaller level. In other respects, the Commission directs the Wireline Competition Bureau to ensure that the model design maximizes the number of locations that will receive robust, scalable broadband within the budgeted amounts. Specifically, the model should direct funds to support 4 Mbps/1 Mbps broadband service to all supported locations, subject only to the waiver process for upstream speed described above, and should ensure that the most locations possible receive a 6 Mbps/1.5 Mbps or faster service at the end of the five year term, consistent with the CAF Phase II budget. The Wireline Competition Bureau's ultimate choice of a greenfield or brownfield model, the modeled architecture, and the costs and inputs of that model should ensure that the public interest obligations are achieved as cost-effectively as possible.

124. *Geographic Granularity.* The Commission concluded that the CAF Phase II model should estimate costs at a granular level—the census block or smaller—in all areas of the country. Geographic granularity is important in capturing the forward-looking costs associated with deploying broadband networks in rural and remote areas. Using the average cost per location of existing deployments in large areas, even when adjusted for differences in population and linear densities, presents a risk that costs may be underestimated in rural areas. Deployments in rural markets are likely to be subscale, so an analysis based on costs averaged over large areas, particularly large areas that include both low- and high-density zones, will be inaccurate. A granular approach, calculating costs based on the plant and hardware required to serve each location in a small area (*i.e.,* census block or smaller), will provide sufficient geographic and cost-component granularity to accurately capture the true costs of subscale markets. For example, if only one home in an area with very low density is connected to a DSLAM, the entire cost of that DSLAM should be allocated to the home rather than the fraction based on DSLAM capacity. Furthermore, to the extent that a home is served by a long section of feeder or distribution cabling that serves only that home, the entire cost of such cabling should be allocated to the home as well.

125. *Wireline Network Architecture.* The Commission concludes that the CAF Phase II model should estimate the cost of a wireline network. For a number of reasons, the Commission rejects some commenters' suggestion that the Commission should attempt to model the costs of both wireline and wireless technologies and base support on whichever technology is lower cost in each area of the country.

126. For one, the Commission has concerns about the feasibility of developing a wireless cost model with sufficient accuracy for use in the CAF Phase II framework. The Commission recognizes that all cost models involve a certain degree of imprecision. As the Commission noted in the *USF Reform NOI/NPRM,* 75 FR 26906, May 13, 2010, however, accurately modeling wireless deployment may raise challenges beyond those that exist for wireline models, particularly where highly localized cost estimates are required. For example, the availability of desirable cell sites can significantly affect the cost of covering any given small geographic area and is challenging to model without detailed local siting information. Propagation characteristics may vary based on local and difficult to model features like foliage. Access to spectrum, which substantially affects overall network costs, varies dramatically among potential funding recipients and differs across geographies. Because the cost model for CAF Phase II will need to calculate costs for small areas (census-block or smaller), high local variability in the accuracy of outputs will create challenges, even if a cost model provides high quality results when averaged over a larger area. In light of the issues with modeling wireless costs, the Commission remains concerned that a lowest-cost technology model including both wireless and wireline

components could introduce greater error than a wireline-only model in identifying eligible areas. The Commission does not believe that delaying implementation of CAF Phase II to resolve these issues serves the public interest.

127. Finally, the record fails to persuade us that, in general, the costs of cellular wireless networks are likely to be significantly lower than wireline networks for providing broadband service that meets the CAF Phase II speed, latency, and capacity requirements. In particular, the Commission emphasizes that, as described above, carriers receiving CAF Phase II support should expect to offer service with increasing download and upload speeds over time, and that allows monthly usage reasonably comparable to terrestrial fixed residential broadband offerings in urban areas. The National Broadband Plan modeled the nationwide costs of a wireless broadband network dimensioned to support typical usage patterns for fixed services to homes, and found that the cost was similar to that of wireline networks. None of the parties advocating for the use of a wireless model has submitted into the record a wireless model for fixed service and, therefore, the Commission has no evidence that such service would be less costly.

128. *Process for Adopting the Model.* The Commission anticipates that the Wireline Competition Bureau will adopt the specific model to be used for purposes of estimating support amounts in price cap areas by the end of 2012 for purposes of providing support beginning January 1, 2013. Before the model is adopted, the Commission will ensure that interested parties have access to the underlying data, assumptions, and logic of all models under consideration, as well as the opportunity for further comment. When the Commission adopted its existing cost model, it did so in an open, deliberative process with ample opportunity for interested parties to participate and provide valuable assistance. The Commission has had three rounds of comment on the use of a model for purposes of determining Connect America Fund support and remains committed to a robust public comment process. To expedite this process, the Commission delegates to the Wireline Competition Bureau the authority to select the specific engineering cost model and associated inputs, consistent with this R&O. The Commission directs the Wireline Competition Bureau to issue a public notice within 30 days of release of this R&O requesting parties to file models for consideration in this proceeding consistent with this R&O, and to report to the Commission on the status of the model development process no later than June 1, 2012.

129. The Commission notes that price cap carriers serving Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands and Northern Marianas Islands argue they face operating conditions and challenges that differ from those faced by carriers in the contiguous 48 states. The Commission directs the Wireline Competition Bureau to consider the unique circumstances of these areas when adopting a cost model, and further directs the Wireline Competition Bureau to consider whether the model ultimately adopted adequately accounts for the costs faced by carriers serving these areas. If, after reviewing the evidence, the Wireline Competition Bureau determines that the model ultimately adopted does not provide sufficient support to any of these areas, the Bureau may maintain existing support levels, as modified in this R&O, to any affected price cap carrier, without exceeding the overall budget of $1.8 billion per year for price cap areas.

### *C. Universal Service Support for Rate-of-Return Carriers*

#### 1. Public Interest Obligations of Rate-of-Return Carriers

130. The Commission recognizes that, in the absence of any federal mandate to provide broadband, rate-of-return carriers have been deploying broadband to millions of rural Americans, often with support from a combination of loans from lenders such as RUS and ongoing universal service support. The Commission now requires that recipients use their support in a manner consistent with achieving universal availability of voice and broadband.

131. To implement this policy, rather than establishing a mandatory requirement to deploy broadband-capable facilities to all locations within their service territory, the Commission continues to offer a more flexible approach for these smaller carriers. Specifically, beginning July 1, 2012, the Commission requires the following of rate-of-return carriers that continue to receive HCLS or ICLS or begin receiving new CAF funding in conjunction with the implementation of intercarrier compensation reform, as a condition of receiving that support: Such carriers must provide broadband service at speeds of at least 4 Mbps downstream and 1 Mbps upstream with latency suitable for real-time applications, such as VoIP, and with usage capacity reasonably comparable to that available in residential terrestrial fixed broadband offerings in urban areas, upon reasonable request. The Commission thus requires rate-of-return carriers to provide their customers with at least the same initial minimum level of broadband service as those carriers who receive model-based support, but given their generally small size, the Commission determines that rate-of-return carriers should be provided greater flexibility in edging out their broadband-capable networks in response to consumer demand. At this time the Commission does not adopt intermediate build-out milestones or increased speed requirements for future years, but the Commission expects carriers will deploy scalable broadband to their communities and will monitor their progress in doing so, including through the annual reports they will be required to submit. The broadband deployment obligation the Commission adopts is similar to the voice deployment obligations many of these carriers are subject to today.

132. The Commission believes these public interest obligations are reasonable. Although many carriers may experience some reduction in support as a result of the reforms adopted herein, those reforms are necessary to eliminate waste and inefficiency and improve incentives for rational investment and operation by rate-of-return LECs. The Commission notes that these carriers benefit by receiving certain and predictable funding through the CAF created to address access charge reform. In addition, rate-of-return carriers will not necessarily be required to build out to and serve the most expensive locations within their service area.

133. Upon receipt of a reasonable request for service, carriers must deploy broadband to the requesting customer within a reasonable amount of time. The Commission agrees with the State Members of the Federal-State Joint Board on Universal Service that construction charges may be assessed, subject to limits. In the Accountability and Oversight section of this R&O, the Commission requires ETCs to include in their annual reports to USAC and to the relevant state commission and Tribal government, if applicable, the number of unfulfilled requests for service from potential customers and the number of customer complaints, broken out separately for voice and broadband services. The Commission will monitor carriers' filings to determine whether reasonable requests for broadband service are being fulfilled, and the Commission encourages states and Tribal governments to do the same. As

discussed in the legal authority section above, the Commission is funding a broadband-capable voice network, so the Commission believes that to the extent states retain jurisdiction over voice service, states will have jurisdiction to monitor these carriers' responsiveness to customer requests for service.

134. The Commission recognizes that smaller carriers serve some of the highest cost areas of the nation. The Commission seeks comment in the *USF/ICC Transformation FNPRM* below on alternative ways to meet the needs of consumers in these highest cost areas. Pending development of the record and resolution of these issues, rate-of-return carriers are simply required to extend broadband on reasonable request. The Commission expects that rate-of-return carriers will follow pre-existing state requirements, if any, regarding service line extensions in their highest-cost areas.

2. Limits on Reimbursable Capital and Operating Costs

135. *Discussion.* The Commission concludes that the Commission should use regression analyses to limit reimbursable capital expenses and operating expenses for purposes of determining high-cost support for rate-of-return carriers. The methodology will generate caps, to be updated annually, for each rate-of-return company. This rule change will place important constraints on how rate-of-return companies invest and operate that over time will incent greater operational efficiencies. The Commission delegates authority to the Wireline Competition Bureau to implement a methodology and expect that limits will be implemented no later than July 1, 2012.

136. Several commenters support the proposal to impose reasonable limits on reimbursable capital and operating expenses. Although many small rate-of-return carriers seem to imply that the Commission should not adopt operating expense benchmarks because their operating expenses are ''fixed,'' other representatives of rural rate-of-return companies support the concept of imposing reasonable benchmarks. The Rural Associations concede that ''[t]o the extent any 'race to the top' occurs, it undermines predictability and stability for current USF recipients.''

137. The Commission sets forth in the *USF/ICC Transformation FNPRM* and Appendix H a specific methodology for capping recovery for capital expenses and operating expenses using quantile regression techniques and publicly available cost, geographic and demographic data. The net effect would be to limit high-cost loop support amounts for rate-of-return carriers to reasonable amounts relative to other carriers with similar characteristics. Specifically, the methodology uses National Exchange Carrier Association (NECA) cost data and 2010 Census data to cap permissible expenses for certain costs used in the HCLS formula. The Commission invites public input in the accompanying *USF/ICC Transformation FNPRM* on that methodology and anticipates that HCLS benchmarks will be implemented for support calculations beginning in July 2012.

138. The Commission sets forth here the parameters of the methodology that the Bureau should use to limit payments from HCLS. The Commission requires that companies' costs be compared to those of similarly situated companies. The Commission concludes that statistical techniques should be used to determine which companies shall be deemed similarly situated. For purposes of this analysis, the Commission concludes the following non-exhaustive list of variables may be considered: Number of loops, number of housing units (broken out by whether the housing units are in urbanized areas, urbanized clusters, and nonurban areas), as well as geographic measures such as land area, water area, and the number of census blocks (all broken out by urbanized areas, urbanized clusters, and nonurban areas). The Commission grants the Bureau discretion to determine whether other variables, such as soil type, would improve the regression analysis. The Commission notes that the soils data from the Natural Resource Conservation Service (NRCS) that the Nebraska study used to generate soil, frost and wetland variables do not cover the entire United States. These data, called the Soil Survey Geographic Database or SSURGO, do not cover about 24 percent of the United States land mass, including Puerto Rico, Guam, American Samoa, U.S. Virgin Islands and Northern Mariana Islands as well as Alaska. The Commission seeks comment in the *USF/ICC Transformation FNPRM* on sources of other publicly available soil data. The Commission delegates authority to the Bureau to adopt the initial methodology, to update it as it gains more experience and additional information, and to update its regression analysis annually with new cost data.

139. Each year the Wireline Competition Bureau will publish in a public notice the updated capped values that will be used in the NECA formula in place of an individual company's actual cost data for those rate-of-return cost companies whose costs exceed the caps, which will result in revised support amounts. The Commission directs NECA to modify the high-cost loop support universal service formula for average schedule companies annually to reflect the caps derived from the cost company data.

140. The Commission concludes that establishing reasonable limits on recovery for capital expenses and operating expenses will provide better incentives for carriers to invest prudently and operate efficiently than the current system. Under the current HCLS rules, a company receives support when its costs are relatively high compared to a national average—without regard to whether a lesser amount would be sufficient to provide supported services to its customers. The current rules fail to create incentives to reduce expenditures; indeed, because of the operation of the overall cap on HCLS, carriers that take prudent measures to cut costs under the current rules may actually lose HCLS support to carriers that significantly increase their costs in a given year.

141. Under the new rule, the Commission will place limits on the HCLS provided to carriers whose costs are significantly higher than other companies that are similarly situated, and support will be redistributed to those carriers whose unseparated loop cost is not limited by operation of the benchmark methodology. The Commission notes that the fact that an individual company will not know how the benchmark affects its support levels until after investments are made is no different from the current operation of high-cost loop support, in which a carrier receives support based on where its own cost per loop falls relative to a national average that changes from year to year. Even today, companies can only estimate whether their expenditures will be reimbursed through HCLS. In contrast to the current situation, the new rule will discourage companies from over-spending relative to their peers. The new rule will provide additional support to those companies that are otherwise at risk of losing HCLS altogether, and would not otherwise be well-positioned to further advance broadband deployment.

142. The Commission rejects the argument that imposing benchmarks in this fashion would negatively impact companies that have made past investments in reliance upon the current rules or the ''no barriers to advanced services'' policy. 47 U.S.C. 254 does not mandate the receipt of support by any particular carrier. Rather, as the Commission has indicated

and the courts have agreed, the ''purpose of universal service is to benefit the customer, not the carrier.'' That is, while 47 U.S.C. 254 directs the Commission to provide support that is sufficient to achieve universal service goals, that obligation does not create any entitlement or expectation that ETCs will receive any particular level of support or even any support at all. The new rule will inject greater predictability into the current HCLS mechanism, as companies will have more certainty of support if they manage their costs to be in alignment with their similarly situated peers.

143. Our obligation to consumers is to ensure that they receive supported services. Our expectation is that carriers will provide such services to their customers through prudent facility investment and maintenance. To the extent costs above the benchmark are disallowed under this new rule, companies are free to file a petition for waiver to seek additional support.

144. The Commission finds that the approach—which limits allowable investment and expenses with reference to similarly situated carriers—is a reasonable way to place limits on recovery of loop costs. The Rural Associations propose an alternative limitation on capital investment that would tie the amount of a rural company's recovery of prospective investment that qualifies for high-cost support to the accumulated depreciation in its existing loop plant. Their proposal would limit only future annual loop investment for individual companies by multiplying (a) the ratio of accumulated loop depreciation to total loop plant or (b) twenty percent, whichever is lower, times (c) an estimated total loop plant investment amount (adjusted for inflation). This proposal would do little to limit support for capital expenses if past investments for a particular company were high enough to be more than sufficient to provide supported services, and would do nothing to limit support for operating expenses, which are on average more than half of total loop costs. In addition, it would likely be administratively impracticable for the Commission to verify the inflation adjustments each company would make for various pieces of equipment acquired at various times.

145. The Commission also concludes that the approach can be more readily implemented and updated than the specific proposal presented by the Nebraska Companies. Consultants for the Nebraska Companies, in their regression analyses, used proprietary cost data. Because the proprietary cost data were not placed in the record, Commission staff was not able to verify the results of the Nebraska Companies' studies. The Nebraska Companies subsequently proposed that the Commission begin collecting similar investment and operating expense data, as well as independent variables such as density per route mile, to be used in similar regression analyses. For example, they suggest that ''[o]ne useful source for this data would be the investment costs associated with actual broadband construction projects that meet or exceed current engineering standards.'' Although the Nebraska Companies' proposal shares objectives similar to the methodology, it would require the collection of additional data that the Commission does not currently have, which would lead to considerable delay in implementation. The Commission also is concerned about the difficulty in obtaining a sufficiently representative and standardized data set based on construction projects that will vary in size, scope and duration. Moreover, regressions based on such data could not easily be updated on a regular basis without further data collection and standardization. On balance, the Commission does not believe that any advantages of the Nebraska Companies' approach outweigh the benefits of relying on cost data that the Commission already collects on a regular basis. As explained in detail in the accompanying *USF/ICC Transformation FNPRM* and Appendix H, Commission staff used publicly available NECA cost data and other publicly available geographic and demographic data sets to develop the proposed benchmarks.

146. Finally, the Commission notes that while the methodology in Appendix H is specifically designed to modify the formula for determining HCLS, the Commission concludes that the Commission should also develop similar benchmarks for determining ICLS. The Commission directs NECA to file the detailed revenue requirement data it receives from carriers, no later than thirty days after release of this R&O, so that the Wireline Competition Bureau can evaluate whether it should adopt a methodology using these data. Over time, benchmarks to limit reimbursable recovery of costs will provide incentives for each individual company to keep its costs lower than its own cap from prior years, and more generally moderate expenditures and improve efficiency, and the Commission believes these objectives are as important in the context of ICLS as they are for HCLS. The Commission seeks comment in the *USF/ICC Transformation FNPRM* on ICLS benchmarks.

147. The Commission delegates authority to the Wireline Competition Bureau to finalize a methodology to limit HCLS and ICLS reimbursements after this further input.

3. Corporate Operations Expense

148. *Discussion.* As supported by many parties, the Commission will adopt the more modest reform proposal to extend the limit on recovery of corporate operations expense to ICLS effective January 1, 2012. The Commission concluded in the *Universal Service First Report and Order,* 62 FR 32862, June 17, 1997, that the amount of recovery of corporate operations expense from HCLS should be limited to help ensure that carriers use such support only to offer better service to their customers through prudent facility investment and maintenance, consistent with their obligations under 47 U.S.C. 254(k). The Commission now concludes that the same reasoning applies to ICLS. Extending the limit on the recovery of corporate operations expenses to ICLS likewise furthers the goal of fiscal responsibility and accountability.

149. The Commission notes, however, that the current formula for limiting the eligibility of corporate operations expenses for HCLS has not been revised since 2001. The initial formula was implemented in 1998, based on 1995 cost data. In 2001, the formula was modified to reflect increases in Gross Domestic Product-Chained Price Index (GDP–CPI), but has not been updated since then.

150. There have been considerable changes in the telecommunications industry in the last decade, given the ''ongoing evolution of the voice network into a broadband network,'' and the Commission believes updating the formula based on more recent cost data will ensure that it reflects the current economics of serving rural areas and appropriately provides incentives for efficient operations. Therefore, the Commission now updates the limitation formula based on an analysis of the most recent actual corporate operations expense submitted by rural incumbent LECs. As set forth in Appendix C of the Report and Order, which is available in its entirety at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1122/FCC–11-161A1.pdf*, and as summarized below in section V.C.3.a, the basic statistical methods for developing the limitation formula and the structure of the formula are the same as before. The Commission also concludes that the updated formula the Commission adopts should include a

growth factor, consistent with the current formula that applies to HCLS.

151. Accordingly, effective January 1, 2012, the Commission modifies the existing limitation on corporate operations expense formula as follows:

- For study areas with 6,000 or fewer total working loops the monthly amount per loop shall be (a) $42.337 − (.00328 × number of total working loops), or (b) $63,000/number of total working loops, whichever is greater;
- For study areas with more than 6,000, but fewer than 17,887 total working loops, the monthly amount per loop shall be $3.007 + (117,990/number of total working loops); and
- For study areas with 17,887 or more total working loops, the monthly amount per loop shall be $9.56;
- Beginning January 1, 2013, the monthly per-loop limit shall be adjusted each year to reflect the annual percentage change in GDP–CPI.

a. Explanation of Methodology for Modifications to Corporate Operations Expense Formulae

152. *The Basic Formulae.* The Commission conducted a statistical analysis using actual incumbent local exchange carrier data submitted by NECA. The Commission used statistical regression techniques that focused on corporate operations expense per loop and the number of loops, in which the cap on corporate operations expense per loop declines as the number of loops increases so that economies of scale, which are evident in the data, can be reflected in the model. As in the previous corporate operations expense limitation formulae, the linear spline model developed has two line segments joined together at a single point or knot. In general, the linear spline model allows the per-line cap on corporate operations expense to decline as the number of loops increases for the smaller study areas having fewer loops than the knot point. Estimates produced by the linear spline model suggest that the per-loop cap on corporate operations expense for study areas with a number of loops higher than the spline knot is constant.

153. The linear spline model requires selecting a knot, the point at which the two line segments of differing slopes meet. The Commission retained the knot point at 10,000 loops from the Commission's previous analysis. The regression results are as follows:

- For study areas having fewer than 10,000 total working loops, the projected monthly corporate operations expense per-loop equals $36.815 − 0.00285 × (number of working loops);
- For study areas with total working loops equal or greater than 10,000 loops, the projected monthly corporate operations expense per-loop equals $8.12.

154. *Correcting for Non-monotonic Behavior in the Model's Total Corporate Operations Expense.* The linear spline model has one undesirable feature. For a certain range, it yields a total allowable corporate operations expense that declines as the number of working loops increases. This occurs because multiplying the linear function that defines the first line segment of the estimated spline model (36.815 − (0.00285 × the number of loops)) by the number of loops defines a quadratic function that determines total allowable corporate operations expense. This quadratic function produces a maximum value at 6,459 loops, well below the selected knot point of 10,000. To correct this problem, we refined the formulae to ensure that the total allowable corporate operations expense always increases as the number of loops increases. The Commission chose a point to the left of the point at which the total corporate operations expense estimate peaks. At that selected point, the slope of the function defining total corporate operations expense is positive. We then calculated the slope at that point and extended a line with the same slope upward to the right of that point until the line intersected the original estimated total operations expense, which is represented by 8.315 × the number of loops. Thus, the Commission we created a line segment with constant slope covering the region over which the original model of corporate operations expenses declines so that total corporate operations expense continues to increase with the number of loops. The Commission chose the point that leads to a line segment that yields the highest $R^2$.

155. Using this procedure, the Commission selected 6,000 as the point. The slope of total operations expense at this point is 2.615 and the line extended intersects the original total operations expense model at 17,887. Accordingly, the line segment formed for total corporate operations expenses, to be applied from 6,000 loops to 17,887 loops, is $2.615 × the number of working loops + $102,600. Dividing this number by the number of working loops defines the maximum allowable corporate operations expense per-loop for the range from 6,000 to 17,887 working loops, *i.e.,* $2.615 + ($102,600/number of working loops). Therefore, the projected per-loop corporate operations expense formulae are:

- For study areas having fewer than 6,000 total working loops, the projected monthly corporate operations expense per-loop equals $ 36.815 − 0.00285 × (number of total working loops);
- For study areas having 6,000 or more total working loops, but less than 17,887 total working loops, the projected monthly corporate operations expense per-loop equals $2.615 + (102,600/number of total working loops);
- For study areas having total working loops greater than or equal to 17,887 total working loops, the projected monthly corporate operations expense per-loop equals $8.315.

156. The Commission concluded previously that the amount of corporate operations expense per-loop that is supported through our universal service programs should fall within a range of reasonableness. Consistent with the formulae currently in place, we define this range of reasonableness for each study area as including levels of reported corporate operations expense per-loop up to a maximum of 115 percent of projected level of corporate operations expense per-loop. Therefore, each of the above formulae is multiplied by 115 percent to yield the maximum allowable monthly per-loop corporate operations expense as follows:

- For study areas having fewer than 6,000 total working loops, the maximum allowable monthly corporate operations expense per-loop equals $42.337 − 0.00328 × number of total working loops;
- For study areas having 6,000 or more total working loops, but fewer than 17,887 total working loops, the maximum allowable monthly corporate operations expense per-loop equals $3.007 + (117,990/number of total working loops);
- For study areas with total working loops greater than or equal to 17,887 total working loops, the maximum allowable monthly corporate operations expense per-loop equals $9.562.

157. Consistent with the existing rules, we will adjust the monthly per-loop limit to reflect the annual change in GDP–CPI.

4. Reducing High Cost Loop Support for Artificially Low End-User Rates

158. *Discussion.* The Commission now adopts a rule to limit high-cost support where end-user rates do not meet a specified local rate floor. This rule will apply to both rate-of-return carriers and price cap companies. 47 U.S.C. 254 obligates states to share in the responsibility of ensuring universal service. The Commission recognizes some state commissions may not have

examined local rates in many years, and carriers may lack incentives to pursue a rate increase when federal universal service support is available. Based on evidence in the record, however, there are a number of carriers with local rates that are significantly *lower* than rates that urban consumers pay. Indeed, there are local rates paid by customers of universal service recipients as low as $5 in some areas of the country. For example, the Commission notes that two carriers in Iowa and one carrier in Minnesota offer local residential rates below $5 per month. The Commission does not believe that Congress intended to create a regime in which universal service subsidizes artificially low local rates in rural areas when it adopted the reasonably comparable principle in 47 U.S.C. 254(b); rather, it is clear from the overall context and structure of the statute that its purpose is to ensure that rates in rural areas not be significantly *higher* than in urban areas.

159. The Commission focuses here on the impact of such a rule on rate-of-return companies. Data submitted by NECA summarizing residential R–1 rates for over 600 companies—a broad cross-section of carriers that typically receive universal service support—show that approximately 60 percent of those study areas have local residential rates that are below the 2008 national average local rate of $15.62. Most rates fall within a five-dollar range of the national average, but more than one hundred companies, collectively representing hundreds of thousands of access lines, have a basic R–1 rate that is significantly lower. This appears consistent with rate data filed by other commenters.

160. It is inappropriate to provide federal high-cost support to subsidize local rates beyond what is necessary to ensure reasonable comparability. Doing so places an undue burden on the Fund and consumers that pay into it. Specifically, the Commission does not believe it is equitable for consumers across the country to subsidize the cost of service for some consumers that pay local service rates that are significantly lower than the national urban average.

161. Based on the foregoing, and as described below, the Commission will limit high-cost support where local end-user rates plus state regulated fees (specifically, state SLCs, state universal service fees, and mandatory extended area service charges) do not meet an urban rate floor representing the national average of local rates plus such state regulated fees. Our calculation of this urban rate floor does not include federal SLCs, as the purposes of this rule change are to ensure that *states* are contributing to support and advance universal service and that consumers are not contributing to the Fund to support customers whose rates are below a reasonable level.

162. The Commission will phase in this rate floor in three steps, beginning with an initial rate floor of $10 for the period July 1, 2012 through June 30, 2013 and $14 for the period July 1, 2013 through June 30, 2014. Beginning July 1, 2014, and in each subsequent calendar year, the rate floor will be established after the Wireline Competition Bureau completes an updated annual survey of voice rates. Under this approach, the Commission will reduce, on a dollar-for-dollar basis, HCLS and CAF Phase I support to the extent that a carrier's local rates (plus state regulated fees) do not meet the urban rate floor.

163. To the extent end-user rates do not meet the rate floor, USAC will make appropriate reductions in HCLS support. This calculation will be pursuant to a rule that is separate from the existing rules for calculation of HCLS, which is subject to an annual cap. As a consequence, any calculated reductions will not flow to other carriers that receive HCLS, but rather will be used to fund other aspects of the CAF pursuant to the reforms the Commission adopts today.

164. This offset does not apply to ICLS because that mechanism provides support for interstate rates, not intrastate end-user rates. Accordingly, the Commission will revise the rules to limit a carrier's high-cost loop support when its rates do not meet the specified local urban rate floor.

165. Phasing in this requirement in three steps will appropriately limit the impact of the new requirement in a measured way. Based on the NECA data, the Commission estimates that there are only 257,000 access lines in study areas having local rates less than $10—which would be affected by the rule change in the second half of 2012—and there are 827,000 access lines in study areas that potentially would be affected in 2013. The Commission assumes, however, that by 2013 carriers will have taken necessary steps to mitigate the impact of the rule change. By adopting a multi-year transition, the Commission seeks to avoid a flash cut that would dramatically affect either carriers or the consumers they serve.

166. In addition, because the Commission anticipates that the rate floor for the third year will be set at a figure close to the sum of $15.62 plus state regulated fees, the Commission is confident that $10 and $14 are conservative levels for the rate floors for the first two years. $15.62 was the average monthly charge for flat-rate service in 2008, the most recent year for which data was available. Under the definition of ''reasonably comparable,'' rural rates are reasonably comparable to urban rates under 47 U.S.C. 254(b) if they fall within a reasonable range above the national average. Under this definition, the Commission could set the rate floor *above* the national average urban rate but within a range considered reasonable. In the present case, the Commission is expecting to set the end point rate floor *at* the average rate, and the Commission is setting rate floors well *below* the current best estimate of the average during the multi-year transition period.

167. Although the high-cost program is not the primary universal service program for addressing affordability, the Commission notes that some commenters have argued that if rates increase, service could become unaffordable for low-income consumers. However, staff analysis suggests that this rule change should not disproportionately affect low-income consumers, because there is no correlation between local rates and average incomes in rate-of-return study areas—that is, rates are not systematically lower where consumer income is lower and higher where consumer income is higher. The Commission further notes that the Commission's Lifeline and Link Up program remains available to low-income consumers regardless of this rule change.

168. In 2010, 1,048 rate-of-return study areas received HCLS support. Using data from the NECA survey filed pursuant to the Protective Order in this proceeding and U.S. Census data from third-party providers, the Commission analyzed monthly local residential rate data for 641 of these study areas and median income data for 618 of those 641 study areas. Based on the 618 study areas for which the Commission has both local rate data and median income data, when the Commission sets one variable dependent upon the other (price as a function of income), the Commission does not observe prices correlating at all with median income levels in the given study areas. The Commission observes a wide range of prices—many are higher than expected and just as many are lower than expected. In fact, some areas with extremely low residential rates exhibit higher than average consumer income.

169. To implement these rule changes, The Commission directs that all carriers receiving HCLS must report their basic voice rates and state regulated fees on an annual basis, so

that necessary support adjustments can be calculated. In addition, all carriers receiving frozen high-cost support will be required to report their basic voice rates and state regulated fees on an annual basis. Carriers will be required to report their rates to USAC, as set forth more fully below. As noted above, the Commission has delegated authority to the Wireline Competition Bureau and the Wireless Telecommunications Bureau to take all necessary steps to develop an annual rate survey for voice services. The Commission expects this annual survey to be implemented as part of the annual survey described above in the section discussing public interest obligations for voice telephony. The Commission expects the initial annual rate survey will be completed prior to the implementation of the third step of the transition.

170. Finally, the Commission notes that the Rural Associations contend that a benchmark approach for voice services fails to address rate comparability for broadband services. Although the Commission addresses only voice services here, elsewhere in this R&O the Commission addresses reasonable comparability in rates for broadband services. The Commission believes that it is critical to reduce support for voice—the supported service—where rates are artificially low. Doing so will relieve strain on the USF and, thus, greatly assist the efforts in bringing about the overall transformation of the high-cost program into the CAF.

5. Safety Net Additive

171. *Discussion.* The Commission concludes the safety net additive is not designed effectively to encourage additional significant investment in telecommunications plant, and therefore eliminate the rule immediately. The Commission grandfathers existing recipients and begin phasing out their support in 2012.

172. Several commenters suggest that rather than eliminate the safety net additive, the Commission revises the rule to base qualification on the *total* year-over-year changes in TPIS, rather than on *per-line* change in TPIS. The Commission declines to adopt this suggestion, and the Commission concludes instead that it should phase out safety net additive rather than modify how it operates. While revising the rule as some commenters suggested would address one deficiency with safety net additive support, doing so would not address the overarching concern that safety net additive as a whole does not provide the right incentives for investment in modern communications networks. It does not ensure that investment is reasonable or cost-efficient, nor does it ensure that investment is targeted to areas that would not be served absent support. For example, even if the Commission changed the rule as proposed, safety net additive could continue to allow incumbent LECs to get additional support if, for instance, they choose to build fiber-to-the-home on an accelerated basis in an area that is also served by an unsubsidized cable competitor. That said, the Commission does modify the proposed phase out of safety net additive based on the record.

173. The Commission concludes that beneficiaries of safety net additive whose total TPIS increased by more than 14 percent over the prior year at the time of their initial qualification should continue to receive such support for the remainder of their eligibility period, consistent with the original intent of the rule. For the remaining beneficiaries of safety net, the Commission finds that such support should be phased down in 2012 because such support is not being paid on the basis of significant investment in telecommunications plant. Specifically, for the latter group of beneficiaries, the safety net additive will be reduced 50 percent in 2012, and eliminated in 2013. The Commission does not provide any new safety net support for costs incurred after 2009.

6. Local Switching Support

174. *Discussion.* The Commission agrees with the Rural Associations that reforms to LSS should be integrated with reforms to ICC and the accompanying creation of a CAF to provide measured replacement of lost intercarrier revenues. The Commission continues to believe that the rationale for LSS has weakened with the advent of cheaper, more scalable switches and routers. The Commission also agrees with the Ad Hoc Telecommunications Users Committee that the LSS funding mechanism provides a disincentive for those carriers owning multiple study areas in the same state to combine those study areas, potentially resulting in inefficient, costly deployment of resources. Further, because qualification is solely based on the number of lines in the study area, LSS does not appropriately target funding to high-cost areas, nor does it target funding to areas that are unserved with broadband.

175. At the same time, the Commission recognizes that today many small companies recover a portion of the costs of their switching investment, both for circuit switches and recently purchased soft switches, through LSS. LSS is a form of explicit recovery for switching investment that otherwise would be recovered through intrastate access charges or end user rates. As such, any reductions in LSS would result in a revenue requirement flowing back to the state jurisdiction.

176. For all of these reasons, the Commission concludes that it is time to end LSS as a stand-alone universal service support mechanism, but that, as discussed in more detail in the ICC section of this R&O, limited recovery of the costs previously covered by LSS should be available pursuant to the ICC reform and the accompanying creation of an ICC recovery mechanism through the CAF. Effective July 1, 2012 the Commission will eliminate LSS as a separate support mechanism. In order to simplify the transition of LSS, beginning January 1, 2012 and until June 30, 2012, LSS payments to each eligible incumbent LEC shall be frozen at 2011 support levels subject to true-up based on 2011 operating results. To the extent that the elimination of LSS support affects incumbent LECs interstate switched access revenue requirement, the Commission addresses that issue in the ICC context.

7. Other High-Cost Rule Changes

a. Adjusted High Cost Loop Cap for 2012

177. *Discussion.* NECA projects that the high-cost loop cap will be $858 million for all rural incumbent LECs for 2012, which is $48 million less than the $906 million projected to be disbursed in 2011. Due to the elimination of HCLS for price cap companies as discussed above, the Commission is lowering the HCLS cap for 2012 by the amount of HCLS support price cap carriers would have received for 2012. The Commission resets the 2012 high-cost loop cap to the level that remaining rate-of-return carriers are projected to receive in 2012. Although price cap holding companies currently receive HCLS in a few rate-of- return study areas, as a result of the rule changes discussed above, all of their remaining rate-of-return support will be distributed through a new transitional CAF program, rather than existing mechanisms like HCLS. Accordingly, NECA is required to re-calculate the HCLS cap for 2012 after deducting all HCLS that price cap carriers and their affiliated rate-of-return study areas would have received for 2012. NECA is required to submit to the Wireline Bureau the revised 2012 HCLS cap within 30 days of the release of this R&O. NECA shall provide to the Wireline Bureau all calculations and

assumptions used in re-calculating the HCLS cap.

b. Study Area Waivers

i. Standards for Review

178. *Discussion.* The Commission concludes that the one-percent guideline is no longer an appropriate guideline to evaluate whether a study area waiver would result in an adverse effect on the fund and, therefore, eliminate the one-percent guideline in evaluating petitions for study area waiver. Therefore, on a prospective basis, the standards for evaluating petitions for study area waiver are: (1) The state commission having regulatory authority over the transferred exchanges does not object to the transfer and (2) the transfer must be in the public interest. As proposed in the *USF/ICC Transformation NPRM,* the evaluation of the public interest benefits of a proposed study area waiver will include: (1) the number of lines at issue; (2) the projected universal service fund cost per line; and (3) whether such a grant would result in consolidation of study areas that facilitates reductions in cost by taking advantage of the economies of scale, *i.e.,* reduction in cost per line due to the increased number of lines. The Commission stresses that these guidelines are only guidelines and not rigid measures for evaluating a petition for study area waiver. The Commission believes that this streamlined process will provide greater regulatory certainty and a more certain timetable for carriers seeking to invest in additional exchanges.

ii. Streamlining the Study Area Waiver Process

179. *Discussion.* To more efficiently and effectively process petitions for waiver of the study area freeze, the Commission adopts the proposal to streamline the study are waiver process. Upon receipt of a petition for study area waiver, a public notice shall be issued seeking comment on the petition. As is the usual practice, comments and reply comments will be due within 30 and 45 days, respectively, after release of the public notice. Absent any further action by the Bureau, the waiver will be deemed granted on the 60th day after the reply comment due date. Additionally, any study area waiver related waiver requests that petitioners routinely include in petitions for study area waiver and the Commission routinely grants—such as requests for waiver of 47 CFR 69.3(e)(11) (to include any acquired lines in the NECA pool) and 69.605(c) (to remain an average schedule company after an acquisition of exchanges)—will also be deemed granted on the 60th day after the reply comment due date absent any further action by the Bureau. Should the Bureau have concerns with any aspect of the petition for study area waiver or related waivers, however, the Bureau may issue a second public notice stating that the petition will not be deemed granted on the 60th day after the reply comment due date and is subject to further analysis and review.

c. Revising the ''Parent Trap'' Rule, Section 54.305

180. *Discussion.* The Commission finds that the proposed minor revision to the rule will better effectuate the intent of 47 CFR 54.305 that incumbent LECs not purchase exchanges merely to increase their high-cost universal service support and should not dissuade any transactions that are in the public interest. Therefore, effective January 1, 2012, any incumbent LEC currently and prospectively subject to the provisions of 47 CFR 54.305, that would otherwise receive no support or lesser support based on the actual costs of the study area, will receive the lesser of the support pursuant to 47 CFR 54.305 or the support based on its own costs.

181. The Commission notes that above, the Commission freezes all support under the existing high-cost support mechanisms on a study area basis for price cap carriers and their rate-of-return affiliates, at 2011 levels, effective January 1, 2012. The modification of the operation of 47 CFR 54.305 is not intended to reduce support levels for those companies; they will receive frozen high-cost support equal to the amount of support each carrier received in 2011 in a given study area, adjusted downward as necessary to the extent local rates are below the specified urban rate floor.

8. Limits on Total per Line High-Cost Support

182. *Discussion.* After consideration of the record, the Commission finds it appropriate to implement responsible fiscal limits on universal service support by immediately imposing a presumptive per-line cap on universal service support for all carriers, regardless of whether they are incumbents or competitive ETCs. For administrative reasons, the Commission finds that the cap shall be implemented based on a $250 per-line monthly basis rather than a $3,000 per-line annual basis because USAC disburses support on a monthly basis, not on an annual basis. The Commission finds that support drawn from limited public funds in excess of $250 per-line monthly (not including any new CAF support resulting from ICC reform) should not be provided without further justification.

183. This rule change will be phased in over three years to ease the potential impact of this transition. From July 1, 2012 through June 30, 2013, carriers shall receive no more than $250 per-line monthly plus two-thirds of the difference between their uncapped per-line amount and $250. From July 1, 2013 through June 30, 2014, carriers shall receive no more than $250 per-line monthly plus one-third of the difference between their uncapped per-line amount and $250. July 1, 2014, carriers shall receive no more than $250 per-line monthly.

184. The Rural Associations argue that a cap on total annual per-line high-cost support should not be imposed without considering individual circumstances and that if such a cap is imposed only on non-tribal companies located in the contiguous 48 states, about 12,000 customers would experience rate increases of $9.24 to $1,200 per month and the overall effect would reduce high-cost disbursements by less than $15 million. The Rural Associations also point out while that it is reasonable to ask whether it makes sense for USF to support extremely high per-line levels going forward, the Commission must consider the consequences of imposing such a limit on companies with high costs based on past investments.

185. The Commission emphasizes that virtually all (99 percent) of incumbent LEC study areas currently receiving support are under the $250 per-line monthly limit. Only eighteen incumbent carriers and one competitive ETC today receive support in excess of $250 per-line monthly, and as a result of the other reforms described above, the Commission estimates that only twelve will continue to receive support in excess of $250 per-line monthly.

186. The Commission also recognizes that there may be legitimate reasons why certain companies have extremely high support amounts per line. For example, some of these extremely high-cost study areas exist because states sought to ensure a provider would serve a remote area. The Commission estimates that the cap the Commission adopts today will affect companies serving approximately 5,000 customers, many of whom live in extremely remote and high-cost service territories. That is, all of the affected study areas total just 5,000 customers. Therefore, as suggested by the Rural Associations, the Commission will consider individual circumstances when applying the $250

per-line monthly cap. Any carrier affected by the $250 per-line monthly cap may file a petition for waiver or adjustment of the cap that would include additional financial data, information, and justification for support in excess of the cap using the process set forth below. The Commission does not anticipate granting any waivers of undefined duration, but rather would expect carriers to periodically re-validate any need for support above the cap. The Commission also notes that even if a carrier can demonstrate the need for funding above the $250 per-line monthly cap, they are only entitled to the amount above the cap they can show is necessary, not the amount they were previously receiving.

187. Absent a waiver or adjustment of the $250 per-line monthly cap, USAC shall commence reductions of the affected carrier's support to $250 per-line monthly six months after the effective date of these rules. This six month delay should provide an opportunity for companies to make operational changes, engage in discussions with their current lenders, and bring any unique circumstances to the Commission's attention through the waiver process. To reach the $250 per-line cap, USAC shall reduce support provided from each universal support mechanism, with the exception of LSS, based on the relative amounts received from each mechanism.

9. Elimination of Support in Areas With 100 Percent Overlap

188. *Discussion.* Providing universal service support in areas of the country where another voice and broadband provider is offering high-quality service without government assistance is an inefficient use of limited universal service funds. The Commission agrees with commenters that ''USF support should be directed to areas where providers would not deploy and maintain network facilities absent a USF subsidy, and not in areas where unsubsidized facilities-based providers already are competing for customers.'' For this reason, the Commission excludes from the CAF areas that are overlapped by an unsubsidized competitor (*see infra* Section VII.C). Likewise, the Commission does not intend to continue to provide current levels of high-cost support to rate-of-return companies where there is overlap with one or more unsubsidized competitors.

189. At the same time, the Commission recognizes that there are instances where an unsubsidized competitor offers broadband and voice service to a significant percentage of the customers in a particular study area (typically where customers are concentrated in a town or other higher density sub-area), but not to the remaining customers in the rest of the study area, and that continued support may be required to enable the availability of supported voice services to those remaining customers. In those cases, the Commission agrees with the Rural Associations that there should be a process to determine appropriate support levels.

190. Accordingly, the Commission adopts a rule to phase out all high-cost support received by incumbent rate-of-return carriers over three years in study areas where an unsubsidized competitor—or a combination of unsubsidized competitors—offers voice and broadband service at speeds of at least 4 Mbps downstream/1 Mbps upstream, and with latency and usage limits that meet the broadband performance requirements described above, for 100 percent of the residential and business locations in the incumbent's study area.

191. The *USF/ICC Transformation FNPRM* seeks comment on the methodology and data for determining overlap. Upon receiving a record on those issues, the Commission directs the Wireline Competition Bureau to publish a finalized methodology for determining areas of overlap and to publish a list of companies for which there is a 100 percent overlap. In study areas where there is 100 percent overlap, the Commission will freeze the incumbent's high-cost support at its total 2010 support, or an amount equal to $3,000 times the number of reported lines as of year end 2010, whichever is lower, and reduce such support over three years (*i.e.* by 33 percent each year). For this purpose, ''total 2010 support'' is the amount of support disbursed to carrier for 2010, without regard to prior period adjustments related to years other than 2010 and as determined by USAC on January 31, 2011. In addition, in the *USF/ICC Transformation FNPRM,* the Commission seeks comment on a process for determining support in study areas with less than 100 percent overlap.

10. Impact of These Reforms on Rate-of-Return Carriers and the Communities They Serve

192. The Commission agrees with the Rural Associations that ''there is * * * without question a need to modify certain of the existing universal service mechanism to enhance performance and improve sustainability.'' The Commission takes a number of important steps to do so in this R&O, and the Commission is careful to implement these changes in a gradual manner so that the efforts do not jeopardize service to consumers or investments made consistent with existing rules. It is essential that the Commission ensures the continued availability and affordability of offerings in the rural and remote communities served by many rate-of-return carriers. The existing regulatory structure and competitive trends have placed many small carriers under financial strain and inhibited the ability of providers to raise capital.

193. The Commission reaffirms its commitment to these communities. The Commission provides rate-of-return carriers the predictability of remaining under the legacy universal service system in the near-term, while giving notice that the Commission intends to transition to more incentive-based regulation in the near future. The Commission also provides greater certainty and a more predictable flow of revenues than the status quo through the intercarrier compensation reforms, and set a total budget to direct up to $2 billion in annual universal service (including CAF associated with intercarrier compensation reform) payments to areas served by rate-of-return carriers. The Commission believes that this global approach will provide a more stable base going forward for these carriers, and the communities they serve.

194. Today's package of universal service reforms is targeted at eliminating inefficiencies and closing gaps in the system, not at making indiscriminate industry-wide reductions. Many of the rules addressed today have not been comprehensively examined in more than a decade, and direct funding in ways that may no longer make sense in today's marketplace. By providing an opportunity for a stable 11.25 percent interstate return for rate-of-return companies, regardless of the necessity or prudence of any given investment, the current system imposes no practical limits on the type or extent of network upgrades or investment. Our system provides universal service support to both a well-run company operating as efficiently as possible, and a company with high costs due to imprudent investment decisions, unwarranted corporate overhead, or an inefficient operating structure.

195. In this R&O, the Commission takes the overdue steps necessary to address the misaligned incentives in the current system by correcting program design flaws, extending successful safeguards, ensuring basic fiscal

responsibility, and closing loopholes to ensure the rules reward only prudent and efficient investment in modern networks. Today's reforms will help ensure rate-of-return carriers retain the incentive and ability to invest and operate modern networks capable of delivering broadband as well as voice services, while eliminating unnecessary spending that unnecessarily limits funding that is available to consumers in high-cost, unserved communities.

196. Because the approach is focused on rooting out inefficiencies, these reforms will not affect all carriers in the same manner or in the same magnitude. After significant analysis, including review of numerous cost studies submitted by individual small companies and cost consultants, NECA and USAC data, and aggregated information provided by the RUS on their current loan portfolio, the Commission is confident that these incremental reforms will not endanger existing service to consumers. Further, the Commission believes strongly that carriers that invest and operate in a prudent manner will be minimally affected by this R&O.

197. Indeed, based on calendar year 2010 support levels, the analysis shows that nearly 9 out of 10 rate-of-return carriers will see reductions in high-cost universal service receipts of less than 20 percent annually, and approximately 7 out of 10 will see reductions of less than 10 percent. In fact, almost 34 percent of rate-of-return carriers will see no reductions whatsoever, and more than 12 percent of providers will see an increase in high-cost universal service receipts. This, coupled with a stabilized path for ICC, will provide the predictability and certainty needed for new investment.

198. Looking more broadly at all revenues, the Commission believes that the overall regulatory and revenue predictability and certainty for rate-of-return carriers under today's reforms will help facilitate access to capital and efficient network investment. Specifically, it is critical to underscore that legacy high-cost support is but one of four main sources of revenues for rate-of-return providers: universal service revenues account for approximately 30 percent of the typical rate-of-return carrier's total revenues. Today's action does not alter a provider's ability to collect regulated or unregulated end-user revenues, and comprehensively reforms the fourth main source of revenues, the intercarrier compensation system. Importantly, ICC reforms will provide rate-of-return carriers with access to a new explicit recovery mechanism in CAF, offering a source of stable and certain revenues that the current intercarrier system can no longer provide. Taking into account these other revenue streams, and the complete package of reforms, the Commission believes that rate-of-return carriers on the whole will have a stronger and more certain foundation from which to operate, and, therefore, continue to serve rural parts of America.

199. The Commission is, therefore, equally confident that these reforms, while ensuring significant overall cost savings and improving incentives for rational investment and operation by rate-of-return carriers, will in general not materially impact the ability of these carriers to service their existing debt. Based on an analysis of the reform proposals in the Notice, RUS projects that the Times Interest Earned Ratio (TIER) for some borrowers could fall below 1.0, which RUS considers a minimum baseline level for a healthy borrower. However, the package of reforms adopted in this R&O is more modest than the set proposed in the Notice. In addition, companies may still have positive cash flow and be able to service their debt even with TIERs of less than 1.0. Indeed of the 444 RUS borrowers in 2010, 75 (17 percent) were below TIER 1.0. Moreover, whereas RUS assumed that all USF reductions directly impact borrowers' bottom lines, in fact the Commission expects many borrowers affected by the reforms will be able to achieve operational efficiencies to reduce operating expenses, for instance, by sharing administrative or operating functions with other carriers, and thereby offset reductions in universal service support.

200. The Commission, therefore, rejects the sweeping argument that the rule changes the Commission adopts today would unlawfully necessarily affect a taking. Commenters seem to suggest that they are entitled to continued USF support as a matter of right. Precedent makes clear, however, that carriers have no vested property interest in USF. To recognize a property interest, carriers must ''have a legitimate claim of entitlement to'' USF support. Such entitlement would not be established by the Constitution, but by independent sources of law. 47 U.S.C. 254 does not expressly or impliedly provide that particular companies are entitled to ongoing USF support. Indeed, there is no statutory provision or Commission rule that provides companies with a vested right to continued receipt of support at current levels, and the Commission is not aware of any other, independent source of law that gives particular companies an entitlement to ongoing USF support. Carriers, therefore, have no property interest in or right to continued USF support.

201. Additionally, carriers have not shown that elimination of USF support will result in confiscatory end-user rates. To be confiscatory, government-regulated rates must be so low that they threaten a regulated entity's ''financial integrity'' or ''destroy the value'' of the company's property. Carriers face a ''heavy burden'' in proving confiscation as a result of rate regulation. To the extent that any rate-of-return carrier can effectively demonstrate that it needs additional support to avoid constitutionally confiscatory rates, the Commission will consider a waiver request for additional support. The Commission will seek the assistance of the relevant state commission in review of such a waiver to the extent that the state commission wishes to provide insight based on its understanding of the carrier's activities and other circumstances in the state. The Commission does not expect to routinely grant requests for additional support, but this safeguard is in place to help protect the communities served by rate-of-return carriers.

*D. Rationalizing Support for Mobility*

202. Mobile voice and mobile broadband services are increasingly important to consumers and to our nation's economy. Given the important benefits of and the strong consumer demand for mobile services, ubiquitous mobile coverage must be a national priority. Yet despite growth in annual funding for competitive ETCs of almost 1000 percent over the past decade, there remain many areas of the country where people live, work, and travel that lack any mobile voice coverage, and still larger geographic areas that lack current generation mobile broadband coverage. To increase the availability of current generation mobile broadband, as well as mobile voice, across the country, universal service funding for mobile networks must be deployed in a more targeted and efficient fashion than it is today.

203. With the R&O, the Commission adopts reforms that will secure funding for mobility directly, rather than as a side-effect of the competitive ETC system, while rationalizing how universal service funding is provided to ensure that it is cost-effective and targeted to areas that require public funding to receive the benefits of mobility.

204. To accomplish the universal service goal of ubiquitous availability of mobile services, the Commission establishes the Mobility Fund. The first

phase of the Mobility Fund will provide one-time support through a reverse auction, with a total budget of $300 million, and will provide the Commission with experience in running reverse auctions for universal service support. The Commission expects to distribute this support as quickly as feasible, with the goal of holding an auction in 2012, with support beginning to flow no later than 2013. As part of this first phase, the Commission also designates an additional $50 million for one-time support for advanced mobile services on Tribal lands, for which the Commission expects to hold an auction in 2013. The second phase of the Mobility Fund will provide ongoing support for mobile service with the goal of holding the auction in the third quarter of 2013 and support disbursed starting in 2014, with an annual budget of $500 million. This dedicated support for mobile service supplements the other competitive bidding mechanisms under the CAF.

1. Mobility Fund Phase I

a. Overall Design of Mobility Fund Phase I

i. Legal Authority

205. In other parts of the R&O, the Commission discussed its authority to provide universal service funding to support the provision of voice telephony services. The Commission explained that, pursuant to its statutory authority, it may require that universal service support be used to ensure the deployment of broadband networks capable of offering not only voice telephony services, but also advanced telecommunications and information services, to all areas of the nation, as contemplated by the principles set forth in 47 U.S.C. 254(b). In this section of the R&O, the Commission applies the legal analysis of its statutory authority to the establishment of Phase I and II of the Mobility Fund.

206. As an initial matter, it is wholly apparent that mobile wireless providers offer ''voice telephony services'' and thus offer services for which federal universal support is available. Furthermore, wireless providers have long been designated as ETCs eligible to receive universal service support. Nonetheless, a number of parties responding to the *Mobility Fund NPRM,* 75 FR 67060, November 1, 2010, question the Commission's authority to establish the Mobility Fund as described below. The Commission rejects those arguments.

207. First, the Commission rejects the argument that it may not support mobile networks that offer services other than the services designated for support under 47 U.S.C. 254. Under its longstanding ''no barriers'' policy, the Commission allows carriers receiving high-cost support ''to invest in infrastructure capable of providing access to advanced services'' as well as supported voice services. Moreover, 47 U.S.C. 254(e)'s reference to ''facilities'' and ''services'' as distinct items for which federal universal service funds may be used demonstrates that the federal interest in universal service extends not only to supported services, but also the nature of the facilities over which they are offered. Specifically, the Commission has an interest in promoting the deployment of the types of facilities that will best achieve the principles set forth in 47 U.S.C. 254(b) (and any other universal service principle that the Commission may adopt under 47 U.S.C. 254(b)(7)), including the principle that universal service program be designed to bring advanced telecommunications and information services to all Americans, at rates and terms that are comparable to the rates and terms enjoyed in urban areas. Those interests are equally strong in the wireless arena. The Commission thus concludes that USF support may be provided to networks, including 3G and 4G wireless services networks, that are capable of providing additional services beyond supported voice services.

208. For similar reasons, the Commission rejects arguments made by MetroPCS, NASUCA, and US Cellular that the Mobility Fund would impermissibly support an ''information service;'' by Free Press and the Florida Commission that establishment of the Mobility Fund would violate 47 U.S.C. 254 because mobile data service is not a supported service; and by various parties that 47 U.S.C. 254(c)(1) prohibits funding for services to which a substantial majority of residential customers do not subscribe. All of these arguments incorrectly assume that the Mobility Fund will be used to support mobile data service as a supported service in its own right. To the contrary, the Mobility Fund will be used to support the provision of ''voice telephony service'' and the underlying mobile network. That the network will also be used to provide information services to consumers does not make the network ineligible to receive support; to the contrary, such use directly advances the policy goals set forth in 47 U.S.C. 254(b), the new universal service principle recommended by the Joint Board, as well as 47 U.S.C. 1302.

209. The Commission also rejects the argument that the Mobility Fund violates the principle in 47 U.S.C. 254(b)(5) that ''[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.'' The Commission disagrees with commenters argue that non-recurring funding won in a reverse auction is not ''predictable'' because the final amount of support is not known in advance of the bidding or ''sufficient'' because non-recurring funding will not meet recurring costs. The terms ''predictable'' and ''sufficient'' modify ''Federal and State mechanisms.'' Reverse auction rules establish a predictable mechanism to support universal service in that the carrier receiving support has notice of its rights and obligations before it undertakes to fulfill its universal service obligations. Moreover, this interpretation of the statute was upheld by the Fifth Circuit's decision in *Alenco Communications* v. *FCC,* 201 F.3d 608 (5th Cir 2000).

210. The mechanism adopted in the R&O is also ''sufficient.'' The auction process is effectively a self-selecting mechanism: Bidders are presumed to understand that Mobility Fund Phase I will provide one-time support, that bidders will face recurring costs when providing service, and that they must tailor their bid amounts accordingly. The Commission declines to interpret the ''sufficiency'' requirement so broadly as to require it to guarantee that carriers who receive support make the correct business judgments in deciding how to structure their bids or their service offerings to consumers.

211. The Commission also disagrees with Cellular South's contention that ''by collecting USF contributions from all ETCs and awarding distributions to only a limited set of ETCs, support auctions would transform the Fund into an unconstitutional tax.'' As the Supreme Court explained in *United States* v. *Munoz-Flores,* 495 U.S. 385, 398 (1990), ''a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause.'' This analysis clearly applies to the sections of the Telecommunications Act of 1996 authorizing the Universal Service Fund, including the Mobility Fund. Moreover, the Commission concludes that the Fifth Circuit's analysis of this issue in *Texas Office of Public Utility Counsel et al* v. *FCC,* 183 F.3d 393, 428 (5th Cir. 1999), with respect to paging carriers applies equally to all carriers. As that court explained: ''universal service contributions are part of a particular

program supporting the expansion of, and increased access to, the public institutional telecommunications network. Each paging carrier directly benefits from a larger and larger network and, with that in mind, Congress designed the universal service scheme to exact payments from those companies benefiting from the provision of universal service.'' Finally, there is always likely to be a disparity between the contributions parties make to the USF and the amounts that they receive from the USF. Indeed, 47 U.S.C. 254(d) requires contributions from ''every telecommunications carrier that provides interstate telecommunications services,'' not just ETCs or funding recipients.

ii. Size of Mobility Fund Phase I

212. The Commission concludes that $300 million is an appropriate amount for one-time Mobility Fund Phase I support, and is consistent with the goal of swiftly extending current generation wireless coverage in areas where it is cost effective to do so with one-time support. The Commission believes that there are unserved areas for which such support will be useful, and that competition among wireless carriers for support to serve these areas will be sufficient to ensure that the available funds are distributed efficiently and effectively. The Commission concludes that a one-time infusion of $300 million should be sufficient to enable the deployment of 3G or better mobile broadband to many of the areas where such services are unavailable, while at the same time ensuring adequate universal service monies are available for other priorities, including broader reform initiatives to address ongoing support.

iii. Basic Structure for Mobility Fund Phase I

213. The Commission declines to adopt the structure of the current competitive ETC rules, which provide support for multiple providers in an area. That structure has led to duplicative investment by multiple competitive ETCs in certain areas at the expense of investment that could be directed elsewhere, including areas that are not currently served. Therefore, as a general matter, the Commission should not award Mobility Fund Phase I support to more than one provider per area unless doing so would increase the number of units (road miles) served, as is possible with partially overlapping bids. Priority in awarding USF support should be to expand service; permitting multiple winners as a routine matter in any geographic area to serve the same pool of customers would drain Mobility Fund resources with limited corresponding benefits to consumers. In certain limited circumstances, however, the most efficient use of resources may result in small overlaps in supported service. Thus, the Commission delegates to the Bureaus, as part of the auctions procedures process, the question of the circumstances, if any, in which to allow overlaps in supported service to permit the widest possible coverage given the overall budget.

214. While 47 U.S.C. 214(e) allows the states to designate more than one provider as an eligible telecommunications provider in any given area, nothing in the statute compels the states (or this Commission) to do so; rather, the states (and this Commission) must determine whether that is in the public interest. Likewise, nothing in the statute compels that every party eligible for support actually receive it.

215. In the past, the Commission concluded that universal service subsidies should be portable, and allowed multiple competitive ETCs to receive support in a given geographic area. Based on the experience of a decade, however, this prior policy of supporting multiple networks may not be the most effective way of achieving universal service. In this case, the Commission chooses not to subsidize competition through universal service in areas that are challenging for even one provider to serve. Given that Mobility Fund Phase I seeks to expand the availability of current and next generation services, it will be used to offer services where no provider currently offers such service. The public interest is best served by maximizing the expansion of networks into currently unserved communities given the available budget, which will generally result in providing support to no more than one provider in a given area.

216. Participation in Mobility Fund Phase I, however, is conditioned on collocation and data roaming obligations designed to minimize anticompetitive behavior. Recipients must also provide services with Mobility Fund Phase I support at reasonably comparable rates. These obligations should help address the concerns of those that argue for continued support of multiple providers in a particular geographic area and further the goal to ensure the widest possible reach of Phase I of the Mobility Fund.

iv. Auction To Determine Awards of Support

217. The goal of Mobility Fund Phase I is to extend the availability of mobile voice service on networks that provide 3G or better performance and to accelerate the deployment of 4G wireless networks in areas where it is cost effective to do so with one-time support. The purpose of the mechanism the Commission chooses is to identify those areas where additional investment can make as large a difference as possible in improving current-generation mobile wireless coverage. The Commission adopts a reverse auction format because it believes such a format is the best available tool for identifying such areas—and associated support amounts—in a transparent, simple, speedy, and effective way. In such a reverse auction, bidders are asked to indicate the amount of one-time support they would require to achieve the defined performance standards for specified numbers of units in given unserved areas. A reverse auction is the best way to achieve the Commission's overall objective of maximizing consumer benefits given the available funds.

218. Objections to using a competitive bidding mechanism largely challenge or misunderstand the goals of the instant proposal. Mobility Fund Phase I is focused solely on identifying recipients that can extend coverage with one-time support. Phase I has a limited and targeted purpose and is not intended to ensure that the highest cost areas receive support. Those issues are addressed separately in the sections of the R&O discussing Mobility Fund Phase II and other aspects of CAF, as well as in the *USF/ICC Transformation FNPRM.*

219. Others contend that funding will be directed to areas that will be built out with private investment even without support. The goal in establishing the Mobility Fund, however, is to provide the necessary ''jump start'' to accelerate service to areas where it is cost effective to do so. The Commission will also exclude from auction those areas where a provider has made a regulatory commitment to provide 3G or better wireless service, or has received a funding commitment from a federal executive department or agency in response to the carrier's commitment to provide 3G or better service. Taken together, these measures provide sufficient safeguards to exclude funding for areas that would otherwise be built with private investment in the near term.

220. *Delegation of Authority.* The Commission delegates to the Bureaus authority to administer the policies, programs, rules and procedures to implement Mobility Fund Phase I. In addition to the specific tasks noted elsewhere in the R&O, such as identifying areas eligible for Mobility Fund support and the number of units associated with each, this delegation includes all authority necessary to conduct a Mobility Fund Phase I auction and conduct program administration and oversight consistent with the policies and rules adopted in the R&O.

v. Identifying Unserved Areas Eligible for Support

(a) Using Census Blocks To Identify Unserved Areas

221. The Commission will identify areas eligible for Mobility Fund Phase I support at the census block level. Such a granular review will allow the Commission to identify unserved areas with greater accuracy than if it used larger areas. Although census blocks, particularly in rural areas, may include both served and unserved areas, it is not feasible to identify unserved areas on a more granular level for Mobility Fund Phase I, since as noted, census blocks are the smallest unit for which the Census Bureau provides data.

(b) Identifying Unserved Census Blocks

(i) Using American Roamer Data

222. American Roamer data is the best available choice at this time for determining wireless service at the census-block level. American Roamer data is recognized as the industry standard for the presence of service, although commenters note that the data may not be comprehensive and accurate in all cases. The Bureaus will exercise their delegated authority to use the most recent American Roamer data available in advance of a Phase I auction in 2012. In so doing, they should use the data to determine the geographic coverage of networks using EV–DO, EV–DO Rev A, UMTS/HSPA, or better technologies. In identifying unserved census blocks, the Commission will exclude census blocks that are served by 3G or better service. Better than 3G service would include any 4G technologies, including, for example, HSPA+ or LTE.

223. Some commenters to the *Mobility Fund NPRM* observe that American Roamer data relies on reporting by existing providers and therefore may tend to over-report the extent of existing coverage. While the Commission intends to be as accurate as possible in determining the extent of coverage, perfect information is not available, and the Commission knows of no data source that is more reliable than American Roamer, nor does the record reflect any other viable options.

224. Several commenters note that the potential for error is unavoidable and therefore advocate that some provision be made for outside parties to appeal or initiate a review of the initial coverage determination for a particular area. The Commission will, within a limited timeframe only, entertain challenges to its determinations regarding unserved geographic areas for purposes of Mobility Fund Phase I. Specifically, the Commission will make public a list of unserved areas as part of the pre-auction process and afford parties a reasonable opportunity to respond by demonstrating that specific areas identified as unserved are actually served and/or that additional unserved areas should be included. The Commission's goal is to accelerate expanded availability of mobile voice service over current-generation or better networks by providing one-time support from a limited source of funds, and any more extended pre-auction review process might risk undue delay in making any support available. Providing for post-auction challenges would similarly inject uncertainty and delay into the process. It is important to provide finality prior to the auction with respect to the specific unserved census blocks eligible for support. Accordingly, the Bureaus will finalize determinations with respect to which areas are eligible for support in a public notice establishing final procedures for a Mobility Fund Phase I auction.

(ii) Other Service-Related Factors

225. The Commission will not consider the presence in a census block of voice or broadband services over non-mobile networks in determining which census blocks are unserved. Mobile services provide benefits, consistent with, and in furtherance of the principles of 47 U.S.C. 254, not offered by fixed services. The ability to communicate from any point within a mobile network's coverage area lets people communicate at times when they may need it most, including during emergencies. The fact that fixed communications may be available nearby does not detract from this critical benefit. Moreover, the Internet access provided by current and next generation mobile networks renders them qualitatively different from existing voice-only mobile networks. Current and next generation networks offer the ability to tap resources well beyond the resources available through basic voice networks. Accordingly, in identifying blocks eligible for Mobility Fund support, the Commission will not consider whether voice and/or broadband services are available using non-mobile technologies or pre-3G mobile wireless technologies.

226. To help focus Mobility Fund Phase I support toward unserved locations where it will have the most significant impact, the Commission provides that support will not be offered in areas where, notwithstanding the current absence of 3G wireless service, any provider has made a regulatory commitment to provide 3G or better wireless service, or has received a funding commitment from a federal executive department or agency in response to the carrier's commitment to provide 3G or better wireless service.

227. To implement this decision, the Commission will require that all wireless competitive ETCs that receive USF high cost support, under either legacy or reformed programs, as well as all parties that seek Mobility Fund support, review the list of areas eligible for Mobility Fund support when published by the Commission and identify any areas with respect to which they have made a regulatory commitment to provide 3G or better wireless service or received a federal executive department or agency funding commitment in exchange for their commitment to provide 3G or better wireless service. A regulatory commitment ultimately may not result in service to the area in question. Nevertheless, given the limited resources provided for Mobility Fund Phase I and the fact that the commitments were made in the absence of any support from the Mobility Fund, it would not be an appropriate use of available resources to utilize Mobility Fund support in such areas.

(iii) Using Centroid Method

228. The Commission will consider any census block as unserved, if the American Roamer data indicates that the geometric center of the block—referred to as the centroid—is not covered by networks using EV–DO, EV–DO Rev A, or UMTS/HSPA or better. Employing the centroid method is relatively simple and straightforward, and will be an effective method for determining whether a block is uncovered. The centroid method is an administratively simple and efficient approach that, when used here, will permit the Commission to begin distributing this support without undue delay.

(c) Offering Support for Unserved Areas by Census Block

229. The census block should be the minimum geographic building block for defining areas for which support is provided. Using census blocks as the minimum geographic area gives the Commission and bidders more flexibility to tailor their bids to their business plans. Because census blocks are numerous and can be quite small, the Commission will need to provide at the auction for the aggregation of census blocks for purposes for bidding. Therefore, the Commission delegates to the Bureaus, as part of the auctions procedures process, the task of deciding whether to provide a minimum area for bidding comprised of an aggregation of eligible census blocks or whether to permit bidding on individual census blocks and provide bidders with the opportunity to make ''all-or-nothing'' package bids on combinations of census blocks. Package bidding procedures could specify certain predefined packages, or could provide bidders greater flexibility in defining their own areas, comprised of census blocks. However, any aggregation, whether predetermined by the Bureaus or defined by bidders, should not exceed the bounds of one Cellular Market Area (CMA).

230. The unique circumstances raised by the large size of census areas in Alaska may require that bidding be permitted on individual census blocks, rather than a larger pre-determined area, such as a census tract or block group. In Alaska, the average census block is more than 50 times the size of the average census block in the other 49 states and the District of Columbia, such that the large size of census areas poses distinctive challenges in identifying unserved communities and providing service.

(d) Establishing Unserved Units

231. The Commission will use the number of linear road miles—rather than population, as proposed in the *Mobility Fund NPRM*—as the basis for calculating the number of units in each unserved census block. This decision is based on a number of factors. First, requiring additional coverage of road miles more directly reflects the Mobility Fund's goal of extending current generation *mobile* services. Using road miles, rather than population, as a unit for bids and awards of support is also more consistent with the Commission's decision to measure mobile broadband service based on drive tests and to require coverage of a specified percentage of road miles. Moreover, using per-road mile bids as a basis for awarding support implicitly will take into account many of the other factors that commenters argue are important—such as business locations, recreation areas, and work sites—since roads are used to access those areas. Because bidders are likely to take potential roaming and subscriber revenues into account when deciding where to bid for support under Mobility Fund Phase I, support will tend to be disbursed to areas where there is greater traffic, even without our factoring traffic into the number of road mile units. Further, using road miles as the basic unit for the Mobility Fund Phase I will be relatively simple to administer, since standard nationwide data exists for road miles, as it does for population. In both cases, the data can be disaggregated to the census block level.

232. The TIGER road miles data made available by the Census Bureau can be used to establish the road miles associated with each census block eligible for Mobility Fund Phase I support. TIGER data is comprehensive and consistent nationwide, and available at no cost. As with the standard for identifying census blocks that will be eligible for Phase I support, the Bureaus will, in the pre-auction process, establish the road miles associated with each and identify the specific road categories considered—for example, interstate highways, *etc.*—to be consistent with the performance requirements and with the goal of extending coverage to the areas where people live, work, and travel.

(e) Distributing Mobility Fund Phase I Support Among Unserved Areas

233. The Commission creates a separate Mobility Fund Phase I to support the extension of current generation wireless service in Tribal lands. For both general and Tribal Mobility Fund Phase I support, providers seeking to serve Tribal lands must engage with the affected Tribal governments, where appropriate. The Commission will also provide a bidding credit for Tribally-owned and controlled providers seeking to serve Tribal lands with which they are associated. Apart from these provisions, the Commission concludes that it should not attempt to prioritize within the areas otherwise eligible for support from Phase I.

(ii) Public Interest Obligations

(a) Mobile Performance Requirements

234. In addition to the public interest obligations applicable to all recipients of CAF support, mobile service providers receiving non-recurring Mobility Fund Phase I support will be obligated to provide supported services over a 3G or better network that has achieved particular data rates under particular conditions. Specifically, Phase I recipients will be required to specify whether they will be deploying a network that meets 3G requirements or 4G requirements in areas eligible for support as those requirements are detailed here.

235. Recognizing the unavoidable variability of mobile service within a covered area, the Commission proposed and adopted performance standards that will adopt a strong floor for the service provided. Consequently, many users may receive much better service when, for example, accessing the network from a fixed location or when close to a base station. In light of this fact, and the decision to permit providers to elect whether to provide 3G or 4G service, the Commission is adopting different speeds than originally proposed for those providing 3G, while retaining the original proposal for those that offer 4G.

236. For purposes of meeting a commitment to deploy a 3G network, providers must offer mobile transmissions to and from the network meeting or exceeding an outdoor minimum of 200 kbps downstream and 50 kbps upstream to handheld mobile devices.

237. Recipients that commit to provide supported services over a network that represents the latest generation of mobile technologies, or 4G, must offer mobile transmissions to and from the network meeting or exceeding the following minimum standards: outdoor minimum of 768 kbps downstream and 200 kbps upstream to handheld mobile devices.

238. For both 3G and 4G networks, the data rates should be achievable in both fixed and mobile conditions, at vehicle speeds consistent with typical speeds on the roads covered. These minimum standards must be achieved throughout the cell area, including at the cell edge.

239. With respect to latency, in order to assure that recipients offer service that enables the use of real-time applications such as VoIP, the Commission also requires that round trip latencies for communications over the network be low enough for this purpose.

240. With respect to capacity, the Commission declines at this time to adopt a specific minimum capacity requirement that supported providers must offer mobile broadband users. However, any usage limits imposed by a provider on its mobile broadband offerings supported by the Mobility

Fund must be reasonably comparable to any usage limits for comparable mobile broadband offerings in urban areas.

241. Recipients that elect to provide supported services over 3G networks will have two years to meet their requirements and those that elect to deploy 4G networks will have three years. At the end of the applicable period for build-out, providers will be obligated to provide the service defined above in the areas for which they receive support, over at least 75 percent of the road miles associated with census blocks identified as unserved by the Bureaus in advance of the Mobility Fund Phase I auction. The Commission delegates to the Bureaus the question of whether a higher coverage threshold should be required should the Bureaus permit bidding on individual census blocks. A higher coverage threshold may be appropriate in such circumstances because bidders can choose the particular census blocks they can cover. Presumably, this would allow them to choose areas in which their coverage can be 95 to 100 percent, as suggested by the *Mobility Fund NPRM.*

242. Should the Bureaus choose to implement a coverage area requirement of less than 100 percent, a recipient will receive support only for those road miles actually covered and not for the full 100 percent of road miles of the census blocks or tracts for which it is responsible. For example, if a recipient covers 90 percent of the road miles in the minimum geographic area (and it meets the threshold), then that recipient will receive 90 percent of the total support available for that area. To the extent that a recipient covers additional road miles, it will receive support in an amount based on its bid per road mile up to 100 percent of the road miles associated with the specific unserved census blocks covered by a bid.

243. In contrast to other support provided under CAF, support provided through Mobility Fund Phase I will be non-recurring. Consequently, the Commission does not plan to modify the service obligations of providers that receive Phase I support.

(b) Measuring and Reporting Mobile Broadband

244. As proposed in the *Mobility Fund NPRM,* Mobility Fund support recipients must demonstrate that they have deployed a network that covers the relevant area and meets their public interest obligations with data from drive tests. The drive test data satisfying the requirements must be submitted by the deadline for providing the service. Drive test data must also be submitted to demonstrate the recipient has met the 50 percent minimum coverage requirement to receive the second payment of Mobility Fund Phase I support.

245. The requirement regarding drive tests demonstrating data speeds ''to the network'' means to the physical location of core network equipment, such as the mobile switching office or the evolved packet core. Therefore, a test server utilized to conduct drive tests should be at such a central location rather than at a base station, so that the drive test results take into account the effect of backhaul on communication speeds.

(c) Collocation

246. Recipients of Mobility Fund support must allow for reasonable collocation by other providers of services that would meet the technological requirements of the Mobility Fund on newly constructed towers that Mobility Fund recipients own or manage in the unserved area for which they receive support. This includes a duty: (1) To construct towers where reasonable in a manner that will accommodate collocations; and (2) to engage in reasonable negotiations on a not unreasonably discriminatory basis with any party that seeks to collocate equipment at such a site in order to offer service that would meet the technological requirements of the Mobility Fund. Furthermore, Mobility Fund recipients must not enter into arrangements with third parties for access to towers or other siting facilities wherein the Mobility Fund recipients restrict the third parties from allowing other providers to collocate on their facilities.

247. These collocation requirements are in the public interest because they will help increase the benefits of the expanded coverage made possible by the Mobility Fund, by facilitating service that meets the requirements of the Mobility Fund by providers using different technologies. Mobility Fund recipients will not be required to favor providers of services that meet Mobility Fund requirements over other applicants for limited collocation spaces.

248. The Commission agrees with those commenters that attempting to specify collocation practices that are applicable in all circumstances may unduly complicate efforts to expand coverage, and thus declines to adopt more specific requirements for collocation by any specific number of providers or require any specific terms or conditions as part of any agreement for collocation.

(d) Voice and Data Roaming

249. Recipients of Mobility Fund support must comply with the Commission's voice and data roaming requirements on networks that are built through Mobility Fund support. Specifically, recipients of Mobility Fund support must provide roaming pursuant to 47 CFR 20.12 on networks that are built through Mobility Fund support.

250. Some commenters responding to the *Mobility Fund NPRM* contend that there is no need to adopt a data roaming requirement specifically for Mobility Fund recipients because the Commission's general data roaming rules already address the issue or that such a requirement is unrelated to the goals of the Mobility Fund. Making compliance with these rules a condition of universal service support, however, will mean that violations can result in the withholding or clawing back of universal service support—sanctions based on the receipt of federal support—that would be in addition to penalties for violation of the Commission's generally applicable data roaming rules. Moreover, in addition to the sanctions that would apply to any party violating the general requirements, Mobility Fund recipients may lose their eligibility for future Mobility Fund participation as a consequence of any violation. Recipients shall comply with these requirements without regard to any judicial challenge thereto.

251. Consistent with the R&O, any interested party may file a formal or informal complaint using the Commission's existing processes if it believes a Mobility Fund recipient has violated the Commission's roaming requirements. As noted, the Commission intends to address roaming-related disputes expeditiously. The Commission also has the authority to initiate enforcement actions on its own motion.

(e) Reasonably Comparable Rates

252. The Commission will evaluate the rates for services offered with Mobility Fund Phase I support based on whether they fall within a reasonable range of urban rates for mobile service. To implement the statutory principle regarding comparable rates while offering Mobility Fund Phase I support at the earliest time feasible, the Bureaus may develop target rate(s) for Mobility Fund Phase I before fully developing all the data to be included in a determination of comparable rates with respect to other CAF support. Mobility Fund Phase I recipients must certify annually that they offer service in areas with support at rates that are within a

reasonable range of rates for similar service plans offered by mobile wireless providers in urban areas. Recipients' service offerings will be subject to this requirement for a period ending five years after the date of award of support. The Bureaus, under their delegated authority, may define these conditions more precisely in the pre-auction process. The Commission will retain its authority to look behind recipients' certifications and take action to rectify any violations that develop.

b. Mobility Fund Phase I Eligibility Requirements

253. The Commission proposed that to be eligible for Mobility Fund support, entities must (1) be designated as a wireless ETC pursuant to 47 U.S.C. 214(e) by the state public utilities commission (''PUC'') (or the Commission, where the state PUC does not have jurisdiction to designate ETCs) in any area that it seeks to serve; (2) have access to spectrum capable of 3G or better service in the geographic area to be served; and (3) certify that it is financially and technically capable of providing service within the specified timeframe. With a limited exception, the Commission adopts these requirements.

254. The Commission also adopts a two-stage application filing process for participants in the Mobility Fund Phase I auction, similar to that used in spectrum license auctions, which will, among other things, require potential Mobility Fund recipients to make disclosures and certifications establishing their eligibility. Specifically, in the pre-auction ''short-form'' application, a potential bidder will need to establish its eligibility to participate in the Mobility Fund Phase I auction and, in a post-auction ''long-form'' application, a winning bidder will need to establish its eligibility to receive support. Such an approach should provide an appropriate screen to ensure serious participation without being unduly burdensome.

(i) ETC Designation

255. Mobility Fund Phase I participants must be ETCs prior to participating in the auction. As a practical matter, this means that parties that seek to participate in the auction must be ETCs in the areas for which they will seek support at the deadline for applying to participate in the auction. As discussed elsewhere in the R&O, the Commission provides a narrow exception to permit participation by Tribally-owned or controlled entities that have filed for ETC designation prior to the short-form application deadline. An ETC must be designated (or have applied for designation under the exception) with respect to an area that includes area(s) on which it wishes to receive Mobility Fund support. Moreover, a recipient of Mobility Fund support will remain obligated to provide supported services throughout the area for which it is designated an ETC if that area is larger than the areas for which it receives Mobility Fund support.

256. By statute, the states, along with the Commission, are empowered to designate common carriers as ETCs. In light of the roughly comparable amounts of time required for the Commission and states to process applications to be designated as an ETC and the time required to move from the adoption of the R&O to the acceptance of applications to participate in a Mobility Fund Phase I auction, parties contemplating requesting new designations as ETCs for purposes of participating in the auction should act promptly to begin the process. The Commission will make every effort to process such applications in a timely fashion, and it urges the states to do likewise.

257. The Commission retains existing ETC requirements and obligations, in addition to requiring that parties be ETCs in the area in which they seek Mobility Fund support. It is sufficient for purposes of an application to participate in the Mobility Fund Phase I auction, however, that the applicant has received its ETC designation conditioned only upon receiving Mobility Fund Phase I support.

258. The Commission generally will not allow parties to bid for support prior to being designated an ETC because such an approach would inject uncertainties as to eligibility that could interfere with speedy deployment of networks by those that are awarded support, or disrupt the Mobility Fund auction. Moreover, requiring that applicants be designated as ETCs prior to a Mobility Fund Phase I auction may help ensure that the pool of bidders is serious about seeking support and meeting the obligations that receipt of support would entail.

(ii) Access to Spectrum

259. Any applicant for a Mobility Fund Phase I auction must have access to the necessary spectrum to fulfill any obligations related to support. Thus, those eligible for Mobility Fund Phase I support include all entities that, prior to an auction, hold a license authorizing use of appropriate spectrum in the geographic area(s) for which support is sought. The spectrum access requirement can also be met by leasing appropriate spectrum, prior to an auction, covering the relevant geographic area(s). Spectrum access through a license or leasing arrangement must be in effect prior to auction for an applicant to be eligible for an award of support. Regardless of whether an applicant claims required access to spectrum through a license or a lease, it must retain such access for at least five years from the date of award of Phase I support. For purposes of calculating term length, parties may include opportunities for license and/or lease renewal.

260. Further, parties may satisfy the spectrum access requirement if they have acquired spectrum access, including any necessary renewal expectancy, that is contingent on their obtaining support in the auction. Other contingencies, however, will render the relevant spectrum access insufficient for the party to meet the Commission's requirements for participation.

261. Entities seeking to receive support from the Mobility Fund must certify that they have access to spectrum capable of supporting the required services. While the Commission declines to restrict the frequencies applicants must use to be eligible for Mobility Fund Support, certain spectrum bands will not support mobile broadband (for example, paging service). Applicants will be required to identify the particular frequency bands and the nature of the access on which they assert their eligibility for support, and the Commission will assess the reasonableness of eligibility certifications based on information submitted in short- and long-form applications. Should entities make this certification and not have access to the appropriate level of spectrum, they will be subject to the penalties described elsewhere in the R&O.

(iii) Certification of Financial and Technical Capability

262. Each applicant for Mobility Fund Phase I support must certify, in its pre-auction short-form application and in its post-auction long-form application, that it is financially and technically capable of providing 3G or better service within the specified timeframe in the geographic areas for which it seeks support. Given that Mobility Fund Phase I provides non-recurring support, applicants for Phase I funds need to assure the Commission that they can provide the requisite service without any assurance of ongoing support for the area in question after Phase I support has been exhausted.

263. Applicants making certifications to the Commission expose themselves to

liability for false certifications. Applicants should take care to review their resources and their plans before making the required certification and be prepared to document their review, if necessary.

(iv) Other Qualifications

264. The Commission will not impose any additional eligibility requirements to participation in the Mobility Fund, with one exception. One commenter to the Mobility Fund NPRM questions whether the Mobility Fund should be available to parties in particular areas if the party previously (that is, without respect to Mobility Fund support) indicated an intention to deploy wireless voice and broadband service in that area. The Commission concludes that this concern has merit and it will restrict parties from bidding for support in certain limited circumstances to assure that Mobility Fund Phase I support does not go to finance coverage that carriers would have provided in the near term without any subsidy. In particular, an applicant for Mobility Fund Phase I support must certify that it will not seek support for any areas in which it has made a public commitment to deploy 3G or better wireless service by December 31, 2012. This restriction will not prevent a provider from seeking and receiving support for a geographic area where another carrier has announced such a commitment to deploy 3G or better, but it may conserve funds and avoid displacing private investment by making a carrier that made such a commitment ineligible for Mobility Fund Phase I support with respect to the identified geographic area(s). Because circumstances are more likely to change over a longer term, providers should not be held to statements for any time period beyond December 31, 2012.

c. Reverse Auction Mechanism

265. In the R&O, the Commission establishes program and auction rules for the Mobility Fund Phase I, to be followed by a process conducted by the Bureaus on delegated authority identifying areas eligible for support, and seeking comment on specific detailed auction procedures to be used, consistent with the R&O. This process will be initiated by the release of a Public Notice announcing an auction date, to be followed by a subsequent Public Notice specifying the auction procedures, including dates, deadlines, and other details of the application and bidding process.

(i) Basic Auction Design

266. A single-round sealed bid format appears to be most appropriate for a Mobility Fund Phase I reverse auction, although the Commission does not make a final determination in the R&O, but delegates such determination to the Bureaus, to be addressed in the pre-auction development of specific procedures.

(ii) Application Process

267. The Commission adopts a two-stage application process. In the first stage Mobility Fund auction short-form application, each auction applicant must provide information to establish its identity, including disclosure of parties with ownership interests, consistent with the ownership interest disclosure required in 47 CFR part 1 for applicants for spectrum licenses, and any agreements the applicant may have relating to the support to be sought through the auction. With respect to eligibility requirements relating to ETC designation and spectrum access, applicants will be required to disclose and certify their ETC status as well as the source of the spectrum they plan to use to meet Mobility Fund obligations in the particular area(s) for which they plan to bid. Specifically, applicants will be required to disclose whether they currently hold or lease the spectrum, or have entered into a binding agreement, and have submitted an application with the Commission, to either hold or lease spectrum. Moreover, applicants will be required to certify that they will retain their access to the spectrum for at least five years from the date of award of support. The Bureaus should exercise their delegated authority to establish the specific form in which such information will be collected from applicants.

(iii) Bidding Process

268. The Commission delegates authority to the Bureaus to administer the policies, programs, rules, and procedures for Mobility Fund Phase I and take all actions necessary to conduct a Phase I auction. The Bureaus should exercise this authority by conducting a pre-auction notice-and-comment process to establish the specific procedures for the auction. Such procedures will enable the establishment of procedures for reviewing bids and determining winning bidders. The overall objective of the bidding in this context is to maximize the number of units to be covered in unserved areas given the overall budget for support. The Bureaus have discretion to adopt the best procedures to achieve this objective during the pre-auction process taking into account all relevant factors, including the implementation feasibility and the simplicity of bidder participation.

269. *Maximum Bids and Reserve Prices.* The Commission adopts its proposed rule to provide for maximum acceptable per-unit bid amounts and reserve amounts, separate and apart from any maximum opening bids, and to provide that those reserves may be disclosed or undisclosed and anticipates that, as detailed procedures for a Mobility Fund Phase I auction are established during the pre-auction period, the Bureaus will consider all proposals with respect to reserve prices in light of the specific timing of and other circumstances related to the auction.

270. *Aggregating Service Areas and Package Bidding.* The Bureaus will address issues relating to package bidding as part of the pre-auction process, which is consistent with the way the Commission approaches this issue for spectrum auctions. Interested parties will have an opportunity to comment on the desirability of package bidding in the pre-auction process in connection with the determination of the minimum area for bidding. Potential bidders will be able to provide input on whether specific package bidding procedures would allow them to formulate and implement bidding strategies to incorporate Mobility Fund Phase I support into their business plans and capture efficiencies, and on how well those procedures will facilitate the realization of the Commission's objectives for Mobility Fund Phase I.

271. *Refinements to the Selection Mechanism to Address Limited Available Funds.*

272. The Commission adopts a rule that would provide the Bureaus with discretion to establish procedures in the pre-auction process to deal with the possibility that funds may remain available after the auction has identified the last lowest per-unit bid that does not assign support exceeding the total funds available. The Commission also proposed a rule to give discretion to address a situation where there are two or more bids for the same per-unit amount but for different areas (''tied bids'') and remaining funds are insufficient to satisfy all of the tied bids. The Bureaus should develop appropriate procedures to address these issues during the pre-auction notice-and-comment process. These procedures shall be consistent with the objective of awarding support so as to maximize the number of units that will

gain coverage in unserved areas subject to the overall budget for support.

273. *Withdrawn Bids.* In the R&O, the Commission adopts a rule to provide for procedures for withdrawing provisionally winning bids, but does not expect the Bureaus to permit withdrawn bids, particularly if the Mobility Fund Phase I auction will be conducted in a single round.

274. *Preference for Tribally-Owned or Controlled Providers.* The Commission adopts a 25 percent bidding credit for Tribally-owned or controlled providers that participate in a Mobility Fund Phase I auction. The preference would act as a ''reverse'' bidding credit that would effectively reduce the bid amount by 25 percent for the purpose of comparing it to other bids, thus increasing the likelihood that a Tribally-owned or controlled entity would receive funding. The preference would be available solely with respect to the eligible census blocks located within the geographic area defined by the boundaries of the Tribal land associated with the Tribal entity seeking support.

(iv) Information and Competition

275. The Commission adopts rules to prohibit applicants competing for support in the auction from communicating with one another regarding the substance of their bids or bidding strategies and to limit public disclosure of auction-related information as appropriate. These rules are similar to those used for spectrum license auctions, and the Bureaus should seek comment during the pre-auction procedures process and decide on the details and extent of information to be withheld until the close of the auction.

(v) Auction Cancellation

276. The Commission adopts a rule to provide discretion to delay, suspend, or cancel bidding before or after a reverse auction begins under a variety of circumstances, including natural disasters, technical failures, administrative necessity, or any other reason that affects the fair and efficient conduct of the bidding. Based on its experience with a similar rule for spectrum license auctions, the Commission concludes that such a rule is necessary.

d. Post-Auction Long-Form Application Process

(i) Long-Form Application

277. The Commission adopts the long-form application process proposed in the *Mobility Fund NPRM* and delegates to the Bureaus responsibility for establishing the necessary FCC application form(s). After bidding for Mobility Fund Phase I support has ended, the Commission will declare the bidding closed and identify and notify the winning bidders. Unless otherwise specified by public notice, within 10 business days after being notified that it is a winning bidder for Mobility Fund support, a winning bidder will be required to submit a long-form application, providing certain information described below.

(ii) Ownership Disclosure

278. The Commission adopts for the Mobility Fund the existing ownership disclosure requirements in 47 CFR part 1 that already apply to short-form applicants to participate in spectrum license auctions and long-form applicants for licenses in the wireless services. Thus, an applicant for Mobility Fund support will be required to fully disclose its ownership structure as well as information regarding the real party- or parties-in-interest of the applicant or application. Wireless providers that have participated in spectrum auctions will already be familiar with these requirements, and are likely to already have ownership disclosure information reports (FCC Form 602) on file with the Commission, which may simply need to be updated. To minimize the reporting burden on winning bidders, applicants will be able to use ownership information stored in existing Commission databases and update that ownership information as necessary.

(iii) Eligibility To Receive Support

279. *ETC Designation.* The Commission will, with a limited exception, require any entity bidding for Mobility Fund support to be designated an ETC prior to the Mobility Fund auction short-form application deadline. A winning bidder will be required to submit with its long-form application appropriate documentation of its ETC designation in all of the areas for which it will receive support. However, in the event that a winning bidder receives an ETC designation conditioned upon receiving Mobility Fund support, it may submit documentation of its conditional designation, provided that it promptly submits documentation of its final designation after its long-form application has been approved but before any disbursement of Mobility Fund funds.

280. *Access to Spectrum.* Applicants for Mobility Fund support must also identify the particular frequency bands and the nature of the access (for example, licenses or leasing arrangements) on which they assert their eligibility for support. Because not all spectrum bands are capable of supporting mobile broadband, and leasing arrangements can be subject to a wide variety of conditions and contingencies, before an initial disbursement of support is approved, the Commission will assess the reasonableness of these assertions. An applicant whose access to spectrum derives from a spectrum manager leasing arrangement pursuant to 47 CFR 1.9020 may have a greater burden than other licensees and spectrum lessees to demonstrate through the execution of contractual conditions in its leasing arrangements that it has the necessary access to spectrum required to qualify for disbursement of Mobility Fund support. Should an applicant not have access to the appropriate level of spectrum, it will be found not qualified to receive Mobility Fund support and will be subject to an auction default payment.

(iv) Project Construction

281. A winning bidder's long-form application must include a description of the network it will construct with Mobility Fund support. Carriers must specify on their long-form applications whether the supported project will qualify as either a 3G or 4G network, including the proposed technology choice and demonstration of technical feasibility. Applications should also include a detailed description of the network design and contracting phase, construction period, and deployment and maintenance period. Applicants must also provide a complete projected budget for the project and a project schedule and timeline. Recipients will be required to provide updated information in their annual reports and in the information they provide to obtain a disbursement of funds. In addition, winning bidders of areas that include Tribal lands must comply with Tribal engagement obligations to demonstrate that they have engaged Tribal governments in the planning process and that the service to be provided will advance the goals established by the Tribe.

(v) Financial Security and Guarantee of Performance

282. Winning bidders for Mobility Fund support must provide the Commission with an irrevocable stand-by Letter of Credit (''LOC'') issued by a bank that is acceptable to the Commission, in an amount equal to the amount of support as it is disbursed, plus an additional percentage of the amount of support disbursed which shall serve as a default payment, which percentage will be determined by the

Bureaus in advance of the auction. The LOC should be in substantially the same form as set forth in the model LOC provided in Appendix N to the R&O and must be acceptable in all respects to the Commission.

283. The Commission is primarily concerned with protecting the integrity of the USF funds disbursed to the recipient. Should a recipient default on its obligations under the Mobility Fund, the priority should be to secure a return of the USF funds disbursed to it for this purpose, so that the Commission can reassign the support consistent with its goal to maximize the number of units covered given the funds available. A Mobility Fund recipient's failure to fulfill its obligations may also impose significant costs on the Commission and higher support costs for USF. Therefore, the Commission also concludes that it is necessary to adopt a default payment obligation for performance defaults.

284. Consistent with its goal of using the LOC to protect the government's interest in the funds it disburses in Mobility Fund Phase I, the Commission will require winning bidders to obtain an LOC in an amount equal to the amount of support it receives plus an additional percentage of the amount of support disbursed to safeguard against costs to the Commission and the USF. The precise amount of this additional percentage will not exceed 20 percent and will be determined by the Bureaus as part of its process for establishing the procedures for the auction. Thus, before an application for Mobility Fund support is granted and funds are disbursed, each winning bidder must provide an LOC in the amount of the first one-third of the support associated with the unserved census tract that will be disbursed upon grant of its application, plus the established additional default payment percentage. Before a participant receives the second third of its total support, it will be required to provide a second LOC or increase the initial LOC to correspond to the amount of that second support payment such that LOC coverage will be equal to the total support amount plus the established default payment percentage. The LOC(s) will remain open and must be renewed to secure the amounts disbursed as necessary until the recipient has met the requirements for demonstrating coverage and final payment is made. This approach will help to reduce the costs recipients incur for maintaining the LOCs, because they will only have to maintain LOCs in amounts that correspond to the actual USF funds as they are being disbursed.

285. Consistent with the purpose of the LOC, recipients must maintain the LOC in place until at least 120 days after they have completed their supported expansion to unserved areas and received their final payment of Mobility Fund Phase I support. Under the terms of the LOC, the Commission will be entitled to draw upon the LOC upon a recipient's failure to comply with the terms and conditions upon which USF support was granted. The Commission, for example, will draw upon the LOC when the recipient fails to meet its required deployment milestone(s). Failure to satisfy essential terms and conditions upon which USF support was granted or to ensure completion of the supported project, including failure to timely renew the LOC, will be deemed a failure to properly use USF support and will entitle the Commission to draw the entire amount of the LOC. Failure to comply will be evidenced by a letter issued by the Chief of either the Wireless Bureau or Wireline Bureau or their designees, which letter, attached to an LOC draw certificate, shall be sufficient for a draw on the LOC. In addition, a recipient that fails to comply with the terms and conditions of the Mobility Fund support it is granted could be disqualified from receiving additional Mobility Fund support or other USF support.

286. In the *Mobility Fund NPRM,* the Commission sought comment on the relative merits of performance bonds and LOCs and the extent to which performance bonds, in the event of the bankruptcy of the recipient of Mobility Fund support, might frustrate the Commission's goal of ensuring timely build-out of the network. The Commission concludes that an LOC will better serve its objective of minimizing the possibility that Mobility Fund support becomes property of a recipient's bankruptcy estate for an extended period of time, thereby preventing the funds from being used promptly to accomplish the Mobility Fund's goals. It is well established that an LOC and the proceeds thereunder are not property of a debtor's estate under 11 U.S.C. 541 (the ''Bankruptcy Code''). In a proper draw upon an LOC, the issuer honors a draft under the LOC from its own assets and not from the assets of the debtor who caused the LOC to be issued. Because the proceeds under an LOC are not property of the bankruptcy estate, absent extreme circumstances such as fraud, neither the LOC nor the funds drawn down under it are subject to the automatic stay provided by the Bankruptcy Code.

287. In the long-form application filing, each winning bidder must submit a commitment letter from the bank issuing the LOC. The commitment letter will at a minimum provide the dollar amount of the LOC and the issuing bank's agreement to follow the terms and conditions of the Commission's model LOC, found in Appendix N to the R&O. The winning bidder will, however, be required to have its LOC in place before it is authorized to receive Mobility Fund Phase I support and before any Mobility Fund Phase I support is disbursed. Further, at the time it submits its LOC, a winning bidder must provide an opinion letter from legal counsel clearly stating, subject only to customary assumptions, limitations and qualifications, that in a proceeding under the Bankruptcy Code, the bankruptcy court would not treat the LOC or proceeds of the LOC as property of winning bidder's bankruptcy estate, or the bankruptcy estate of any other bidder-related entity requesting issuance of the LOC, under 11 U.S.C. 541.

(vi) Other Funding Restrictions

288. While the Commission agrees with commenters that Mobility Fund recipients might benefit if they were able to leverage resources from other federal programs, it must also take care to ensure that USF funds are put to their most efficient and effective use. Therefore, the Commission will exclude all areas from the Mobility Fund where, prior to the short-form filing deadline, any carrier has made a regulatory commitment to provide 3G or better service, or has received a funding commitment from a federal executive department or agency in response to the carrier's commitment to provide 3G or better service.

(vii) Post-Auction Certifications

289. Prior to receiving Mobility Fund support, an applicant must certify in its long-form application to the availability of funds for all project costs that exceed the amount of support to be received from the Mobility Fund and certify that they will comply with all program requirements.

290. As discussed elsewhere in the R&O, recipients of Mobility Fund support are required by statute to offer services in rural areas at rates that are reasonably comparable to those charged to customers in urban areas. Accordingly, the post-auction certifications made in the long-form application will include a certification that the applicant will offer services in rural areas at rates that are reasonably comparable to those charged to customers in urban areas.

(viii) Auction Defaults

291. *Auction Default Payments.* The Commission will impose a default payment on winning bidders that fail to timely file a long-form application. Such a payment is also appropriate if a bidder is found ineligible or unqualified to receive Mobility Fund support, its long-form application is dismissed for any reason, or it otherwise defaults on its bid or is disqualified for any reason after the close of the auction.

292. Failures to fulfill auction obligations may undermine the stability and predictability of the auction process, and impose costs on the Commission and higher support costs for USF. In the case of a reverse auction for USF support, a default payment is appropriate to ensure the integrity of the auction process and to safeguard against costs to the Commission and the USF. The size of the payment and the method by which it is calculated may vary depending on the procedures established for the auction, including auction design. In advance of the auction, the Bureaus will determine whether a default payment should be a percentage of the defaulted bid amount or should be calculated using another method, such as basing the amount on differences between the defaulted bid and the next best bid(s) to cover the same number of road miles as without the default. If the Bureaus establish a default payment to be calculated as a percentage of the defaulted bid, that percentage will not exceed 20 percent of the total amount of the defaulted bid. However it is determined, agreeing to that payment in event of a default will be a condition for participating in bidding. The Bureaus may determine prior to bidding that all participants will be required to furnish a bond or place funds on deposit with the Commission in the amount of the maximum anticipated default payment. A winning bidder will be deemed to have defaulted on its bid under a number of circumstances if it withdraws its bid after the close of the auction, it fails to timely file a long-form application, it is found ineligible or unqualified to receive Mobility Fund Phase I support, its long-form application is dismissed for any reason, or it otherwise defaults on its bid or is disqualified for any reason after the close of the auction. In addition to being liable for an auction default payment, a bidder that defaults on its bid may be subject to other sanctions, including but not limited to disqualification from future competitive bidding for USF support.

293. The Commission distinguishes between a Mobility Fund auction applicant that defaults on its winning bid and a winning bidder whose long-form application is approved but subsequently fails or is unable to meet its minimum coverage requirement or demonstrate an adequate quality of service that complies with Mobility Fund requirements. In the latter case of a recipient's performance default, in addition to being liable for a performance default payment, the recipient will be required to repay all of the Mobility Fund support it has received and, depending on the circumstances involved, could be disqualified from receiving any additional Mobility Fund or other USF support. The Commission may obtain its performance default payment and repayment of a recipient's Mobility Fund support by drawing upon the irrevocable stand-by LOC that recipients will be required to provide in the full amount of support received.

294. *Undisbursed Support Payments.* When a winning bidder defaults on its bid or is disqualified for any reason after the close of the auction, the funds that would have been provided to such an applicant will be used in a manner consistent with the purposes of the Universal Service program.

e. Accountability and Oversight

295. In the *Mobility Fund NPRM,* the Commission sought comment on issues relating to the administration, management and oversight of the Mobility Fund. On a number of these issues, the Commission adopts uniform requirements that will apply to all recipients of high-cost and CAF support, including recipients of Mobility Fund Phase I support. Recipients of Phase I support will be subject generally to the reporting, audit, and record retention requirements that are discussed in the Accountability and Oversight section of the R&O. In addition, recipients of Mobility Fund Phase I support will be subject to certain aspects of support disbursement and annual reporting and record retention requirements.

(i) Disbursing Support Payments

296. Mobility Fund Phase I support will be provided in three installments. This approach strikes the appropriate balance between advancing funds to expand service and assuring that service is actually expanded. Specifically, each party receiving support will be eligible to receive from USAC a disbursement of one-third of the amount of support associated with any specific census tract once its long-form application for support is granted. To qualify for the second installment of support, a recipient will be required to demonstrate it has met 50 percent of its minimum coverage requirement using the same drive tests that will be used to analyze network coverage to provide proof of deployment at the end of the project to receive its final installment of support. The report a recipient files for this purpose will be subject to review and verification before support is disbursed. A party will receive the remainder of its support after filing with USAC a report with the required data that demonstrates that it has deployed a network covering at least the required percent of the relevant road miles in the unserved census block(s) within the census tract. This data will be subject to review and verification before the final support payment for an unserved area is disbursed to the recipient. A party's final payment would be the difference between the total amount of support based on the road miles of unserved census blocks actually covered, *i.e.,* a figure between the required percent and 100 percent of the road miles, and any support previously received.

297. To minimize that risk of lost funds to parties that ultimately fail to meet their obligations, the Commission is requiring participants to maintain their LOCs in place until after they have completed their supported network construction and received their final payment of Mobility Fund Phase I support. In addition, participants must certify that they are in compliance with all requirements for receipt of Mobility Fund Phase I support at the time that they request disbursements.

(ii) Annual Reports

298. Parties receiving Mobility Fund support must file annual reports with the Commission demonstrating the coverage provided with support from the Mobility Fund for five years after the winning bidder is authorized to receive Mobility Fund support. The reports must include maps illustrating the scope of the area reached by new services, the population residing in those areas (based on Census Bureau data and estimates), and the linear road miles covered. In addition, annual reports must include all coverage test data for the supported areas that the party receives or makes use of, whether the tests were conducted pursuant to Commission requirements or any other reason. Further, annual reports will include any updated project information including updates to the project description, budget and schedule.

299. However, to the extent that a recipient of Mobility Fund support is a carrier subject to other existing or new annual reporting requirements under 47 CFR 54.313 based on their receipt of

USF support under another high cost mechanism, it will be permitted to satisfy its Mobility Fund Phase I reporting requirements by filing a separate Mobility Fund annual report or by including this additional information in a separate section of its other annual report filed with the Commission. Mobility Fund recipients choosing to fulfill their Mobility Fund reporting requirements in an annual report filed under 47 CFR 54.313 must, at a minimum, file a separate Mobility Fund annual report notifying us that the required information is included the other annual report.

(iii) Record Retention

300. Elsewhere in the R&O, the Commission adopts revised requirements that extend the record retention period to ten years for all recipients of high-cost and CAF support, including recipients of Mobility Fund Phase I. This new retention period will be adequate to facilitate audits of Mobility Fund program participants, with one clarification regarding the required retention period: for the purpose of the Mobility Fund program, the ten-year period for which records must be maintained will begin to run only after a recipient has received its final payment of Mobility Fund support. That is, because recipients will receive Mobility Fund support in up to three installments, but recipients that ultimately fail to deploy a network that meets the Commission's minimum coverage and performance requirements or otherwise fail to meet their Mobility Fund public interest obligations will be liable for repayment of all previously disbursed Mobility Fund support, recipients must retain records for ten years from the receipt of the final disbursement of Mobility Fund funds.

2. Service to Tribal Lands

a. Tribal Mobility Fund Phase I

301. The Commission establishes a separate Tribal Mobility Fund Phase I to provide one-time support to deploy mobile broadband to unserved Tribal lands, which have significant telecommunications deployment and connectivity challenges. The Commission anticipates that an auction will occur as soon as feasible after a general Mobility Fund Phase I auction, providing for a limited period of time in between so that applicants that may wish to participate in both auctions may plan and prepare for a Tribal Phase I auction after a general Phase I auction. The decision to establish a Tribal Mobility Fund Phase I stems from the Commission's policy regarding ''Covered Locations,'' and represents its commitment to Tribal lands, including Alaska.

302. The Commission allocates $50 million from universal service funds reserves for Tribal Mobility Fund Phase I, separate and apart from the $300 million allocated for the general Mobility Fund Phase I. Providers in Tribal lands will be eligible for both the general and Tribal Mobility Fund Phase I auctions. Consistent with the general Mobility Fund Phase I, the Commission delegates to the Bureaus authority to administer the policies, programs, rules and procedures to implement Tribal Mobility Fund Phase I as established in the R&O. The Commission determines that allocating $50 million from universal service fund reserves to support the deployment of mobile broadband to unserved Tribal lands is necessary, separate and apart from the $300 million we are allocating for Mobility Fund Phase I, because of special challenges involved in deploying mobile broadband on Tribal lands. Various characteristics of Tribal lands may increase the cost of entry and reduce the profitability of providing service, including: ''(1) The lack of basic infrastructure in many tribal communities; (2) a high concentration of low-income individuals with few business subscribers; (3) cultural and language barriers where carriers serving a tribal community may lack familiarity with the Native language and customs of that community; (4) the process of obtaining access to rights-of-way on tribal lands where tribal authorities control such access; and (5) jurisdictional issues that may arise where there are questions concerning whether a state may assert jurisdiction over the provision of telecommunications services on tribal lands.''

303. Promoting the development of telecommunications infrastructure on Tribal lands is consistent with the Commission's unique trust relationship with Tribes. The Commission previously observed that ''by increasing the total number of individuals, both Indian and non-Indian, who are connected to the network within a tribal community the value of the network for tribal members in that community is greatly enhanced.'' By structuring the support to benefit Tribal lands, rather than attempting to require wireless providers to distinguish between Tribal and non-Tribal customers, the Commission will ''reduc[e] the possible administrative burdens associated with implementation of the enhanced federal support, [and] eliminate a potential disincentive to providing service on Tribal lands.'' Support for Tribal lands generally will be awarded on the same terms and subject to the same rules as general Mobility Fund Phase I support. Therefore, the Commission incorporates by reference the eligible geographic area, provider eligibility, public interest obligations, auction and post-auction processes, and program management and oversight measures established for Phase I of the Mobility Fund. However, in some instances, a more tailored approach is appropriate and the Commission adopts modest revisions to its general rules. As discussed in the USF–ICC Transformation FNPRM, the Commission also proposes an ongoing support mechanism for Tribal lands in Phase II of the Mobility Fund, as well as a separate CAF mechanism to reach the most remote areas, including Tribal lands.

304. *Size of Fund.* The Commission dedicates $50 million in one-time support for the Tribal Mobility Fund Phase I, which should help facilitate mobile deployment in unserved areas on Tribal lands. This amount is in addition to the $300 million to be provided under the general Mobility Fund Phase I, for which qualifying Tribal lands would also be eligible, and is in addition to the up to $100 million in ongoing support being dedicated to Tribal lands in the Tribal Mobility Fund Phase II. A one-time infusion of $50 million through the Tribal Mobility Fund can make a difference in expanding the availability of mobile broadband in Tribal lands unserved by 3G. The more targeted nature of this support will enhance the impact of this significant one-time addition to current support levels. At the same time, this funding level is consistent with the Commission's commitment to fiscal responsibility and the varied objectives the Commission has for its limited funds, including its proposals for ongoing support for mobile services as established below.

305. *Mechanism To Award Support.* Consistent with the general approach to awarding Phase I support, to maximize consumer benefits, the Commission generally will award support to one provider per qualifying area by reverse auction and will only award support to more than one provider per area where doing so would cover more total units given the budget constraint. In certain limited circumstances, however, depending on the bidding at auction, allowing small overlaps in support could result in greater overall coverage.

306. Because it is essential to award support in a way that respects and reflects Tribal needs, the Commission adopts Tribal engagement obligations to

ensure that needs are identified and appropriate solutions are developed. The Commission also adopts a bidding credit for Tribally-owned or controlled providers seeking to expand service on their Tribal lands. A reverse auction mechanism, together with the Tribal engagement and preferences adopted in the R&O, would best achieve the Commission's goals in expanding service to Tribal lands in a respectful, fair, and fiscally responsible manner.

307. *Establishing Unserved Units.* For purposes of determining the number of unserved units in a given geographic area, the Commission concludes that, for a Tribal Phase I auction, a population-based metric is more appropriate than road miles, which will be used in a general Mobility Fund Phase I auction. In light of this conclusion, the ''drive tests'' used to demonstrate coverage supported by Tribal Mobility Fund Phase I may be conducted by means other than in automobiles on roads. Providers may demonstrate coverage of an area with a statistically significant number of tests in the vicinity of residences being covered. Moreover, equipment to conduct the testing can be transported by off-road vehicles, such as snow-mobiles or other vehicles appropriate to local conditions.

b. Tribal Engagement Obligation

308. The Commission agrees with commenters that have repeatedly stressed the essential role that Tribal consultation and engagement plays in the successful deployment of mobile broadband service. Therefore, for both the general and Tribal Mobility Fund Phase I auctions, the Commission encourages applicants seeking to serve Tribal lands to begin engaging with the affected Tribal government as soon as possible but no later than the submission of its long-form application. Any such engagement, however, must be done consistent with the Commission's auction rules prohibiting certain communications during the competitive bidding process.

309. Moreover, any bidder winning support for areas within Tribal lands must notify the relevant Tribal government no later than five business days after being identified by Public Notice as such a winning bidder. Thereafter, at the long-form application stage, in annual reports, and prior to any disbursement of support from USAC, Mobility Fund Phase I winning bidders will be required to comply with the general Tribal engagement obligations discussed *infra.*

c. Preference for Tribally-Owned or Controlled Providers

310. The Commission adopts a preference for Tribally-owned or controlled providers seeking general or Tribal Mobility Fund Phase I support. Eligible entities include Tribes or tribal consortia, and entities majority owned or controlled by Tribes. The preference will act as a ''reverse'' bidding credit that will effectively reduce the bid amount of a qualified Tribally owned- or controlled provider by a designated percentage for the purpose of comparing it to other bids, thus increasing the likelihood that Tribally-owned and controlled entities will receive funding. The preference will be available with respect to the eligible census blocks located within the geographic area defined by the boundaries of the Tribal land associated with the Tribal entity seeking support. In the spectrum auction context, the Commission typically awards small business bidding credits ranging from 15 to 35 percent, depending on varying small business size standards. The Commission believes that a bidding credit in that range would further Tribal self-government by increasing the likelihood that the bid would be awarded to a Tribal entity associated with the relevant Tribal land, without providing an unfair advantage over substantially more cost-competitive bids. Accordingly, it adopts a 25 percent bidding credit.

d. ETC Designation for Tribally-Owned or Controlled Entities

311. To afford Tribes an increased opportunity to participate at auction, in recognition of their interest in self-government and self-provisioning on their own lands, the Commission will permit a Tribally-owned or controlled entity that has an application for ETC designation pending at the relevant short-form application deadline to participate in an auction to seek general and Tribal Mobility Fund Phase I support for eligible census blocks located within the geographic area defined by the boundaries of the Tribal land associated with the Tribe that owns or controls the entity. Allowing such participation at auction in no way prejudges the ultimate decision on a Tribally-owned or controlled entity's ETC designation and that support will be disbursed only after it receives such designation.

e. Tribal Priority

312. Further comment is warranted before the Commission moves forward with any Tribal priority process that would afford Tribes ''priority units'' to allocate to areas of particular importance to them. Therefore, the Commission seeks additional input on this proposal in the context of the Tribal Mobility Fund Phase II. In the meantime, the Tribal engagement obligations adopted in the R&O, combined with build-out obligations, will ensure that Tribal needs are met in bringing service to unserved Tribal communities in the Mobility Fund Phase I.

3. Mobility Fund Phase II

313. In addition to Phase I of the Mobility Fund, the Commission also establishes in the R&O Phase II of the Mobility Fund, which will provide ongoing support for mobile services in areas where such support is needed. Whereas Mobility Fund Phase I will provide one-time funding for the expansion of current and next generation mobile networks, Phase II of the Mobility Fund recognizes that there are areas in which offering of mobile services will require ongoing support.

314. The Commission designates $500 million annually for ongoing support for mobile services, to be distributed in Phase II of the Mobility Fund. Of this amount, the Commission anticipates that it would designate up to $100 million to address the special circumstances of Tribal lands. The Commission sets a budget of $500 million to promote mobile broadband in these areas, where a private sector business case cannot be met without federal support. Although the budget for fixed services exceeds the budget for mobile services, significantly more Americans at this time have access to 3G mobile coverage than have access to residential broadband via fixed wireless, DSL, cable, or fiber. The Commission expects that as 4G mobile service is rolled out, this disparity will persist—private investment will enable the availability of 4G mobile service to a larger number of Americans than will have access to fixed broadband with speeds of at least 4 Mbps downstream and 1 Mbps upstream.

315. In 2010, wireless ETCs other than Verizon Wireless and Sprint received $921 million in high-cost support. Under 2008 commitments to phase down their competitive ETC support, Verizon Wireless and Sprint have already given up significant amounts of the support they received under the identical support rule, and there is nothing in the record showing that either carrier is reducing coverage or shutting down towers even as this support is eliminated. Nor is there anything in the record that suggests

AT&T or T-Mobile would reduce coverage or shut down towers in the absence of ETC support. It reasonable to assume that the four national carriers will maintain at least their existing coverage footprints even if the support they receive today is phased out. In 2010, $579 million flowed to regional and small carriers, *i.e.,* carriers other than the four nationwide providers. Of this $579 million, in many instances this support is being provided to multiple wireless carriers in the same geographic area. The State Members of the Federal State Joint Board on Universal Service have proposed that the Commission establish a dedicated Mobility Fund that would provide $50 million in the first year, $100 million in the second year, and then increase by $100 million each year until support reaches $500 million annually. A $500 million annual budget should be sufficient to sustain and expand the availability of mobile broadband. Moreover, mobile providers may also be eligible for support in CAF 1 in areas where price cap carriers opt not to accept the state-level commitment, in addition to Mobility Fund Phase II support.

316. Some small proportion of geographic areas may be served by a single wireless ETC, which might reduce coverage if it fails to win ongoing support within the $500 million budget. But the current record does not persuade the Commission that the best approach to ensure continuing service in those instances is to increase its overall $500 million budget. Rather, the Commission has established a waiver process as discussed elsewhere in the R&O that a wireless ETC may use to demonstrate that additional support is needed for its customers to continue receiving mobile voice service in areas where there is no terrestrial mobile alternative.

317. Of the $500 million, the Commission sets aside up to $100 million for a separate Tribal Mobility Fund, for the same reasons articulated with respect to the Tribal Mobility Fund Phase I. In addition, many Tribal lands require ongoing support in order to provide service and therefore the Commission designates a substantial level of funding to ensure that these communities are not left behind. This amount is roughly equivalent to the amount of funding currently provided to Tribal lands in the lower 48 states and in Alaska, excluding support awarded to study areas that include the most densely populated communities in Alaska.

4. Eliminating the Identical Support Rule

318. *Discussion.* The Commission eliminates the identical support rule. Based on more than a decade of experience with the operation of the current rule and having received a multitude of comments noting that the current rule fails to efficiently target support where it is needed, the Commission reiterates the conclusion that this rule has not functioned as intended. As described in more detail below, identical support does not provide appropriate levels of support for the efficient deployment of mobile services in areas that do not support a private business case for mobile voice and broadband. Because the explicit support for mobility the Commission adopts today will be designed to appropriately target funds to such areas, the identical support rule is no longer necessary or in the public interest.

319. The Commission anticipated that universal service support would be driven to the most efficient providers as they captured customers from the incumbent provider in a competitive marketplace. It originally expected that growth in subscribership to a competitive ETC's services would necessarily result in a reduction in subscribership to the incumbent's services. Instead, the vast majority of competitive ETC support has been attributable to the growing role of wireless in the United States. Overwhelmingly, high-cost support for competitive ETCs has been distributed to wireless carriers providing mobile services. Although nearly 30 percent of households nationwide have cut the cord and have only wireless voice service, many households subscribe to both wireline voice service and wireless voice service. Moreover, because households typically have multiple mobile phones, wireless competitive ETCs have been able to receive multiple subsidies for the same household. Although the expansion of wireless service has brought many benefits to consumers, the identical support rule was not designed to efficiently provide appropriate levels of support for mobility.

320. The support levels generated by the identical support rule bear no relation to the efficient cost of providing mobile voice service in a particular geography. In areas where the incumbent's support per line is high, a competitive ETC will receive relatively high levels of support per line, while it would receive markedly less support in an adjacent area with the same cost characteristics, if the incumbent there is receiving relatively little support per line. This makes little sense. Demographics, topography, and demand by travelers for mobile coverage along roads, as opposed to residences, are considerations that may create different business cases for fixed vs. mobile voice services in different areas, with a resulting effect on the level of need for subsidization. As a result of these and other differences in cost and revenue structures, the per-line amounts received by competitive ETCs are a highly imperfect approximation of the amount of subsidy necessary to support mobile service in a particular geographic area and such structures have simply missed the mark.

321. Given the way the identical support rule operates, wireless competitive ETCs often do not have appropriate incentives for entry. Some areas with per-line support amounts that are relatively high may be attracting multiple competitive ETCs, each of which invests in its own duplicative infrastructure. Indeed, many areas have four or more competitive ETCs providing overlapping service. These areas may be attracting investment that could otherwise be directed elsewhere, including areas that are not currently served. Conversely, in some areas the subsidy provided by the identical support rule may be too low, so that no competitive ETCs seek to serve the area, resulting in inadequate mobile coverage.

322. Moreover, today, competitive ETC support is calculated, and lines are reported, according to the billing address of the subscriber. Although the identical support rule provides a per-line subsidy for each competitive ETC handset in service, the customer need not use the handset at the billing address in order to receive support. Indeed, mobile competitive ETCs may receive support for some customers that rarely use their handsets in high-cost areas, but typically use their cell phones on highways and in towns or other places in which coverage would be available even without support. As currently constructed, the rule fails to ensure that facilities are built in areas that actually lack coverage.

323. The Commission rejects contentions that competitive ETCs serving certain types of areas should be exempted from elimination of the identical support rule. For example, a number of commenters from Alaska suggest that Alaska should be excluded altogether from today's reforms, and that high-cost support should generally continue in Alaska at existing levels with redistribution of that support within the state. The Commission appreciates and recognizes that Alaska

faces uniquely challenging operating conditions, and agrees that national solutions may require modification to serve the public interest in Alaska. The Commission does not, however, believe that the Alaskan proposals ultimately best serve the interest of Alaskan consumers. The Commission believes that the package of reforms adopted in the R&O targeting funding for broadband and mobility, eliminating duplicative support, and ensuring all mechanisms provide incentives for prudent and efficient network investment and operation is the best approach for all parts of the Nation, including Alaska.

324. That said, it is important to ensure our approach is flexible enough to take into account the unique conditions in places like Alaska, and the Commission makes a number of important modifications to the national rules, particularly with respect to public interest obligations, the Mobility Funds, and competitive ETC phase down, to account for those special circumstances, such as its remoteness, lack of roads, challenges and costs associated with transporting fuel, lack of scalability per community, satellite and backhaul availability, extreme weather conditions, challenging topography, and short construction season. Further, to the extent specific proposals have a disproportionate or inequitable impact on any carriers (wireline or wireless) serving Alaska, the Commission notes that it will provide for expedited treatment of any related waiver requests for all Tribal and insular areas. The Commission believes this approach, on balance, provides the benefits of our national approach while taking into account the unique operating conditions in some communities. Analogous proposals to maintain existing wireline and wireless support levels in other geographic areas, including the U.S. Territories and other Tribal lands, suffer the same infirmities as the proposals related to Alaska, and are also rejected.

325. The Commission notes that the elimination of the identical support rule applies also to competitive ETCs providing fixed services, including competitive wireline service providers. The reforms the Commission adopts elsewhere in the R&O are designed to achieve nearly ubiquitous broadband deployment. In those states where the incumbent price cap carrier declines to make a state-level commitment to build broadband in exchange for model-based support, all competitive ETCs will have the opportunity to compete to provide supported services. In other areas, where the incumbent service providers will be responsible for achieving the universal service goals, the Commission finds it would not be in the public interest to provide additional support to carriers providing duplicative services. In addition, in areas where unsubsidized providers have built out service, no carrier—incumbent or competitive—will receive support, placing all providers on even footing.

326. The Commission rejects any arguments that the Commission may not eliminate the identical support rule because doing so would prevent some carriers from receiving high-cost support. 47 U.S.C. 254 does not mandate the receipt of support by any particular carrier. Rather, as the Commission has indicated and the courts have agreed, the ''purpose of universal service is to benefit the customer, not the carrier.'' ETCs are not entitled to the expectation of any particular level of support, or even any support, so long as the level of support provided is sufficient to achieve universal service goals. As explained above, the Commission finds that the identical support rule does not provide an amount to any particular carrier that is reasonably calculated to be sufficient but not excessive for universal service purposes.

327. For all of these reasons, the Commission finds the identical support rule does not effectively serve the Commission's goals, and the Commission eliminates the rule effective January 1, 2012.

5. Transition of Competitive ETC Support to CAF

328. *Discussion.* The Commission transitions existing competitive ETC support to the CAF, including our reformed system for supporting mobile service over a five-year period beginning July 1, 2012. The Commission finds that a transition is desirable in order to avoid shocks to service providers that may result in service disruptions for consumers. Several commenters supported longer transition periods, but the Commission does not find their arguments compelling. The Commission understands that current recipients would prefer a slower, longer transition that provides them with more universal service revenues under the current system. The Commission finds, however, that a five-year transition will be sufficient for competitive ETCs that are currently receiving high-cost support to adjust and make necessary operational changes to ensure that service is maintained during the transition.

329. Moreover, during this period, competitive ETCs offering mobile wireless services will have the opportunity to bid in the Mobility Fund Phase I auction in 2012 and participate in the second phase of the Mobility Fund in 2013. Competitive ETCs offering broadband services that meet the performance standards described above will also have the opportunity to participate in competitive bidding for CAF support in areas where price cap companies decline to make a state-level broadband commitment in exchange for model-determined support, as described above, in 2013. With these new funding opportunities, many carriers, including wireless carriers, could receive similar or even greater amounts of funding after our reforms than before, albeit with that funding more appropriately targeted to the areas that need additional support.

330. For the purpose of this transition, the Commission concludes that each competitive ETC's baseline support amount will be equal to its total 2011 support in a given study area, or an amount equal to $3,000 times the number of reported lines as of year-end 2011, whichever is lower. For the purpose of this transition, ''total 2011 support'' is the amount of support disbursed to a competitive ETC for 2011, without regard to prior period adjustments related to years other than 2011 and as determined by USAC on January 31, 2012. Using a full calendar year of support to set the baseline will provide a reasonable approximation of the amount that competitive ETCs would currently expect to receive, absent reform, and a natural starting point for the phase-down of support.

331. In addition, the Commission limits the baseline to $3,000 per line in order to reflect similar changes to our rules limiting support for incumbent wireline carriers to $3,000 per line per year. For the purpose of applying the $3,000 per line limit, USAC shall use the average of lines reported by a competitive ETC pursuant to line count filings required for December 31, 2010, and December 31, 2011. This will provide an approximation of the number of lines typically served during 2011. As discussed above, the per-line amounts received by competitive ETCs are a highly imperfect approximation of the amount of subsidy necessary to support mobile service in a particular geographic area. There is no indication in the record before us that competitive ETCs need support in excess of $3,000 per line to maintain existing service pending transition to the Mobility Fund. Moreover, if the Commission did not apply the $3,000 per line limit to the baseline amount for competitive ETCs, their baselines could, in some circumstances, be much higher than the amount that they would have been

permitted had the Commission retained the identical support rule going forward, due to other changes that may lower support for the incumbent carrier.

332. Because the amount of Mobility Fund Phase II support provided will be designed to provide a sufficient level of support for a mobile carrier to provide service, the Commission finds there is no need for any carrier receiving Mobility Fund Phase II support to also continue receiving legacy support. Therefore, any such carrier will cease to be eligible for phase-down support in the first month it is eligible to receive support pursuant to the Mobility Fund Phase II. The receipt of support pursuant to Mobility Fund Phase I will not impact a carrier's receipt of support under the phase-down. Similarly, the receipt of support pursuant to Mobility Fund Phase II for service to a particular area will not affect a carrier's receipt of phase-down support in other areas.

333. The Commission notes that, pursuant to 47 U.S.C. 214(e) of the Act, competitive ETCs are required to offer service throughout their designated service areas. This requirement remains in place, even as support provided pursuant to the identical support rule is phased down. A competitive ETC may request modification of its designated service area by petitioning the entity with the relevant jurisdictional authority. In considering such petitions, the Commission will examine how an ETC modification would affect areas for which there is no other mobile service provider, and the Commission encourages state commissions to do the same.

334. Competitive ETC support per study area will be frozen at the 2011 baseline, and that monthly baseline amount will be provided from January 1, 2012 to June 30, 2012. Each competitive ETC will then receive 80 percent of its monthly baseline amount from July 1, 2012 to June 30, 2013, 60 percent of its baseline amount from July 1, 2013, to June 30, 2014, 40 percent from July 1, 2014, to June 30, 2015, 20 percent from July 1, 2015, to June 30, 2016, and no support beginning July 1, 2016. The Commission expects that the Mobility Fund Phase I auction will occur in 2012, and that ongoing support through the Mobility Fund Phase II will be implemented by 2013, with $500 million expressly dedicated to mobility. If the Mobility Fund Phase II is not operational by June 30, 2014, the Commission will halt the phase-down of support until it is operational. The Commission will similarly halt the phase-down of support for competitive ETCs serving Tribal lands if the Mobility Fund Phase II for Tribal lands has not been implemented at that time. The Commission anticipates that any temporary halt of the phase-down would be accompanied by additional mobile broadband public interest obligations, to be determined. The temporary halt will apply to wireline competitive ETCs as well as competitive ETCs providing mobile services.

335. The Commission notes that Verizon Wireless and Sprint will continue to be subject to the phase-down commitments they made in the November 2008 merger Orders. Consistent with the process set forth in the *Corr Wireless Order,* their specific phase downs will be applied to the revised rules of general applicability the Commission adopts today. As a result, each carrier will have its baseline support calculated based on disbursements, with a 20 percent reduction applied beginning July 1, 2012. Sprint, which elected Option A described in the *Corr Wireless Order,* will, in 2012, have an additional reduction applied as necessary to reduce its support to 20 percent of its 2008 baseline amount. Verizon Wireless, which elected Option B, will, in 2012, have an 80 percent reduction applied to the support it would otherwise receive. In 2013, neither carrier will receive phase down support, consistent with the commitments. To the extent that they qualify by remaining ETCs or obtaining ETC designations and agreeing to the obligations imposed on all Mobility Fund recipients, they will be permitted to participate in Mobility Fund Phases I and II.

336. In determining this transition process, the Commission also considered (a) applying the reduction factors to each state's interim cap amount, or (b) converting each competitive ETC's baseline amount to a per-line amount, to which the reduction factor would be applied. The Commission rejects these alternatives because they would provide less certainty regarding support amounts for competitive ETCs during the transition and would create greater administrative burdens and complexity. Under the first alternative, an individual competitive ETC's support would continue to be affected by line counts, support calculations and relinquishments for other, unrelated carriers within the state. Under the second alternative, a competitive ETC's support would fluctuate based on line growth or loss. The Commission believes, on balance, that the additional certainty to all competitive ETCs and the administrative efficiencies for USAC of freezing study area support as the baseline, particularly at a time when considerable demands will be placed on USAC to implement an entirely new support mechanism, outweigh the potential negative impact to any individual competitive ETCs that otherwise might receive greater support amounts during the transition to the CAF. In addition, competitive ETCs will be relieved of the obligation to file quarterly line counts, which will reduce their administrative burden as well.

337. In the *USF/ICC Transformation NPRM,* the Commission sought comment on whether exceptions to the phase down or other modified transitions should be permitted for some carriers. Although the Commission adopts limited exceptions for some remote parts of Alaska described below and for one Tribally-owned carrier whose ETC designation was modified after release of the *USF/ICC Transformation NPRM,* the Commission declines to adopt any general exceptions to our transition. Although some commenters have argued that broad exceptions will be needed, they did not generally provide the sort of detailed data and analysis that would enable us to develop a general rule for which carriers would qualify. The purpose of the phase down is to avoid unnecessary consumer disruption as the Commission transitions to new programs that will be better designed to achieve universal service goals, especially with respect to promoting investment in and deployment of mobile service to areas not yet served. The Commission does not wish to encourage further investment based on the inefficient subsidy levels generated by the identical support rule. The Commission concludes that phasing down and transitioning existing competitive support will not create significant or widespread risks that consumers in areas that currently have service, including mobile service, will be left without any viable mobile service provider serving their area.

338. The Commission will, however, consider waiver requests on a case-by-case basis. Consistent with the phase-down support's purpose of protecting existing service during the transition to the Mobility Fund programs, the Commission would not find persuasive arguments that waivers are necessary in order to expand deployment and service offerings to new areas. The Commission anticipates that future investment supported with universal service support will be provided pursuant to the new programs.

339. The Commission will carefully consider all requests for waiver of the phase down that meet the requirements

described above. The Commission expects that those requests will not be numerous. The Commission notes that two of the four nationwide carriers—Verizon Wireless and Sprint—have already given up significant amounts of the support they received under the identical support rule, and there is no indication in the record before us that those companies have turned off towers as a consequence of relinquishing their support.

340. The Commission notes that the transition the Commission adopts here will include those carriers currently receiving support under the Covered Locations exception to the interim cap and those carriers that have sought to take advantage of the own-costs exception to the cap. In adopting the Covered Locations exception to the funding cap in the *2008 Interim Cap Order,* the Commission recognized that penetration rates for basic telephone service on Tribal lands were lower than for the rest of the Nation, and the Commission concluded that competitive ETCs serving those areas were not merely providing complementary services. Under this exception, competitive ETCs serving Tribal lands have operated without a cap, and have benefited from significant funding increases. Indeed, support provided for service in Covered Locations has nearly doubled, from an estimated $72 million in 2008 to an estimated $150 million in 2011, while competitive ETC high-cost support for the remainder of the nation was frozen.

341. A significant number of supported lines under the Covered Locations exception are in larger cities in Alaska where multiple competitive ETCs often serve the same area. The result is that a significant amount of support in Alaska is provided to competitive ETCs serving the three largest Alaskan cities, Anchorage, Fairbanks, and Juneau.

342. The interim cap—along with its exceptions—was intended to be in place only until the Commission adopted comprehensive reforms to the high-cost program. The Commission adopts those reforms today. It is therefore appropriate, as the Commission transitions away from the identical support rule and the interim cap to a new high-cost support mechanism, including for mobile services, that this transition should begin for all competitive ETCs, including those that previously received uncapped support under exceptions to the interim cap.

343. With respect to Covered Locations, the Commission recognizes the significant strides that competitive ETCs have made in Covered Locations in the last two years, and that more still must be done to support expanded mobile coverage on Tribal lands. But, as with the rest of the Nation, the Commission concludes that the most effective way to do so will be through mechanisms that specifically and explicitly target support to expand coverage in Tribal lands where there is no economic business case to provide mobile service, not through the permanent continuation of the identical support rule. Our newly created Mobility Funds will provide dedicated funding to Tribal lands in a manner consistent with the policy objectives underlying our Covered Locations policy to continue to promote deployment in these communities.

344. The Commission therefore lifts the Covered Locations exception, and concludes that those carriers serving Tribal lands will be subject to the national five-year transition period. The Commission finds persuasive, however, arguments that carriers serving remote parts of Alaska, including Alaska Native villages, should have a slower transition path in order to preserve newly initiated services and facilitate additional investment in still unserved and underserved areas during the national transition to the Mobility Funds. Over 50 remote communities in Alaska have no access to mobile voice service today, and many remote Alaskan communities have access to only 2G services. While carriers serving other parts of Alaska will be subject to the national five-year transition period, the Commission is convinced a more gradual approach is warranted for carriers in remote parts of Alaska. For purposes of this R&O, the Commission will treat as remote areas of Alaska all areas other than the study areas, or portions thereof, that include the three major cities in Alaska with over 30,000 in population, Anchorage, Juneau, and Fairbanks. With respect to Anchorage, the Commission excludes the ACS of Anchorage study area (SAC 613000) as well as Eagle River Zones 1 and 2 and Chugiak Zones 1 and 2 of the Matanuska Telephone Authority study area (SAC 619003). For Fairbanks, the Commission excludes zone 1 of the ACS of Fairbanks (SAC 613008), and for Juneau, the Commission excludes the ACS Alaska-Juneau study area (SAC 613012). The Commission notes that ACS and GCI concur that the study areas, or portions thereof, that include these three cities are an appropriate proxy for non-remote areas of Alaska. There is no evidence on the record that any accommodation is necessary to preserve service or protect consumers in these larger Alaskan communities.

345. Specifically, in lifting the Covered Locations exception, the Commission delays the beginning of the five-year transition period for a two-year period for remote areas of Alaska. As a result, the Commission expects that ongoing support through the Mobility Fund Phase II, including the Tribal Mobility Fund Phase II, will be implemented prior to the beginning of the five-year transition period in July 2014 for remote parts of Alaska, providing greater certainty and stability for carriers in these areas. During this two-year period, the Commission establishes an interim cap for remote areas of Alaska for high-cost support for competitive ETCs, which balances the need to control the growth in support to competitive ETCs in uncapped areas and the need to provide a more gradual transition for the very remote and very high-cost areas in Alaska to reflect the special circumstances carriers and consumers face in those communities. This cap will be modeled on the state-by-state interim cap that has been in place under the *Interim Cap Order.* Specifically, the interim cap for remote areas of Alaska will be set at the total of all competitive ETC's baseline support amounts in remote areas of Alaska using the same process described above. On a quarterly basis, USAC will calculate the support each competitive ETC would have received under the frozen per-line support amount as of December 31, 2011 capped at $3000 per year, and then, if necessary, calculate a state reduction factor to reduce the total amount down to the cap amount for remote areas of Alaska. Specifically, USAC will compare the total amount of uncapped support to the interim cap for remote areas of Alaska. Where the total uncapped support is greater than the available support amount, USAC will divide the interim cap support amount by the total uncapped amount to yield the reduction factor. USAC will then apply the reduction factor to the uncapped amount for each competitive ETC within remote areas of Alaska to arrive at the capped level of high-cost support. If the uncapped support is less than the available capped support amount, no reduction will be required.

346. In addition, the Commission adopts a limited exception to the phase-down of support for Standing Rock Telecommunications, Inc. (Standing Rock), a Tribally-owned competitive ETC that had its ETC designation modified within calendar year 2011 for the purpose of providing service throughout the entire Standing Rock Sioux Reservation. The Commission recognizes that Tribally-owned ETCs

play a vital role in serving their communities, often in remote, low-income, and unserved and underserved regions. The Commission finds that a tailored approach in this particular instance is appropriate because of the unique federal trust relationship the Commission shares with federally recognized Tribes, which requires the federal government to adhere to certain fiduciary standards in its dealings with Tribes. In this regard, the federal government has a longstanding policy of promoting Tribal self-sufficiency and economic development, as embodied in various federal statutes. As an independent agency of the federal government, ''the Commission recognizes its own general trust relationship with, and responsibility to, federally recognized Tribes.'' In keeping with this recognition, the Commission has previously taken actions to aid Tribally-owned companies, which are entities of their Tribal governments and instruments of Tribal self-determination. For example, the Commission has adopted licensing procedures to increase radio station ownership by Tribes and Tribally-owned entities through the use of a ''Tribal Priority.''

347. A limited exception to the phase-down of competitive ETC support will give Standing Rock, a nascent Tribally-owned ETC that was designated to serve its entire Reservation and the only such ETC to have its ETC designation modified since release of the *USF/ICC Transformation NPRM* in February 2011, the opportunity to ramp up its operations in order to reach a sustainable scale to serve consumers in its service territory. The Commission finds that granting a two-year exception to the phase-down of support to this Tribally-owned competitive ETC is in the public interest. For a two-year period, Standing Rock will receive per-line support amounts that are the same as the total support per line received in the fourth quarter of this year. The Commission adopts this approach in order to enable Standing Rock to reach a sustainable scale so that consumers on the Reservation can realize the benefits of connectivity that, but for Standing Rock, they might not otherwise have access to.

348. The Commission concludes that carriers that have sought to take advantage of the ''own-costs'' exception to the existing interim cap on competitive ETC funds should not be exempted from the phase down of support. The ''own costs'' exception was intended to exempt carriers filing their own cost data from the interim cap to the extent their costs met an appropriate threshold. Because the Commission is transitioning away from support based on the identical support rule and toward new high-cost support mechanisms, the Commission sees no reason to continue to make the exception available going forward.

*E. Connect America Fund in Remote Areas*

349. In this section of the R&O, the Commission establishes a budget for CAF support in remote areas. This reflects the Commission's commitment to ensuring that Americans living in the most remote areas of the nation, where the cost of deploying wireline or cellular terrestrial broadband technologies is extremely high, can obtain affordable broadband through alternative technology platforms such as satellite and unlicensed wireless. As the National Broadband Plan observes, the cost of providing service is typically much higher for terrestrial networks in the hardest-to-serve areas of the country than in less remote but still rural areas. Accordingly, the Commission has exempted the most remote areas, including fewer than 1 percent of all American homes, from the home and business broadband service obligations that otherwise apply to CAF recipients. By setting aside designated funding for these difficult-to-serve areas, however, and by modestly relaxing the broadband performance obligations associated with this funding to encourage its use by providers of innovative technologies like satellite and fixed wireless, which may be significantly less costly to deploy in these remote areas, the Commission can ensure that those who live and work in remote locations also have access to affordable broadband service.

350. Although the Commission seeks further comment on the details of distributing dedicated remote-areas funding in the Further Notice of Proposed Rulemaking accompanying the R&O, the Commission sets as the budget for this funding at least $100 million annually. The choice of budget necessarily involves the reasonable exercise of predictive judgment, rather than a precise calculation: Many of the innovative, lower-cost approaches to serving hard to reach areas continue to evolve rapidly; the Commission is not setting the details of the distribution mechanism in the R&O; and the Commission is balancing competing priorities for funding. Nevertheless, a budget of at least $100 million per year is likely to make a significant difference in ensuring meaningful broadband access in the most difficult-to-serve areas.

351. Based on the RUS's prior experience with dedicated satellite funding to remote areas, a budget of at least $100 million could make a significant difference in expanding availability of affordable broadband service at such locations. Satellite broadband is already available to most households and small businesses in remote areas, and is likely to be available at increasing speeds over time, but current satellite services tend to have significantly higher prices to end-users than terrestrial fixed broadband services, and include substantial up-front installation costs. To help overcome these barriers in the RUS's BIP satellite program, supported providers received a one-time upfront payment per location to offer service for at least one year at a reduced price. There has been substantial consumer participation in this program, with providers estimating that they would be able to provide service to approximately 424,000 people at the reduced rates. Were the Commission to take a similar approach in distributing the $100 million set aside for remote areas funding, it could, in principle, provide a one-time sign-up subsidy to *almost all* of the estimated 670,000 remote, terrestrially-unserved locations within 4 years.

352. Such a calculation is only illustrative. For one, the Commission does not anticipate restricting the technology that can be used for remote area support. To the contrary, it seeks to encourage maximum participation of providers able to serve these most difficult to reach areas. In addition, the Commission may choose to disburse funding for remote areas in ways that either increase or decrease the dollars per supported customer, as compared to the RUS program. For example, the Commission may choose to provide ongoing support, in addition to or instead of a one-time subsidy, or it may adopt a means-tested approach to reducing the cost of service in remote areas, to target support to those most in need. The Commission seeks comment on each of these approaches in the Further Notice.

353. Notwithstanding this uncertainty, however, the record is sufficient for the Commission to conclude that a budget of at least $100 million falls within a reasonable initial range for a program targeted at innovative broadband technologies in remote areas. The Commission expects to revisit this decision over time, and will adjust support levels as appropriate.

*F. Petitions for Waiver*

354. During the course of this proceeding, various parties, both incumbents and competitive ETCs, have argued that reductions in current support levels would threaten their financial viability, imperiling service to consumers in the areas they serve. The Commission cannot, however, evaluate those claims absent detailed information about individualized circumstances, and conclude that they are better handled in the course of case-by-case review. Accordingly, the Commission permits any carrier negatively affected by these universal service reforms to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service.

355. The Commission does not, however, expect to grant waiver requests routinely, and caution petitioners that the Commission intends to subject such requests to a rigorous, thorough and searching review comparable to a total company earnings review. In particular, the Commission intends to take into account not only all revenues derived from network facilities that are supported by universal service but also revenues derived from unregulated and unsupported services as well. The intent of this waiver process is not to shield companies from secular market trends, such as line loss or wireless substitution. Waiver would be warranted where an ETC can demonstrate that, without additional universal service funding, its support would not be ''sufficient to achieve the purposes of [section 254 of the Act].'' In particular, a carrier seeking such waiver must demonstrate that it needs additional support in order for its customers to continue receiving voice service in areas where there is no terrestrial alternative. The Commission envisions granting relief only in those circumstances in which the petitioner can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available to provide voice telephony service using the same or other technologies that provide the functionalities required for supported voice service. The Commission envisions granting relief only in those circumstances in which the petitioner can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available to provide voice telephony service to consumers using the same or other technologies that provide the functionalities required for supported voice service. The Commission will also consider whether the specific reforms would cause a provider to default on existing loans and/or become insolvent. For mobile providers, the Commission will consider as a factor specific showings regarding the impact on customers, including roaming customers, if a petitioner is the only provider of CDMA or GSM coverage in the affected area.

356. Petitions for waiver must include a specific explanation of why the waiver standard is met in a particular case. Conclusory assertions that reductions in support will cause harm to the carrier or make it difficult to invest in the future will not be sufficient.

357. In addition, petitions must include all financial data and other information sufficient to verify the carrier's assertions, including, at a minimum, the following information:

- Density characteristics of the study area or other relevant geographic area including total square miles, subscribers per square mile, road miles, subscribers per road mile, mountains, bodies of water, lack of roads, remoteness, challenges and costs associated with transporting fuel, lack of scalability per community, satellite and backhaul availability, extreme weather conditions, challenging topography, short construction season or any other characteristics that contribute to the area's high costs.
- Information regarding existence or lack of alternative providers of voice and whether those alternative providers offer broadband.
- (For incumbent carriers) How unused or spare equipment or facilities is accounted for by providing the Part 32 account and Part 36 separations category this equipment is assigned to.
- Specific details on the make-up of corporate operations expenses such as corporate salaries, the number of employees, the nature of any overhead expenses allocated from affiliated or parent companies, or other expenses.
- Information regarding all end user rate plans, both the standard residential rate and plans that include local calling, long distance, Internet, texting, and/or video capabilities.
- (For mobile providers) A map or maps showing (1) the area it is licensed to serve; (2) the area in which it actually provides service; (3) the area in which it is designated as a CETC; (4) the area in which it is the sole provider of mobile service; (5) location of each cell site. For the first four of these areas, the provider must also submit the number of road-miles, population, and square miles. Maps shall include roads, political boundaries, and major topographical features. Any areas, places, or natural features discussed in the provider's waiver petition shall be shown on the map.
- (For mobile providers) Evidence demonstrating that it is the only provider of mobile service in a significant portion of any study area for which it seeks a waiver. A mobile provider may satisfy this evidentiary requirement by submitting industry-recognized carrier service availability data, such as American Roamer data, for all wireless providers licensed by the FCC to serve the area in question. If a mobile provider claims to be the sole provider in an area where an industry-recognized carrier service availability data indicates the presence of other service, then it must support its claim with the results of drive tests throughout the area in question. In the parts of Alaska or other areas where drive testing is not feasible, a mobile provider may offer a statistically significant number of tests in the vicinity of locations covered. Moreover, equipment to conduct the testing can be transported by off-road vehicles, such as snow-mobiles or other vehicles appropriate to local conditions. Testing must examine a statistically meaningful number of call attempts (originations) and be conducted in a manner consistent with industry best practices. Waiver petitioners that submit test results must fully describe the testing methodology, including but not limited to the test's geographic scope, sampling method, and test set-up (equipment models, configuration, *etc.*). Test results must be submitted for the waiver petitioner's own network and for all carriers that the industry-recognized carrier service availability data shows to be serving the area in which the petitioner claims to be the only provider of mobile service.
- (For mobile providers). Revenue and expense data for each cell site for the three most recent fiscal years. Revenues shall be broken out by source: End user revenues, roaming revenues, other revenues derived from facilities supported by USF, all other revenues. Expenses shall be categorized: Expenses that are directly attributable to a specific cell site, network expenses allocated among all sites, overhead expenses allocated among sites. Submissions must include descriptions the manner in which shared or common costs and corporate overheads are allocated to specific cell sites. To the extent that a mobile provider makes arguments in its

waiver petition based on the profitability of specific cell sites, petitioner must explain why its cost allocation methodology is reasonable.

• (For mobile providers) Projected revenues and expenses, on cell-site basis, for 5 years, with and without the waiver it seeks. In developing revenue and expense projections, petitioner should assume that it is required to serve those areas in which it is the sole provider for the entire five years and that it is required to fulfill all of its obligations as an ETC through December 2013.

• A list of services other than voice telephone services provided over the universal service supported plant, *e.g.,* video or Internet, and the percentage of the study area's telephone subscribers that take these additional services.

• (For incumbent carriers) Procedures for allocating shared or common costs between incumbent LEC regulated operations, competitive operations, and other unregulated or unsupported operations.

• Audited financial statements and notes to the financial statements, if available, and otherwise unaudited financial statements for the most recent three fiscal years. Specifically, the cash flow statement, income statement and balance sheets. Such statements shall include information regarding costs and revenues associated with unregulated operations, *e.g.,* video or Internet.

• Information regarding outstanding loans, including lender, loan terms, and any current discussions regarding restructuring of such loans.

• Identification of the specific facilities that will be taken out of service, such as specific cell towers for a mobile provider, absent grant of the requested waiver.

• For Tribal lands and insular areas, any additional information about the operating conditions, economic conditions, or other reasons warranting relief based on the unique characteristics of those communities.

358. Failure to provide the listed information shall be grounds for dismissal without prejudice. In addition to the above, the petitioner shall respond and provide any additional information as requested by Commission staff. The Commission will also welcome any input that the relevant state commission may wish to provide on the issues under consideration, with a particular focus on the availability of alternative unsubsidized voice competitors in the relevant area and recent rate-setting activities at the state level, if any.

359. The Commission delegates to the Wireline Competition and Wireless Telecommunications Bureaus the authority to approve or deny all or part of requests for waiver of the phase-down in support adopted herein. Such petitions will be placed on public notice, with a minimum of 45 days provided for comments and reply comments to be filed by the general public and relevant state commission. The Commission directs the Bureaus to prioritize review of any applications for waiver filed by providers serving Tribal lands and insular areas, and to complete their review of petitions from providers serving Tribal lands and insular areas within 45 days of the record closing on such waiver petitions.

### *G. Enforcing the Budget for Universal Service*

#### 1. Creating New Flexibility To Manage Fluctuations in Demand

360. *Discussion.* The Commission adopts the proposed amendment to 47 CFR 54.709(b) to permit the Commission to instruct USAC to take alternative action with regard to prior period adjustments when making its quarterly demand filings. Currently, the section requires that excess contributions received in a quarter ''will be carried forward to the following quarter.'' The Commission amends the rule to add paragraph 54.709(b)(1), which shall read, ''The Commission may instruct USAC to treat excess contributions in a manner other than as prescribed in paragraph (b). Such instructions may be made in the form of a Commission Order or a Public Notice released by the Wireline Competition Bureau. Any such Public Notice will become effective fourteen days after release of the Public Notice, absent further Commission action.''

361. Permitting the Commission to modify its current treatment of excess contributions as necessary on a case-by-case basis will permit it to better manage the effects of one-time and seasonal events that may create undue volatility in the contribution factor. Programmatic changes, one-time distributions of support (such as Mobility Fund Phase I), and other transitional processes will likely cause the quarterly funding demands to fluctuate considerably until the transitions are complete, similarly to how large, unforecasted one-time contributions have caused significant fluctuations in the past. The ability to provide specific, case-by-case instructions will allow the Commission to smooth the effects of such events on the contribution factor, rendering it more predictable for the consumers who ultimately pay for universal service.

362. In response to the *USF/ICC Transformation NPRM* seeking comment on whether to modify 47 CFR 54.709(b), some commenters raise questions about whether 47 U.S.C. 254 of the Act provides the Commission the authority to establish a broadband reserve fund intended to make disbursements according to rules that were, at the time, not yet adopted. As RICA put it, 47 U.S.C. 254 requires carriers to contribute to the ''specific, predictable, and sufficient mechanisms established (not *to be* established) by the Commission to preserve and advance Universal Service.'' Verizon, similarly, suggests that 47 U.S.C. 254's reference to '''specific' and 'predictable' USF programs and support—and contributions collected for 'established' universal service mechanisms—counsels against reserving support for mechanisms that do not yet exist.'' Nevertheless, for the reasons set forth below, the Commission concludes that a broadband reserve account is consistent with 47 U.S.C. 254 of the Act.

363. The Commission does not read 47 U.S.C. 254(d) as limiting the Commission's authority to require contributions only to support specific mechanisms that are already established at the time the contributions are required, for several reasons.

364. Broadly speaking, the Commission understands 47 U.S.C. 254(d) to be directed to explaining *who* must contribute to the Federal universal service mechanisms—specifically, telecommunications carriers that provide interstate telecommunications services, unless exempted by the Commission, as well as other providers of interstate telecommunications if the Commission determines the public interest so requires. The reference in 47 U.S.C. 254(d) to ''the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service'' is not, as these commenters suggest, a limitation on what kinds of mechanisms—*i.e.,* already-established mechanisms—will be supported; it is instead a reference to language in 47 U.S.C. 254(b), which directs the Commission (as well as the Joint Board) to be guided by several principles in establishing universal service policies, including the principle that ''[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.'' In other words, it merely requires that contributions under 47 U.S.C. 254 are to be used to support the Federal mechanisms that are established under 47 U.S.C. 254.

365. The Commission also finds that commenters' argument is unpersuasive given the grammatical construction of the relevant section of the law. In the phrase ''mechanisms established by the Commission,'' the clause ''established by the Commission'' functions as an adjectival phrase identifying which mechanisms are funded through 47 U.S.C. 254(d). Specifically, the mechanisms funded by 47 U.S.C. 254(d) are the mechanisms ''established by the Commission'' consistent with the principles of 47 U.S.C. 254(b) (that they be specific, predictable, and sufficient). When used in this way, the word ''established'' is not a word in the past tense; it is not a word that signifies any particular tense at all. Commenters who read the word ''established'' as signifying the past tense are, the Commission concludes, improperly reading ''already'' into the phrase, so that it would read ''mechanisms already established by the Commission.'' Congress could have written the statute that way, but it did not. Admittedly, Congress could have written the statute in yet other ways that would have made clearer that these commenters' concerns are misplaced. But that indicates only that the statute is amenable to various interpretations. And for the reasons explained here, the Commission concludes its interpretation is the better reading of the statute.

366. These commenters' view also raises troubling questions of interpretation, which the Commission believes Congress did not intend. That is, under these commenters' reading of the statute, contributions may only be collected to fund a mechanism that has already been established. Broadly speaking, all of the rule changes that the Commission has implemented since the 1996 Act, including those adopted in this R&O, have been to effectuate the general statutory directive that consumers should have access to telecommunication and information services in rural and high cost areas. As such, the entire collection of rules can be viewed as the ''high-cost mechanism,'' and the specific existing programs, as well as the Connect America Fund, are part of that high-cost mechanism.

367. To read the statute in any other way would create significant administrative issues that the Commission cannot believe Congress would have intended. How would the Commission—or a court— decide whether a modified mechanism is a new, not-yet-established mechanism (which could not provide support until new funds are collected for it), or whether the modifications are minor enough such that the mechanism, although different, is still the mechanism that was already established? The Commission does not believe that Congress intended either the Commission or a court to be required to wrestle with such questions, which serve no obvious congressional purpose. Alternatively, any change, no matter how minor, could transform the mechanism into one that was not-yet-established. Interpreting the statute in that way would similarly serve no identifiable congressional purpose, but would serve only to slow down and complicate reforms to support mechanisms that the Commission determines are appropriate to advance the public interest. Significantly in this regard, Congress in 47 U.S.C. 254 specifically contemplated that universal service programs would change over time; reading the statute the way these commenters suggest would add unnecessary burdens to that process.

2. Setting Quarterly Demand To Meet the $4.5 Billion Budget

368. *Discussion.* Various parties have submitted proposed budgets into the record suggesting that the Commission could maintain an overall $4.5 billion annual budget by collecting that amount in the near term, projecting that actual demand will be lower than that amount, and using those funds in subsequent quarters to address actual demand that exceeds $1.125 billion. The Commission is persuaded that, on balance, it would be appropriate to provide greater flexibility to USAC to use past contributions to meet future program demand so that the Commission can implement the Connect America Fund in a way that does not cause dramatic swings in the contribution factor. The Commission now sets forth general instructions to USAC on how to implement the $4.5 billion budget target.

369. First, beginning with the quarterly demand filing for the first quarter of 2012, USAC should forecast total high-cost universal service demand as no less than $1.125 billion, *i.e.,* one quarter of the annual high-cost budget. To the extent that USAC forecasts demand will actually be higher than that amount, USAC should reflect that higher forecast in its quarterly demand filing. If high-cost demand actually exceeds $1.125 billion, no additional funds will accumulate in the reserve account for that quarter and, consistent with the third instruction below, the reserve account will be used to constrain the high-cost demand in the contribution factor. USAC should no longer forecast total competitive ETC support at the original interim cap amount, as previously instructed, but should forecast competitive ETC support subject to the rules the Commission adopts today. Specifically, USAC shall forecast competitive ETC demand as set by the frozen baseline per study area as of year end 2011, as adjusted by the phase-down in the relevant time period.

370. Second, consistent with the newly revised section 54.709(b) of the rules, the Commission instructs USAC not to make prior period adjustments related to high-cost support if actual contributions exceed demand. Excess contributions shall instead be credited to a new Connect America Fund reserve account, to be used as described below.

371. Third, beginning with the second quarter of 2012, the Commission directs USAC to use the balances accrued in the CAF reserve account to reduce high-cost demand to $1.125 billion in any quarter that would otherwise exceed $1.125 billion.

372. The Commission expects the reforms the Commission adopts today to keep annual contributions for the CAF and any existing high-cost support mechanisms to no more than $4.5 billion. And through the use of incentive-based rules and competitive bidding, the fund could require less than $4.5 billion to achieve its goals in future years. However, if actual program demand, exclusive of funding provided from the CAF or *Corr Wireless* reserve accounts, for CAF and existing high-cost mechanisms exceed an annualized $4.5 billion over any consecutive four quarters, this situation will automatically trigger a process to bring demand back under budget. Specifically, immediately upon receiving information from USAC regarding actual quarterly demand, the Wireline Competition Bureau will notify each Commissioner and publish a Public Notice indicating that program demand has exceeded $4.5 billion over the last four quarters. Then, within 75 days of the Public Notice being published, the Bureau will develop options and provide to the Commissioners a recommendation and specific action plan to immediately bring expenditures back to no more than $4.5 billion.

3. Drawing Down the Corr Wireless Reserve Account

373. *Discussion.* In order to wind down the current broadband reserve account, the Commission provides the following instructions to USAC.

374. First, the Commission directs USAC to utilize $300 million in the *Corr Wireless* reserve account to fund

commitments that the Commission anticipates will be made in 2012 to recipients of the Mobility Fund Phase I to accelerate advanced mobile services. The Commission also directs USAC to use the remaining funds and any additional funding necessary for Phase I of the CAF for price cap carriers in 2012. Those actions together should exhaust the *Corr Wireless* reserve account.

375. Second, the Commission instructs USAC not to use the *Corr Wireless* reserve account to fund inflation adjustments to the e-rate cap for the current 2011 funding year. Inflation adjustments to the e-rate cap for Funding Year 2011 and future years shall be included in demand projections for the e-rate program.

## VI. Accountability and Oversight

376. The billons of dollars that the Universal Service Fund disburses each year to support vital communications services come from American consumers and businesses, and recipients must be held accountable for how they spend that money. This requires vigorous ongoing oversight by the Commission, working in partnership with the states, Tribal governments, where appropriate, and U.S. Territories, and the Fund administrator, USAC. Because the CAF, including the Mobility Fund, are part of USF, the Commission concludes that USAC shall administer these new programs under the terms of its current appointment as Administrator, subject to all existing Commission rules and orders applicable to the Administrator. The Commission hereby designates the Wireless Telecommunications Bureau as a point of contact, in addition to the Wireline Competition Bureau, on policy matters relating to USF administration.

### *A. Uniform Framework for ETC Oversight*

#### 1. Need for Uniform Standards for Accountability and Oversight

377. *Discussion.* A uniform national framework for accountability, including unified reporting and certification procedures, is critical to ensure appropriate use of high-cost support and to allow the Commission to determine whether it is achieving its goals efficiently and effectively. Therefore, the Commission now establishes a national framework for oversight that will be implemented as a partnership between the Commission and the states, U.S. Territories, and Tribal governments, where appropriate. As set forth more fully in the subsections immediately following, this national framework will include annual reporting and certification requirements for all ETCs receiving universal funds—not just federally-designated ETCs—which will provide federal and state regulators the factual basis to determine that all USF recipients are using support for the intended purposes, and are receiving support that is sufficient, but not excessive. The Commission has authority to require all ETCs to comply with these national requirements as a condition of receiving federal high-cost universal service support. (For purposes of this section, the references to ETCs include those ETCs that receive high-cost support pursuant to legacy high-cost programs and CAF programs adopted in this R&O. It does not generally include ETCs that receive support solely pursuant to Mobility Fund Phase I, which has separate reporting obligations. Where the requirements discussed in this section also apply to ETCs receiving only Phase I Mobility Fund support, the Commission specifically states so. In the *USF/ICC Transformation FNPRM,* the Commission seeks comment on alternative reporting requirements for Mobility Fund support to reflect basic differences in the nature and purpose of the support provided for mobile services.)

378. The Commission clarifies that the specific reporting and certification requirements adopted below are a floor rather than a ceiling for the states. In 47 U.S.C. 254(f), Congress expressly permitted states to take action to preserve and advance universal service, so long as not inconsistent with the Commission's universal service rules. The statute permits states to adopt additional regulations to preserve and advance universal service so long as they also adopt state mechanisms to support those additional substantive requirements. Consistent with this federal framework, state commissions may require the submission of additional information that they believe is necessary to ensure that ETCs are using support consistent with the statute and the implementing regulations, so long as those additional reporting requirements do not create burdens that thwart achievement of the universal service reforms set forth in this R&O.

379. The Commission notes, however, that one benefit of a uniform reporting and certification framework for ETCs is that it will minimize regulatory compliance costs for those ETCs that operate in multiple states. ETCs should be able to implement uniform policies and procedures in all of their operating companies to track, validate, and report the necessary information. Although the Commission adopts a number of new reporting requirements below, the Commission concludes that the critical benefit of such reporting—to ensure that statutory and regulatory requirements associated with the receipt of USF funds are met—outweighs the imposition of some additional time and cost on individual ETCs to make the necessary reports. Under this uniform framework, ETCs will provide annual reports and certifications regarding specific aspects of their compliance with public interest obligations to the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate by April 1 of each year. These annual reporting requirements should provide the factual basis underlying the annual 47 U.S.C. 254(e) certification by the state commission (or ETC in the case of federally designated ETCs) by October 1 of every year that support is being used for the intended purposes.

#### 2. Reporting Requirements

380. *Discussion.* First, the Commission extends the current federal annual reporting requirements to all ETCs, including those designated by states. These requirements will now be located in new 47 CFR 54.313. Specifically, the Commission concludes that all ETCs must include in their annual reports the information that is currently required by 47 CFR 54.209(a)(1)–(a)(6)—specifically, a progress report on their five-year build-out plans; data and explanatory text concerning outages; unfulfilled requests for service; complaints received; and certifications of compliance with applicable service quality and consumer protection standards and of the ability to function in emergency situations. If ETCs are complying with any voluntary code (*e.g.,* the voluntary code of conduct concerning ''bill shock'' or the CTIA Consumer Code for Wireless Service), they should so indicate in their reports. The Commission concludes that it is necessary and appropriate to obtain such information from all ETCs, both federal- and state-designated, to ensure the continued availability of high-quality voice services and monitor progress in achieving the broadband goals and to assist the FCC in determining whether the funds are being used appropriately. As the Commission said at the time the Commission adopted these requirements for federally-designated ETCs, these reporting requirements ensure that ETCs comply with the conditions of the ETC designation and that universal service funds are used for

their intended purposes. They also help prevent carriers from seeking ETC status for purposes unrelated to providing rural and high-cost consumers with access to affordable telecommunications and information services. Accordingly, the Commission now concludes that these requirements should serve as a baseline requirement for all ETCs.

381. All ETCs that receive high-cost support will file the information required by new 47 CFR 54.313 with the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate. USAC will review such information as appropriate to inform its ongoing audit program, in depth data validations, and related activities. 47 CFR 54.313 reports will be due annually by April 1, beginning on April 1, 2012. (The Commission delegates authority to the Wireline Competition Bureau to modify the initial filing deadline as necessary to comply with the requirements of the Paperwork Reduction Act.) The Commission will also require that an officer of the company certify to the accuracy of the information provided and make the certifications required by new 47 CFR 54.313, with all certifications subject to the penalties for false statements imposed under 18 U.S.C. 1001.

382. Second, the Commission incorporates new reporting requirements described below to ensure that recipients are complying with the new broadband public interest obligations adopted in this R&O, including broadband public interest obligations associated with CAF ICC. This information must be included in annual 47 CFR 54.313 reports filed with Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate. However, some of the new elements are tied to new public interest obligations that will be implemented in 2013 or a subsequent year and, therefore, they need not be included until that time, as detailed below.

383. Competitive ETCs whose support is being phased down will not be required to submit any of the new information or certifications below related solely to the new broadband public interest obligations, but must continue to submit information or certifications with respect to their provision of voice service.

384. The Commission delegates to the Wireline Competition Bureau and Wireless Telecommunication Bureaus the authority to determine the form in which recipients of support must report this information.

385. *Speed and latency.* Starting in 2013, the Commission will require all ETCs to include the results of network performance tests conducted in accordance with the requirements of this R&O and any further requirements adopted after consideration of the record received in response to the FNPRM. Additionally, in the calendar year no later than three years after implementation of CAF Phase II, price cap recipients must certify that they are meeting all interim speed and latency milestones, including the 4 Mbps/1 Mbps speed standard required by this R&O. In the calendar year no later than five years after implementation of CAF Phase II, those price cap recipients must certify that they are meeting the default speed and latency standards applicable at the time.

386. *Capacity.* Starting in 2013, the Commission requires all ETCs to include a self-certification letter certifying that usage capacity limits (if any) for their services that are subject to the broadband public interest standard associated with the type of funding they are receiving are reasonably comparable to usage capacity limits for comparable terrestrial residential fixed broadband offerings in urban areas, as set forth in the Public Interest Obligations sections above. ETCs will also be required to report on specific capacity requirements (if any) in conjunction with reporting of pricing of their broadband offerings that meet the public interest obligations, as discussed below.

387. *Build-out/Service.* Recognizing that existing five-year build out plans may need to change to account for new broadband obligations set forth in this R&O, the Commission requires all ETCs to file a new five-year build-out plan in a manner consistent with 54.202(a)(1)(ii) by April 1, 2013. Under the terms of new 47 CFR 54.313(a), all ETCs will be required to include in their annual 54.313 reports information regarding their progress on this five-year broadband build-out plan beginning April 1, 2014. This progress report shall include the number, names, and addresses of community anchor institutions to which the ETCs newly offer broadband service. As discussed above, the Commission expects ETCs to use their support in a manner consistent with achieving universal availability of voice and broadband. Incumbent carriers, both rate-of-return and price cap, should make certifications to that effect beginning April 1, 2013 for the 2012 calendar year.

388. In addition, all ETCs must supply the following information:

(a) *Rate-of-Return Territories.* The Commission requires all rate-of-return ETCs receiving support to include a self-certification letter certifying that they are taking reasonable steps to offer broadband service meeting the requirements established above throughout their service area, and that requests for such service are met within a reasonable amount of time. As noted above, these carriers must also notify the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate, of all unfulfilled requests for broadband service meeting the 4 Mbps/1 Mbps standard the Commission establishes as the initial CAF requirement, and the status of such requests.

(b) *Price Cap Territories.* The Commission requires all ETCs receiving CAF support in price cap territories based on a forward-looking cost model to include a self-certification letter certifying that they are meeting the interim deployment milestones as set forth in the Public Interest Obligations section above and that they are taking reasonable steps to meet increased speed obligations that will exist for a specified number of supported locations before the expiration of the five-year term for CAF Phase II funding. ETCs that receive CAF support awarded through a competitive process will also be required to file such self-certifications, subject to any modifications adopted pursuant to the FNPRM below.

389. In addition, as discussed above, price cap ETCs will be able to elect to receive CAF Phase I incremental funding under a transitional distribution mechanism prior to adoption and implementation of an updated forward-looking broadband-focused cost model for CAF Phase II. As a condition of receiving such support, those companies will be required to deploy broadband to a certain number of unserved locations within three years, with deployment to no fewer than two-thirds of the required number of locations within two years and to all required locations within three years after filing their notices of acceptance. As of that time, carriers must offer broadband service of at least 4 Mbps downstream and 1 Mbps upstream, with latency sufficiently low to enable the use of real-time communications, including VoIP, and with usage limits, if any, that are reasonably comparable to those in urban areas. As noted above, no later than 90 days after being informed of its eligible incremental support amount, each price cap ETC must provide notice to the Commission and to the relevant state commission, relevant authority in a U.S. Territory, or

Tribal government, as appropriate, identifying the areas, by wire center and census block, in which the carrier intends to deploy broadband to meet this obligation, or stating that the carrier declines to accept incremental support for that year.

390. The carrier must also certify that (1) deployment funded by CAF Phase I incremental support will occur in areas shown as unserved by fixed broadband on the National Broadband Map that is most current at that time, and that, to the best of the carrier's knowledge, are unserved by fixed broadband with a minimum speed of 768 kbps downstream and 200 kbps upstream, and that, to the best of the carrier's knowledge, are, in fact, unserved by fixed broadband at those speeds; and (2) the carrier's current capital improvement plan did not already include plans to deploy broadband to that area within three years, and that CAF Phase I support will not be used to satisfy any merger commitment or similar regulatory obligation. In addition, carriers must certify that: (1) Within two years after filing a notice of acceptance, they have deployed to no fewer than two-thirds of the required number of locations; and (2) within three years after filing a notice of acceptance, they have deployed to all required locations and that they are offering broadband service of at least 4 Mbps downstream and 1 Mbps upstream, with latency sufficiently low to enable the use of real-time communications, including VoIP, and with usage limits, if any, that are reasonably comparable to those in urban areas. These certifications must be included in the first annual report due following the year in which the carriers reach the required milestones.

391. In addition, price cap carriers that receive frozen high-cost support will be required to certify that they are using such support in a manner consistent with achieving universal availability of voice and broadband. Specifically, in the 2013 certification, all price cap carriers receiving frozen high-cost support must certify to the Commission, the relevant state commission, relevant authority in a U.S. Territory, and to any affected Tribal government that they used such support in a manner consistent with achieving the universal availability of voice and broadband. In the 2014 certification, all price cap carriers receiving frozen high-cost support must certify that at least one-third of the frozen-high cost support they received in 2013 was used to build and operate broadband-capable networks used to offer the provider's own retail broadband service in areas substantially unserved by an unsubsidized competitor. In the 2015 certification, carriers must certify that at least two-thirds of the frozen high-cost support the carrier received in 2014 was used in such fashion, and for 2016 and subsequent years, carriers must certify that all frozen high-cost support they received in the previous year was used in such fashion. These certifications must be included in the carriers' annual reports due April 1 of each year. Price cap companies that receive CAF ICC also are obligated to certify that they are using such support for building and operating broadband-capable networks used to offer their own retail service in areas substantially unserved by an unsubsidized competitor.

392. *Price.* The Commission requires all ETCs to submit a self-certification that the pricing of their voice services is no more than two standard deviations above the national average urban rate for voice service, which will be specified annually in a public notice issued by the Wireline Competition Bureau. This certification requirement begins April 1, 2013, to cover 2012.

393. ETCs receiving only Mobility Fund Phase I support will self-certify annually that they offer service in areas with support at rates that are within a reasonable range of rates for similar service plans offered by mobile wireless providers in urban areas. ETCs receiving any other support will submit a self-certification that the pricing of their broadband service is within a specified reasonable range. That range will be established and published as more fully described above for recipients of high-cost and CAF support, other than Mobility Fund Phase I. This certification requirement begins April 1, 2013, to cover 2012.

394. ETCs must also report pricing information for both voice and broadband offerings. They must submit the price and capacity range (if any) for the broadband offering that meets the relevant speed requirement in their annual reporting. In addition, beginning April 1, 2012, subject to PRA approval, all incumbent local exchange company recipients of HCLS, frozen high-cost support, and CAF also must report their flat rate for residential local service to USAC so that USAC can calculate reductions in support levels for those carriers with R1 rates below the specified rate floor, as established above. Carriers may not request confidential treatment for such pricing and rate information.

395. *Financial Reporting.* The Commission sought comment on requiring all ETCs to provide financial information, including balance sheets, income statements, and statements of cash flow.

396. Upon consideration of the record, the Commission now adopts a less burdensome variation of this proposal. The Commission concludes that it is not necessary to require submission of such information from publicly traded companies, as we can obtain such information directly for SEC registrants. Likewise, the Commission concludes at this time it is not necessary to require the filing of such information by recipients of funding determined through a forward-looking cost model or through a competitive bidding process, even if those recipients are privately held. The Commission expects that a model developed through a transparent and rigorous process will produce support levels that are sufficient but not excessive, and that support awarded through competitive processes will be disciplined by market forces. The design of those mechanisms should drive support to efficient levels.

397. The Commission emphasizes, however, that it may request additional information on a case-by-case basis from all ETCs, both private and public, as necessary to discharge the universal service oversight responsibilities.

398. For privately-held rate-of-return carriers that continue to receive support based in part on embedded costs, the Commission adopts a more limited reporting requirement, beginning in 2012. The Commission requires all privately-held rate-of-return carriers receiving high-cost and/or CAF support to file with the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate beginning April 1, 2012, subject to PRA approval, a full and complete annual report of their financial condition and operations as of the end of their preceding fiscal year, which is audited and certified by an independent certified public accountant in a form satisfactory to the Commission, and accompanied by a report of such audit. The annual report shall include balance sheets, income statements, and cash flow statements along with necessary notes to clarify the financial statements. The income statements shall itemize revenue by its sources.

399. The ETCs subject to this new requirement are all already subject to the Uniform System of Accounts, which specifies how required financial information shall be maintained in accordance with Part 32 of the Commission's rules. Because Part 32 of the rules already requires incumbent carriers to break down accounting by study area, it should provide an

accurate picture of how recipients are using the high-cost support they receive in particular study areas. Additionally, Part 32 provides a uniform system of accounting that allows for an accurate comparison among carriers. ETCs that receive loans from the Rural Utility Service (RUS) are already required to provide RUS with annual financial reports maintained in accordance with Part 32. The Commission will allow these carriers to satisfy their financial reporting obligation by simply providing electronic copies of their annual RUS reports to the Commission, which should not impose any additional burden. All other rate-of-return carriers, in their initial filing after adoption of this R&O, shall provide the required financial information as kept in accordance with Part 32 of the Commission's rules.

400. The Commission delegates to the Wireline Competition Bureau the authority to resolve all other questions regarding the appropriate format for carriers' first financial filing following this R&O, as well as the authority to set the format for subsequent reports. The Commission may in future years implement a standardized electronic filing system, and the Commission also delegates to the Wireline Competition Bureau the task of establishing an appropriate format for transmission of this information.

401. The Commission does not expect privately held ETCs will face a significant burden in producing the financial disclosures required herein because such financial accounting statements are normally prepared in the usual course of business. In particular, because incumbent LECs are already required to maintain their accounts in accordance with Part 32, the required disclosures are expected to impose minimal new burdens. Indeed, for the many carriers that already provide Part 32 financial reports to RUS, there will be no additional burden.

402. Finally, the Commission concludes that these carriers' financial disclosures should be made publicly available. The only comment the Commission received on this issue came from NASUCA, which strongly urged the Commission to require public disclosure of all financial reports. NASUCA rightly observed that recipients of high-cost and/or CAF support receive extensive public funding, and therefore the public has a legitimate interest in being able to verify the efficient use of those funds. Moreover, by making this information public, the Commission will be assisted in its oversight duties by public interest watchdogs, consumer advocates, and others who seek to ensure that recipients of support receive funding that is sufficient but not excessive.

403. *Ownership Information.* The Commission now adopts a rule requiring all ETCs to report annually the company's holding company, operating companies, affiliates, and any branding (a ''dba,'' or ''doing-business-as company'' or brand designation). In addition, filers will be required to report relevant universal service identifiers for each such entity by Study Area Codes. This will help the Commission reduce waste, fraud, and abuse and increase accountability in the universal service programs by simplifying the process of determining the total amount of public support received by each recipient, regardless of corporate structure. Such information is necessary in order for the Commission to ensure compliance with various requirements adopted today that take into account holding company structure. For purposes of this requirement, affiliated interests shall be reported consistent with 47 U.S.C. 3(2) of the Communications Act of 1934, as amended.

404. *Tribal Engagement.* ETCs serving Tribal lands must include in their reports documents or information demonstrating that they have meaningfully engaged Tribal governments in their supported areas. The demonstration must document that they had discussions that, at a minimum, included: (1) A needs assessment and deployment planning with a focus on Tribal community anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with Tribal business and licensing requirements.

405. *Elimination of Certain Data Reporting Requirements.* Finally, as discussed above, the Commission is eliminating LSS and IAS as standalone support mechanisms. This obviates the need for reporting requirements specific to 54.301(b) and 54.802 of the rules (and 54.301(e) after December 31, 2012).

406. Overall, the changes to the reporting requirements do not impose an undue burden on ETCs and that the benefits outweigh any burdens. Given the extensive public funding these entities receive, the expanded goals of the program, and the need for greater oversight, as noted by the GAO, it is prudent to impose narrowly tailored reporting requirements focused on the information that will demonstrate compliance with statutory requirements and the implementing rules. These specific reporting requirements are tailored to ensure that ETCs are complying with their public interest obligations and using support for the intended purposes, as required by 47 U.S.C. 254(e) of the Act. Where possible, the Commission is minimizing burdens by requiring certifications in lieu of collecting data, and by allowing the filing of reports already prepared for other government agencies in lieu of new reports. Moreover, the Commission is eliminating some of the existing requirements, which will reduce burdens for some ETCs. Finally, to the extent ETCs currently provide information either to their state or to the Commission, they will not bear any significant additional burden in now also providing copies of such information to the other regulatory body.

3. Annual Section 254(e) Certifications

407. *Discussion.* First, the Commission requires that states—and entities not falling within the states' jurisdiction (*i.e.,* federally-designated ETCs)—certify that all federal high-cost and CAF support was used in the preceding calendar year *and* will be used in the new calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended, regardless of the rule under which that support is provided. This corrects a defect in the current rules, which require only a certification with respect to the coming year. The certifications required by new 47 CFR 54.314 will be due by October 1 of each year, beginning with October 1, 2012. The certification requirement applies to all recipients of high-cost and CAF support, including those that receive only Phase I Mobility Fund support.

408. Second, the Commission maintains states' ongoing role in annual certifications. Several commenters take the position that responsibility for ensuring USF recipients comply with their public interest obligations should remain with the states. As discussed above, the Commission agrees that the states should play an integral role in assisting the Commission in monitoring compliance, consistent with an overarching uniform national framework. States will continue to certify to the Commission that support is used by state-designated ETCs for the intended purpose, which is modified to include the provision, maintenance, and upgrading of facilities capable of delivering voice and broadband services to homes, businesses and community anchor institutions.

409. Under the reformed rules, as before, some recipients of support may be designated by the Commission rather than the states. States are not required to file certifications with the Commission with respect to carriers that do not fall within their jurisdiction. However, consistent with the partnership between the Commission and the states to preserve and enhance universal service, and the recognition that states will continue to be the first place that consumers may contact regarding consumer protection issues, the Commission encourages states to bring to its attention issues and concerns about all carriers operating within their boundaries, including information regarding non-compliance with the rules by federally-designated ETCs. The Commission similarly encourages Tribal governments, where appropriate, to report to the Commission any concerns about non-compliance with the rules by all recipients of support operating on Tribal lands. Any such information should be provided to the Wireline Competition Bureau and the Consumer & Governmental Affairs Bureau. Through such collaborative efforts, the Commission will work together to ensure that consumer interests are appropriately protected.

410. Third, the Commission clarifies that it expects a rigorous examination of the factual information provided in the annual 47 CFR 54.313 reports prior to issuance of the annual 47 U.S.C. 254(e) certifications. Because the underlying reporting requirements for recipients of Mobility Fund Phase I support differ from the reporting requirements for ETCs receiving other high-cost support, Mobility Fund Phase I recipients' certifications will be based on the factual information they provide in the annual reports they file pursuant to 47 CFR 54.1009 of the Mobility Fund rules. Because ETCs of Mobility Fund Phase I support that receive support pursuant to other high-cost mechanisms are subject to the reporting requirements of new 47 CFR 54.313, those companies' certifications will be based on the factual information in the annual reports they file pursuant to both new 47 CFR 54.313 and 47 CFR 54.1009 of the Mobility Fund rules.

411. The Commission expects that states (or the ETC if the state lacks jurisdiction) will use the information reported in April of each year for the prior calendar year in determining whether they can certify that carriers' support has been used and will be used for the intended purposes. In light of the public interest obligations the Commission adopts in this R&O, a key component of this certification will now be that support is being used to maintain and extend modern networks capable of providing voice and broadband service. Thus, for example, if a state commission determines, after reviewing the annual 47 CFR 54.313 report, that an ETC did not meet its speed or build-out requirements for the prior year, a state commission should refuse to certify that support is being used for the intended purposes. In conjunction with such review, to the extent the state has a concern about ETC performance, the Commission welcomes a recommendation from the state regarding prospective support adjustments or whether to recover past support amounts. As discussed more fully below, failure to meet all requirements will not necessarily result in a total loss of support, to the extent the Commission concludes, based on a review of the circumstances, that a lesser reduction is warranted. Likewise, the Commission will look at ETCs' annual 54.313 reports to verify certifications by ETCs (in instances where the state lacks jurisdiction) that support is being used for the intended purposes.

412. Fourth, the Commission streamlines existing certifications. Today, the Commission has two different state certification rules, one for rural carriers and one for non-rural carriers. There is no substantive difference between the existing certification rules for the two classes of carriers, and as a matter of administrative convenience, the Commission consolidates all certifications into a single rule. Moreover, because the net effect of the changes that the Commission is implementing to the high-cost programs is, as a practical matter, to shift the focus from whether a company is classified as ''rural'' versus ''non-rural'' to whether a company receives all support through a forward-looking model or competitive process or, instead, based in part on embedded costs, it does not make sense to maintain separate certification rules for ''rural'' and ''non-rural'' carriers. The Commission sees no substantive difference in the certifications that should be made. Thus, the Commission eliminates the certification requirements currently found in 47 CFR 54.313 and 54.314 of the rules and implement new 47 CFR 54.314.

413. Finally, the Commission also eliminates carriers' separate certification requirements for IAS and ICLS. As discussed above, the Commission is eliminating IAS as a standalone support mechanism, and this obviates the need for IAS-specific certifications. Although ICLS will remain in place for some carriers, those carriers will certify compliance through new 47 CFR 54.314. However, to ensure there is no gap in coverage, those carriers will file a final certification under 47 CFR 54.904 due June 30, 2012, covering the 2012–13 program year. Thus, by this R&O, the Commission eliminates 47 CFR 54.809 and, effective July 2013, 47 CFR 54.904 of the rules. And as discussed above, the Commission also eliminates 47 CFR 54.316 of the rules, relating to rate comparability.

*B. Consequences for Non-Compliance With Program Rules*

414. *Discussion.* Effective enforcement is necessary to ensure that the reforms R&O achieve their intended goal. Our existing rules already have self-effectuating mechanisms to incent prompt filing of requisite certifications and information necessary to calculate support amounts, as companies lose support to the extent such information is not provided in a timely fashion. While the Commission needs such information to ensure that support is being used for the intended purposes, consistent with 47 U.S.C. 254(e) of the Act, the Commission also needs to ensure that such certifications, which will be based upon the certifications and information provided in the new 47 CFR 54.313 annual reports, adequately address all areas of material non-compliance with program obligations.

415. The Commission believes that in the majority of cases involving repeated failures to timely file certifications or data, the Commission's existing enforcement procedures and penalties will adequately deter noncompliance with the Commission's rules, as herein amended, regarding high-cost and CAF support. The Commission adopts the provisions of 47 CFR 54.209(b) in new 47 CFR 54.313, which provides for reductions in support for failing to file the reports required by 47 CFR 54.209(a) in a timely fashion, and extend those provisions to all recipients of high-cost support. The Commission also adopts new 47 CFR 54.314, which provides for a similar reduction in support for the late filing of annual certifications that the funds received were used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. The rules also provide for debarment of those convicted of or found civilly liable for defrauding the high-cost support program, and the Commission emphasizes that those rules apply with

equal force to CAF, including the Mobility Fund Phase I.

416. To further ensure that the recipients of existing high-cost and/or CAF support use those funds for the purposes for which they are provided, the Commission creates a rule that entities receiving such support will receive reduced support should they fail to fulfill their public interest obligations, such as by failing to meet deployment milestones, to provide broadband at the speeds required by this R&O, or to provide service at reasonably comparable rates. This is consistent with the suggestions of the State Members of the Federal-State Joint Board on Universal Service, who further note that revoking a carrier's ETC designation is too blunt an instrument. The Commission agrees that revoking a carrier's ETC status is not an appropriate consequence for noncompliance, except in the most egregious circumstances. In the FNPRM, the Commission seeks comment on appropriate enforcement options for partial non-performance. The Commission does not rule out the option of revoking an ETC's status, but the Commission seeks comment on what circumstances would justify such a remedy and what alternatives might be appropriate in other circumstances. The Commission delegates to the Wireline Competition Bureau and Wireless Telecommunications Bureau the task of implementing reductions in support based on the record received in response to the FNPRM.

*C. Record Retention*

417. *Discussion.* The Commission finds that the current record retention requirements, although adequate to facilitate audits of program participants, are not adequate for purposes of litigation under the False Claims Act, which can involve conduct that relates back substantially more than five years. Thus, the Commission revises the record retention requirements to extend the retention period to ten years.

418. Additionally, the Commission believes the record retention requirements need clarification. The current record retention requirements appear in 47 CFR 54.202(e) of the Commission's rules. 47 CFR 54.202 is entitled: ''Additional requirements for Commission designation of eligible telecommunications carriers.'' Subsections (a) through (d) of that section apply, by their terms, only to ETCs designated under 47 U.S.C. 214(e)(6) of the Act—*i.e.,* ETCs designated by the Commission rather than by the states. Subsection (e), however, is not so limited. Indeed, the Commission intended the requirements of 47 CFR 54.202(e) to apply to all recipients of high-cost support. To fully support ongoing oversight, the record retention requirements must apply to all recipients of high-cost and CAF support. Thus, by this R&O, the Commission amends the rules by re-designating 47 CFR 54.202(e) as new 47 CFR 54.320 to clarify that these ten-year record retention requirements apply to all recipients of high-cost and CAF support. To ensure access to documents and information needed for effective ongoing oversight, the Commission includes in new 47 CFR 54.320 a requirement that all documents be made available upon request to the Commission and any of its Bureaus or offices, the Administrator, and their respective auditors.

*D. USAC Oversight Process*

419. *Discussion.* As noted in the *USF/ICC Transformation NPRM,* audits are an essential tool for the Commission and USAC to ensure program integrity and to detect and deter waste, fraud, and abuse. In the *USF/ICC Transformation NPRM,* the Commission discussed the concerns expressed by the GAO in 2008 regarding, among other things, the audit process that existed at the time. The *USF/ICC Transformation NPRM* also acknowledged USAC's December 2010 Final Report, which detailed the findings of the audits conducted at the direction of the Commission's Office of Inspector General.

420. As directed by the Commission's Office of the Managing Director, USAC now has two programs in place to safeguard the Universal Service Fund—the Beneficiary/Contributor Compliance Audit Program (BCAP) and Payment Quality Assurance (PQA) program. The Commission created these programs, in conjunction with USAC, in order to address the shortcomings of the audit processes discussed in the GAO High-Cost Report and USAC's December 2010 Final Report. The PQA program was launched in August 2010, and the first round of BCAP audits were announced on December 1, 2010. OMD oversees USAC's implementation of both programs.

421. The Commission directs USAC to review and revise the BCAP and PQA programs to take into account the changes adopted in this R&O. The Commission directs USAC to annually assess compliance with the new requirements established for recipients, including for recipients of CAF Phase I and Phase II. For CAF Phase I, the Commission establishes above a requirement that companies have completed build-out to two-thirds of the requisite number of locations within two years. The Commission directs USAC to assess compliance with this requirement for each holding company that receives CAF Phase I funds. ETCs that receive CAF Phase I funding should ensure that their underlying books and records support the assertion that assets necessary to offer broadband service have been placed in service in the requisite number of locations. The Commission also directs USAC to test the accuracy of certifications made pursuant to the new reporting requirements. Any oversight program to assess compliance should be designed to ensure that management is reporting accurately to the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate, and should be designed to test some of the underlying data that forms the basis for management's certification of compliance with various requirements. This list is not intended to be exhaustive, but rather illustrative of the modifications that USAC should make to its existing oversight activities. The Commission directs USAC to submit a report to WCB, WTB, and OMD within 60 days of release of this R&O proposing changes to the BCAP and PQA programs consistent with this R&O.

422. To assist USAC's audit and review efforts, the Commission clarifies in new 47 CFR 54.320 that all ETCs that receive high-cost support are subject to random compliance audits and other investigations to ensure compliance with program rules and orders.

*E. Access to Cost and Revenue Data*

423. *Discussion.* The Commission takes two steps to facilitate the exchange of information needed to administer and oversee universal service programs. First, the Commission the rules to clarify that USAC has a right to obtain—at any time and in any unaltered format—all cost and revenue submissions and related information that carriers submit to NECA that is used to calculate payments under any of the existing programs and any new programs, including the new CAF ICC (access replacement) support.

424. Second, the Commission modfies the rules to ensure that the Commission has timely access to relevant data. Specifically, the Commission requires that USAC (and NECA to the extent USAC does not directly receive such information from carriers) provide to the Commission upon request all underlying data collected from ETCs to calculate payments under current support mechanisms—specifically,

HCLS, ICLS, LSS, SNA, SVS, HCMS and IAS—as well as to calculate CAF payments. This includes information or data underlying existing and future analyses that USAC uses to determine the amount of federal universal service support disbursed in the past or the future, including the new CAF.

425. The Commission anticipates that NECA and USAC will submit summary filings to the Commission on a regular basis, and the Commission delegates to the Wireline Competition Bureau authority to determine the format and timing of such summary filings, but the Commission emphasizes that USAC and NECA must timely provide any underlying data upon request. The Commission also modifies the rules to require rate-of-return carriers to submit to the Commission upon request a copy of all cost and revenue data and related information submitted to NECA for purposes of calculating intercarrier compensation and any new CAF payments resulting from intercarrier compensation reform adopted in this R&O.

## VII. Additional Issues

### *A. Tribal Engagement*

426. The deep digital divide that persists between the Native Nations of the United States and the rest of the country is well-documented. Many residents of Tribal lands lack not only broadband access, but even basic telephone service. Throughout this reform proceeding, commenters have repeatedly stressed the essential role that Tribal consultation and engagement play in the successful deployment of service on Tribal lands. For example, the National Tribal Telecommunications Association, the National Congress of American Indians, and the Affiliated Tribes of Northwest Indians have stressed the importance of measures to ''specifically support and enhance tribal sovereignty, with emphasis on consultation with Tribes.''

427. The Commission agrees that engagement between Tribal governments and communications providers either currently providing service or contemplating the provision of service on Tribal lands is vitally important to the successful deployment and provision of service. The Commission, therefore, will require that, at a minimum, ETCs to demonstrate on an annual basis that they have meaningfully engaged Tribal governments in their supported areas. At a minimum, such discussions must include: (1) A needs assessment and deployment planning with a focus on Tribal community anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with Tribal business and licensing requirements. Tribal business and licensing requirements include business practice licenses that Tribal and non-Tribal business entities, whether located on or off Tribal lands, must obtain upon application to the relevant Tribal government office or division to conduct any business or trade, or deliver any goods or services to the Tribes, Tribal members, or Tribal lands. These include certificates of public convenience and necessity, Tribal business licenses, master licenses, and other related forms of Tribal government licensure.

428. In requiring Tribal engagement, the Commission does not seek to supplant the Commission's own ongoing obligation to consult with Tribes on a government-to-government basis, but instead recognize the important role that all parties play in expediting service to Tribal lands. As discussed above, support recipients will be required to submit to the Commission and appropriate Tribal government officials an annual certification and summary of their compliance with this Tribal government engagement obligation. Appropriate Tribal government officials are elected or duly authorized government officials of federally recognized American Indian Tribes and Alaska Native Villages. In the instance of the Hawaiian Home Lands, this engagement must occur with the State of Hawaii Department of Hawaiian Home Lands and Office of Hawaiian Affairs. Carriers failing to satisfy the Tribal government engagement obligation would be subject to financial consequences, including potential reduction in support should they fail to fulfill their engagement obligations. The Commission envisions that the Office of Native Affairs and Policy (''ONAP''), in coordination with the Wireline and Wireless Bureaus, would utilize their delegated authority to develop specific procedures regarding the Tribal engagement process as necessary.

### *B. Interstate Rate of Return Prescription*

429. In the *USF/ICC Transformation Notice,* the Commission sought comment on whether to initiate a proceeding to represcribe the authorized interstate rate of return for rate-of-return carriers if it determines that such carriers should continue to receive high-cost support under a modified rate-of-return system. The Commission has not revisited the current 11.25 percent rate of return for over 20 years. Several commenters supported our proposal to initiate a represcription proceeding. Others offered comments on how the Commission should proceed in the event it does initiate such a proceeding. We, therefore, conclude that the Commission should represcribe the authorized interstate rate of return for rate-of-return carriers, and we initiate that represcription process today. In the FNPRM, we propose that the interstate rate of return should be adjusted to ensure that it more accurately reflects the true cost of capital today. Based on our preliminary analysis and record evidence, we believe the current rate of return of 11.25 percent is no longer consistent with the Act and today's financial conditions. In this Order, we find good cause to waive certain procedural requirements in the Commission's rules relating to rate represcriptions to streamline and modernize this process to align it with the current Commission practice.

#### 1. Represcription

430. Section 205(a) of the Act authorizes the Commission, on an appropriate record, to prescribe just and reasonable charges of common carriers. The Commission last adjusted the authorized rate of return in 1990, reducing it from 12 percent to 11.25 percent. In 1998, the Commission initiated a proceeding to represcribe the authorized rate of return for rate-of-return carriers. However, in the *MAG Order,* the Commission terminated that prescription proceeding. Given the time that has elapsed since the authorized rate of return was last prescribed, and the major changes that have occurred in the market since then, we find that the authorized interstate rate of return should be reviewed and begin that process, seeking the information necessary to prescribe a new rate of return.

431. The Commission's rules provide that the trigger for a new prescription proceeding is satisfied if the monthly average yields on ten-year United States Treasury securities remain, for a consecutive six month period, at least 150 basis points above or below the average of the monthly average yields in effect for the consecutive six month period immediately prior to the effective date of the current prescription. The monthly average yields for the past six months have been over 450 basis points below the monthly average yields in the six months immediately prior to the last prescription. Our trigger is easily

satisfied, and we initiate the represcription now.

2. Procedural Requirements

432. Section 205(a) requires the Commission to give ''full opportunity for hearing'' before prescribing a rate. However, a formal evidentiary hearing is not required under section 205, and we have on multiple occasions prescribed individual rates in notice and comment rulemaking proceedings. Although we have found it useful in the past to impose somewhat more detailed requirements in rate of return prescription proceedings, we have expressly rejected the proposition that we could not ''lawfully use simple notice and comment procedures to prescribe the rate of return authorized for LEC interstate access services.'' Accordingly, in the FNPRM we initiate a new rate of return prescription proceeding using notice and comment procedures, and on our own motion, we waive certain existing procedural rules to facilitate a more efficient process.

433. The Commission's current interstate rate of return represcription rules in Part 65 contemplate a streamlined paper hearing process. These procedural rules are more specific and detailed than the Commission's rules for filing comments, replies, and written *ex parte* presentations in permit-but-disclose proceedings. The Part 65 rules require that:

—An original and four copies of all submissions must be filed with the Secretary (rule 65.103(d)),

—All participants in the proceeding state in their initial pleading whether they wish to receive service of documents filed in the proceeding (rule 65.100(b)), and filing parties must serve copies of their submissions (other than initial submissions) on all participants who properly so requested (rule 65.103(e)),

—Parties may file ''direct case submissions, responses, and rebuttals,'' with direct case submissions due 60 days after the beginning of the proceeding, responses due 60 days thereafter, and rebuttals due 21 days thereafter (rule 65.103(b),

—Direct case submissions and responses are subject to a 70-page limit, and rebuttals to a 50-page limit (rule 65.104(a)–(c)),

—Parties must file copies of all information (such as financial analysts' reports) that they relied on in preparing their submissions (rule 65.105(a)), and

—Parties may file written interrogatories and discovery requests directed at any other party's submissions, and the submitting parties may oppose those requests (rule 65.105(b)–(f)).

434. We find good cause to waive some of these procedural requirements on our own motion. We find that these procedures would be onerous and are not necessary to ensure adequate public participation. For instance, there is no need for parties to file an original plus four copies of submissions with the Secretary. The Commission recently revised its rules to encourage electronic filing of comments and replies whenever technically feasible, and to require that *ex parte* submissions be filed electronically unless doing so poses a hardship. Given the vast improvements to the electronic filing system, and the usual practice now of many parties to file documents electronically rather than on paper, we see no reason to require the submission of paper copies. Rather, parties to this proceeding may comply with our usual procedures in permit-but-disclosure proceedings. Pleadings other than *ex parte* submissions may be filed electronically or may be filed on paper with the Secretary's office. If they are filed on paper, the original and one copy should be provided.

435. The Part 65 rules also contemplate that all parties to the proceeding will be served with copies of all other parties' submissions. Again, this is no longer necessary. Before the greater and more accepted use of electronic filing, service may have been a reasonable requirement to assure timely distribution of relevant materials. However, our electronic filing system generally makes filings available within 24 hours, and the vast majority of parties have access to these materials via the Internet. We, therefore, find that service is not required, and we waive the requirement. Any party that wishes to receive an electronic notification when new documents are filed in the proceeding may subscribe to an RSS feed, available from ECFS.

436. In addition, we waive the specific filing schedule contained in section 65.103(b) of the Commission's rules so that comments may be filed pursuant to the pleading cycle adopted for sections XVII.A–K of the FNPRM. We also find the page limits applicable to rate represcription proceedings to be inappropriate here. Lastly, we waive the requirement in section 65.301 that the Commission publish in this notice the cost of debt, cost of preferred stock, and capital structure computed under our rules, because, as detailed in the FNPRM, the data set necessary to calculate those formulas is no longer collected by the Commission. We seek comment in the FNRPM on those calculations and the related data and methodology issues.

*C. Pending Matters*

437. The Commission also denies four pending high-cost maters currently pending before the Commission: two petitions for reconsideration of the *Corr Wireless Order;* Puerto Rico Telephone Company, Inc.'s petition to reconsider the decision declining to adopt a new high-cost support mechanism for non-rural insular carriers; and Verizon Wireless's Petition for Reconsideration of the Wireline Competition Bureau's letter directing the USAC to implement certain caps on high-cost universal service support for two companies, known as the ''company-specific caps.''

*D. Deletion of Obsolete Universal Service Rules and Conforming Changes to Existing Rules*

438. As part of comprehensive reform, the Commission makes conforming changes to delete obsolete rules from the Code of Federal Regulations. Specifically, we eliminate the rules governing Long Term Support, which the Commission eliminated as a discrete support program in the *MAG Order,* and Interim Hold Harmless Support for Non-Rural Carriers, which addressed non-rural carriers' transition from high-cost loop support to high-cost model support. Because these rules are obsolete, the Commission finds good cause to delete them without notice and comment. The Commission also makes conforming changes to existing rules to ensure they are consistent with changes made in this R&O.

**VIII. Measures To Address Arbitrage**

*A. Rules To Reduce Access Stimulation*

439. In this section, the Commission adopts revisions to its interstate switched access charge rules to address access stimulation. Access stimulation occurs when a LEC with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and ''free'' conference calls. The arrangement inflates or stimulates the access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the ''free'' service provider, or offers some other benefit to the ''free'' service provider. The shared revenues received by the service provider cover its costs, and it therefore may not need to, and typically does not, assess a separate charge for the service it is offering. Meanwhile, the wireless

and interexchange carriers (collectively IXCs) paying the increased access charges are forced to recover these costs from all their customers, even though many of those customers do not use the services stimulating the access demand.

440. Access stimulation schemes work because when LECs enter traffic-inflating revenue-sharing agreements, they are currently not required to reduce their access rates to reflect their increased volume of minutes. The combination of significant increases in switched access traffic with unchanged access rates results in a jump in revenues and thus inflated profits that almost uniformly make the LEC's interstate switched access rates unjust and unreasonable under section 201(b) of the Act, 47 U.S.C. 201(b). Consistent with the approach proposed in the *USF/ICC Transformation NPRM,* the Commission adopts a definition of access stimulation that includes two conditions. If a LEC meets those conditions, the LEC generally must reduce its interstate switched access tariffed rates to the rates of the price cap LEC in the state with the lowest rates, which are presumptively consistent with the Act. This will reduce the extent to which IXC customers that do not use the stimulating services are forced to subsidize the customers that do use the services.

441. Based on the record received in response to the single-pronged trigger proposed in the *USF/ICC Transformation NPRM,* the Commission modifies its approach from defining an access stimulation trigger to defining access stimulation. The access stimulation definition the Commission adopts now has two conditions: (1) A revenue sharing condition, revised slightly from the proposal in the *USF/ICC Transformation NPRM;* and (2) an additional traffic volume condition, which is met where the LEC either: (a) Has a three-to-one interstate terminating-to-originating traffic ratio in a calendar month; or (b) has had more than a 100 percent growth in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year. If both conditions are satisfied, the LEC generally must file revised tariffs to account for its increased traffic.

442. Adoption of the definition of access stimulation with two conditions will facilitate enforcement of the new access stimulation rules in instances where a LEC meets the conditions for access stimulation but does not file revised tariffs. In particular, IXCs will be permitted to file complaints based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition, *i.e.,* that the second condition has been met. If the IXC filing the complaint makes this showing, the burden will shift to the LEC to establish that it has not met the access stimulation definition and therefore that it is not in violation of its rules. This burden-shifting approach will enable IXCs to bring complaints based on their own traffic data, and will help the Commission to identify circumstances where a LEC may be in violation of its rules.

443. The Commission concludes that these revised interstate access rules are narrowly tailored to minimize the costs of the rule revisions on the industry, while reducing the adverse effects of access stimulation and ensuring that interstate access rates are at levels presumptively consistent with section 201(b) of the Act, 47 U.S.C. 201(b).

1. Discussion

a. Need for Reform To Address Access Stimulation

444. The record confirms the need for prompt Commission action to address the adverse effects of access stimulation and to help ensure that interstate switched access rates remain just and reasonable, as required by section 201(b) of the Act, 47 U.S.C. 201(b). Commenters agree that the interstate switched access rates being charged by access stimulating LECs do not reflect the volume of traffic associated with access stimulation. As a result, access stimulating LECs realize significant revenue increases and thus inflated profits that almost uniformly make their interstate switched access rates unjust and unreasonable.

445. Access stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment. When access stimulation occurs in locations that have higher than average access charges, which is the predominant case today, the average per-minute cost of access and thus the average cost of long-distance calling is increased. Because of the rate integration requirements of section 254(g) of the Act, 47 U.S.C. 254(g), long-distance carriers are prohibited from passing on the higher access costs directly to the customers making the calls to access stimulating entities. Therefore, all customers of these long-distance providers bear these costs, even though many of them do not use the access stimulator's services, and, in essence, ultimately support businesses designed to take advantage of today's above-cost intercarrier compensation rates.

446. The record indicates that a significant amount of access traffic is going to LECs engaging in access stimulation. TEOCO estimates that the total cost of access stimulation to IXCs has been more than $2.3 billion over the past five years. Verizon estimates the overall costs to IXCs to be between $330 and $440 million per year, and states that it expected to be billed between $66 and $88 million by access stimulators for approximately two billion wireline and wireless long-distance minutes in 2010. Other parties indicate that payment of access charges to access stimulating LECs is the subject of large numbers of disputes in a variety of forums. When carriers pay more access charges as a result of access stimulation schemes, the amount of capital available to invest in broadband deployment and other network investments that would benefit consumers is substantially reduced.

447. Access stimulation also harms competition by giving companies that offer a ''free'' calling service a competitive advantage over companies that charge their customers for the service. For example, conference calling provider ZipDX indicates that, by not engaging in access stimulation, it is at a disadvantage vis-à-vis competitors that engage in access stimulation. Providers of conferencing services, like ZipDX, are recovering the costs of the service, such as conference bridges, marketing, and billing, from the user of the service rather than, as explained above in the case of access stimulators, spreading those costs across the universe of long-distance subscribers. As a result, the services offered by ''free'' conferencing providers that leverage arbitrage opportunities put companies that recover the cost of services from their customers at a distinct competitive disadvantage.

448. How access revenues are used is not relevant in determining whether switched access rates are just and reasonable in accordance with section 201(b), 47 U.S.C. 201(b). In addition, excess revenues that are shared in access stimulation schemes provide additional proof that the LEC's rates are above cost. Moreover, Congress created an explicit universal service fund to spur investment and deployment in rural, high cost, and insular areas, and the Commission is taking action here and in other proceedings to facilitate such deployment.

(i) Access Stimulation Definition

449. The Commission adopts a definition to identify when an access

stimulating LEC must refile its interstate access tariffs at rates that are presumptively consistent with the Act. After reviewing the record, the Commission makes a few changes to the *USF/ICC Transformation NPRM* proposal, including defining access stimulation as occurring when two conditions are met. The first condition is that the LEC has entered into an access revenue sharing agreement, and the Commission clarifies what types of agreements qualify as ''revenue sharing.'' The second condition is met where the LEC either has had a three-to-one interstate terminating-to-originating traffic ratio in a calendar month, or has had a greater than 100 percent increase in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year. The Commission adopts these changes to ensure that the access stimulation definition is not over-inclusive and to improve its enforceability.

450. *Definition of a Revenue Sharing Agreement.* After reviewing the record, the Commission clarifies the scope of the access revenue sharing agreement condition of the new access stimulation definition. The access revenue sharing condition of the access stimulation definition the Commission adopts herein is met when a rate-of-return LEC or a competitive LEC: ''has an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.''

451. This rule focuses on revenue sharing that would result in a net payment to the other entity over the course of the agreement arising from the sharing of access revenues. The use of ''over the course of the agreement'' does not preclude an IXC from filing a complaint if the traffic measurement condition is met. The agreement is to be interpreted in terms of what the anticipated net payments would be over the course of the agreement. The Commission clarifies that patronage dividends paid by cooperatives generally do not constitute revenue sharing as contemplated by this definition. However, a cooperative, like other LECs, could structure payments in a manner to engage in revenue sharing that would cause it to meet the definition as discussed herein. The Commission intends the net payment language to limit the revenue sharing definition in a manner that, along with the traffic measurements discussed below, best identifies the revenue sharing agreements likely to be associated with access stimulation and thus those cases in which a LEC must refile its switched access rates. Revenue sharing may include payments characterized as marketing fees or other similar payments that result in a net payment to the access stimulator. However, this rule does not encompass typical, widely available, retail discounts offered by LECs through, for example, bundled service offerings.

452. If a LEC's circumstances change because it terminates the access revenue sharing agreement(s), it may file a tariff to revise its rates under the rules applicable when access stimulation is not occurring. As part of that tariff filing, an officer of the LEC must certify that it has terminated the revenue sharing agreement(s).

453. As proposed in the *USF/ICC Transformation NPRM,* the Commission does not declare revenue sharing to be a *per se* violation of section 201(b) of the Act, 47 U.S.C. 201(b). A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming. Nor does the Commission find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases. The Commission notes that the access stimulation rules it adopts in this R&O are part of the Commission's comprehensive intercarrier compensation reform. That reform will, as the transition unfolds, address remaining incentives to engage in access stimulation.

454. The rules adopted here pursuant to sections 201 and 202 of the Act, 47 U.S.C. 201, 202, address conferencing services being provided by a third party, whether affiliated with the LEC or not. Section 254(k), 47 U.S.C. 254(k), would apply to a LEC's operation of an access stimulation plan within its own corporate organization. In that context, as the Commission has found in other proceedings, terminating access is a monopoly service. The conferencing activity, as portrayed by the parties engaged in access stimulation, would be a competitive service. Thus, the use of non-competitive terminating access revenues to support competitive conferencing service within the LEC operating entity would violate section 254(k), 47 U.S.C. 254(k), and appropriate sanctions could be imposed.

455. *Addition of a Traffic Measurement Condition.* After reviewing the record, the Commission agrees that it is appropriate to include a traffic measurement condition in the definition of access stimulation. Accordingly, in addition to requiring the existence of a revenue sharing agreement, the Commission adds a second condition to the definition requiring that a LEC: ''Has either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year.'' The addition of a traffic measurement component to the access stimulation definition creates a bright-line rule that responds to record concerns about using access revenue sharing alone. The Commission concludes that these measurements of switched access traffic of all carriers exchanging traffic with the LEC reflect the significant growth in traffic volumes that would generally be observed in cases where access stimulation is occurring and thus should make detection and enforcement easier. Carriers paying switched access charges can observe their own traffic patterns for each of these traffic measurements and file complaints based on their own traffic patterns. Thus, this will not place a burden on LECs to file traffic reports, as some proposals would.

456. The record offers support for both a terminating-to-originating traffic ratio and a traffic growth factor. The Commission adopted a 3:1 ratio in its 2001 *ISP-Remand Order* to address a similar arbitrage scheme based on artificially increasing reciprocal compensation minutes. Further, the Wireline Competition Bureau employed a 100 percent traffic growth factor as a benchmark in a tariff investigation to address the potential that some rate-of-return LECs might engage in access stimulation after having filed tariffs with high switched access rates. In each case, the approach was largely successful in identifying and reducing the practice.

457. The Commission concludes that the use of a terminating-to-originating traffic ratio in conjunction with a traffic growth factor as alternative traffic measures addresses the shortcomings of using either component separately. A few parties argue that carriers can game the terminating-to-originating traffic

ratio component by simply increasing the number of originating MOU. The traffic growth component protects against this possibility because increasing the originating access traffic to avoid tripping the 3:1 component would likely mean total access traffic would increase enough to trip the growth component. The terminating-to-originating traffic ratio component will capture those current access stimulation situations that already have very high volumes that could otherwise continue to operate without tripping the growth component. For example, a LEC that has been engaged in access stimulation for a significant period of time would have a high terminating traffic volume that, under a traffic growth factor alone, could continue to expand its operations, possibly avoiding the condition entirely by controlling its terminating traffic. Because these alternative traffic measurements are combined with the requirement that an access revenue sharing agreement exist, the Commissions reduces the risk that the terminating-to-originating traffic ratio or traffic growth components of the definition could be met by legitimate changes in a LEC's calling patterns. The combination of these two traffic measurements as alternatives is preferable to either standing alone, as some parties have urged. A terminating-to-originating traffic ratio or traffic growth condition alone could prove to be overly inclusive by encompassing LECs that had realized access traffic growth through general economic development, unaided by revenue sharing. Such situations could include the location of a customer support center in a new community without any revenue sharing arrangement, or a new competitive LEC that is experiencing substantial growth from a small base. State Joint Board Members propose a condition for access stimulation based on a terminating ratio one standard deviation above the national average terminating ratio annually. Under their proposal, a carrier meeting this condition would set new rates so that the terminating revenue for any carrier equals the carrier's initial rate times its originating minutes times the terminating ratio at the one standard deviation point. The Commission declines to adopt this proposal because it is unclear that using originating traffic volumes would produce a rate that adequately reflects the increased terminating traffic volumes sufficient to ensure that rates are just and reasonable as required by Section 201(b) of the Act, 47 U.S.C. 201(b).

(ii) Remedies

458. If a LEC meets both conditions of the definition, it must file a revised tariff except under certain limited circumstances. As explained in more detail below, a rate-of-return LEC must file its own cost-based tariff under section 61.38 of the Commission's rules, 47 CFR 61.38, and may not file based on historical costs under section 61.39 of the Commission's rules, 47 CFR 61.39, or participate in the NECA traffic-sensitive tariff. If a competitive LEC meets the definition, it must benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state, rather than to the rates of the BOC or the largest incumbent LEC in the state (as proposed in the *USF/ICC Transformation NPRM*). The Commission concludes, however, that if a LEC has terminated its revenue sharing agreement(s) before the deadline the Commission establishes for filing its revised tariff, or if the competitive LEC's rates are already below the benchmark rate, such a LEC does not have to file a revised interstate switched access tariff. However, once a rate-of-return LEC or a competitive LEC has met both conditions of the definition and has filed revised tariffs, when required, it may not file new tariffs at rates other than those required by the revised pricing rules until it terminates its revenue sharing agreement(s), even if the LEC no longer meets the 3:1 terminating-to-originating traffic ratio condition of the definition or traffic growth threshold. As price cap LECs reduce their switched access rates under the ICC reforms the Commission adopts herein, competitive LECs must benchmark to the reduced rates.

459. *Rate-of-Return Carriers Filing Tariffs Based on Historical Costs and Demand: 47 CFR 61.39.* The Commission adopts its proposal in the *USF/ICC Transformation NPRM* that a LEC filing access tariffs pursuant to 47 CFR 61.39 would lose its ability to base its rates on historical costs and demand if it is engaged in access stimulation. Incumbent LECs filing access tariffs pursuant to 47 CFR 61.39 of the Commission's rules currently base their rates on historical costs and demand, which, because of their small size, generally results in high switched access rates based on the high costs and low demand of such carriers. The limited comment in the record was supportive of the Commission's proposal for the reasons set forth in the *USF/ICC Transformation NPRM.* The Commission accordingly revises 47 CFR 61.39 to bar a carrier otherwise eligible to file tariffs pursuant to 47 CFR 61.39 from doing so if it meets the access stimulation definition. The Commission also requires such a carrier to file a revised interstate switched access tariff pursuant to 47 CFR 61.38 within 45 days after meeting the definition, or within 45 days after the effective date of this rule in cases where the carrier meets the definition on that date.

460. *Participation in NECA Tariffs.* In the *USF/ICC Transformation NPRM,* the Commission proposed that a carrier engaging in revenue sharing would lose its eligibility to participate in the NECA tariffs 45 days after engaging in access stimulation, or 45 days after the effective date of this rule in cases where it currently engages in access stimulation. A carrier leaving the NECA tariff thus would have to file its own tariff for interstate switched access, pursuant to section 61.38 of the rules, 47 CFR 61.38.

461. The record is generally supportive of this approach for the reasons stated in the *USF/ICC Transformation NPRM,* and the Commission adopts it, subject to one modification. The Commission clarifies that, pursuant to 47 CFR 69.3(e)(3) of the rules, a LEC required to leave the NECA interstate tariff (which includes both switched and special access services) because it has met the access stimulation definition must file its own tariff for both interstate switched and special access services. USTelecom suggests that given that shared revenues are not appropriately included in a carrier's revenue requirement, the Commission does not need to address eligibility for participation in NECA tariffs in its access stimulation rules—a carrier would either stop sharing, or file its own tariff without any mandate to do so. The Commission disagrees, because current rules only provide for a participating carrier to leave the NECA tariff at the time of the annual tariff filing. A rule prohibiting LECs from further participating in the NECA tariff when the definition is met, and providing for advance notice to NECA, spells out the procedure.

462. The Commission also adopts a revision to the proposed rule similar to a suggestion by the Louisiana Small Carrier Committee, which recommends that rate-of-return carriers be given an opportunity to show that they are in compliance with the Commission's rules before being required to file a revised tariff. Accordingly, the Commission concludes that if a carrier sharing access revenues terminates its access revenue sharing agreement before the date on which its revised tariff must be filed, it does not have to file a revised

tariff. The Commission believes that when sharing agreements are terminated, in most instances traffic patterns should return to levels that existed prior to the LEC entering into the access revenue sharing agreement. This eliminates a burden on such carriers when there is no ongoing reason for requiring such a filing.

463. *Rate of Return Carriers Filing Tariffs Based On Projected Costs and Demand: 47 CFR 61.38.* In the *USF/ICC Transformation NPRM,* the Commission proposed that a carrier filing interstate switched access tariffs based on projected costs and demand pursuant to 47 CFR 61.38 of the rules be required to file revised access tariffs within 45 days of commencing access revenue sharing, or within 45 days of the effective date of the rule if the LEC on that date is engaged in access revenue sharing, unless the costs and demand arising from the new revenue sharing arrangement had been reflected in its most recent tariff filing. The Commission further proposed that payments made by a LEC pursuant to an access revenue sharing arrangement should not be included as costs in the rate-of-return LEC's interstate switched access revenue requirement because such payments have nothing to do with the provision of interstate switched access service and are thus not used and useful in the provision of such service. Thus, the Commission proposed to clarify prospectively that a rate-of-return carrier that shares access revenue, provides other compensation to an access stimulating entity, or directly provides the stimulating activity, and bundles those costs with access, is engaging in an unreasonable practice that violates 47 U.S.C. 201(b) and the prudent expenditure standard. The prudent expenditure standard is associated with the ''used and useful'' doctrine, which together are employed in evaluating whether a carrier's rates are just and reasonable.

464. The Commission adopts the approach proposed in the *USF/ICC Transformation NPRM.* Commenters that addressed this issue support the approach. In particular, the Commission adopts a rule requiring carriers filing interstate switched access tariffs based on projected costs and demand pursuant to 47 CFR 61.38 of the rules to file revised access tariffs within 45 days of commencing access revenue sharing, or within 45 days of the effective date of the rule if the LEC on that date was engaged in access revenue sharing, unless the costs and demand arising from the new access revenue sharing agreement were reflected in its most recent tariff filing. This tariff filing requirement provides the carrier with the opportunity to show, and the Commission to review, any projected increase in costs, as well as to consider the higher anticipated demand in setting revised rates. If the access revenue sharing agreement(s) that required the new tariff filing has been terminated by the time the revised tariff is required to be filed, the Commission will not require the filing of a revised tariff, as the proposal would have. A refiling in that instance would be unnecessary because the original rates will now more likely reflect the cost/demand relationship of the carrier. If a LEC, however, subsequently reactivates the same telephone numbers in connection with a new access revenue sharing agreement, the Commission will presumptively treat that action to be furtive concealment resulting in the loss of deemed lawful status for the LEC's tariff, as discussed below in conjunction with the discussion of section 204(a)(3) of the Act, 47 U.S.C. 204(a)(3). As described therein, a carrier may be required to make refunds if its tariff does not have deemed lawful status. This will prevent a LEC from entering into a series of access revenue sharing agreements to avoid the 45-day filing requirement, while benefiting from the advertising of those telephone numbers used under previous agreements.

465. The Commission also adopts the proposal that payments made by a LEC pursuant to an access revenue sharing agreement are not properly included as costs in the rate-of-return LEC's interstate switched access revenue requirement. This proposal received broad support in the record.

466. The rule the Commission adopts will require 47 CFR 61.38 carriers to set their rates based on projected costs and demand data.

467. *Competitive LECs.* In the *USF/ICC Transformation NPRM,* the Commission proposed that when a competitive LEC is engaged in access stimulation, it would be required to benchmark its interstate switched access rates to the rate of the BOC in the state in which the competitive LEC operates, or the independent incumbent LEC with the largest number of access lines in the state if there is no BOC in the state, and if the competitive LEC is not already benchmarking to that carrier's rate. Under the proposal, a competitive LEC would have to file a revised tariff within 45 days of engaging in access stimulation, or within 45 days of the effective date of the rule if it currently engages in access stimulation.

468. After reviewing the record, the Commission adopts its proposal with one modification to ensure that the LEC refiles at a rate no higher than the lowest rate of a price cap LEC in the state. In so doing, the Commission concludes that neither the switched access rate of the rate-of-return LEC in whose territory the competitive LEC is operating nor the rate used in the rural exemption is an appropriate benchmark when the competitive LEC meets the access stimulation definition. In those instances, the access stimulator's traffic vastly exceeds the volume of traffic of the incumbent LEC to whom the access stimulator is currently benchmarking. Thus, the competitive LEC's traffic volumes no longer operationally resemble the carrier's traffic volumes whose rates it had been benchmarking because of the significant increase in interstate switched access traffic associated with access stimulation. Instead, the access stimulating LEC's traffic volumes are more like those of the price cap LEC in the state, and it is therefore appropriate and reasonable for the access stimulating LEC to benchmark to the price cap LEC.

469. Although many parties support using the switched access rates of the BOC in the state, or the rates of the largest independent LEC in the state if there is no BOC, as the Commission proposed, the Commission concludes that the lowest interstate switched access rate of a price cap LEC in the state is the rate to which a competitive LEC must benchmark if it meets the definition. Generally, the BOC will have the lowest interstate switched access rates. However, the record reveals that in California, Pacific Bell's interstate switched access rates are higher than those of other price cap LECs in the state, as well as being higher than the interstate switched access rates of price cap LECs in other states. Benchmarking to the lowest price cap LEC interstate switched access rate in the state will reduce rate variance among states and will significantly reduce the rates charged by competitive LECs engaging in access stimulation, even if it does not entirely eliminate the potential for access stimulation. However, should the traffic volumes of a competitive LEC that meets the access stimulation definition substantially exceed the traffic volumes of the price cap LEC to which it benchmarks, the Commission may reevaluate the appropriateness of the competitive LEC's rates and may evaluate whether any further reductions in rates is warranted. In addition, the Commission believes the reforms it adopts elsewhere in this R&O will, over time, further reduce intercarrier payments and the incentives for this type of arbitrage.

470. The Commission requires a competitive LEC to file a revised interstate switched access tariff within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition. A competitive LEC whose rates are already at or below the rate to which they would have to benchmark in the refiled tariff will not be required to make a tariff filing.

471. The Commission's benchmarking approach addresses access stimulation within the parameters of the existing access charge regulatory structure. The Commission expects that the approach it adopts will reduce the effects of access stimulation significantly, and the intercarrier compensation reforms the Commission adopts should resolve remaining concerns.

472. *Section 204(a)(3), 47 U.S.C. 204(a)(3) (''Deemed Lawful'') Considerations.* The Commission concludes that the policy objectives of this proceeding can be achieved without creating an exception to the statutory tariffing timelines. LECs that meet the access stimulation trigger are required to refile their interstate switched access tariffs as outlined above. Any issues that arise in these refiled tariffs can be addressed through the suspension and rejection authority of the Commission contained in section 204 of the Act, 47 U.S.C. 204, or through appropriate enforcement action.

473. The Commission concludes that a LEC's failure to comply with the requirement that it file a revised tariff if the trigger is met constitutes a violation of the Commission's rules, which is sanctionable under section 503 of the Act, 47 U.S.C. 503. Section 503(b)(2)(B) of the Act, 47 U.S.C. 503(b)(2)(B), authorizes the Commission to assess a forfeiture of up to $150,000 for each violation, or each day of a continuing violation, up to a statutory maximum of $1,500,000 for a single act or failure to act by common carriers, 47 CFR 1.80(b)(2). In 2008, the Commission amended its rules to increase the maximum forfeiture amounts in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. 2461. The Commission also concludes that such a failure would constitute ''furtive concealment'' as described by the DC Circuit in *ACS of Anchorage, Inc.* v. *FCC,* 290 F.3d 403 (D.C. Cir. 2002). In 2002, the United States Court of Appeals for the D.C. Circuit, in reversing a Commission decision that had found a tariff filing did not qualify for deemed lawful treatment and was thus subject to possible refund liability, noted that it was not addressing ''the case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations.'' The Commission therefore puts parties on notice that if it finds in a complaint proceeding under sections 206–209 of the Act, 47 U.S.C 206–209, that such ''furtive concealment'' has occurred, that finding will be applicable to the tariff as of the date on which the revised tariff was required to be filed and any refund liability will be applied as of such date. The Commission concludes that this approach will eliminate any incentives that LECs may have to delay or avoid complying with the requirement that they file revised tariffs. Several parties support this approach.

474. All American Telephone Co. filed a petition for declaratory ruling requesting that the Commission find that commercial agreements involving the sharing of access revenues between LECs and ''free'' service providers do not violate the Communications Act. In this R&O, the Commission adopts a definition of access revenue sharing agreement and prescribe that a LEC meeting the conditions of that definition must file revised tariffs. Given the findings and the rules adopted in this R&O, the Commission declines to address the All American petition and it is dismissed.

(iii) Enforcement

475. The revised interstate access rules adopted in this R&O will facilitate enforcement through the Commission's complaint procedures, if necessary. Given the two-year statute of limitations in section 405 of the Act, 47 U.S.C. 405, a complaining IXC would have two years from the date the cause of action accrued (the date after the tariff should have been filed) to file its complaint. Because the rules the Commission adopts are prospective, they will have no binding effect on pending complaints. A complaining carrier may rely on the 3:1 terminating-to-originating traffic ratio and/or the traffic growth factor for the traffic it exchanges with the LEC as the basis for filing a complaint. This will create a rebuttable presumption that revenue sharing is occurring and the LEC has violated the Commission's rules. The LEC then would have the burden of showing that it does not meet both conditions of the definition. The Commission declines to require a particular showing, but, at a minimum, an officer of the LEC must certify that it has not been, or is no longer engaged in access revenue sharing, and the LEC must also provide a certification from an officer of the company with whom the LEC is alleged to have a revenue sharing agreement(s) associated with access stimulation that that entity has not, or is not currently, engaged in access stimulation and related revenue sharing with the LEC. If the LEC challenges that it has met either of the traffic measurements, it must provide the necessary traffic data to establish its contention. With the guidance in this R&O, the Commission believes parties should in good faith be able to determine whether the definition is met without further Commission intervention.

476. *Non-payment Disputes.* Several parties have requested that the Commission address alleged self-help by long distance carriers who they claim are not paying invoices sent for interstate switched access services. As the Commission has previously stated, ''[w]e do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions.'' The Commission otherwise declines to address this issue in this R&O, but cautions parties of their payment obligations under tariffs and contracts to which they are a party. The new rules the Commission adopts in this R&O will provide clarity to all affected parties, which should reduce disputes and litigation surrounding access stimulation and revenue sharing agreements.

(iv) Conclusion

477. The rules the Commission adopt in this section will require rates associated with access stimulation to be just and reasonable because those rates will more closely reflect the access stimulators' actual traffic volume. Taking this basic step will immediately reduce some of the inefficient incentives enabled by the current intercarrier compensation system, and permit the industry to devote resources to innovation and investment rather than access stimulation and disputes. The Commission has balanced the need for the new rules to address traffic stimulation with the costs that may be imposed on LECs and have concluded that the benefits justify any burdens. The Commission's new rules will work in tandem with the comprehensive intercarrier compensation reforms the Commission adopts below, which will, when fully implemented, eliminate the incentives in the present system that give rise to access stimulation.

*B. Phantom Traffic*

478. In this portion of the R&O, the Commission amends the Commission's rules to address ''phantom traffic'' by ensuring that terminating service

providers receive sufficient information to bill for telecommunications traffic sent to their networks, including interconnected VoIP traffic. The amendments the Commission adopts close loopholes that are being used to manipulate the intercarrier compensation system.

479. ''Phantom traffic'' refers to traffic that terminating networks receive that lacks certain identifying information. In some cases, service providers in the call path intentionally remove or alter identifying information to avoid paying the terminating rates that would apply if the call were accurately signaled and billed. For example, some parties have sought to avoid payment of relatively high intrastate access charges by making intrastate traffic appear interstate or international in nature. Parties have also disguised or routed non-local traffic subject to access charges to avoid those charges in favor of lower reciprocal compensation rates. Collectively, problems involving unidentifiable or misidentified traffic appear to be widespread. Parties have documented that phantom traffic is a sizeable problem, with estimates ranging from 3–20 percent of all traffic on carriers' networks, which costs carriers—and ultimately consumers—potentially hundreds of millions of dollars annually. In turn, carriers are diverting resources to investigate and pursue billing disputes, rather than use such resources for more productive purposes such as capital investment. This sort of gamesmanship distorts the intercarrier compensation system and chokes off revenue that carriers depend on to deliver broadband and other essential services to consumers, particularly in rural and difficult to serve areas of the country.

480. Based on the record developed in this proceeding, the Commission now adopts its original proposal with the minor modifications described in further detail below. Service providers that originate interstate or intrastate traffic on the PSTN, or that originate inter- or intrastate interconnected VoIP traffic destined for the PSTN, will now be required to transmit the telephone number associated with the calling party to the next provider in the call path. Intermediate providers must pass calling party number or charge number signaling information they receive from other providers unaltered, to subsequent providers in the call path. These requirements will assist service providers in appropriately billing for calls traversing their networks.

481. By ensuring that the calling party telephone number information is provided and transmitted for all types of traffic originating or terminating on the PSTN, the revised rules will assist service providers in accurately identifying and billing for traffic terminating on their networks, and help to guard against further arbitrage practices. These measures will work in tandem with the Commission's reforms adopted elsewhere in this R&O, which, by minimizing intercarrier compensation rate differences, promise to eliminate the incentive for providers to engage in phantom traffic arbitrage. Together, these changes will benefit consumers by enabling providers to devote more resources to investment and innovation that would otherwise have been spent resolving billing disputes.

1. Revised Call Signaling Rules

482. The Commission adopts the proposal contained in the *USF/ICC Transformation NPRM* to require that the CN be passed unaltered where it is different from the CPN. The Commission believes that this requirement will be an adequate remedy to the problem of CN number substitution that disguises the characteristics of traffic to terminating service providers. Additionally, the Commission notes that the CN field may only be used to contain a calling party's charge number, and that it may not contain or be populated with a number associated with an intermediate switch, platform, or gateway, or other number that designates anything other than a calling party's charge number. The Commission is not persuaded by objections to this requirement. First, unsupported objections that there may be ''circumstances where a CN may be different from the CPN but cannot be easily transmitted'' are unpersuasive without more specific evidence. Second, the Commission notes that it addressed similar circumstances in *Regulation of Prepaid Calling Card Services,* WC Docket No. 05–68, Declaratory Ruling and Report and Order, 71 FR 43667, Aug. 2, 2006 (*Prepaid Calling Card Order*), and prohibited carriers that serve prepaid calling card providers from passing the telephone number associated with the platform in the charge number parameter. In this case, the Commission agrees with the analysis of the *Prepaid Calling Card Order* that ''[b]ecause industry standards allow for the use of CN to populate carrier billing records * * * passing the number of the [] platform in the parameters of the SS7 stream to carriers involved in terminating a call may lead to incorrect treatment of the call for billing purposes.'' In sum, the record demonstrates that CN substitution is a technique that leads to phantom traffic, and the proposed rules are a necessary and reasonable response.

483. The Commission amends its rules to require service providers using MF signaling to pass the number of the calling party (or CN, if different) in the MF ANI field. This requirement will provide consistent treatment across signaling systems and will ensure that information identifying the calling party is included in call signaling information for all calls. Moreover, this requirement responds to the concerns expressed in the record that MF signaling can be used by ''unscrupulous providers'' to engage in phantom traffic practices. The previous record concerning the technical limitations of MF ANI appears to be mixed. In balancing the need for a rule that covers all traffic with the technical limitations asserted in the record, the Commission concludes that the approach most consistent with its policy objective is not to exclude the entire category of MF traffic. Such a categorical exclusion could create a disincentive to invest in IP technologies and invite additional opportunities for arbitrage. Although the rules will apply to carriers that use or pass MF signaling, the Commission does not mandate any specific method of compliance. Carriers will have flexibility to devise their own means to pass this information in their MF signaling. Nevertheless, to the extent that a party is unable to comply with the rule as a result of technical limitations related to MF signaling in its network, it can seek a waiver for good cause shown, pursuant to section 1.3 of the Commission's rules, 47 CFR 1.3.

484. *IP Signaling.* Consistent with the proposal in the *USF/ICC Transformation NPRM,* the rules the Commission adopts also apply to interconnected VoIP traffic. Failure to include interconnected VoIP traffic in the signaling rules would create a large and growing loophole as the number of interconnected VoIP lines in service continues to grow. Therefore, VoIP service providers will be required to transmit the telephone number of the calling party for all traffic destined for the PSTN that they originate. If they are intermediate providers in a call path, they must pass, unaltered, signaling information they receive indicating the telephone number, or billing number if different, of the calling party. Because IP transmission standards and practices are rapidly changing, the Commission refrains from mandating a specific compliance method and instead leaves to service providers using different IP technologies the flexibility to determine how best to comply with this requirement.

485. In extending its call signaling rules to interconnected VoIP service providers, the Commission acknowledges that it has not classified interconnected VoIP services as ''telecommunications services'' or ''information services.'' The Commission needs not resolve this issue here, for the Commission would have authority to impose call signaling on interconnected VoIP providers even under an information service classification. Additionally, as the Commission has previously found, section 706, 47 U.S.C. 1302, provides authority applicable in this context.

2. Prohibition of Altering or Stripping Call Information

486. In the *USF/ICC Transformation NPRM,* the Commission also sought comment on a proposed rule that would prohibit service providers from altering or stripping relevant call information. More specifically, the Commission proposed to require all telecommunications providers and entities providing interconnected VoIP service to pass the calling party's telephone number (or, if different, the financially responsible party's number), unaltered, to subsequent carriers in the call path. Commenters overwhelmingly supported this proposal. The Commission believes that a prohibition on stripping or altering information in the call signaling stream serves the public interest. The prohibition should help ensure that the signaling information required by its rules reaches terminating carriers. Therefore, the Commission adopts its proposal to prohibit stripping or altering call signaling information with the modifications discussed below.

487. In response to comments in the record, the Commission makes several clarifying changes to the text of the proposed rules in this section. First, commenters objected to the use of the undefined term ''financially responsible party'' in the proposed rules. The Commission agrees with the concerns and clarify that providers are required to pass the billing number (*e.g.,* CN in SS7) if different from the calling party's number. For similar reasons, for purposes of this rule, the Commission adds the following definition of the term ''intermediate provider'' to the rules: ''any entity that carries or processes traffic that traverses or will traverse the PSTN at any point insofar as that entity neither originates nor terminates that traffic.'' The Commission finds that adding this definition will eliminate potential ambiguity in the revised rule. As provided in Appendix A, the Commission also makes modest adjustments to the rules proposed in the *USF/ICC Transformation NPRM.* Specifically, the Commission clarifies that the obligation to pass signaling information applies to the telephone number or billing number, and the Commission clarifies that the revised rules apply to telecommunications carriers and providers of interconnected VoIP services. Finally, because, as discussed below, the waiver process is available to parties seeking exceptions to the revised rule, the Commission removes the proposed rule language limiting applicability in relation to industry standards. With these minor changes, the Commission adopts the proposed prohibition on stripping or altering information regarding the calling party number.

3. Exceptions

488. The Commission declines to adopt any general exceptions to its new call signaling rules at this time. Parties seeking limited exceptions or relief in connection with the call signaling rules the Commission adopts can avail themselves of established waiver procedures at the Commission. To that end, the Commission delegates authority to the Wireline Competition Bureau to act upon requests for a waiver of the rules adopted herein in accordance with existing Commission rules.

4. Signaling/Billing Record Requirements

a. Discussion

489. After considering the substantial record received in response to the *USF/ICC Transformation NPRM,* the Commission determines that limiting the scope of the rules it adopts to address phantom traffic to CPN and CN signaling is consistent with the goal of helping to ensure complete and accurate passing of call signaling information, while minimizing disruption to industry practices or existing carrier agreements. The revised and expanded requirements with regard to CPN and CN will ensure that terminating carriers will receive, via SS7, MF, or IP signaling, information helpful in identifying carriers sending terminating traffic to their networks. This information, in combination with billing records provided to terminating carriers in accordance with industry standards, should significantly reduce the amount of unbillable traffic that terminating carriers receive.

b. Enforcement

490. Commenters to the *USF/ICC Transformation NPRM* urged the Commission to consider a number of measures to ensure compliance with the Commission's new rules. As explained below, however, there is no persuasive evidence that existing enforcement mechanisms and complaint processes are inadequate. The Commission therefore declines to adopt these enforcement proposals. Parties aggrieved by violations of the phantom traffic rules have a number of options, such as filing an informal or formal complaint. In addition, the Commission has broad authority to initiate proceedings on its own motion to investigate and enforce its phantom traffic rules.

## IX. Comprehensive Intercarrier Compensation Reform

491. Consistent with the National Broadband Plan's recommendation to phase out regulated per-minute intercarrier compensation charges, in this section the Commission adopts bill-and-keep as the default methodology for all intercarrier compensation traffic. The Commission believes that setting an end state for all traffic will promote the transition to IP networks, provide a more predictable path for the industry and investors, and anchor the reform process that will ultimately free consumers from shouldering the hidden multi-billion dollar subsidies embedded in the current system.

492. Under bill-and-keep arrangements, a carrier generally looks to its end-users—which are the entities and individuals making the choice to subscribe to that network—rather than looking to other carriers and their customers to pay for the costs of its network. To the extent additional subsidies are necessary, such subsidies will come from the CAF, and/or state universal service funds. Wireless providers have long been operating pursuant to what are essentially bill-and-keep arrangements, and this framework has proven to be successful for that industry. Bill-and-keep arrangements are also akin to the model generally used to determine who bears the cost for the exchange of IP traffic, where providers bear the cost of getting their traffic to a mutually agreeable exchange point with other providers.

493. Bill-and-keep has significant policy advantages over other proposals in the record. A bill-and-keep methodology will ensure that consumers pay only for services that they choose and receive, eliminating the existing opaque implicit subsidy system under which consumers pay to support other carriers' network costs. This subsidy system shields subsidy recipients and their customers from price signals associated with network

deployment choices. A bill-and-keep methodology also imposes fewer regulatory burdens and reduces arbitrage and competitive distortions inherent in the current system, eliminating carriers' ability to shift network costs to competitors and their customers. The Commission has legal authority to adopt a bill-and-keep methodology as the end point for reform pursuant to its rulemaking authority to implement sections 251(b)(5), 47 U.S.C. 251(b)(5), and 252(d)(2), 47 U.S.C. 252(d)(2), in addition to authority under other provisions of the Act, including 47 U.S.C. 201 and 332.

494. The Commission also adopts in this section a gradual transition for terminating access, providing price cap carriers, and competitive LECs that benchmark to price cap carrier rates, six years and rate-of-return carriers, and competitive LECs that benchmark to rate-of-return carrier rates, nine years to reach the end state. The Commission believes that initially focusing the bill-and-keep transition on terminating access rates will allow a more manageable process and will focus reform where some of the most pressing problems, such as access charge arbitrage, currently arise. Additionally, the Commission believes that limiting reform to terminating access charges at this time minimizes the burden intercarrier compensation reform will place on consumers and will help manage the size of the access replacement mechanism adopted herein. The Commission recognizes, however, that it needs to further evaluate the timing, transition, and possible need for a recovery mechanism for those rate elements—including originating access, common transport elements not reduced, and dedicated transport—that are not immediately transitioned; the Commission addresses those elements in the *USF/ICC Transformation FNPRM.* The transition the Commission adopts sets a default framework, leaving carriers free to enter into negotiated agreements that allow for different terms.

*A. Bill-and-Keep as the End Point for Reform*

1. Bill-and-Keep Best Advances the Goals of Reform

495. The Commission adopts a bill-and-keep methodology as a default framework and end state for all intercarrier compensation traffic. The Commission finds that a bill-and-keep framework for intercarrier compensation best advances the Commission's policy goals and the public interest, driving greater efficiency in the operation of telecommunications networks and promoting the deployment of IP-based networks.

496. *Bill-and-Keep Is Market-Based and Less Burdensome than the Proposed Alternatives.* Bill-and-keep brings market discipline to intercarrier compensation because it ensures that the customer who chooses a network pays the network for the services the subscriber receives. Specifically, a bill-and-keep methodology requires carriers to recover the cost of their network through end-user charges, which are potentially subject to competition. Under the existing approach, carriers recover the cost of their network from competing carriers through intercarrier charges, which may not be subject to competitive discipline. Thus, bill-and-keep gives carriers appropriate incentives to serve their customers efficiently.

497. Bill-and-keep is also less burdensome than approaches that would require the Commission and/or state regulators to set a uniform positive intercarrier compensation rate, such as $0.0007. In particular, bill-and-keep reduces the significant regulatory costs and uncertainty associated with choosing such a rate, which would require complicated, time consuming regulatory proceedings, based on factors such as demand elasticities for subscription and usage as well as the nature and extent of competition. As the Commission has recognized with respect to the existing reciprocal compensation rate methodology, ''[s]tate pricing proceedings under the TELRIC [Total Element Long Run Incremental Cost] regime have been extremely complicated and often last for two or three years at a time. * * * The drain on resources for the state commissions and interested parties can be tremendous.'' Indeed, the cost of implementing such a framework potentially could outweigh the resulting intercarrier compensation revenues for many carriers. Moreover, in setting any new intercarrier rate, it would be necessary to rely on information from carriers who would have incentives to maximize their own revenues, rather than ensure socially optimal intercarrier compensation charges. Thus, the costs of choosing a new positive intercarrier compensation rate would be significant, and a reasonable outcome would be highly uncertain.

498. *Bill-and-Keep Is Consistent with Cost Causation Principles.* As the *USF/ICC Transformation NPRM* observed, ''[u]nderlying historical pricing policies for termination of traffic was the assumption that the calling party was the sole beneficiary and sole cost-causer of a call.'' However, as one regulatory group has observed, if the called party did not benefit from incoming calls, ''users would either turn off their phone or not pick up calls.'' This is particularly true given the prevalence of caller ID, the availability of the national do-not-call registry, and the option of having unlisted telephone numbers. More recent analyses have recognized that both parties generally benefit from participating in a call, and therefore, that both parties should split the cost of the call. That line of economic research finds that the most efficient termination charge is less than incremental cost, and could be negative.

499. Moreover, the subscription decisions of the called party play a significant role in determining the cost of terminating calls to that party. A consequent effect of the existing intercarrier compensation regime is that it allows carriers to shift recovery of the costs of their local networks to other providers because subscribers do not have accurate pricing signals to allow them to identify lower-cost or more efficient providers. By contrast, a bill-and-keep framework helps reveal the true cost of the network to potential subscribers by limiting carriers' ability to recover their own costs from other carriers and their customers, even as the Commission retains beneficial policies regarding interconnection, call blocking, and geographic rate averaging.

500. The Commission rejects claims that bill-and-keep does not allow for sufficient cost recovery. In the past, parties have argued that a bill-and-keep approach somehow results in ''free'' termination. But bill-and-keep merely shifts the responsibility for recovery from other carrier's customers to the customers that chose to purchase service from that network plus explicit universal service support where necessary. Such an approach provides better incentives for carriers to operate efficiently by better reflecting those efficiencies (or inefficiencies) in pricing signals to end-user customers.

501. To the extent carriers in costly-to-serve areas are unable to recover their costs from their end users while maintaining service and rates that are reasonably comparable to those in urban areas, universal service support, rather than intercarrier compensation should make up the difference. In this respect, bill-and-keep helps fulfill the direction from Congress in the 1996 Act that the Commission should make support explicit rather than implicit.

502. *Consumer Benefits of Bill-and-Keep.* Economic theory suggests that carriers will reduce consumers' effective price of calling, through reduced

charges and/or improved service quality. The Commission predicts that reduced quality-adjusted prices will lead to substantial savings on calls made, and to increased calling. Economic theory suggests that quality-adjusted prices will be reduced regardless of the extent of competition in any given market, but will be reduced most where competition is strongest. These price reductions will be most significant among carriers who, by and large, incur but do not collect termination charges, notably CMRS and long-distance carriers. The potential for benefits to wireless customers is particularly important, as today there are approximately 300 million wireless devices, compared to approximately 117 million fixed lines, in the United States. Lower termination charges for wireless carriers could allow lower prepaid calling charges and larger bundles of free calls for the same monthly price. For example, carriers presently offer free ''in-network'' wireless calls at least in part because they do not have to pay to terminate calls on their own network. Lower termination charges could also enable more investment in wireless networks, resulting in higher quality service—*e.g.,* fewer dropped calls and higher quality calls—as well as accelerated deployment of 4G service. Similarly, IXCs, calling card providers, and VoIP providers will be able to offer cheaper long-distance rates and unlimited minutes at a lower price.

503. Moreover, as carriers face intercarrier compensation charges that more accurately reflect the incremental cost of making a call, consumers will see at least three mutually reinforcing types of benefits. First, carriers operations will become more efficient as they are able to better allocate resources for delivering and marketing existing communications services. Specifically, as described below, bill-and-keep will over time eliminate wasteful arbitrage schemes and other behaviors designed to take advantage of or avoid above-cost interconnection rates, as well as reducing ongoing call monitoring, intercarrier billing disputes, and contract enforcement efforts. Second, carrier decisions to invest in, develop, and market communications services will increasingly be based on efficient price signals.

504. Third, and perhaps most importantly, the Commission expects carriers will engage in substantial innovation to attract and retain consumers. New services that are presently offered on a limited basis will be expanded, and innovative services and complementary products will be developed. For example, with the substantial elimination of termination charges under a bill-and-keep methodology, a wide range of IP-calling services are likely to be developed and extended, a process that may ultimately result in the sale of broadband services that incorporate voice at a zero or nominal charge. All these changes will bring substantial benefits to consumers.

505. The impact of the Commission's last substantial intercarrier compensation reform supports its view that consumers will benefit significantly from the R&O's reforms. In 2000, the *CALLS Order, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers,* CC Docket Nos. 96–262 and 94–1, Sixth Report and Order, *Low-Volume Long-Distance Users,* CC Docket No. 99–249, Report and Order, *Federal-State Joint Board on Universal Service,* CC Docket No. 96–45, Eleventh Report and Order, 65 FR 57739, Sept. 26, 2000 (*CALLS Order*), reduced interstate access charges. At the same time, in ways similar to the present reforms, we imposed modest increases in the fixed charges faced by end users. In the *CALLS Order,* the Commission forecasted that reduced interstate access rates would bring a range of efficiency benefits. Although some of these forecasts were met with initial skepticism, end-users in fact realized benefits that exceeded most expectations. In particular, the *CALLS Order* resulted in substantial decreases in calling prices, but in largely unexpected ways. As a result of the *CALLS Order,* retail toll charges fell sharply, bringing average customer expenditures per minute of interstate toll calling down 18 percent during the year 2000. However, rather than merely reducing per-minute rates, wireless carriers started offering a new form of pricing, a fixed fee for a ''bucket'' of minutes, and ended distance-based pricing. As a result of these price declines, the gains in consumer surplus for wireless users in the United States from the *CALLS Order* were estimated to be about $115 billion per year. Competitive pressure from wireless providers brought similar changes to fixed line carriers, who began offering unlimited domestic calls. These price declines and innovations also had important indirect effects, allowing end-users to fundamentally change the way they used telephony services. For example, lower calling charges enabled a substantial and ongoing shift from landlines to wireless. In short, the Commission's prior intercarrier compensation reform led to more convenient access to telecommunication services and substantially lower costs for long-distance calls.

506. *Bill-and-Keep Eliminates Arbitrage and Marketplace Distortions.* Bill-and-keep will address arbitrage and marketplace distortions arising from the current intercarrier compensation regimes, and therefore will promote competition in the telecommunications marketplace. Intercarrier compensation rates above incremental cost have enabled much of the arbitrage that occurs today, and to the extent that such rates apply differently across providers, have led to significant marketplace distortions. Rates today are determined by looking at the average cost of the entire network, whereas a bill-and-keep approach better reflects the incremental cost of termination, reducing arbitrage incentives. For example, based on a hypothetical calculation of the cost of voice service on a next generation network providing a full range of voice, video, and data services, one study estimated that the incremental cost of delivering an average customer's total volume of voice service could be as low as $0.000256 per month; on a per minute basis, this incremental cost would translate to a cost of $0.0000001 per minute. Moreover, non-voice traffic on next generation networks (NGNs) is growing much more rapidly than voice traffic, and under any reasonable methods of cost allocation, the share of voice cost to total cost will continue to be small in an NGN. Record evidence indicates that the incremental cost of termination for circuit-switched networks is likewise extremely small.

507. The conclusion that the incremental cost of call termination is very nearly zero, coupled with the difficulty of appropriately setting an efficient, positive intercarrier compensation charge, further supports the adoption of bill-and-keep. The Commission notes that the statutory text of 47 U.S.C. 252(d)(2) provides that the methodology for reciprocal compensation should allow for the recovery of the ''additional costs'' of a call which equals incremental cost, not the average or total cost of transporting or terminating a call. Exact identification of efficient termination charges would be extremely complex, and considering the costs of metering, billing, and contract enforcement that come with a non-zero termination charge, the Commission finds that the benefits obtained from imposing even a very careful estimate of the efficient interconnection charge would be more than offset by the considerable costs of doing so. The Commission acknowledges that it is also possible that, in some instances, the efficient

termination rates of preceding models would not allow overall cost recovery. In that case, while the efficient *cost-covering* termination rate could lie above incremental cost, the Commission also concludes that it is more efficient to ensure cost recovery via direct subsidies, such as the CAF, than by distorting usage prices.

508. Some parties have expressed concerns that bill-and-keep arrangements will encourage carriers to ''dump'' traffic on other providers' terminating network, because the cost of termination to the carrier delivering the traffic will be zero. Such concerns, however, appear to be largely speculative; no commenter has identified a concrete reason why any carrier would engage in such ''dumping'' or how it would do so. Indeed, there has been no evidence that any such ''dumping'' has occurred in the wireless industry, which has operated under a similar framework. Even so, if a long distance carrier decided to deliver all of its traffic to a terminating LECs' tandem switch, that practice could result in tandem exhaust, requiring the terminating LEC to invest in additional switching capacity. To help address this concern, the Commission confirms that a LEC may include traffic grooming requirements in its tariffs. These traffic grooming requirements specify when a long distance carrier must purchase dedicated DS1 or DS3 trunks to deliver traffic rather than pay per-minute transport charges, a determination based on the amount of traffic going to a particular end office. The Commission believes this accountability and additional information will deter concerns regarding traffic dumping.

509. *Bill-and-Keep Is Appropriate Even If Traffic Is Imbalanced.* The Commission initially permitted states to impose bill-and-keep arrangements on providers, but did so with the caveat that traffic should be roughly in balance. At the time, the Commission reasoned that carriers incur costs for terminating traffic, and bill-and-keep may not enable the recovery of such costs from other carriers. The Commission also expressed concern that, in a reciprocal compensation arrangement, bill-and-keep may ''distort carriers' incentives, encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic.''

510. In light of technological advancements and the rejection of the calling party network pays model in favor of a model that better tracks cost causation principles, the Commission revisits its prior concerns and conclusions supporting the ''balanced traffic limitation.'' First, the Commission rejects claims that, as a policy matter, bill-and-keep is only appropriate in the case of roughly balanced traffic. Concerns about the balance of traffic exchanged reflect the view that the calling party's network should bear all the costs of a call. Given the understanding that both the calling and called party benefit from a call, the ''direction'' of the traffic—*i.e.,* which network is originating or terminating the call—is no longer as relevant. Under bill-and-keep, ''success in the marketplace will reflect a carrier's ability to serve customers efficiently, rather than its ability to extract payments from other carriers.'' Additionally, bill-and-keep is most consistent with the models used for wireless and IP networks, models that have flourished and promoted innovation and investment without any symmetry or balanced traffic requirement.

511. Second, as already explained, the Commission rejects the assertion that bill-and-keep does not enable cost recovery. Although a bill-and-keep approach will not provide for the recovery of certain costs via *intercarrier* compensation, it will still allow for cost recovery via end-user compensation and, where necessary, explicit universal service support. The Commission finds that although the statute provides that each carrier will have the opportunity to recover its costs, it does not entitle each carrier to recover those costs from another carrier, so long as it can recover those costs from its own end users and explicit universal service support where necessary.

512. As a result, the Commission departs from the Commission's earlier articulated concern that bill-and-keep distorts carriers incentives. To the contrary, the Commission concludes, based on policy and economic theory, that bill-and-keep best addresses the significant arbitrage incentives inherent in today's system.

513. These conclusions are consistent with the Commission's more recent consideration of bill-and-keep arrangements in the context of ISP-bound traffic. Specifically, in the *2001 ISP Remand Order, Intercarrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96–98, 99–68, Order on Remand and Report and Order, 66 FR 26800, May 15, 2001 (*2001 ISP Remand Order*), the Commission stated that its initial ''concerns about economic inefficiencies associated with bill and keep missed the mark'' because they incorrectly assumed that the ''calling party was the sole cost causer of the call.'' The Commission tentatively concluded that bill-and-keep would provide a viable solution to the market distortions caused by ISP-bound traffic. Indeed, the Commission's experience with ISP-bound traffic suggests that a bill-and-keep approach may be most efficient where the traffic is not balanced because the obligation to pay reciprocal compensation in such situations may give rise to uneconomic incentives. The Commission therefore concludes it is appropriate to repeal section 51.713 of its rules, 47 CFR 51.713.

2. Legal Authority

514. The Commission's statutory authority to implement bill-and-keep as the default framework for the exchange of traffic with LECs flows directly from sections 251(b)(5) and 201(b) of the Act, 47 U.S.C. 251(b)(5), 201(b). The Commission has additional statutory authority under 47 U.S.C. 332 to regulate interconnection arrangements involving CMRS providers. Section 251(b)(5), 47 U.S.C. 251(b)(5), states that LECs have a ''duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.'' Section 201(b), 47 U.S.C. 201(b), grants the Commission authority to ''prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.'' In *AT&T Corp.* v. *Iowa Utilities Board,* 525 U.S. 366, 378 (1999), the Supreme Court held that ''the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252.'' As discussed below, the Commission may exercise this rulemaking authority to define the types of traffic that will be subject to 47 U.S.C. 251(b)(5)'s reciprocal compensation framework and to adopt a default compensation mechanism that will apply to such traffic in the absence of an agreement between the carriers involved.

515. *The Scope of 47 U.S.C. 251(b)(5).* Section 251(b)(5), 47 U.S.C. 251(b)(5) imposes on all LECs the ''duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.'' The Commission initially interpreted this provision to ''apply only to traffic that originates and terminates within a local area.'' In the *2001 ISP Remand Order,* however, the Commission noted that its initial reading is inconsistent with the statutory terms. The Commission explained that 47 U.S.C. 251(b)(5) does not use the term ''local,'' but instead speaks more broadly of the transport and termination of

''telecommunications.'' As defined in the Act, the term ''telecommunications'' means the ''transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received'' and thus encompasses communications traffic of any geographic scope (*e.g.,* ''local,'' ''intrastate,'' or ''interstate'') or regulatory classification (*e.g.,* ''telephone exchange service,'' ''telephone toll service,'' or ''exchange access''). The Commission reiterated this interpretation of 47 U.S.C. 251(b)(5) in its *2008 Order and ICC/USF FNPRM, High-Cost Universal Service Support,* WC Docket No. 05–337, 03–109, 06–122, 04–36, CC Docket No. 96–45, 99–200, 96–98, 01–92, 99–68, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 73 FR 66821, Dec. 12, 2008 (*2008 Order and ICC/USF FNPRM*), and the Commission proposed in the *ICC/USF Transformation NPRM* to make clear that 47 U.S.C. 251(b)(5) applies to ''all telecommunications, including access traffic.''

516. After reviewing the record, the Commission adopts its proposal and concludes that 47 U.S.C. 251(b)(5) applies to traffic that traditionally has been classified as access traffic. Nothing in the record seriously calls into question the Commission's conclusion that access traffic is one form of ''telecommunications.'' By the express terms of 47 U.S.C. 251(b)(5), therefore, when a LEC is a party to the transport and termination of access traffic, the exchange of traffic is subject to regulation under the reciprocal compensation framework.

517. The Commission recognizes that the Commission has not previously regulated access traffic under 47 U.S.C. 251(b)(5). The reason, as the Commission has previously explained, is section 251(g), 47 U.S.C. 251(g). Section 251(g), 47 U.S.C. 251(g), is a ''transitional device'' that requires LECs to continue ''provid[ing] exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)'' previously in effect ''until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission.'' Section 251(g), 47 U.S.C. 251(g), thus preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing ''receipt of compensation,'' and thereby precluded the application of 47 U.S.C. 251(b)(5) to such traffic ''unless and until the Commission by regulation should determine otherwise.''

518. In this R&O, the Commission explicitly supersedes the traditional access charge regime and, subject to the transition mechanism outlined below, regulates terminating access traffic in accordance with the 47 U.S.C. 251(b)(5) framework. Consistent with its approach to comprehensive reform generally and the desire for a more unified approach, the Commission finds it appropriate to bring all traffic within the 47 U.S.C. 251(b)(5) regime at this time, and commenters generally agree. Doing so is key to advancing the Commission's goals of encouraging migration to modern, all IP networks; eliminating arbitrage and competitive distortions; and eliminating the thicket of disparate intercarrier compensation rates and payments that are ultimately borne by consumers. Even though the transition process detailed below is limited to terminating switched access traffic and certain transport traffic, the Commission makes clear that the legal authority to adopt the bill-and-keep methodology described herein applies to all intercarrier compensation traffic. As noted below, the Commission seeks comment on the transition and recovery for originating access and transport in the *USF/ICC Transformation FNPRM.*

519. The Commission rejects arguments that 47 U.S.C. 251(b)(5) does not apply to intrastate access traffic. Like other forms of carrier traffic, intrastate access traffic falls within the scope of the broad term ''telecommunications'' used in 47 U.S.C. 251(b)(5). ''Had Congress intended to exclude certain types of telecommunications traffic,'' such as ''local'' or ''intrastate'' traffic, ''from the reciprocal compensation framework, it could have easily done so by using more restrictive terms to define the traffic subject to 47 U.S.C. 251(b)(5).'' Nor does the Commission believe that section 2(b) of the Act, 47 U.S.C. 152(b), which generally preserves state authority over intrastate communications, bears on its interpretation of 47 U.S.C. 251(b)(5). As the Supreme Court noted, ''[s]uch an interpretation [of 47 U.S.C. 152(b)] would utterly nullify the 1996 amendments, which clearly 'apply' to intrastate services, and clearly confer 'Commission jurisdiction' over some matters.'' Indeed, if 47 U.S.C. 152(b) limited the scope of 47 U.S.C. 251(b)(5), the Commission could not apply the reciprocal compensation framework even to local traffic between a CLEC and an ILEC—the type of traffic that has been subject to the reciprocal compensation rules since the Commission implemented the 1996 Act. The Commission sees no reason to adopt such an absurd reading of the statute.

520. The Commission also rejects arguments that 47 U.S.C. 251(g) and 251(d)(3) somehow limit the scope of the ''telecommunications'' covered by 47 U.S.C. 251(b)(5). Whatever protections these provisions provide to state access regulations, it is clear that those protections are not absolute. As noted above, 47 U.S.C. 251(g) preserves access charge rules only during a transitional period, which ends when the Commission adopts superseding regulations. Accordingly, to the extent 47 U.S.C. 251(g) has preserved state intrastate access rules against the operation of 47 U.S.C. 251(b)(5) until now, this rulemaking R&O supersedes that provision.

521. Section 251(d)(3), 47 U.S.C. 251(d)(3), states that ''[i]n prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—(A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.'' As the Commission has previously observed, ''section 251(d)(3) of the Act independently establishes a standard very similar to the judicial conflict preemption doctrine,'' and ''[i]ts protections do *not* apply when the state regulation is inconsistent with the requirements of section 251, *or* when the state regulation substantially prevents implementation of the requirements of section 251 or the purposes of sections 251 through 261 of the Act.'' Moreover, ''in order to be consistent with the requirements of section 251 and not 'substantially prevent' implementation of section 251 or Part II of Title II, state requirements must be consistent with the FCC's implementing regulations.'' In other words, 47 U.S.C. 251(d)(3) instructs the Commission not to preempt state regulations that are consistent with and promote federal rules and policies, but it does not protect state regulations that frustrate the Act's policies or the Commission's implementation of the statute's requirements. As discussed in this R&O, the Commission is bringing all telecommunications traffic terminated on LECs, including intrastate switched access traffic, into the 47 U.S.C. 251(b)(5) framework to fulfill the

objectives of 47 U.S.C. 251(b)(5) and other provisions of the Act. Consequently, the Commission finds that, to the extent 47 U.S.C. 251(d)(3) applies in this context, it does not prevent us from adopting rules to implement the provisions of 47 U.S.C. 251(b)(5) and applying those rules to traffic traditionally classified as intrastate access.

522. Finally, the Commission rejects the view of some commenters that the pricing standard set forth in 47 U.S.C. 252(d)(2)(A) limits the scope of 47 U.S.C. 251(b)(5). As the Commission explained in the *2008 Order and ICC/USF FNPRM,* 47 U.S.C. 252(d)(2)(A)(i) ''deals with the mechanics of who owes what to whom, it does not define the scope of traffic to which section 251(b)(5) applies.'' The Commission noted that construing ''the pricing standards in section 252(d)(2) to limit the otherwise broad scope of section 251(b)(5)'' would nonsensically suggest that ''Congress intended the tail to wag the dog.'' The Commission reaffirms that conclusion here.

523. *Authority To Adopt Bill-and-Keep as a Default Compensation Standard.* The Commission concludes that it has the statutory authority to establish bill-and-keep as the default compensation arrangement for all traffic subject to 47 U.S.C. 251(b)(5). That includes traffic that, prior to this R&O, was subject to the interstate and intrastate access regimes, as well as traffic exchanged between two LECs or a LEC and a CMRS carrier.

524. Section 201(b), 47 U.S.C. 201(b) states that ''[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.'' As the Supreme Court held in *Iowa Utilities Board,* section 201(b) of the Act, 47 U.S.C. 201(b), ''means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252.'' Moreover, section 251(i) of the Act, 47 U.S.C. 251(i), states that ''[n]othing in this section [section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201.'' Section 251(i), 47 U.S.C. 251(i), ''fortifies [our] position'' that the Commission has the authority to regulate the default compensation arrangement applicable to traffic subject to 47 U.S.C. 251(b)(5).

525. The Commission concludes that it has the statutory authority to establish bill-and-keep as a default compensation mechanism with respect to interstate traffic subject to 47 U.S.C. 251(b)(5). Section 201, 47 U.S.C. 201, has long conferred authority on the Commission to regulate interstate communications to ensure that ''charges, practices, classifications, and regulations'' are ''just and reasonable'' and not unreasonably discriminatory. Indeed, the D.C. Circuit recently upheld the Commission's authority under 47 U.S.C. 201 to establish interim rates for ISP-bound traffic, which the Commission had found to also be subject to 47 U.S.C. 251(b)(5).

526. In any event, the Commission concludes that it has authority, independent of its traditional interstate rate-setting authority in 47 U.S.C. 201, to establish bill-and-keep as the default compensation arrangement for all traffic subject to 47 U.S.C. 251(b)(5), including intrastate traffic. Although section 2(b), 47 U.S.C. 152(b) has traditionally preserved the states' authority to regulate intrastate communications, after the 1996 Act section 2(b) has ''less practical effect'' because ''Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control.'' Thus, ''[w]ith regard to the matters addressed by the 1996 Act,'' Congress ''unquestionably'' ''has taken the regulation of local telecommunications competition away from the States,'' and, as the Supreme Court has held, ''the administration of the new *federal* regime is to be guided by federal-agency regulations.'' The rulemaking authority in section 201(b), 47 U.S.C. 152(b) ''*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies'' and thereby authorizes the Commission's adoption of rules to implement 47 U.S.C. 251(b)(5)'s directive that LECs have a ''duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.''

527. The Commission rejects the argument of some commenters that 47 U.S.C. 252(c) and 252(d)(2) limit its authority to adopt bill-and-keep. Section 252(c), 47 U.S.C. 252(c), provides that states conducting arbitration proceedings under section 252 shall ''establish any rates for interconnection, services, or network elements according to'' section 252(d), 47 U.S.C. 252(d). Section 252(d)(2), 47 U.S.C. 252(d), in turn, states in relevant part that ''[f]or the purposes of compliance by an *incumbent local exchange carrier* with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable'' unless they: (i) ''provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls *that originate on the network facilities of the other carrier;''* and (ii) determine such costs through a ''reasonable approximation of the additional costs of terminating such calls.'' Section 252(d)(2), 47 U.S.C. 252(d)(2), also states that the pricing standard it sets forth ''shall not be construed * * * to preclude arrangements * * * that waive mutual recovery (such as bill-and-keep arrangements).'' Although the Supreme Court made clear that the Commission may, through rulemaking, establish a ''pricing methodology'' under 47 U.S.C. 252(d) for states to apply in arbitration proceedings, the Eighth Circuit has held that ''[s]etting specific [reciprocal compensation] prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to § 252(c)(2).'' Commenters who cite 47 U.S.C. 252(d) as a limitation on the Commission's authority to adopt bill-and-keep argue that bill-and-keep intrudes on states' rate-setting authority by effectively setting a compensation rate of zero.

528. The Commission disagrees for two reasons. First, the pricing standard in 47 U.S.C. 252(d) simply does not apply to most of the traffic that is the focus of this R&O—traffic exchanged between LECs and IXCs. Section 252(d), 47 U.S.C. 252(d), applies only to traffic exchanged with an ILEC, so CLEC–IXC traffic is categorically beyond its scope. Even with respect to traffic exchanged with an ILEC, 47 U.S.C. 252(d) applies only to arrangements between carriers where the traffic ''originate[s] on the network facilities of the other carrier,'' *i.e.,* the carrier sending the traffic for transport and termination. IXCs, however, typically do not originate (or terminate) calls on their own network facilities but instead transmit calls that originate and terminate on distant LECs. Accordingly, to the extent the bill-and-keep rules apply to LEC–IXC traffic, the rules do not implicate any question of the states' authority under 47 U.S.C. 252(c) or (d) or the Eighth Circuit's interpretation of those provisions.

529. Second, and in any event, bill-and-keep is consistent with section 252(d)'s pricing standard. Section 252(d)(2)(B), 47 U.S.C. 252(d)(2)(B) makes clear that ''arrangements that waive mutual recovery (such as bill-and-keep arrangements)'' are consistent with section 252(d)'s pricing standard. Although bill-and-keep by definition ''waive[s] mutual recovery'' 47 U.S.C. 252(d)(2)(B)(i), in that carriers do not pay each other for transporting and terminating calls, a bill-and-keep framework provides for ''reciprocal''

recovery because each carrier exchanging traffic is entitled to recover their costs through the same mechanism, *i.e.,* through the rates they charge their own customers. As explained in the *Local Competition First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket Nos. 96–98, 95–185, First Report and Order, 61 FR 45476, Aug. 29, 1996 (*Local Competition First Report and Order*), this provision precludes any argument that ''the Commission and states do not have the authority to mandate bill-and-keep arrangements'' or that bill-and-keep is permissible only if it is voluntarily agreed to by the carriers involved. Bill-and-keep also ensures ''recovery of each carrier of costs'' associated with transport and termination. The Act does not specify from whom each carrier may (or must) recover those costs and, under the approach the Commission adopts, each carrier will ''recover'' its costs from its own end users or from explicit support mechanisms such as the federal universal service fund. The economic premise of a bill-and-keep regime differs from the calling party network pays (CPNP) philosophy of cost causation. Under CPNP thinking, the party that initiated the call is receiving the most benefit from that call. Under the bill-and-keep methodology the economic premise is that both the calling and the called party benefit from the ability to exchange traffic, *i.e.,* being interconnected. This is consistent with policy justifications for bill-and-keep described in the *Intercarrier Compensation NPRM* in which the Commission said ''there may be no reason why *both* LECs should not recover the costs of providing these benefits directly from their end users. Bill-and-keep provides a mechanism whereby end users pay for the benefit of making *and* receiving calls.'' Thus, bill-and-keep will not limit the amount of a carrier's cost recovery, but instead will alter the source of the cost recovery—network costs would be recovered from carriers' customers supplemented as necessary by explicit universal service support, rather than from other carriers.

530. Finally, even assuming 47 U.S.C. 252(d) applies, adoption of bill-and-keep as a default compensation mechanism would not intrude on the states' role to set rates as interpreted by the Eighth Circuit. To the extent the traffic at issue is intrastate in nature and subject to 47 U.S.C. 252(d)'s pricing standard, states retain the authority to regulate the rates that the carriers will charge *their end users* to recover the costs of transport and termination to ensure that such rates are ''just and reasonable.'' Moreover, states will retain important responsibilities in the implementation of a bill-and-keep framework. An inherent part of any rate setting process is not only the establishment of the rate level and rate structure, but the definition of the service or functionality to which the rate will apply. Under a bill-and-keep framework, the determination of points on a network at which a carrier must deliver terminating traffic to avail itself of bill-and-keep (sometimes known as the ''edge'') serves this function, and will be addressed by states through the arbitration process where parties cannot agree on a negotiated outcome. Depending upon how the ''edge'' is defined in particular circumstances, in conjunction with how the carriers physically interconnect their networks, payments still could change hands as reciprocal compensation even under a bill-and-keep regime where, for instance, an IXC pays a terminating LEC to transport traffic from the IXC to the edge of the LEC's network. This statement does not suggest any particular outcome with respect to the definition of the ''edge,'' which is an issue the Commission seeks comment on in the *USF/ICC Transformation FNPRM.* Consistent with their existing role under 47 U.S.C. 251 and 252, which the Commission does not expand or contract, states will continue to have the responsibility to address these issues in state arbitration proceedings, which the Commission believes is sufficient to satisfy any statutory role that the states have under 47 U.S.C. 252(d) to ''determin[e] the concrete result in particular circumstances'' of the bill-and-keep framework the Commission adopts.

531. *Originating Access.* Some parties contend that the Commission lacks authority over originating access charges under 47 U.S.C. 251(b)(5) because that section refers only to transport and termination. Other commenters urge the Commission to act swiftly to eliminate originating access charges. Although the Commission concludes that the originating access regime should be reformed, at this time the Commission establishes a transition to bill-and-keep only with respect to terminating access charge rates. The concerns the Commission has with respect to network inefficiencies, arbitrage, and costly litigation are less pressing with respect to originating access, primarily because many carriers now have wholesale partners or have integrated local and long distance operations.

532. As discussed above, 47 U.S.C. 251(g) provides for the continued enforcement of certain pre-1996 Act obligations pertaining to ''exchange access'' until ''such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission.'' Exchange access is defined to mean ''the offering of access to telephone exchange services or facilities for the purpose of the *origination* or termination of telephone toll services.'' Thus, 47 U.S.C. 251(g) continues to preserve originating access until the Commission adopts rules to transition away from that system. At this time, the Commission adopts transition rules only with respect to terminating access and seeks comment in the *USF/ICC Transformation FNPRM* on the ultimate transition away from such charges as part of the transition of all access charge rates to bill-and-keep. In the meantime, the Commission will cap interstate originating access rates at their current level, pending resolution of the issues raised in the *USF/ICC Transformation FNPRM.*

533. *Section 332 and Wireless Traffic.* With respect to wireless traffic exchanged with a LEC, the Commission has independent authority under section 332 of the Act, 47 U.S.C. 332, to establish a default bill-and-keep methodology that will apply in the absence of an interconnection agreement. Although the Commission has not previously exercised its authority under 47 U.S.C. 332 to reform intercarrier compensation charges paid by or to wireless providers, the Commission has clear authority to do so, and this authority extends to both interstate and intrastate traffic. The Eighth Circuit has construed the Act to authorize the Commission to set reciprocal compensation rates for CMRS providers. In reaching that decision, the court relied on: (a) 47 U.S.C. 332(c)(1)(B), which obligates LECs to interconnect with wireless providers ''pursuant to the provisions of section 201;'' (b) section 2(b), 47 U.S.C. 152(b), which provides that the Act should not be construed to apply or to give the Commission jurisdiction with respect to charges in connection with intrastate communication service by radio ''[e]xcept as provided in * * * section 332;'' and (c) the preemptive language in 47 U.S.C. 332(c)(3)(A), which prohibits states from regulating the entry of or the rates charged by CMRS providers. The DC Circuit likewise recently acknowledged the Commission's authority in this regard, observing that the Commission historically had elected to leave

intrastate access rates imposed on CMRS providers to state regulation, and recognizing: ''That the FCC *can* issue guidance does not mean it must do so.'' Accordingly, the Commission concludes that it has separate authority under 47 U.S.C. 201 and 332(c) to establish rules governing the exchange of both intrastate and interstate traffic between LECs and CMRS carriers.

534. *Section 254(k).* The Commission also rejects the claims of some commenters that a bill-and-keep approach would violate 47 U.S.C. 254(k) of the Act. Section 254(k) of the Act, 47 U.S.C. 254(k), states that a telecommunications carrier ''may not use services that are not competitive to subsidize services that are subject to competition,'' and that the Commission ''shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.'' Some parties express concern that, under a bill-and-keep regime, retail voice telephone services subject to universal service support would bear more than ''a reasonable share of the joint and common costs.''

535. The United States Court of Appeals for the Eighth Circuit previously considered and rejected similar arguments concerning the reallocation of loop costs between end users and IXCs. Specifically, the court considered whether the recovery of joint and common costs must be borne mutually by end-users and by IXCs, and whether a shift in cost recovery from IXCs to end-users violated 47 U.S.C. 254(k) of the Act. As to the first provision of 47 U.S.C. 254(k), the court found that ''[s]ection 254(k) was not designed to regulate the apportionment of loop costs between end-users and IXCs because this allocation does not involve improperly shifting costs from a competitive to a non-competitive service,'' even if ''a LEC allocates all of its local loop costs to the end-user.'' Further, the court disagreed that an increase in the SLC price cap violates the second part of 254(k) by causing services included in the definition of universal service to bear more than a reasonable share of the joint and common costs of facilities used to provide those services. The court explained that the ''SLC is a method of recovering loop costs, not an allocation of costs between supported and unsupported services'' in violation of 47 U.S.C. 254(k). The Commission concurs with the Eighth Circuit's analysis and concludes that it applies equally in this context. A bill-and-keep framework resolves whether a carrier will recover its costs from its end users or from other carriers; the underlying service whose costs are being recovered is the same, however, so no costs are being improperly shifted between competitive and non-competitive services for purposes of 47 U.S.C. 254(k).

*B. Federal/State Roles in Implementing Bill-and-Keep*

536. The Commission now concludes that a uniform, national framework for the transition of intercarrier compensation to bill-and-keep, with an accompanying federal recovery mechanism, best advances the Commission's policy goals of accelerating the migration to all IP networks, facilitating IP-to-IP interconnection, and promoting deployment of new broadband networks by providing certainty and predictability to carriers and investors. Although states will not set the transition for intrastate rates under this approach, the Commission does follow the State Member's proposal regarding recovery coming from the federal jurisdiction. Doing so takes a potentially large financial burden away from states. States will also help implement the bill-and-keep methodology: They will continue to oversee the tariffing of intrastate rate reductions during the transition period as well as interconnection negotiations and arbitrations pursuant to 47 U.S.C. 251 and 252, and will have responsibility for determining the network ''edge'' for purposes of bill-and-keep.

537. Today, intrastate access rates vary widely. In many states, intrastate rates are significantly higher than interstate rates; in others, intrastate and interstate rates are at parity; and in still other states, intrastate access rates are below interstate levels. The varying rates have created incentives for arbitrage and pervasive competitive distortions within the industry. Equally important, consumers may not receive adequate price signals to make economically efficient choices because local and long-distance rates do not necessarily reflect the underlying costs of their calls. Depending on their regulatory classification, some carriers charge and collect intercarrier compensation charges, while other carriers do not. A bill-and-keep system will ultimately eliminate the competitive distortions and consumer inequities that arise today when different carriers that use differing technologies (wireline, wireless, VoIP) to perform the same function—complete a call—are subject to different regulatory classifications and requirements.

538. Providing a uniform national transition and recovery framework, to be implemented in partnership with the states, will achieve the benefits of a uniform system and realize the goals of reducing arbitrage and promoting investment in IP networks as quickly as possible. By transitioning all traffic in a coordinated manner, the Commission will minimize opportunities for arbitrage that could be presented by disparate intrastate rates. For example, the Commission's approach will reduce the potential for arbitrage that could result from a widening gap between intrastate and interstate rates if the Commission were to initially reduce interstate rates only. In addition, a coordinated transition involving both intrastate and interstate traffic will help to align principles of cost causation and provide appropriate pricing signals to end users. Whether completing an interstate or intrastate call, consumers will benefit from a unified system in which arbitrage opportunities that inequitably shift costs among consumers are reduced.

539. By moving in a coordinated manner to address the intercarrier compensation system for all traffic, the Commission will also help to ensure that there is no disruption in the transition to more efficient forms of all IP networks. The record suggests that a ''federally managed, geographically neutral'' intercarrier compensation regime that eliminates incentives for arbitrage will allow service providers to deploy resources in more productive ways. In addition, a unified approach for all ICC traffic will help remove obstacles to progress toward all-IP networks where jurisdictional boundaries become less relevant. In sum, the Commission's approach helps to ensure that the intercarrier compensation modernization effort will continue apace without unnecessary delays needed to harmonize disparate state actions.

540. Although several states have sought to reform intrastate access rates, significant challenges remain that could impede the comprehensive reform efforts absent a uniform, national transition. Under the direction of both state commissions and legislatures, states have taken a variety of approaches to reform. In some states, these efforts have resulted in intrastate access rate levels coming to parity with interstate levels. In other states, reform has led to reductions in intrastate rate levels, but rates remain above interstate levels. Although many states may genuinely desire to advance additional reforms,

the challenges posed by a state-by-state process would likely result in significant variability and unpredictability of outcomes. Moreover, some state commissions lack authority to address intrastate access reform, and the Commission is concerned that many states will be unable to complete reforms in a timely manner or will otherwise decline to act. Indeed, the Missouri Commission endorsed a 47 U.S.C. 251(b)(5) approach because ''states should not be allowed to delay access reform.'' The lack of certainty and predictability for the industry without a uniform framework is a significant concern. Carriers and investors need predictability to make investment and deployment decisions and lack of certainty regarding intrastate access rates or recovery hampers these efforts. In addition some parties warned that it would be ''extremely costly'' to participate in ''the multitude'' of state commission proceedings that would follow from an approach relying on dozens of different state transitions and recovery frameworks.

541. In addition, as noted above, adopting a uniform federal transition and recovery mechanism will free states from potentially significant financial burdens. The recovery mechanism will provide carriers with recovery for reductions to eligible interstate *and* intrastate revenue. As a result, states will not be required to bear the burden of establishing and funding state recovery mechanisms for intrastate access reductions, while states will continue to play a role in implementation. Furthermore, the Residential Rate Ceiling adopted as part of the recovery mechanism will help ensure that consumer telephone rates remain affordable, and will also recognize so-called ''early adopter'' states that have already undertaken reform of intrastate access charges and rebalanced rates.

542. Some commenters argued that the uniform approach the Commission takes is inappropriate because states should be allowed to pursue tailored intrastate access reforms. The Commission appreciates and respects the expertise and on-the-ground knowledge of its state partners concerning intrastate telecommunications. Indeed, as the Commission has said, states will have responsibility for implementing the bill-and-keep methodology adopted herein and will continue to oversee the tariffing of intrastate rates during the transition period and interconnection negotiations and arbitrations pursuant to 47 U.S.C. 252, as well as determine the network ''edge'' for purposes of bill-and-keep. With respect to the ultimate ICC framework and the intervening transition, however, the Commission finds that a uniform national approach will best create predictability for carriers and promote efficient pricing and new investment to the benefit of consumers.

*C. Transition*

543. In light of the decision to adopt a uniform federal transition to bill-and-keep, in this section the Commission sets out a default transition path for terminating end office switching and certain transport rate elements to begin that process. The Commission also begins the process of reforming other rate elements by capping all interstate rate elements as of the effective date of the rules adopted pursuant to this R&O, and capping terminating intrastate rates for all carriers. Doing so ensures that no rates increase during reform, and that carriers do not shift costs between or among other rate elements, which would be counter to the principles the Commission adopts. And, this transition will help minimize disruption to consumers and service providers by giving parties time, certainty, and stability as they adjust to an IP world and a new compensation regime.

544. The Commission sets forth a transition path for terminating end office switching and certain transport rate elements and reciprocal compensation charges in Figure 9. In brief, the transition plan first focuses on the transition for terminating traffic, which is where the most acute intercarrier compensation problems, such as arbitrage, currently arise. The Commission believes that limiting reductions at this time to terminating access rates will help address the majority of arbitrage and manage the size of the access replacement mechanism. The Commission also takes measures to start reforming other elements as well by capping all interstate switched access rates in effect as of the effective date of the rules, including originating access and all transport rates. Absent such action, rate-of-return carriers could shift costs between or among other rate elements and rates to interconnecting carriers could continue to increase as they have been in the past years, which is counter to the reform the Commission adopts. Even so, the Commission does not specify the transition to reduce these rates further at this time. Instead, the Commission seeks comment regarding the transition and recovery for such other rate elements in the *USF/ICC Transformation FNPRM.*

545. Thus, at the outset of the transition, all interstate switched access and reciprocal compensation rates will be capped at rates in effect as of the effective date of the rules. This will ensure that carriers do not seek to inflate their access charges in advance of the Commission's reforms. Specifically, the Commission caps all rate elements in the ''traffic sensitive basket'' and the ''trunking basket'' as described in 47 CFR 61.42(d)(2)–(3) unless a price cap carrier made a tariff filing increasing any such rate element prior to the effective date of the rules and such change was not yet in effect. The Commission caps these rates as of the effective date of the R&O, as opposed to a future date such as January 1, 2012, to ensure that carriers cannot make changes to rates or rate structures to their benefit in light of the reforms adopted in this R&O. For price cap carriers, all intrastate rates will also be capped, and, for rate-of-return carriers, all terminating intrastate access rates will also be capped. Consistent with many proposals in the record, the transition plan provides rate-of-return carriers, whose rates typically are higher, additional time to transition as appropriate. Specifically, the Commission concludes that a six-year transition for price cap carriers and competitive LECs that benchmark to price cap carrier rates and a nine-year transition for rate-of-return carriers and competitive LECs that benchmark to rate-of-return carrier rates to transition rates to bill-and-keep strikes an appropriate balance that will moderate potential adverse effects on consumers and carriers of moving too quickly from the existing intercarrier compensation regimes.

INTERCARRIER COMPENSATION REFORM TIMELINE

| Effective date | For price cap carriers and CLECs that benchmark access rates to price cap carriers | For rate-of-return carriers and CLECs that benchmark access rates to rate-of-return carriers |
|---|---|---|
| Effective Date of the rules | All intercarrier switched access rate elements, including interstate and intrastate originating and terminating rates and reciprocal compensation rates are capped. | All interstate switched access rate elements, including all originating and terminating rates and reciprocal compensation rates are capped. Intrastate terminating rates are also capped. |
| July 1, 2012 | Intrastate terminating switched end office and transport rates, originating and terminating dedicated transport, and reciprocal compensation rates, if above the carrier's interstate access rate, are reduced by 50 percent of the differential between the rate and the carrier's interstate access rate. | Intrastate terminating switched end office and transport rates, originating and terminating dedicated transport, and reciprocal compensation rates, if above the carrier's interstate access rate, are reduced by 50 percent of the differential between the rate and the carrier's interstate access rate. |
| July 1, 2013 | Intrastate terminating switched end office and transport rates and reciprocal compensation, if above the carrier's interstate access rate, are reduced to parity with interstate access rate. | Intrastate terminating switched end office and transport rates and reciprocal compensation, if above the carrier's interstate access rate, are reduced to parity with interstate access rate. |
| July 1, 2014 | Terminating switched end office and reciprocal compensation rates are reduced by one-third of the differential between end office rates and $0.0007.* | Terminating switched end office and reciprocal compensation rates are reduced by one-third of the differential between end office rates and $0.005.* |
| July 1, 2015 | Terminating switched end office and reciprocal compensation rates are reduced by an additional one-third of the original differential to $0.0007.* | Terminating switched end office and reciprocal compensation rates are reduced by an additional one-third of the original differential to $0.005.* |
| July 1, 2016 | Terminating switched end office and reciprocal compensation rates are reduced to $0.0007.* | Terminating switched end office and reciprocal compensation rates are reduced to $0.005.* |
| July 1, 2017 | Terminating switched end office and reciprocal compensation rates are reduced to bill-and-keep. Terminating switched end office and transport are reduced to $0.0007 for all terminating traffic within the tandem serving area when the terminating carrier owns the serving tandem switch. | Terminating end office and reciprocal compensation rates are reduced by one-third of the differential between its end office rates ($0.005) and $0.0007.* |
| July 1, 2018 | Terminating switched end office and transport are reduced to bill-and-keep for all terminating traffic within the tandem serving area when the terminating carrier owns the serving tandem switch. | Terminating switched end office and reciprocal compensation rates are reduced by an additional one-third of the differential between its end office rates as of July 1, 2016 and $0.0007.* |
| July 1, 2019 | ..... | Terminating switched end office and reciprocal compensation rates are reduced to $0.0007.* |
| July 1, 2020 | ..... | Terminating switched end office and reciprocal compensation rates are reduced to bill-and-keep.* |

Figure 9
*Transport rates remain unchanged from the previous step.

546. The Commission notes that CMRS providers are subject to mandatory detariffing. Nonetheless, CMRS providers are included in the transition to the extent their reciprocal compensation rates are inconsistent with the reforms the Commission adopts here. The Commission also notes that carriers remain free to make elections regarding participation in the NECA pool and tariffing processes during the transition. *See* 47 CFR 69.601 *et seq.*

547. The Commission believes that these transition periods strike the right balance between its commitment to avoid flash cuts and enabling carriers sufficient time to adjust to marketplace changes and technological advancements, while furthering the Commission's overall goal of promoting a migration to modern IP networks. The Commission finds that consumers will benefit from this regulatory transition, which enables their providers to adapt to the changing regulatory and technical landscape and will enable a faster and more efficient introduction of next-generation services.

548. The transition the Commission adopts is partially based on a stakeholder proposal, with certain modifications, including the adoption of a bill-and-keep methodology as the end state for all traffic. As explained further below, states will play a key role in implementing the framework the Commission adopts. In particular, states will oversee changes to intrastate access tariffs to ensure that modifications to intrastate tariffs are consistent with the new framework and rules.. For example, states will help guard against carriers improperly moving costs between or among different rate elements to reap a windfall from reform.

549. Since intercarrier compensation charges are constrained by the transition glide path that the Commission adopts, the Commission will be monitoring to ensure that carriers do not shift costs to other rate elements that are not specifically covered, such as special access or common line. The Commission also clarifies that, in cases where a provider's interstate terminating access rates are higher than its intrastate terminating access rates, intrastate rate reductions shall begin to occur at the stage of the transition in which interstate rates come to parity with intrastate rate levels.

550. The transition imposes a cap on originating intrastate access charges for price cap carriers at current rates as of the effective date of the rules. The transition does not cap originating intrastate access charges for rate-of-return carriers. Rate-of-return carriers suggested that it would not be viable for them to reduce terminating switched rates, while at the same time reducing originating rates without overburdening the Universal Service Fund. In the meantime, rate-of-return carriers indicate that the wholesale long distance market will constrain originating rates. Given its commitment to control the size of the CAF and minimize burdens on consumers, the Commission does not cap intrastate

originating access charges for rate-of-return carriers at this time. As noted above, the Commission has placed priority on reform of terminating access charges and the Commission is mindful of the compromises that must be made to accomplish meaningful reform in a measured and timely manner. In the *USF/ICC Transformation FNPRM,* the Commission seeks comment on the transition of *all* originating access charges to bill-and-keep, including originating intrastate access charges for rate-of-return carriers.

551. *CMRS Providers.* As noted above, CMRS providers will be subject to the transition applicable to price cap carriers. Although CMRS providers are subject to mandatory detariffing, these providers are included to the extent their reciprocal compensation rates are inconsistent with the reforms the Commission adopts here. The Commission also addresses compensation for non-access traffic exchanged between LECs and CMRS providers herein. As the Commission details in that section, the Commission immediately adopts bill-and-keep as the default compensation methodology for non-access traffic exchanged between LECs and CMRS providers under section 20.11 of its rules, 47 CFR 20.11, and Part 51, 47 CFR part 51.

552. *Competitive LECs.* To ensure smooth operation of the transition, the Commission provides competitive LECs that benchmark their rates a limited allowance of additional time to make tariff filings during the transition period. Application of the access reforms will generally apply to competitive LECs via the CLEC benchmarking rule. In cases where more than one incumbent LEC operates within a competitive LEC's service area and those incumbent LECs are both price cap and rate-of-return regulated, a question may arise as to the appropriate transition track for the competitive LEC. If the competitive LEC tariffs a benchmarked or average rate in such circumstances, that competitive LEC shall adopt the transition path applicable to the majority of lines capable of being served in its territory. For example, if price cap carriers serve 70 percent of a competitive LEC's service territory and rate-of-return carriers serve 30 percent of the service territory, then the competitive LEC using a blended rate should follow the price cap transition. For interstate switched access rates, competitive LECs are permitted to tariff interstate access charges at a level no higher than the tariffed rate for such services offered by the incumbent LEC serving the same geographic area (the benchmarking rule). There are two exceptions to the general benchmarking rule. First, rural competitive LECs offering service in the same areas as non-rural incumbent LECs are permitted to ''benchmark'' to the access rates prescribed in the NECA access tariff, assuming the highest rate band for local switching (the rural exemption). Second, as explained above, competitive LECs meeting the access revenue sharing definition are required to benchmark to the lowest interstate switched access rate of a price cap LEC in the state. Because the Commission retains the CLEC benchmark rule during the transition, the Commission allows competitive LECs an extra 15 days from the effective date of the tariff to which a competitive LEC is benchmarking to make its filing(s). The Commission emphasizes that the rates that are filed by the competitive LEC must comply with the applicable benchmarking rate. As is the case now, the Commission declines to adopt rules governing the rates that competitive LECs may assess on their end users.

553. The Commission also declines to adopt a separate and longer transition period for competitive LECs, as suggested by some commenters. For one, competitive LEC rates are already at or near parity for many if not all access rates. Due to the operation of the Commission's CLEC benchmark rules, competitive LEC tariffed access rates are largely already at parity with incumbent LEC rates. And, in a large number of states, competitive LEC intrastate access rates are at or near parity to those of the incumbent LEC, as well. Thus, the Commission does not find a sufficient basis for creating a separate transition for competitive LECs. Moreover, the transition periods of six and nine years are sufficiently long to permit advance planning and represent a careful balance of the interests of all stakeholders. As a result, the Commission concludes that a uniform approach for all LECs is preferable and does not find compelling evidence to depart from the important policy objectives underlying the CLEC benchmarking rule. Further, new arbitrage opportunities could arise and increased regulatory oversight would be necessary were the Commission to abandon the CLEC benchmarking rule.

1. Authority To Specify the Transition

554. Specifying the timing and steps for the transition to bill-and-keep requires us to make a number of line-drawing decisions. Although the Commission could avoid those decisions by moving to bill-and-keep immediately, such a flash cut would entail significant market disruption to the detriment of consumers and carriers alike. As the DC Circuit has recognized, ''[w]hen necessary to avoid excessively burdening carriers, the gradual implementation of new rates and policies is a standard tool of the Commission,'' and the transition ''may certainly be accomplished gradually to permit the affected carriers, subscribers and state regulators to adjust to the new pricing system, thus preserving the efficient operation of the interstate telephone network during the interim.'' Thus, ''[i]t is reasonable for the FCC to take into account the ability of the industry to adjust financially to changing policies,'' and ''[i]nterim solutions may need to consider the past expectations of parties and the unfairness of abruptly shifting policies.'' In such circumstances, ''the FCC should be given 'substantial deference' when acting to impose interim regulations.''

555. In the Commission's judgment, the framework that it adopts carefully balances the potential industry disruption for both payers and recipients of intercarrier compensation as the Commission transitions to a new intercarrier compensation regime more broadly. It is particularly appropriate for the Commission to exercise its authority to craft a transition plan in this context, where the Commission is acting, as it has in prior orders, to reconcile the ''implicit tension between'' the Act's goals of ''moving toward cost-based rates and protecting universal service.''

2. Implementation Issues

556. *Role of Tariffs.* Under today's intercarrier compensation system, carriers typically tariff their access charges. To avoid disruption of these well-established relationships, the Commission preserves a role for tariffing charges for toll traffic during the transition. Pursuant to the transition set forth above, the Commission permits LECs to tariff the default charges for intrastate toll traffic at the state level, and for interstate toll traffic with the Commission, in accordance with the timetable and rate reductions set forth above. At the same time, carriers remain free to enter into negotiated agreements that differ from the default rates established above, consistent with the negotiated agreement framework that Congress envisioned for the 251(b)(5) regime to which access traffic is transitioned. As an interim matter, this new regime will facilitate the benefits that can arise from negotiated arrangements, while also allowing for revenue predictability that has been associated with tariffing. In some respects the allowance of some tariffing may be similar to the wireless

termination tariffs for non-access traffic addressed in the Commission's 2005 *T-Mobile Order, Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs,* CC Docket No. 01–92, Declaratory Ruling and Report and Order, 70 FR 49401, Mar. 30, 2005 (*T-Mobile Order*). In that decision, the Commission prohibited the filing of state tariffs governing the compensation for terminating non-access CMRS traffic because they were inconsistent with the negotiated agreement framework contemplated by Commission precedent and by Congress when it enacted 47 U.S.C. 251. The Commission does not, however, believe that the policies underlying the prohibition of wireless termination tariffs for non-access traffic in the *T-Mobile Order* preclude the allowance of certain tariffing of intercarrier compensation for toll traffic. Finally, during the transition, traffic that historically has been addressed through interconnection agreements will continue to be so addressed.

557. Because carriers will be revising intrastate access tariffs to reduce rates for certain terminating switched access rate elements, and capping other intrastate rates, states will play a critical role implementing and enforcing intercarrier compensation reforms. The Commission does not cap intrastate originating access for rate-of-return carriers in this R&O. The Commission notes that states remain free to do so, provided states support any recovery that may be necessary, and such a result would promote the goals of comprehensive reform adopted in the R&O. State oversight of the transition process is necessary to ensure that carriers comply with the transition timing and intrastate access charge reductions outlined above. Under the Commission's framework, rates for intrastate access traffic will remain in intrastate tariffs. As a result, to ensure compliance with the framework and to ensure carriers are not taking actions that could enable a windfall and/or double recovery, state commissions should monitor compliance with the rate transition; review how carriers reduce rates to ensure consistency with the uniform framework; and guard against attempts to raise capped intercarrier compensation rates, as well as unanticipated types of gamesmanship. Consistent with states' existing authority, therefore, states could require carriers to provide additional information and/or refile intrastate access tariffs that do not follow the framework or rules adopted in this R&O. Moreover, state commissions will continue to review and approve interconnection agreements and associated reciprocal compensation rates to ensure that they are consistent with the new federal framework and transition. Thus, the Commission will be working in partnership with states to monitor carriers' compliance with its rules, thereby ensuring that consumers throughout the country will realize the tremendous benefits of ICC reform.

558. *Price Cap Conversions.* The Commission has regulated the provision of interstate access services by incumbent LECs, pursuant to either rate-of-return regulation or price cap regulation. The Commission has previously described the benefits that flow from the adoption of price cap regulation, and has allowed carriers to convert from rate-of-return to price cap regulation. The Commission continues to encourage carriers to undergo such conversions. The application of the Commission's reforms to proposed conversions will be addressed in the context of those proceedings based on the individualized situation of the carrier seeking to convert to price cap regulation. Similarly, transition issues related to rate-of-return affiliates of price cap holding companies will be addressed in the context of such proceedings.

559. *Existing Agreements.* With respect to the impact of the Commission's reforms on existing agreements, the Commission emphasizes that its reforms do not abrogate existing commercial contracts or interconnection agreements or otherwise require an automatic ''fresh look'' at these agreements. As the Commission has recognized, both telecommunications carriers and their customers often benefit from long-term contracts—providers gain assurance of cost recovery, and customers (whether wholesale or end-users) may receive discounted and stable prices—and the Commission tries to avoid disrupting such contracts. Indeed, giving carriers or customers an automatic fresh look at existing commercial contracts or interconnection agreements could result in a windfall for entities that entered long-term arrangements in exchange for lower prices, as compared to other entities that avoided the risk of early termination fees by electing shorter contract periods at higher prices. Accordingly, the Commission declines to require that these existing arrangements be reopened in connection with the reforms in this R&O, and leaves such issues to any change-of-law provisions in these arrangements and commercial negotiations among the parties. The Commission does, however, make clear that its actions in this R&O constitute a change in law, and the Commission recognizes that existing agreements may contain change-of-law provisions that allow for renegotiation and/or may contain some mechanism to resolve disputes about new agreement language implementing new rules.

560. *Dismissal as Moot of Pending Petitions.* The reforms adopted by this R&O render moot a petition filed by Embarq in 2008 and a petition filed by Michigan CLECs in 2010. The actions taken in this R&O, which set forth a comprehensive intercarrier compensation plan, render the Embarq petition moot and, the Commission further notes that CenturyLink has subsequently filed a letter seeking to withdraw the petition. The Michigan CLECs filed a petition asking the Commission to preempt Michigan's 2009 access restructuring law, which mandated intrastate access rate reductions and created an access restructuring mechanism that was unavailable to CLECs. Here, again, the actions the Commission takes in this R&O, which include bringing intrastate access traffic within 47 U.S.C. 251(b)(5) and subjecting that traffic to the above transition, address many of the access rates elements at issue in the Michigan CLECs' petition. To the extent that states have established rate reduction transitions for rate elements not reduced in this R&O, nothing in this R&O impacts such transitions. Nor does this R&O prevent states from reducing rates on a faster transition provided that states provide any additional recovery support that may be needed as a result of a faster transition. The Commission therefore dismisses the petition as the reforms in this R&O and the accompanying *USF/ICC Transformation FNPRM* will render it moot.

3. Other Rate Elements

561. *Originating Access.* The Commission finds that originating charges also should ultimately be subject to the bill-and-keep framework. Some commenters urge that originating charges be retained, at least on an interim basis. Other parties express concerns with the retention of originating access charges. The legal framework underpinning the Commission's decision is inconsistent with the permanent retention of originating access charges. In the *Local Competition First Report and Order,* the Commission observed that 47 U.S.C. 251(b)(5) does not address charges payable to a carrier that originates traffic and concluded, therefore, that such

charges were prohibited under that provision of the Act. Accordingly, the Commission finds that originating charges for all telecommunications traffic subject to its comprehensive intercarrier compensation framework should ultimately move to bill-and-keep. Notwithstanding this conclusion, the Commission takes immediate action to cap all interstate originating access charges and intrastate originating access charges for price cap carriers. Although the Commission does not establish the transition for rate reductions to bill-and-keep in this R&O, it seeks comment in the *USF/ICC Transformation FNPRM* on the appropriate transition and recovery mechanism for ultimately phasing down originating access charges. Meanwhile, the Commission prohibits carriers from increasing their originating interstate access rates above those in effect as the effective date of the rules. This prohibition on increasing access rates also applies to any remaining Primary Interexchange Carrier Charge in section 69.153 of the Commission's rules, 47 CFR 69.153, the per-minute Carrier Common Line charge in section 69.154 of the Commission's rules, 47 CFR 69.154, and the per-minute Residual Interconnection Charge in section 69.155 of the Commission's rules, 47 CFR 69.155. Price cap carriers and CLECs that benchmark to price cap rates are also prohibited from increasing their originating intrastate access rates. A cap on interstate originating access represents a first step as part of the measured transition toward comprehensive reform and helps to ensure that the initial reforms to terminating access are not undermined. Thus, interstate originating switched access rates will remain capped and may not exceed current levels until further action by the Commission addressing the appropriate transition path for this traffic.

562. *Transport.* Similarly, the transition path set forth above begins the transition for transport elements, including capping such rates, but does not provide the transition for all transport charges for price cap or rate-of-return carriers to bill-and-keep. For price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem. However, transport charges in other instances, *i.e.,* where the terminating carrier does not own the tandem, are not addressed at this time. Meanwhile, under the transition for rate-of-return carriers, which is consistent with the transition path put forward by the Joint Letter, interstate and intrastate transport charges will be capped at interstate levels in effect as of the effective date of the rules through the transition.

563. Ultimately, the Commission agrees with concerns raised by commenters that the continuation of transport charges in perpetuity would be problematic. For example, the record contains allegations of ''mileage pumping,'' where service providers designate distant points of interconnection to inflate the mileage used to compute the transport charges. Further, Sprint alleges that current incumbent LEC tariffed charges for transport are ''very high and constitute a sizeable proportion of the total terminating access charges ILECs impose on carriers today.'' More fundamentally, if transport rates are allowed to persist, it gives incumbent LECs incentives to retain a TDM network architecture and therefore likely serves as a disincentive for incumbent LECs to establish more efficient interconnection arrangements such as IP. As a result, commenters suggest that perpetuating high transport rates could undermine the Commission's reform effort and lead to anticompetitive behavior or regulatory arbitrage such as access stimulation. The Commission therefore seeks comment on the appropriate treatment of, and transition for, all tandem switching and transport rates in the *USF/ICC Transformation FNPRM.*

564. *Other Rate Elements.* Finally, the Commission notes that the transition set forth above caps rates but does not provide the transition path for all rate elements or other charges, such as dedicated transport charges. In the *USF/ICC Transformation FNPRM,* the Commission seeks comment on what transition should be set for these other rate elements and charges as part of comprehensive reform, and how the Commission should address those elements.

4. Suspension or Modification Under Section 251(f)(2), 47 U.S.C. 251(f)(2)

565. Section 251(f)(2), 47 U.S.C. 251(f)(2), provides that a LEC with fewer than two percent of the country's subscriber lines may petition its state commission for a suspension or modification of the application to it of a requirement or requirements of 47 U.S.C. 251(b) or (c), and that the state commission shall grant such petition where it makes certain determinations. That provision further states that the state commission must act on the petition within 180 days and ''may suspend enforcement of the requirement or requirements to which the petition applies'' pending action on the petition. Parties aggrieved by a state commission decision under 47 U.S.C. 251(f) may seek review of that decision in federal district court—under 47 U.S.C. 252(e)(6) of the Act, if the decision is rendered in the course of arbitrating an interconnection agreement, or under general ''federal question'' jurisdiction if the decision arises outside of the arbitration context.

566. In *Iowa Utilities Board v. FCC,* the Eighth Circuit held that state commissions had ''exclusive authority'' to make decisions under 47 U.S.C. 251(f) and that the FCC lacked authority to prescribe ''governing standards for such determinations.'' On review, however, the Supreme Court reversed the Eighth Circuit's decision with regard to the Commission's general authority to implement Title II of the Act. The Court stated that ''the grant in section 201(b) [of the Act] means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include sections 251 and 252.'' Accordingly, the Commission finds that this general grant of rulemaking authority recognized by the Court includes the authority to adopt reasonable rules construing and implementing 47 U.S.C. 251(f).

567. In light of the Supreme Court's holding, the Commission may adopt specific, binding prophylactic rules that give content to, among other things, the ''public interest, convenience, and necessity'' standard that governs states' exercise of 47 U.S.C. 251(f)(2) authority to act on suspension/modification petitions. The Commission sought comment on specific rules in the *ICC/USF Transformation NPRM* and in the *2008 ICC NPRM.* However, given the limited record the Commission received in response, the Commission declines to adopt specific rules regarding 47 U.S.C. 251(f)(2) at this time. Nevertheless, the Commission cautions states that suspensions or modifications of the bill-and-keep methodology the Commission adopts in the R&O would, among other things, re-introduce regulatory uncertainty, shift the costs of providing service to a LEC's competitors and the competitor's customers, increase transaction costs for terminating calls, and undermine the efficiencies gained from adopting a uniform national framework. Accordingly, the Commission believes it highly unlikely that any attempt by a state to modify or suspend the federal bill-and-keep regime would be ''consistent with the public interest, convenience and necessity'' as required under 47 U.S.C. 251(f)(2)(B), and the Commission urges states not to grant any petitions seeking

to modify or suspend the bill-and-keep provisions it adopts herein. The Commission will monitor state action regarding the reforms it adopts in the R&O, and may provide specific guidance for states' review of 47 U.S.C. 251(f)(2) petitions in the future.

5. The Duty To Negotiate Interconnection Agreements

568. Because the Commission moves traffic from the access charge regime to the 47 U.S.C. 251(b)(5) framework, where payment terms are agreed to pursuant to an interconnection agreement, incumbent LECs have asked the Commission to make clear that they have the ability to compel other LECs and CMRS providers to negotiate to reach an interconnection agreement. This is a concern for incumbent LECs because under sections 251 and 252 of the Act, 47 U.S.C. 251, 252, although LECs and CMRS providers can compel incumbent LECs to negotiate in good faith and invoke arbitration if negotiations fail, incumbent LECs generally lack the ability to compel other LECs and CMRS providers to negotiate for payment for traffic that is not exchanged pursuant to a tariff. In particular, parties have asked the Commission to expand upon the Commission's findings in the *T-Mobile Order,* which found that incumbent LECs can compel CMRS providers to negotiate to reach an interconnection agreement.

569. After reviewing the record, the Commission concludes it is appropriate to clarify certain aspects of the obligations the Commission adopted in the *T-Mobile Order.* As a result, in this section, the Commission reaffirms the findings in the *T-Mobile Order* that incumbent LECs can compel CMRS providers to negotiate in good faith to reach an interconnection agreement, and makes clear the Commission's authority to do so pursuant to 47 U.S.C. 332, 201, 251 as well as its ancillary authority under 4(i). The Commission also clarifies that this requirement does not impose any 47 U.S.C. 251(c) obligations on CMRS providers, nor does it extend section 252 of the Act, 47 U.S.C. 252, to CMRS providers.

570. The Commission declines, at this time, to extend the obligation to negotiate in good faith and the ability to compel arbitration to other contexts. For example, the *T-Mobile Order* did not address relationships involving competitive LECs or among other interconnecting service providers. Subsequently, competitive LECs have requested that the Commission expand the scope of the *T-Mobile Order* and require CMRS providers to negotiate agreements with competitive LECs under the section 251/252 framework, just as they do with incumbent LECs. In addition, rural incumbent LECs urged the Commission to ''extend the T-Mobile Order to give ILECs the right to demand interconnection negotiations with all carriers.'' The Commission does not believe the record is currently sufficient to justify doing so, but ask further questions about the policy implications as well as the Commission's legal authority to do so in the *USF/ICC Transformation FNPRM.*

a. Petitions for Reconsideration of the *T-Mobile Order*

571. As described below, the Commission resolves the challenges several parties have made to the Commission's authority to adopt sections 20.11(d) and (e), 47 CFR 20.11(d), (e). The Commission concludes that the Commission has both direct and ancillary authority to permit incumbent LECs to request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures of section 252 of the Act, 47 U.S.C. 252. Given this clarification of the Commission's exercise of its authority, the Commission finds that these requirements, codified in section 20.11(e) of the Commission's rules, 47 CFR 20.11(e), are consistent with the Act. The Commission also concludes that the adoption of those requirements in the *T-Mobile Order* was procedurally proper, and it consequently denies requests to reconsider that rule.

i. Authority To Adopt Section 20.11(e) of the Commission's Rules

572. In its petition for reconsideration, RCA claims that the Commission lacked authority to adopt section 20.11(e) of the Commission's rules, 47 CFR 20.11(e), arguing that the Commission cannot directly apply 47 U.S.C. 251(c) of the Act to CMRS providers by requiring them to interconnect directly with ILECs, or submit to compulsory arbitration pursuant to 47 U.S.C. 252 of the Act. RCA misinterprets the nature of the Commission's action in the *T-Mobile Order,* however, viewing it as the direct application of 47 U.S.C. 251(c) and 252 to CMRS providers. Properly understood, the Commission did not apply 47 U.S.C. 251(c) and 252 in that manner. Rather, the *T-Mobile Order* obligations imposed on CMRS providers, codified in section 20.11(e) of the Commission's rules, 47 CFR 20.11(e), implement the Commission's authority under sections 201 and 332, and are reasonably ancillary to the implementation of its statutorily mandated responsibilities under 47 U.S.C. 201, 251(a)(1), 251(b)(5) and 332.

573. *Direct Authority Under Sections 201 and 332.* Sections 201 and 332 of the Act, 47 U.S.C. 201, 332, provide a basis for rules allowing an incumbent LEC to request interconnection, including associated compensation, from a CMRS provider and invoke the negotiation and arbitration procedures set forth in 47 U.S.C. 252 of the Act. Section 332(c)(1)(B), 47 U.S.C. 332(c)(1)(B), states that ''[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service'' pursuant to the provisions of section 201 of the Act, 47 U.S.C. 201. Section 201(a), 47 U.S.C. 201(a), provides that ''every common carrier engaged in interstate or foreign communication by wire or radio'' shall: (i) ''furnish such communication service upon reasonable request therefore;'' and (ii) ''in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.'' Although 47 U.S.C. 201(a) requires an opportunity for hearing, the Commission's previous use of notice and comment procedures to satisfy the 47 U.S.C. 201 hearing requirement was expressly confirmed by the U.S. Court of Appeals for the Third Circuit. As discussed below, the Commission provided notice and received comment here. Consequently, the Commission rejects arguments that the Commission cannot rely on its 47 U.S.C. 201(a) authority to require interconnection through a rulemaking proceeding. The Commission has long relied on these provisions to regulate the terms of LEC–CMRS interconnection, including associated compensation.

574. Historically, interconnection requirements imposed under these provisions were understood to encompass not only the technical linking of networks, but also the associated compensation. For example, intercarrier compensation under the access charge regime had, as its origin, the need to ''ensur[e] *interconnection* at reasonable rates, as required under Section 201 of the Act, 47 U.S.C. 201.'' Likewise, the Commission previously has specified not only the intercarrier compensation required in conjunction

with interconnection by, and with, CMRS providers, but also the mechanism for implementing those compensation obligations. Even prior to the adoption of section 332 of the Act, 47 U.S.C. 332, the Commission relied on its section 201 authority to require LECs and CMRS providers to negotiate interconnection agreements in good faith governing the physical interconnections among these carriers, as well as the associated charges. Following the adoption of 47 U.S.C. 332, the Commission affirmed that ''LECs [must] provide reasonable and fair interconnection for all commercial mobile radio services,'' including ''mutual compensation'' by each interconnected carrier for ''the reasonable costs incurred by such providers in terminating traffic'' that originated on the other carrier's facilities. At that time the Commission retained its then-existing implementation framework, which primarily relied on negotiated agreements with only a limited role expressly identified for tariffing, while observing that this framework would be subject to ''review and possible revision.''

575. In the *T-Mobile Order* the Commission built upon the existing rules governing interconnection and compensation for non-access traffic exchanged between LECs and CMRS providers, incorporating the right of incumbent LECs to request interconnection with a CMRS provider, including associated compensation, and adopting an implementation mechanism. It established obligations surrounding the pre-existing duty both CMRS providers and ILECs have to establish connections between their respective networks, as well as exercising the Commission's authority over the pre-existing tariffing regime. The Commission finds, in light of the analysis and precedent above, that these actions are supported by the Commission's authority under sections 201 and 332 of the Act, 47 U.S.C. 201, 332.

576. *Ancillary Authority.* Ancillary authority also supports the *T-Mobile Order* requirement that CMRS providers comply with the negotiation and arbitration procedures set forth in section 252 of the Act, 47 U.S.C. 252. Ancillary jurisdiction may be employed, at the Commission's discretion, when two conditions are satisfied: ''(1) The Commission's general jurisdictional grant under Title I of the Act covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.'' Both incumbent LECs and CMRS providers are telecommunications carriers, over which the Commission has clear jurisdiction. Further, to meaningfully implement intercarrier compensation requirements established pursuant to 47 U.S.C. 201, 332, and 251(b)(5) against the backdrop of mandatory interconnection and prohibitions on blocking traffic under 47 U.S.C. 201 and 251(a)(1), it was appropriate for the *T-Mobile Order* to impose requirements on CMRS providers beyond those expressly covered by the language of 47 U.S.C. 252.

577. As discussed above, pursuant to the authority of 47 U.S.C. 201 and 332, the Commission required interconnected LECs and CMRS providers to pay mutual compensation for the non-access traffic that they exchange. Even if 47 U.S.C. 201 and 332 were not viewed as providing direct authority to require that CMRS providers negotiate interconnection agreements with incumbents LECs for the exchange of non-access traffic under the 47 U.S.C. 252 framework, such action clearly is reasonably ancillary to the Commission's authority under those provisions, including the associated requirement to pay mutual compensation. Likewise, although 47 U.S.C. 251(b)(5) does not itself require CMRS providers to enter reciprocal compensation arrangements, the Commission brought intraMTA LEC–CMRS traffic within that framework. CMRS providers received certain benefits from this regime, and the Commission likewise anticipated that they would enter agreements under which they would both ''receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and * * * pay such compensation for certain traffic that they transmit and terminate to other carriers.'' Further, when carriers are indirectly interconnected pursuant to 47 U.S.C. 251(a)(1), as is often the case for LECs and CMRS providers, the carriers' interconnection arrangements can be relevant to addressing the appropriate reciprocal compensation, as the Commission recently recognized.

578. Given that the Commission prohibited tariffing of wireless termination charges for non-access traffic on a prospective basis, LECs needed to enter into agreements with CMRS providers providing for compensation under those regimes. Because LEC–CMRS interconnection is compelled by section 251(a)(1) of the Act, 47 U.S.C. 251(a)(1), and section 201 of the Act, 47 U.S.C. 201, also generally restricts carriers from blocking traffic, experience revealed that incumbent LECs would have limited practical ability to ensure that CMRS providers negotiated and entered such agreements because they could not avoid terminating the traffic even in the absence of an agreement to pay compensation. To ensure that the balance of regulatory benefits intended for each party under the LEC–CMRS interconnection and compensation regimes was not frustrated, it was necessary for the Commission to establish a mechanism by which incumbent LECs could request interconnection, and associated compensation, from CMRS providers, and ensure that those providers would negotiate those agreements, subject to an appropriate regulatory backstop. Thus, the Commission's 47 U.S.C. 154(i) authority also supports the *T-Mobile Order* requirement that CMRS providers negotiate interconnection agreements with incumbent LECs in good faith under the 47 U.S.C. 252 framework.

ii. Consistency With the Communications Act and the Administrative Procedures Act

579. In response to the concerns of some Petitioners, the Commission clarifies that the negotiation and arbitration requirements adopted for CMRS providers in the *T-Mobile Order* did not impose 47 U.S.C. 251(c) on CMRS providers. As commenters observe, with one exception, the requirements of 47 U.S.C. 251(c) expressly apply to incumbent LECs, and nothing in the *T-Mobile Order* attempts to extend those statutory requirements to CMRS providers. Nor does the reference to ''interconnection'' in § 20.11(e) of the Commission's rules, 47 CFR 20.11(e), apply to CMRS providers the statutory interconnection obligations governing incumbent LECs under 47 U.S.C. 251(c)(2). As the *T-Mobile Order* makes clear, the primary focus of that rule is to provide a mechanism to implement mutual compensation for non-access traffic between incumbent LECs and CMRS providers. However, the Commission's mutual compensation rules were adopted in the context of addressing LEC–CMRS interconnection, against a backdrop where ''interconnection'' regulations were understood to encompass not only the physical connection of networks, but also the associated intercarrier compensation. The Commission thus concludes that the definition of ''interconnection'' in § 51.5 of the Commission's rules, 47 CFR 51.5, is not dispositive of the interpretation of that term here. This rule was codified in part 20, not part 51. In addition, as the

Commission recently recognized, interconnection arrangements can bear on the resolution of disputes regarding reciprocal compensation under the 47 U.S.C. 252 framework. For example, while interconnection for the exchange of access traffic does not currently implicate 47 U.S.C. 251(b), an interconnection agreement for the exchange of reciprocal compensation traffic may contain terms relevant to determining appropriate rates under the statute and Commission rules. Moreover, § 20.11(e) of the Commission's rules, 47 CFR 20.11(e), does not supplant or expand the otherwise-applicable interconnection obligations for CMRS providers, as some contend. Thus, in response to a request by an incumbent LEC for interconnection under § 20.11(e), 47 CFR 20.11(e), CMRS providers are not required to enter into direct interconnection, and may instead satisfy their obligation to interconnect through indirect arrangements.

580. Similarly, the Commission did not interpret 47 U.S.C. 252 as binding on CMRS providers in the same manner as incumbent LECs. Rather, the Commission exercised its authority under 47 U.S.C. 201, 332, 251 and 154(i) to apply to CMRS providers' duties analogous to the negotiation and arbitration requirements expressly imposed on incumbent LECs under 47 U.S.C. 252. Although Congress did not expressly extend these requirements this broadly in section 252 of the Act, 47 U.S.C. 252, the Commission's subsequent experience with interconnection and intercarrier compensation, as described above, demonstrate the need for the duties imposed on CMRS providers in the *T-Mobile Order.* Thus, the Commission sensibly required CMRS providers to negotiate interconnection agreements with incumbent LECs in good faith, subject to arbitration by the state or, where the state lacks authority or otherwise fails to act, by the Commission. This approach also is supported by the concept of cooperative federalism, which is reasonably contemplated by sections 251 and 252 of the Act, 47 U.S.C. 251, 252. Because of the cooperative federalism embodied by 47 U.S.C. 251 and 252, and the role of the Commission in arbitrating interconnection disputes under the 47 U.S.C. 252 framework when states lack authority or otherwise fail to act, the Commission also reject claims that the *T-Mobile Order* constituted an unlawful delegation to the states.

581. The Commission also does not interpret silence in certain provisions of the Act regarding the duties of CMRS providers as precluding the Commission's action in the *T-Mobile Order.* For one, the Commission rejects requests that it ignore the Commission's experience with interconnection and intercarrier compensation and treat Congress' silence regarding the rights of incumbent LECs to invoke negotiation and arbitration in section 252 of the Act as equivalent to a statutory prohibition on extending such rights. Nor is the Commission persuaded that the language of 47 U.S.C. 332(c)(1)(B) precludes the Commission's extension of section 252-type procedures in this manner. RCA observes that 47 U.S.C. 332(c)(1)(B) only expressly discusses requests *by* CMRS providers for interconnection, and contends that precludes rules that would enable incumbent LECs to request interconnection *from* CMRS providers. As a threshold matter, the Commission observes that CMRS providers are required to interconnect with other carriers under 47 U.S.C. 251(a) of the Act, and that 47 U.S.C. 201 also provides the Commission authority to require CMRS providers to interconnect. The Commission thus disagrees with RCA's suggestion that 47 U.S.C. 332 should be read to preclude CMRS providers from being subject to such requests. With respect to the procedures for implementing such requests, however, it notes that the Commission previously has suggested ''that the procedures of section 252 are not applicable in matters involving section 251(a) alone.'' The Commission finds it appropriate to interpret the obligations imposed on CMRS providers under § 20.11(e), 47 CFR 20.11(e), in a manner consistent with the Commission's interpretation of the scope of the comparable requirements of 47 U.S.C. 252 from which it was derived. The Commission thus makes clear that § 20.11(e), 47 CFR 20.11(e), does not apply to requests for direct or indirect physical interconnection alone, but only requests that also implicate the rates and terms for exchange of non-access traffic.

582. The Commission further finds that the rules adopted in the *T-Mobile Order* were procedurally proper, contrary to the contentions of some petitioners. The Commission's 2001 *Intercarrier Compensation NPRM, Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01–92, Notice of Proposed Rulemaking, 66 FR 28410, May 23, 2001 (Intercarrier Compensation NPRM),* expressly sought ''comment on the rules [the Commission] should adopt to govern LEC interconnection arrangements with CMRS providers, whether pursuant to section 332, or other statutory authority,'' and ''on the relationship between the CMRS interconnection authority assigned to the Commission under sections 201 and 332, and that granted to the states under sections 251 and 252.'' The T-Mobile petition was incorporated into the docket in that proceeding, and in response to the Commission's request for comment on that petition, the issue of LECs being able to request interconnection negotiations with CMRS carriers was raised in the record. The Commission thus is not persuaded that parties lacked adequate notice and an opportunity to comment on the requirements ultimately imposed in § 20.11(e) of the Commission's rules, 47 CFR 20.11(e).

b. Requests for Clarification

583. A number of petitions seek clarification regarding the operation of the *T-Mobile Order* and/or the state of the law that existed prior to such decision. Except insofar as discussed above, or in the Commission's actions regarding wireless intercarrier compensation generally, the Commission declines to provide such clarification here. The Commission has discretion whether to issue a declaratory ruling, and rather than addressing these requests here, the Commission can address issues as they arise.

c. Extending *T-Mobile* to Other Contexts

584. The Commission declines, at this time, to extend the obligations enumerated in the *T-Mobile Order* to other contexts. As discussed above, the *T-Mobile Order* imposed on CMRS providers the duty to negotiate interconnection agreements with incumbent LECs under the 47 U.S.C. 252 framework. However, the *T-Mobile Order* did not address relationships involving competitive LECs or among other interconnecting service providers. Subsequently, competitive LECs have requested that the Commission expand the scope of the *T-Mobile Order* and require CMRS providers to negotiate agreements with competitive LECs under the section 251/252 framework, just as they do with incumbent LECs. In addition, rural incumbent LECs urged the Commission to ''give small carriers some legal authority to demand a negotiated interconnection agreement,'' and argued that ''the Commission should extend the *T-Mobile Order* to give ILECs the right to demand interconnection negotiations with all carriers.'' Policy and legal issues surrounding the possible extension of the *T-Mobile Order* are insufficiently addressed in the current record, and as

such the Commission seeks comment in the accompanying *USF/ICC Transformation FNPRM* on whether to extend *T-Mobile Order* obligations to other contexts.

585. However, this issue remains highly relevant notwithstanding the adoption of bill-and-keep as the default for reciprocal compensation between LECs and CMRS providers under 47 U.S.C. 251(b)(5). Under a bill-and-keep methodology, carriers still will need to address issues such as the ''edge'' for defining the scope of bill-and-keep, subject to arbitration where they cannot reach agreement. These issues do not lend themselves well to one-size-fits-all approaches as would be required under a tariffing regime. Imposing a duty to negotiate, subject to arbitration, will negate the need for Commission intervention in this context and will facilitate more market-based solutions. Because the Commission also maintains its existing requirements regarding interconnection and prohibitions on blocking traffic, its experience suggests that carriers under no legal compulsion to come to the table may have no incentive to do so, thus frustrating the efforts of interconnected carriers to resolve open questions. The section 252 framework—already in place in other contexts under the terms of the Act—may be a reasonable mechanism to use to address these situations.

## X. Recovery Mechanism

### *A. Summary*

586. The recovery mechanism has two basic components. First, the Commission defines the revenue incumbent LECs are eligible to recover, which the Commission refers to as ''Eligible Recovery.'' Second, the Commission specifies how incumbent LECs may recover Eligible Recovery through limited end-user charges and, where eligible and a carrier elects to receive it, CAF support. Competitive LECs are free to recover reduced revenues through end-user charges.

587. *Eligible Recovery.*

• Price cap incumbent LECs' Baseline for recovery will be 90 percent of their Fiscal Year 2011 (FY2011) interstate and intrastate access revenues for the rates subject to reform and net reciprocal compensation revenues. The Commission defines ''fiscal year'' 2011 for these purposes as October 1, 2010 through September 30, 2011. For price cap carriers' study areas that participated in the Commission's 2000 CALLS reforms, and thus have had interstate access rates essentially frozen for almost a decade, Price Cap Eligible Recovery (*i.e.,* revenues subject to the recovery mechanism) will be the difference between: (a) the Price Cap Baseline, subject to 10 percent annual reductions; and (b) the revenues from the reformed intercarrier compensation rates in that year, based on estimated MOUs multiplied by the associated default rate for that year. For carriers that have more recently converted to price cap regulation and did not participate in the CALLS plan, the Commission phases in the reductions after five years, so that the initial 10 percent reduction occurs in year six. Estimated MOUs will be calculated as FY2011 minutes for all price cap carriers, and will be reduced 10 percent annually for each year of reform to reflect MOU trends over the past several years. Because such demand reductions have applied equally to all price cap carriers, the Commission does not make any distinction among price cap carriers for purposes of this calculation. The Commission adopts this straight line approach to determining MOUs, rather than requiring carriers to report actual minutes each year, because it will be more predictable for carriers and less burdensome to administer.

• Rate-of-return incumbent LECs' Baseline for recovery, which is somewhat more complex, will be based on their 2011 interstate switched access revenue requirement (which is recovered today through interstate access revenues and local switching support (LSS), if applicable), plus FY2011 intrastate terminating switched access revenues and FY2011 net reciprocal compensation revenue. Rate-of-Return Eligible Recovery will be the difference between: (a) the Rate-of-Return Baseline, subject to five percent annual reductions; and (b) the revenues from the reformed intercarrier compensation rates in that year, based on actual MOUs multiplied by the associated default rate for that year. The annual Rate-of-Return Baseline reduction used in the calculation of Rate-of-Return Eligible Recovery revenue reflects two considerations. First, in recent years rate-of-return carriers' interstate switched access revenue requirements have been declining on average at approximately three percent annually due to declining regulated costs, with corresponding declines in interstate access revenues; such declines are projected to continue each year for the next several years. In addition, rate-of-return carriers' intrastate revenues have been declining on average at 10 percent per year as MOU decline, with state regulatory systems that typically do not have annual, automatic mechanisms to increase rates to account for declining demand. Weighing these considerations, the Commission finds it appropriate to reduce rate-of-return carriers' Eligible Recovery by five percent annually. This approach to revenue recovery will put most rate-of-return carriers in a better financial position—and will provide substantially more certainty—than the *status quo* path absent reform, where MOU declines would continue to be large and unpredictable and would significantly reduce intrastate revenues. This approach also provides carriers with the benefit of any costs savings and efficiencies they can achieve by enabling carriers to retain revenues even if their switched access costs decline. And it avoids creating misaligned incentives for carriers to inefficiently increase costs to grow their intercarrier compensation revenue requirement and thereby draw more access replacement from the CAF.

588. *Recovery from End Users.* Consistent with past ICC reforms, the Commission permits carriers to recover a limited portion of their Eligible Recovery from their end users through a monthly fixed charge called an Access Recovery Charge or ''ARC.'' The Commission takes measures to ensure that any ARC increase on consumers does not impact affordability of rates, including by limiting the annual increase in consumer ARCs to $0.50. The Commission also makes clear that carriers may not charge an ARC on any Lifeline customers. This charge is calculated independently from, and has no bearing on, existing SLCs, although for administrative and billing efficiencies the Commission does permit carriers to combine the charges as a single line item on a bill.

• *Recovery Fairly Balanced Across All End Users.* The Commission does not, as some commenters urge, put the entire burden of access recovery on consumers. Rather, consistent with the Commission's approach in past reforms, under which business customers also contributed to offset declines in access charges, the Order balances consumer and single-line business recovery with recovery from multi-line businesses. The Commission also adopts additional measures to protect consumers of incumbent LECs that elect not to receive CAF funding, by limiting the proportion of Eligible Recovery that can come from consumers and single-line businesses based on a weighted share of a carrier's residential versus business lines. This limitation is only necessary for carriers that are not eligible or elect not to receive CAF funding because carriers recovering from CAF will have the full ARC imputed to them.

• *Protections for Consumers Already Paying Rebalanced Rates.* To protect consumers, including in states that have already rebalanced rates through prior state intercarrier compensation reforms, the Commission adopts a Residential Rate Ceiling that prohibits imposing an ARC on any consumer paying an inclusive local monthly phone rate of $30 or more.

• *Protections for Multi-Line Businesses.* Although the Commission does not adopt a business rate ceiling, nor were there proposals in the record to do so, the R&O takes measures to ensure that multi-line businesses' total SLC plus ARC line items are just and reasonable. The current multi-line business SLC is capped at $9.20. Some carriers, particularly smaller rate of return and mid-size carriers, are at or near the cap, while larger price cap carriers may have business SLCs as low as $5.00. To minimize the burden on multi-line businesses, the Commission does not permit LECs to charge a multi-line business ARC where the SLC plus ARC would exceed $12.20 per line. This limits the ARC for multi-line businesses for entities at the current $9.20 cap to $3.00. The Commission finds this limitation for multi-line businesses consistent with the reasons the Commission places an overall limit on the residential ARCs discussed below.

• To recover Eligible Recovery, price cap incumbent LECs are permitted to implement monthly end user ARCs with five annual increases of no more than $0.50 for residential/single-line business consumers, for a total monthly ARC of no more than $2.50 in the fifth year; and $1.00 (per month) per line for multi-line business customers, for a total of $5.00 per line in the fifth year, provided that: (1) Any such residential increases would not result in regulated residential end-user rates that exceed the $30 Residential Rate Ceiling; and (2) any multi-line business customer's total SLC plus ARC does not exceed $12.20. The monthly ARC that could be charged to any particular consumer cannot increase by more than $0.50 annually, and in fact the Commission estimates that the average increase in the monthly ARC that would be permitted across all consumer lines over the period of reform, based on the amount of eligible recovery, is approximately $0.20 annually. However, the Commission expects that not all carriers will elect or be able to charge the ARC due in part to competitive pressures, and the Commission therefore predicts the average actual increase across all consumers to be approximately $0.10–$0.15 each year, peaking at approximately $0.50 to $0.90 after five or six years, and declining thereafter.

• To recover Eligible Recovery, rate-of-return incumbent LECs are permitted to implement monthly end user ARCs with six annual increases of no more than $0.50 (per month) for residential/single-line business consumers, for a total ARC of no more than $3.00 in the sixth year; and $1.00 (per month) per line for multi-line business customers for a total of $6.00 per line in the sixth year, provided that: (1) Such increases would not result in regulated residential end-user rates that exceed the $30 Residential Rate Ceiling; and (2) any multi-line business customer's total SLC plus ARC does not exceed $12.20.

• Competitive LECs, which are not subject to the Commission's end-user rate regulations today, may recover reduced intercarrier revenues through end-user charges.

589. *Explicit Support from the CAF.* The Commission has recognized that some areas are uneconomic to serve absent implicit or explicit support. ICC revenues have traditionally been a means of having other carriers (who are now often competitors) implicitly support the costs of the local network. As the Commission continues the transition from implicit to explicit support that the Commission began in 1997, recovery from the CAF for incumbent LECs will be provided to the extent their Eligible Recovery exceeds their permitted ARCs. For price cap carriers that elect to receive CAF support, such support is transitional, phasing out over three years beginning in 2017. This phase out reflects, in part, the fact that such carriers will be receiving additional universal service support from the CAF that will phase in over time and is designed to reflect the efficient costs of providing service over a voice and broadband network. For rate-of-return carriers, ICC-replacement CAF support will phase down as Eligible Recovery decreases over time, but will not be subject to other reductions.

• All incumbent LECs that elect to receive CAF support as part of this recovery mechanism will be subject to the same accountability and oversight requirements adopted above. For rate-of-return carriers, the obligations for deploying broadband upon reasonable request specified in the CAF section above apply as a condition of receiving ICC-replacement CAF. For price cap carriers that elect to receive ICC-replacement CAF support, the Commission requires such support be used for building and operating broadband-capable networks used to offer their own retail service in areas substantially unserved by an unsubsidized competitor of fixed voice and broadband services. Thus, all CAF support will directly advance broadband deployment. This approach is consistent with carriers' representations that they currently use ICC revenues for broadband deployment.

• Competitive LECs, which have greater freedom in setting rates and determining which customers they wish to serve, will not be eligible for CAF support to replace reductions in ICC revenues.

*B. Policy Approach to Recovery*

590. As discussed above, the Commission's reforms seek to enable more widespread deployment of broadband networks, to foster the transition to IP networks, and to reduce marketplace distortions. The Commission recognizes that this transition affects different—but overlapping—segments of consumers in different ways. The Commission therefore seeks to adopt a balanced approach to reform that benefits consumers as a whole.

591. The overall reforms adopted in this R&O will enable expanded build-out of broadband and advanced mobile services to millions of consumers in rural America who do not currently have broadband service. These ICC reforms will fuel new investment by making incumbent LECs' revenue more predictable and certain. Indeed, incumbent LECs receiving CAF support as part of this recovery mechanism will have broadband deployment obligations.

592. In addition, as discussed above, the Commission anticipates that reductions in intercarrier compensation charges will result in reduced prices for network usage, thereby enabling more customers to use unlimited all-distance service plans or plans with a larger volume of long distance minutes, and also leading to increased investment and innovation in communications networks and services. Moreover, consistent with previous ICC reforms, which gave rise to substantial benefits from lower long distance prices, the Commission expects consumers to realize substantial benefits from this reform. This is especially true for customers of carriers for which intercarrier compensation charges historically have been a significant cost, such as wireless providers and long distance carriers.

593. Today, carriers receive payments from other carriers for carrying traffic on their networks at rates that are based on recovering the average cost of the

network, plus expenses, common costs, overhead, and profits, which together far exceed the incremental costs of carrying such traffic. The excess of the payments over the associated costs constitutes an implicit annual subsidy of local phone networks—a subsidy paid by consumers and businesses everywhere in the country. This distorts competition, placing actual and potential competitors that do not receive these same subsidies at a market disadvantage, and denying customers the benefits of competitive entry.

594. As the Commission pursues the benefits of reforming this system, it also seeks to ensure that the transition to a reformed intercarrier compensation and universal service system does not undermine continued network investment—and thus harm consumers. Consequently, the recovery mechanism is designed to provide predictability to incumbent carriers that had been receiving implicit ICC subsidies, to mitigate marketplace disruption during the reform transition, and to ensure that intercarrier compensation reforms do not unintentionally undermine the Commission's objectives for universal service reform. As the State Members observe, for example, ''[b]ankers and equity investors need to be able to see that both past and future investments will be backed by long-term support programs that are predictable.'' Similarly, they note that ''abrupt changes in support levels can harm consumers.'' Predictable recovery during the intercarrier compensation reform transition is particularly important to ensure that carriers ''can maintain/enhance their networks while still offering service to end-users at reasonable rates.'' Providing this stability does not require revenue neutrality, however.

595. Ultimately, consumers bear the burden of the inefficiencies and misaligned incentives of the current ICC system, and they are the ultimate beneficiaries of ICC reform. In structuring a reasonable transition path for ICC reform, the Commission seeks to balance fairly the burdens borne by various categories of end users, including consumers already paying high residential phone rates, consumers paying artificially low residential phone rates, and consumers that contribute to the universal service fund. Given nationwide disparities in local rates, it would be unfair to place the entire burden of the ICC transition on USF contributors. Just as the Commission has undertaken some intercarrier compensation reforms since the 1996 Act, shifting away from implicit intercarrier subsidies to end-user charges and universal service for recovery, some states have done so, as well. For example, Alaska has recently reformed its intrastate access system, establishing a Network Access Fee of $5.75, and increasing the role of the Alaska USF in subsidizing carriers' intrastate revenues with a state USF surcharge of 9.4 percent. Similarly, in Wyoming, which has also rebalanced rates, many rural customers face total charges for basic residential phone service in excess of $40 per month. The Nebraska Companies note total out-of-pocket local residential rates in that state already exceed $30 per month and should not be increased under any federal reforms contemplated by the Commission. Were the Commission to place the entire burden of ICC recovery on USF contributors, not only would consumers in each of these states be forced to contribute more, but USF, which is also supported through consumer contributions, could not stay within the budget discussed above. Meanwhile, other states have retained high intrastate intercarrier compensation rates to subsidize artificially low local rates—including some as low as $5 per month—effectively shifting the costs of those local networks to long distance and wireless customers across the country. In this context, the Commission finds it reasonable to allow carriers to seek some recovery from their own customers, subject to protection for consumers already paying rates for local phone service at or near $30 per month. The Commission also prevents carriers from charging an ARC on any Lifeline customers. The Commission also protects consumers by limiting any increases in consumer ARCs based upon actual or imputed increases in ARCs for business customers.

596. Some commenters argued that a variety of other regulatory considerations should alter the Commission's approach to recovery. For example, some express concerns about the level of existing federal subscriber line charges (SLCs) and special access rates and the extent to which carriers use the ratepayer- and universal service-funded local network to provide unregulated services. Although the Commission addresses certain of those issues below, the Commission is not persuaded that it should delay comprehensive intercarrier compensation and universal reform pending resolution of those outstanding questions, given the urgency of advancing the country's broadband goals. Nor does the Commission treat those issues as a static, unchanging backdrop to the reforms the Commission adopts in the R&O. In the *USF/ICC Transformation FNPRM,* the Commission reevaluates existing SLCs, including by seeking comment on whether SLCs today are set at an excessive level and should be reduced. To attempt to account for these concerns through reduced recovery here, particularly given potential changes that the Commission might consider, would unduly complicate—and significantly delay—badly needed reform that the Commission believes will result in significant consumer benefits. Consequently, the Commission believes that the consumer protections incorporated in the recovery mechanism and the transitional nature of the recovery strike the right balance for consumers as a whole.

597. Although the preceding has been focused on the substantial benefits of the reform to consumers, in crafting these reforms the Commission also took account of costs and benefits to industry. The Commission's reforms are minimally burdensome to carriers, imposing only minor incremental costs (*i.e.,* costs that would not be otherwise incurred without the reforms). The incremental costs of reform arise primarily from implementation, meaning that they are one-time costs of the transition that are not incurred on an ongoing basis. Further, these costs are heavily outweighed by efficiency benefits that carriers, as well as other industry participants and consumers, will experience. For carriers as well as end users, these benefits include significantly more efficient interconnection arrangements. Carriers will provide existing services more efficiently, make better pricing decisions for those services, and innovate more efficiently. Carriers' incentives to engage in inefficient arbitrage will also be reduced, and carriers will face lower costs of metering, billing, recovery, and disputes related to intercarrier compensation. Further, carriers, firms more generally, and consumers, facing more efficient prices for voice services, will make more use of voice services to greater effect, and more efficient innovation will result. In contrast to the transitional, one-time costs of reform, these efficiency benefits are ongoing and will compound over time.

### *C. Carriers Eligible To Participate in the Recovery Mechanism*

598. The Commission sought comment in the *USF/ICC Transformation NPRM* on whether recovery should be limited to certain carriers, or whether it should extend

more broadly to all LECs. The Commission extends the recovery mechanisms adopted in this R&O to all incumbent LECs because regulatory constraints on their pricing and service requirements otherwise limit their ability to recover their costs. If an incumbent LEC receives recovery of any costs or revenues that are already being recovered as Eligible Recovery through ARCs or the CAF, that LEC's ability to recover reduced switched access revenue from ARCs or the CAF shall be reduced to the extent it receives duplicative recovery. Incumbent LECs seeking revenue recovery will be required to certify as part of their tariff filings to both the FCC and to any state commission exercising jurisdiction over the incumbent LEC's intrastate costs that the incumbent LEC is not seeking duplicative recovery in the state jurisdiction for any Eligible Recovery subject to the recovery mechanism. To monitor and ensure that this does not occur, the Commission requires carriers participating in the recovery mechanism, whether ARC and/or CAF, to file data annually. All incumbent LECs have built out their networks subject to COLR obligations, supported in part by ongoing intercarrier compensation revenues. Thus, incumbent LECs have limited control over the areas or customers that they serve, having been required to deploy their network in areas where there was no business case to do so absent subsidies, including the implicit subsidies from intercarrier compensation. At the same time, incumbent LECs generally are subject to more statutory and regulatory constraints than other providers in the retail pricing of their local telephone service. This includes both Commission regulation of the federal SLC and, frequently, state regulation of retail local telephone service rates as well. Thus, incumbent LECs are limited in their ability to increase rates to their local telephone service customers as a whole to offset reduced implicit subsidies.

599. Proposals to limit the recovery mechanism to only some classes of incumbent LECs, such as rate-of-return carriers, neglect these considerations, and in particular ignore that price cap incumbent LECs typically are also subject to regulatory constraints on end-user charges. The Commission does, however, recognize the differences faced by price cap and rate-of-return carriers under the *status quo* absent reform, and therefore adopts different recovery mechanisms for price cap and rate-of-return carriers, as explained below.

600. *Competitive LECs.* The Commission declines to provide an explicit recovery mechanism for competitive LECs. Unlike incumbent LECs, because competitive carriers have generally been found to lack market power in the provision of telecommunications services, their end-user charges are not subject to comparable rate regulation, and therefore those carriers are free to recover reduced access revenue through regular end-user charges. Some competitive LECs have argued that their rates are constrained by incumbent LEC rates (as supplemented by regulated end-user charges and CAF support); to the extent this is true, the Commission would expect this competition to constrain incumbent LECs' ability to rely on end-user recovery as well. Moreover, competitive LECs typically have not built out their networks subject to COLR obligations requiring the provision of service when no other provider will do so, and thus typically can elect whether to enter a service area and/or to serve particular classes of customers (such as residential customers) depending upon whether it is profitable to do so without subsidy.

601. In light of those considerations, the Commission disagrees with parties that advocate making the recovery mechanism the Commission adopts today available to all carriers, both incumbent and competitive, or to all carriers that currently receive access charge revenues. Competitive LECs are free to choose where and how they provide service, and their ability to recover costs from their customers is generally not as limited by statute or regulation as it is for incumbent LECs.

602. The Commission likewise declines to permit competitive LECs to reduce their access rates over a longer period of time than incumbent LECs. Instead, the Commission believes that the approach adopted in the *CLEC Access Charge Order,* 66 FR 27892, May 21, 2001, under which competitive LECs benchmark access rates to incumbent LECs' rates, is the better approach. That benchmarking rule was designed as a tool to constrain competitive LECs' access rates to just and reasonable levels without the need for extensive, ongoing accounting oversight and detailed evaluation of competitive LECs' costs. Deviating from that framework for purposes of the access reform transition would create new opportunities for arbitrage and require increased regulatory oversight, notwithstanding the fact that competitive LECs' access rates under the *CLEC Access Charge Order* were not based on any demonstrated level of need associated with those carriers' networks or operations. Nor has any commenter provided sufficient evidence to warrant departure from the benchmarking approach in this context. The Commission therefore declines to adopt a separate transition path for competitive LECs. Rather, consistent with the general benchmarking rule that had been used for interstate access service, competitive LECs will benchmark to the default rates of the incumbent LEC in the area they serve as specified under this R&O.

*D. Determining Eligible Recovery*

603. The first step in the recovery mechanism is defining the amount, called ''Eligible Recovery,'' that incumbent LECs will be given the opportunity to recover.

1. Establishing the Price Cap Baseline

604. *Costs vs. Revenues.* The *USF/ICC Transformation NPRM* sought comment on whether, in adopting a recovery mechanism, the Commission should base recovery on carrier costs, carrier revenues, or some combination thereof. For the reasons set forth below, for price cap carriers, the Commission will provide recovery based upon Fiscal Year 2011 (''FY2011'' or ''Baseline'') access revenues that are reduced as part of the reforms the Commission adopts, plus FY2011 net reciprocal compensation revenues. Selecting FY2011 ensures that gaming or any disputes or nonpayment that may occur after the release of the R&O does not impact carriers' Baseline revenues. For rate-of-return carriers, the Commission adopts a bifurcated approach based on: (1) Their 2011 interstate switched access revenue requirement; and (2) their FY2011 intrastate switched access revenues for services with rates to be reduced as part of the reforms the Commission adopts today, plus FY2011 net reciprocal compensation revenues. For a rate-of-return carrier that participated in the NECA 2011 annual switched access tariff filing, its 2011 interstate switched access revenue requirement will be its projected interstate switched access revenue requirement associated with the NECA 2011 annual interstate switched access tariff filing. For a rate-of-return carrier subject to § 61.38 of the Commission's rules, 47 CFR 61.38, that filed its own annual access tariff in 2010 and did not participate in the NECA 2011 annual switched access tariff filing, its 2011 interstate switched access revenue requirement will be its projected interstate switched access revenue requirement in its 2010 annual interstate switched access tariff filing. For a rate-of-return carrier subject to § 61.39 of the Commission's rules, 47

CFR 61.39, that filed its own annual switched access tariff in 2011, its revenue requirement will be its historically-determined annual interstate switched access revenue requirement filed with its 2011 annual interstate switched access tariff filing. Carriers have not demonstrated here that the existing intercarrier compensation revenues that the Commission uses as part of the Baseline calculations are confiscatory or otherwise unjustly or unreasonably low, and the Commission thus finds them to be an appropriate starting point for calculations under the recovery mechanism. To the extent that it subsequently is determined that an incumbent LEC's rates during the Baseline time period were not just and reasonable because they were too low, that carrier may seek additional recovery as needed through the Total Cost and Earnings Review Mechanism.

605. The Commission concludes that, where it lacks data, it is preferable to rely on revenues for determining recovery, as most commenters suggest. Defining carriers' costs today would be a burdensome undertaking that could significantly delay implementation of ICC reform. ''Cost'' would first have to be defined for these purposes, which is a difficult and time-consuming exercise. Indeed, price cap carriers' access charges are not based on current costs, and reliable cost information is not readily available. It is not clear that a reliable cost study based on current network configuration could be completed without undue delay, and doing so could be a complicated, time consuming, and expensive process, nor is it clear that a regulatory proceeding could come up with a definition of ''cost'' appropriate for recovery that is any better than the revenues approach the Commission adopts.

606. Moreover, the Commission has long recognized that intercarrier compensation rates include an implicit subsidy because they are set to recover the cost of the entire local network, rather than the actual incremental cost of terminating or originating another call. Given the Commission's commitment to a gradual transition with no flash cuts, the focus on revenues is appropriate to ensure carriers have a measured transition away from this implicit support on which they have been permitted to rely for many years.

607. For rate-of-return carriers, however, interstate switched access rates today are determined based on their interstate switched access revenue requirement, which is calculated in a manner that includes their ''regulated interstate switched access costs'' as the Commission has historically defined them, plus a prescribed rate of return on the net book value of their interstate switched access investment. Although rate-of-return carriers' revenue requirement might not be based on the precise measure of cost the Commission might otherwise adopt if it were starting anew, the Commission believes that using those carriers' interstate revenue requirement is sensible for purposes of determining their Eligible Recovery. For one, this information is readily available today. The Commission will carefully monitor material changes in cost allocation to categories where recovery remains based on actual cost to ensure that carriers do not shift costs properly associated with switched access. The Commission relies on the revenue requirement information available at the time of the initial tariff filings required to implement this recovery framework. This not only enables implementation of the recovery mechanism in the specified timeframes, but also addresses possible incentives to engage in gaming if carriers were able to increase the Rate-of-Return Baseline subsequently. If a carrier subsequently can demonstrate that it is materially harmed by the use of the projected, rather than final, 2011 interstate revenue requirement, it may seek a waiver of the rule specifying the Rate-of-Return Baseline to allow it to rely on an increased Rate-of-Return Baseline amount. Any such waiver would be subject to the Commission's traditional ''good cause'' waiver standard, rather than the Total Cost and Earnings Review specified below. In addition, use of the revenue requirement avoids implementation issues surrounding disputed or uncollectable interstate access revenues, providing greater predictability and substantially insulating small carriers from the harms of arbitrage schemes such as phantom traffic. This approach likewise prevents carriers that may have been earning in excess of their permitted rate of return from locking in those revenues and continuing such overearnings in perpetuity.

608. The Commission's approach is also consistent with the reforms to local switching support (LSS) the Commission adopts above. Historically, smaller carriers have received LSS as a subsidy for certain switching costs, effectively satisfying a portion of their interstate switched access revenue requirement. As discussed above, defining Eligible Recovery based on carriers' interstate switched access requirement allows the Commission to eliminate LSS as a separate universal service support mechanism for rate-of-return carriers. Eligible Recovery will be calculated from carriers' entire interstate switched access revenue requirement—whether it historically was recovered through access charges or LSS. Thus, in essence, carriers receiving LSS today will be eligible to receive support as part of their Eligible Recovery.

609. At the same time, although rate-of-return carriers do track certain costs to establish their interstate revenue requirement for switched access services, the same information is not readily available—or necessarily relevant—for intrastate switched access services or net reciprocal compensation. As a result, their Eligible Recovery will be based on their FY2011 intrastate switched access revenues addressed as part of the reform adopted today plus FY2011 net reciprocal compensation as of April 1, 2012. Rate-of-return carriers may elect to have NECA or another entity perform the annual analysis. The underlying data must be submitted to the relevant state commissions, to the Commission, and, for carriers that are eligible for and elect to receive CAF, to USAC.

610. The *USF/ICC Transformation NPRM* also sought comment on whether, under a revenues-based approach, to base carriers' recovery on gross intercarrier revenue or alternatively to use net intercarrier compensation, defined as ''a company's total intercarrier compensation revenue * * * less its intercarrier compensation expense'' including expenses paid by affiliates. The Commission received a mixed record in response. For the reasons described below, the approach the basis for a carrier's recovery the Commission adopts is neither a pure net revenue approach nor a pure gross revenue approach.

611. Although the Commission is sympathetic to requests to determine recovery based on net revenues, the Commission declines to do so for several reasons. Most importantly, the Commission is committed to a gradual transition with sufficient predictability to enable continued investment, and a net revenue approach could reduce that predictability, especially for non-facilities-based providers of long distance service who pay intercarrier compensation expenses indirectly through their purchase of wholesale long distance service from third parties.

612. There also are other difficulties, substantive and administrative, involved in calculating net revenues, which cannot be adequately addressed based on the information in the record. For example, although reductions in an individual incumbent LEC's ICC revenue is tied to a particular study

area, its affiliated IXC or wireless carrier may operate across multiple study areas, and the record does not suggest an administrable method for accurately identifying the cost savings associated with a particular incumbent LEC. Moreover, determinations of which affiliates should be counted, whether they are fully owned by the incumbent LEC or not, and to what extent, would be highly company-specific and could lead to inequitable treatment of similarly-situated carriers.

613. Such an approach also could create inefficient incentives during the transition regarding the acquisition of exchanges with ICC revenue reductions. For example, if an incumbent LEC has a large reduction in ICC revenue that is offset by affiliates' ICC cost savings, other carriers that lack affiliates with comparable ICC cost savings will be deterred from acquiring such exchanges if they would not be able to obtain additional recovery once it acquired that exchange. Conversely, if a carrier that lacked affiliates with comparable ICC cost savings *would* be entitled to new recovery if it acquired that exchange, a net revenue recovery approach could create inefficient incentives to acquire such exchanges given the potential for expanded CAF support (and thus also risk unconstrained growth in universal service).

614. Finally, although the record does not enable the Commission to determine the precise extent to which savings will be passed through from IXC to incumbent LEC, competition in the long distance market is likely to lead IXCs to pass on significant savings to incumbent LECs, rendering 100 percent gross revenues likely more generous than necessary for incumbent LECs. This is further complicated by incumbent LECs with affiliated IXCs that provide wholesale long distance service; counting the cost savings associated with wholesale long distance service against the recovery need for the affiliated incumbent LEC could create disincentives for the IXC to simultaneously pass through those cost savings in lower wholesale long distance rates, thereby reducing the potential for lower retail long distance rates.

2. Calculating Eligible Recovery for Price Cap Incumbent LECs

615. For price cap carriers, the recovery mechanism allows them to determine at the outset exactly how much their Eligible Recovery will be each year. The certainty regarding this recovery will enable price cap carriers to better manage the transition away from intercarrier compensation for recovery. The recovery approach will use historical trends regarding changes in demand to project future changes in demand (typically MOU), in conjunction with the default rates specified by the Commission's reforms, to determine Eligible Recovery. The Commission recognizes that its transitional intercarrier compensation framework sets default rates but leaves carriers free to negotiate alternatives. The Commission's approach to recovery relies on the default rates specified by the transition and will impute those rates for purposes of determining recovery, even if carriers negotiate a lower ICC rate with particular providers. Price Cap Eligible Recovery will be calculated from a Baseline of 90 percent of relevant FY2011 revenues, reduced on a straight-line basis at a rate of ten percent annually starting in year one (2012). This is consistent with the historical trajectory of decreasing MOU, with which price cap carriers' intercarrier compensation revenues decline today. The Commission concludes that this approach provides the necessary predictability for carriers without reducing their incentives to seek efficiencies or to maximize use of their network. The Commission will not annually true-up actual MOU for price cap carriers, instead likewise using a straight line decline of 10 percent relative to FY2011 MOU, which is a more predictable and administratively less burdensome approach. If MOU decline is less than 10 percent, carriers will receive the benefit of additional revenues. Conversely, if MOU decline accelerates, the risk of decreased revenues falls on the carriers. This allocation of risk incents carriers to be more efficient and retain customers.

616. Specifically, the Price Cap Baseline for price cap incumbent LECs' recovery will be the total switched access revenues that: (1) Are being reduced as part of reform adopted today; (2) are billed for service provided in FY2011; and (3) for which payment has been received by March 31, 2012. In addition, the Baseline will include net reciprocal compensation revenues for FY2011, based on net payments as of March 31, 2012. Carriers will be required to submit to the states data regarding all FY2011 switched access MOU and rates, broken down into categories and subcategories corresponding to the relevant categories of rates being reduced. With this information, states with authority over intrastate access charges will be able to monitor implementation of the recovery mechanism and compliance with the Commission's rules, and help guard against cost-shifting or double dipping by carriers. A price cap incumbent LEC that is eligible to receive CAF shall also file this information with USAC for purposes of implementing CAF ICC support, and the Commission delegates to the Wireline Competition Bureau authority to work with USAC to develop and implement processes for administration of CAF ICC support. These figures will establish the Base Minutes for each relevant category, and shall not include disputed revenues or revenues otherwise not recovered, for whatever reason, or the MOU associated with such revenues. Every carrier, in support of its annual access tariff filing, must also provide data necessary to justify its ability to impose an ARC, including the potential impact of the ARC for residential and multi-line business customers.

617. In determining the recovery mechanism, the Commission declines to provide 100 percent revenue neutrality relative to today's revenues. Rather, the Commission adopts an approach that is informed in part based on the *status quo* path facing price cap carriers today, where intercarrier compensation revenues decline as MOU decline, but also adopt some additional reductions for carriers that have had the benefit of interstate rates essentially being frozen for almost a decade, rather than being reduced annually as would typically occur under price cap regulation. Although the Commission adopts rules to help address concerns about traffic identification and establish a prospective intercarrier compensation framework for VoIP-PSTN traffic, absent the actions in this R&O, issues regarding compensation for that traffic would not have been resolved. Because the Commission is considering the *status quo* path absent reform, its recovery framework is based on historical declining demand notwithstanding reforms that potentially could mitigate some of that decline. Thus, for study areas of carriers that participated in the CALLS plan, which is approximately 95 percent of all price cap lines, and 90 percent of all lines across the country, the Commission adopts a 10 percent initial reduction in price cap incumbent LECs' Eligible Recovery to reflect the fact that these carriers' productivity gains have generally not been accounted for in their regulated rates for many years. Incentive regulation typically provides a mechanism for sharing the benefits of productivity gains with ratepayers. Prior to the *CALLS Order,* 65 FR 38684, June 21, 2000, the Commission included a productivity adjustment to the price cap indices to

ensure that savings would be shared. The *CALLS Order* did not include a productivity-related adjustment, however, providing instead a transitional ''X-factor'' designed simply to target the lower rates specified in that reform plan. After the targeted rates were achieved, which occurred by 2002 for 96 percent of study areas for carriers participating in the CALLS plan, the X-factor was set equal to inflation for the carriers originally subject to the CALLS plan and provided no additional consumer benefit from any productivity gains. As a result, study areas of price cap LECs that participated in the CALLS plan have had no X-Factor reductions to their price cap indices (PCIs), productivity-related or otherwise, for any PCI at least since 2004, and some price cap carriers' X-Factor reductions to their switched access-related PCIs stopped even earlier than that. Because price cap carriers reached their target rates at different times, the inflation-only X-factor took effect at different times for different price cap carriers. In the *CALLS Remand Order,* 68 FR 50077, August 20, 2003, the Commission concluded that price cap carriers serving 36 percent of total nationwide price cap access lines had achieved their target rates by their 2000 annual access filing. By the 2001 annual accessing filings the number grew to carriers serving 75 percent of total access lines, and by the 2002 annual access filings, carriers serving 96 percent of total access lines had achieved their target rates.

618. The record supports the use of a productivity factor such as the X-factor previously applied to price-cap carriers to reduce the amount carriers are eligible to recover through a recovery mechanism. A productivity factor would require recovery to decrease annually by a predetermined amount designed to capture for consumers the efficiencies found to apply generally to the industry. For example, if the Commission had maintained a five percent annual X-factor, rates for carriers that had reached their target rates would have been subject to caps reduced by five percent each year, so by today those rate caps would have been reduced by approximately 30 percent. Although the record does not contain the detailed analysis required to support a particular productivity factor that would apply on an ongoing basis, the Commission finds this initial 10 percent reduction for study areas of price cap LECs that participated in the CALLS Plan to be a conservative approach given the absence of any sharing of productivity or other X-factor reductions for a number of years, particularly when supplemented by other justifications for revenue reductions that the Commission does not otherwise account for in the standard recovery mechanism.

619. The Commission recognizes, however, that the industry has changed significantly since the 2000 *CALLS Order,* with some price cap CALLS carriers merging with or acquiring carriers that did not participate in the CALLS plan and/or newly converted price cap carriers acquiring study areas that did participate in the CALLS plan. For this reason, the Commission concludes it is necessary to apply the 10 percent reduction on a study area basis for CALLS participants, which the Commission collectively defines as ''CALLS study areas.'' Thus, the Commission will apply the 10 percent reduction to all price cap study areas that participated in the CALLS plan.

620. The Commission also recognizes, however, some price cap LECs converted to price cap regulation from rate-of-return regulation within the last five years and therefore such carriers did not participate in the CALLS plan. Thus, not all price cap carriers have had the benefit of productivity gains associated with reaching their target rates by 2002. Indeed, there are a few study areas that have converted to price cap regulation in the last two years and are still in the process of reducing their interstate rates to meet their CALLS target rate. As a result, for non-price cap study areas that were not part of the CALLS plan, the Commission believes a more incremental approach is warranted. In particular, for non-CALLS study areas, the Commission will delay the implementation of the 10 percent reduction to Eligible Recovery for five years, which is approximately the difference in time between when 96 percent of study areas of CALLS price cap carriers reached their target rates in 2002 and when the non-CALLS price cap carriers began converting from rate-of-return in 2007. The Commission believes doing so enables carriers that more recently converted to price cap regulation, carriers which are typically smaller, to have additional time to adjust to the intercarrier compensation rate reductions. In year six, the 10 percent reduction to Eligible Recovery will apply equally to all price cap carriers.

621. In addition, as discussed in the *USF/ICC Transformation NPRM,* Commission data and the record confirm that carriers are losing lines and experiencing a significant and ongoing decrease in minutes-of-use. Incumbent LEC interstate switched access minutes have decreased each year since 2000, as shown in the chart below.

**Interstate Switched Access Minutes for Incumbent LECs (In Billions)**

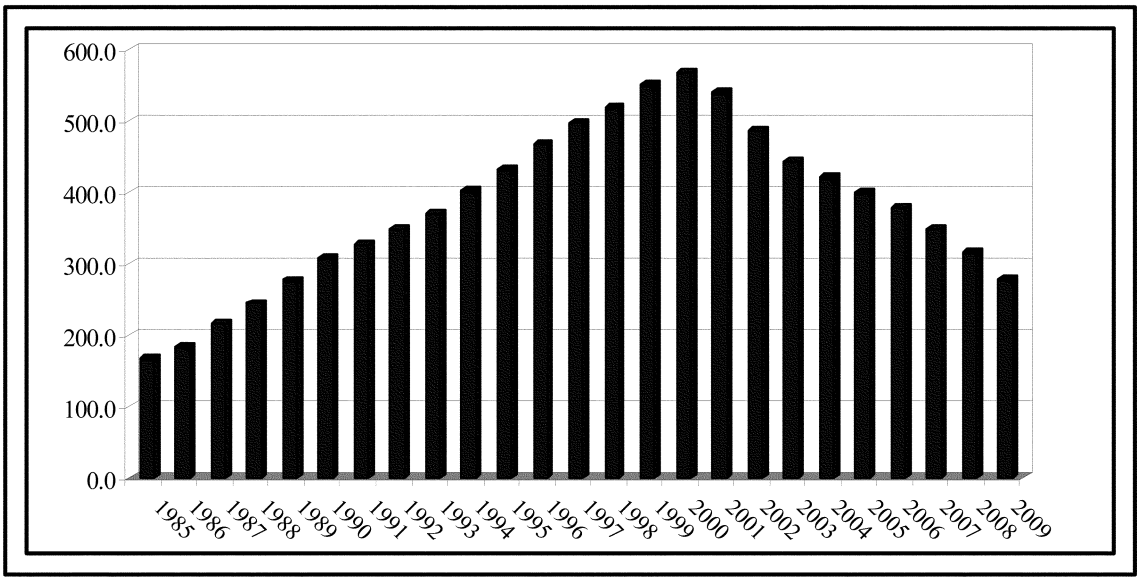



Figure 10

622. This represents an average annual decrease of over 10 percent and a total decrease of over 36 percent since 2006. Further, the percentage loss of MOU is accelerating—it increased each year between 2006 and 2010, and exceeded 13 percent in 2010. Based on the record, it is the Commission's predictive judgment that significant declines in MOU will continue. Accordingly, the Commission will reduce Price Cap Eligible Recovery by 10 percent annually for price cap carriers to reflect a conservative prediction regarding the loss of MOU, and associated loss of revenue, that would have occurred absent reform.

623. As a result, for price cap carriers, Base Minutes will be reduced by 10 percent annually beginning in 2012 to reflect decline in MOU. For example, Year One or ''Y1'' (2012) Intrastate Minutes will be .9 × Intrastate Base Minutes; Y2 (2013) Intrastate Minutes will be .81 × Intrastate Base Minutes (*i.e.,* .9 × .9 × Intrastate Base Minutes); *etc.*

624. *Price Cap Eligible Recovery.* Price Cap Eligible Recovery in a given year is the cumulative reduction in a particular intercarrier compensation rate since the base year multiplied by the pre-determined minutes for that rate for that year, as defined above.

*Price Cap Example.* A price cap carrier has a 2011 intrastate terminating access rate for transport and switching of $.0028, an interstate terminating access rate for transport and switching of $.0020, and 10,000,000 Intrastate Base Minutes. Its Eligible Recovery for intrastate switched access revenue would be determined as follows:

*Year 1.* Reduce intrastate terminating access rate for transport and switching, if above the carrier's interstate access rate, by 50 percent of the differential between the rate and the carrier's interstate access rate.

The carrier's Year 1 (Y1) Minutes equal 9,000,000 (10,000,000 × .9). Its intrastate terminating access rate for transport and switching, $.0028 in 2011, is reduced by $.0004 (($.0028–$.0020) × 50 percent)) to $.0024. Its Y1 Eligible Recovery is $3,600 ($.0004 × 9,000,000). For a CALLS study areas, Eligible Recovery would be reduced by an additional 10 percent to $3,240 ($3,600 × .9). For a non-CALLS study area, such reductions will begin in year six.

*Year 2.* Reduce intrastate terminating access rate for transport and switching, if above the carrier's interstate access rate, to the carrier's interstate access rate.

The carrier's Year 2 (Y2) Minutes equal 8,100,000 (9,000,000 × .9). Its intrastate terminating access rate for transport and switching is reduced by an additional $.0004 from $.0024 to $.0020, for a cumulative reduction of $.0008. Its Y2 Eligible Recovery is $6,480 ($.0008 × 8,100,000). For a CALLS study area, Eligible Recovery would be reduced by an additional 10 percent to $5,832 ($6,480 × .9). For a non-CALLS study area, such reductions will begin in year six.

This is a simplified example of the calculation of Price Cap Eligible Recovery for a price cap carrier's reduction in intrastate terminating access resulting from the reforms the Commission adopts for illustrative purposes only. It is not intended to encompass all necessary calculations applicable in determining Price Cap Eligible Recovery in the periods discussed in the example for all possible rates addressed by the R&O.

625. *This Approach to Recovery for Price Cap Carriers Provides Certainty and Encourages Efficiency.* Under the Act, the Commission has ''broad discretion in selecting regulatory tools, [which] specifically includes 'selecting methods * * * to make and oversee rates,' '' and is not compelled to follow any ''particular regulatory model.'' The approach to defining Price Cap Eligible Recovery continues to give those incumbent LECs incentives for efficiency while also providing greater predictability for carriers and consumers. Under price cap regulation, incumbent LECs already have significant incentives to control their costs associated with services provided to end-users, but have not had the same incentives to limit the costs imposed on IXCs for terminating calls on the price cap incumbent LECs' networks. These costs are ultimately borne by the IXCs' customers generally, rather than by the price cap LECs' customers specifically. By phasing out those termination charges and providing recovery in part through limited end-user charges, the Commission's reform will provide price cap LECs incentives to minimize such costs as they transition to broadband networks.

626. The Commission has considered a number of alternative proposals regarding the elimination of intercarrier terminating switched access charges and finds that the approach the Commission adopts constitutes a hybrid of a variety of proposals that best protects consumers while facilitating the reasonable transition to an all-

broadband network. Some commenters have argued that no additional recovery should be allowed absent a specific showing that denying recovery would constitute a taking. Based upon the record in this proceeding, the Commission concludes that such a denial would represent a flash-cut for price cap LECs, which is inconsistent with the Commission's commitment to a gradual transition and could threaten their ability to invest in extending broadband networks. The Commission also finds that denying any recovery pending the adjudication of a request for an exogenous low-end adjustment under the price cap rules would be unduly burdensome for carriers and for the Commission because of the number of claims the carriers would be required to file and the Commission would be required to adjudicate. The definition of Price Cap Eligible Recovery for both CALLS and non-CALLS study areas gives predictability not only to price cap carriers, but also to consumers and universal service contributors, given the fluctuations that could result from a true-up approach for these large carriers.

3. Calculating Eligible Recovery for Rate-of-Return Incumbent LECs

627. For rate-of-return incumbent LECs, the Commission adopts a recovery mechanism that provides more certainty and predictability than exists today, while also rewarding carriers for efficiencies achieved in switching costs. Specifically, the recovery mechanism will allow interstate rate-of-return carriers to determine at the outset of the transition their total ICC and recovery revenues for all transitioned rate elements, for each year of the transition: Eligible Recovery will be adjusted as necessary with annual true ups to ensure that rate-of-return carriers have the opportunity to receive their Baseline Revenue, notwithstanding changes in demand for their intercarrier compensation rates being capped or reduced under the R&O. The Commission finds that providing this greater degree of certainty for rate-of-return carriers, which are generally smaller and less able to respond to changes in market conditions than are price cap carriers, is necessary to provide a reasonable transition from the existing intercarrier compensation system.

628. As the starting point for calculating the Rate-of Return-Baseline, the Commission will use a rate of return carrier's 2011 interstate switched access revenue requirement, plus FY2011 intrastate switched access revenues and FY2011 net reciprocal compensation revenues. Average schedule carriers will use projected settlements associated with 2011 annual interstate switched access tariff filing. The Commission will then adjust this Baseline over time to reflect trends in the *status quo* absent reform. Under the interstate regulation that has historically applied to them, rate-of-return carriers were able to increase *interstate* access rates to offset declining MOU, which has averaged 10 percent per year, and consequently had insufficient incentive to reduce costs despite rapidly decreasing demand. However, the record indicates that, in the aggregate, rate-of-return carriers' interstate switched access revenue requirement has been declining approximately three percent each year, reflecting declines in switching costs. As a result, interstate switched access revenues have been declining at approximately three percent annually. NECA and a number of rate-of-return carriers project that the revenue requirement will continue to decline at approximately three percent a year over the next five years, because switching costs are declining dramatically given the availability of IP-based softswitches, which are significantly less costly and more efficient than the TDM-based switches they replace. Similarly, the record reveals that legacy LSS, which is being incorporated in the recovery mechanism for rate-of-return carriers, is projected to decline approximately two percent per year, likewise resulting in reduced interstate revenues for carriers receiving LSS.

629. In the intrastate jurisdiction, moreover, the majority of states do not have an annual true-up mechanism; intrastate rates generally do not automatically increase as demand declines and as a result, most rate-of-return carriers have been experiencing significant annual declines in intercarrier compensation revenue. In particular, aggregate data from more than 600 rate-of-return carriers reveal an average decline in intrastate MOUs of approximately 11 percent, and an average decline in intrastate access revenues of approximately 10 percent annually. The recovery mechanism accounts for this existing revenue loss, which would continue to occur under the *status quo* path absent reform, as illustrated in the figure below.

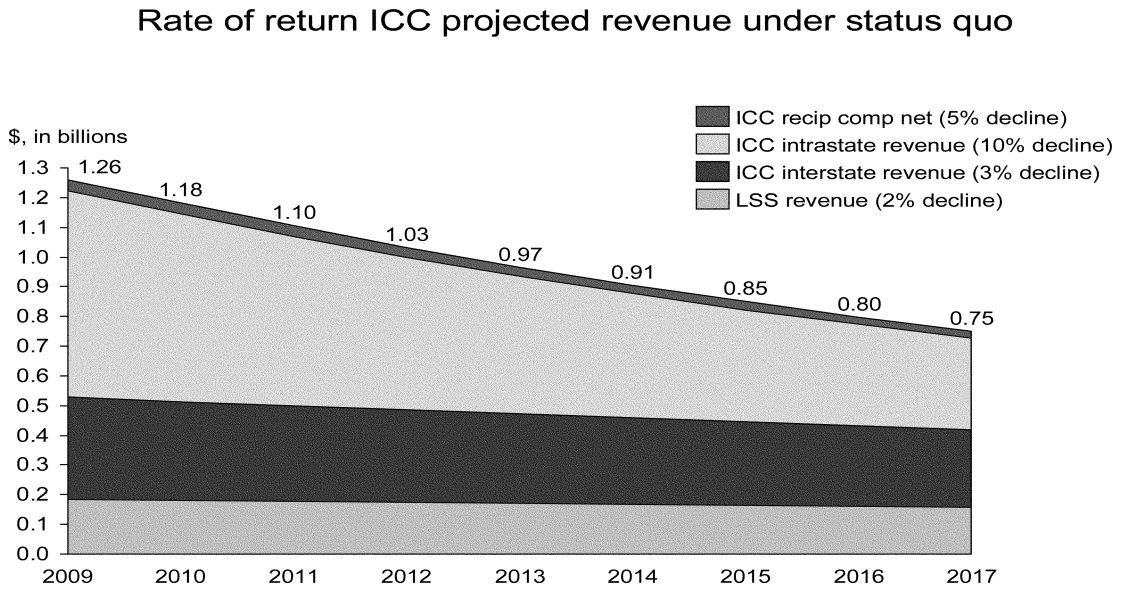



Figure 11

630. Accounting for both the declining interstate revenue requirement and the ongoing loss of intrastate revenue with declining MOU, the record establishes a range of reasonable potential annual reductions in the Baseline from which Rate-of-Return Eligible Recovery is calculated; within that range the Commission initially adopts a five percent annual decrease. At the lower end of the range, an annual decrease of three percent would represent rate-of-return carriers' approximate annual interstate revenue decline absent reform. Limiting the Baseline adjustment to three percent would make these carriers substantially better off with respect to their intrastate access revenues, however. As discussed above, carriers in many states do not have annual true-ups under state access rate regulations so as MOU decline, intrastate access revenues decline as well. Data indicate that this intrastate access revenue decline has been approximately 10 percent. Combining these interstate and intrastate declines weighted by the relative portion of aggregate rate-of-return revenues subject to the mechanism attributable to each category could justify a possible Baseline reduction of approximately seven percent annually. Because the Commission recognizes that the approach to recovery may require adjustments by rate-of-return carriers, the Commission initially adopts a conservative approach and limit the decline in the Baseline amount from which Rate-of-Return Eligible Recovery is calculated to five percent annually.

631. Moreover, the Commission notes that the annual five percent decline does not include the proposal in the *USF/ICC Transformation NPRM* and from the Rural Associations to apply the corporate operations expense limitation to LSS. LSS offsets a portion of rate-of-return carriers' interstate switched access revenue requirement. Applying the corporate operations expense limitations to LSS, or more generally to the entire switched access interstate revenue requirement, would have resulted in one-time reduction of almost three percent. By foregoing this reduction before setting the Baseline, the R&O ensures that the five percent decline is appropriately conservative, while still consistent with overall goals to encourage efficiency and cost savings.

632. Rate-of-return carriers will receive each year's Baseline revenue amount from three sources. First, they will continue to have an opportunity to receive intercarrier compensation revenues, pursuant to the rate reforms described above. Second, they will have an opportunity to collect ARC revenue from their customers, subject to the consumer protection limitations set forth below. Third, they will have an opportunity to collect any remaining Baseline revenue from the CAF. Together, the second and third sources comprise the Rate-of-Return Eligible Recovery.

633. Specifically, Rate-of-Return Eligible Recovery will be calculated from the Rate of Return Baseline by subtracting an amount equal to each carrier's opportunity to collect ICC from the rate elements reformed by this R&O. In each year, this ICC opportunity will be calculated as actual demand for each reformed rate element times the default intercarrier compensation rate for that element in that year. The intercarrier glide path adopted above sets default transitional ICC rates, and permits carriers to negotiate alternatives. In computing the opportunity to collect ICC, the Commission will use the default rates rather than any actual rate to prevent carriers from negotiating low rates simply to prematurely shift intercarrier compensation revenues to the CAF. Thus, in the event that a carrier negotiates intercarrier compensation rates lower than those specified, the Commission will still impute the full default rates, for the purpose of computing the amount each carrier has an opportunity to collect from ICC. To do so, carriers are required to file data annually to ensure that carriers do not recover more than they are entitled under the recovery mechanism.

634. Carriers will annually estimate their anticipated MOU for each relevant intercarrier compensation rate capped or reduced by this R&O. The Commission notes that carriers already use forecasts today in their annual access filings to determine interstate switched access charges and the Commission is requiring carriers to use similar methodology to forecast intercarrier compensation for use in determining Rate-of-Return Eligible Recovery. Because estimated minutes likely will differ from actual minutes, there will be a true-up in two years to adjust the carrier's Rate-of-Return

Eligible Recovery for that year to account for the difference between forecast MOU and actual MOU in the year being trued-up. These data on MOU will establish the Base Minutes for each relevant category, and shall not include MOU for which revenues were not recovered, for whatever reason. Carriers may, however, request a waiver of the rules defining the Baseline to account for revenues billed for terminating switched access service or reciprocal compensation provided in FY 2011 but recovered after the March 31, 2012 cut-off as the result of the decision of a court or regulatory agency of competent jurisdiction. The adjusted Baseline will not include settlements regarding charges after the March 31, 2012 cut-off, and any carrier requesting such modification to its Baseline shall, in addition to otherwise satisfying the waiver criteria, have the burden of demonstrating that the revenues are not already included in its Baseline, including providing a certification to the Commission to that effect. Any request for such a waiver also should include a copy of the decision requiring payment of the disputed intercarrier compensation. Any such waiver would be subject to the Commission's traditional ''good cause'' waiver standard, rather than the Total Cost and Earnings Review specified below. *See* 47 CFR 1.3. Rate-of-return carriers will be required to submit to the states the data used in these calculations, allowing state regulators to monitor implementation of the recovery mechanism. A rate-of-return incumbent LEC that is eligible to receive CAF shall also file this information with USAC, and the Commission delegates to the Wireline Competition Bureau authority to work with USAC to develop and implement processes for administration of CAF ICC support. In support of the carriers' annual access tariff filing, each carrier will provide the necessary data used to justify any ARC to the Commission.

635. *Rate-of-Return Eligible Recovery.* A rate-of-return carrier's baseline for recovery (''Rate-of-Return Baseline'') is its 2011 interstate switched access revenue requirement, plus its FY 2011 intrastate switched access intercarrier compensation revenues for rates capped or reduced by this R&O, plus its FY 2011 net reciprocal compensation revenues. A rate-of-return carrier's Eligible Recovery (''Rate-of-Return Eligible Recovery''), in turn, is: (a) Its Rate-of-Return Baseline reduced by five percent each year; less (b) its ICC recovery opportunity for that year, defined as: (i) Its estimated MOU for each rate element subject to reform times; (ii) the default transition rate for that rate element for that year; plus (3) any necessary true-ups based on the prior year's actual MOUs.

*Rate of Return Example.* A rate-of-return carrier has a 2011 interstate switched access revenue requirement of $200,000, FY2011 intrastate switched access revenues of $50,000, and net reciprocal compensation revenues of $5,000. Its Eligible Recovery would be determined as follows:

*Year 1.* The carrier is entitled to collect $242,250 ($255,000 × .95). The carrier will subtract from this total its ICC recovery opportunity from switched access charges capped or reduced in this R&O (both intrastate and interstate) and net reciprocal compensation, defined as its forecast MOU times the default rates specified by this R&O. The remainder is Eligible Recovery.

*Year 2.* Prior to adjustment for any under- or over-estimation of minutes in Year 1, the carrier is entitled to recover $230,137.50 ($242,250 × .95). This figure is adjusted up or down in the annual true-up to reflect any difference between forecast minutes in Year 1 and actual minutes in Year 1. For example, if the carrier had fewer minutes than estimated in Year 1, such that its ICC recovery opportunity was $500 less than forecast, its recovery in Year 2 would be adjusted upward by $500 and it would be permitted to recover $230,637.50 in Year 2 ($230,137.50 + $500). Conversely, if the carrier had a higher number of MOU than had been forecast and provided the carrier an opportunity for $500 more ICC recovery, its recovery in Year 2 would be adjusted downward to $229,637.50 ($230,137.50 − $500). The carrier will then subtract from this total its Year 2 ICC recovery opportunity, based on its Year 2 forecast minutes and the Year 2 default rates specified by this R&O. The remainder is Eligible Recovery.

This is a simplified example of the calculation of Rate-of-Return Eligible Recovery for a rate-of-return carrier's reduction in intrastate terminating access resulting from the reforms the Commission adopts for illustrative purposes only. It is not intended to encompass all necessary calculations applicable in determining Rate-of-Return Eligible Recovery in the periods discussed in the example for all possible rates addressed by the R&O.

636. *This Approach to Recovery for Interstate Rate-of-Return Carriers Provides Certainty, Minimizes Burdens to Consumers, and Constrains the Size of USF.* Exercising flexibility under the Act to design specific regulatory tools, the R&O adopts an approach to Rate-of-Return Eligible Recovery that takes interstate rate-of-return carriers off of rate-of-return based recovery specifically for interstate switched access revenues, but provides them more predictable recovery than exists under the *status quo.* In addition, to the extent that any interstate rate-of-return carriers also are subject to rate-of-return regulation at the state level, the recovery mechanism for switched access services replaces that, as well. The Commission observes that the recovery mechanism otherwise leaves unaltered the preexisting rate regulations for these carriers' other services, such as common line and special access. Nonetheless, the Commission recognizes that this approach represents a potentially significant regulatory change for those carriers and adopts a longer transition for these carriers for this reason. In addition to the benefits of the standard recovery mechanism discussed below, the Total Cost and Earnings Review mechanism the Commission adopts will ensure that this recovery mechanism will not deprive any carrier of the opportunity to earn a reasonable return. Price cap carriers today already the bear the risk that costs increase and have no true up mechanism for declines in demand. For this reason, the recovery mechanism the Commission adopts for rate-of-return carriers is different than the recovery mechanism the Commission adopts for price cap carriers. Although rate-of-return carriers have a true up process to the Eligible Recovery for actual demand, this is akin to how such carriers are regulated today. The true-up process also protects carriers resulting from changes with regard to, for example, reforms related to various arbitrage schemes. The record does not allow us to quantify with precision the impact of these arbitrage-related reforms on rate-of-return carriers. At the same time, however, the Commission declines to conduct true-ups with regard to rate-of-return carriers' switched access costs; accordingly, carriers will have incentives to become more efficient and to reduce switching costs, including by investing in more efficient technology and by sharing switches. Carriers that are more efficient will be able to retain the benefits of the cost savings. The Commission believes the rural LEC forecast with regard to reduced switched access costs is conservative, and carriers will have additional opportunities to recognize efficiencies with regard to these costs. The Commission discusses these issues in greater detail below.

637. As discussed above, incumbent LECs are experiencing consistent, substantial, and accelerating declines in demand for switched access services. The effect of current interstate rate regulation is to insulate rate-of-return carriers from revenue loss due to competitive pressures that result in declining lines and MOU, but rapidly increasing access rates have exacerbated these carriers' risk of revenue

uncertainty due to arbitrage, and carriers themselves project declining costs—and thus declining revenues—under the *status quo.* In the intrastate jurisdiction, as described above, carriers are often unable to automatically increase rates as they experience a decline in demand caused by competition and changing consumer usage, leading to declining intrastate revenues.

638. The Commission's framework allows rate-of-return carriers to profit from reduced switching costs and increased productivity, ultimately benefitting consumers. The Commission notes in this regard that the transition to broadband networks affords smaller carriers opportunities for efficiencies not previously available. For example, small carriers may be able to realize efficiencies through measures such as sharing switches, measures that preexisting regulations, such as the thresholds for obtaining LSS support, may have deterred. Under the new recovery framework, carriers that realize these efficiencies will not experience a resulting reduction in support. In addition, the new recovery framework—in conjunction with the overall reforms adopted in this Order—provides revenue certainty, stability, and predictable support, as well as promoting continued investment, consistent with advantages some historically have associated with rate-of-return regulation.

639. Importantly, the Commission's approach also avoids the risk of unconstrained escalation in the burden on end-user customers and universal service contributors. The Commission agrees with commenters that, absent incentives for efficiency, determining recovery based on the historical approach to these carriers' rate regulation could cause the CAF to grow significantly and without constraint. This prediction is consistent with the Commission's past recognition that rate-of-return regulation can create incentives for inefficient investment, which would flow through to the recovery mechanism. Although some commenters contend that Commission accounting regulations and oversight adequately protect against inefficient investment, the effectiveness of Commission accounting regulations and oversight is limited in certain respects, as the Commission itself previously has recognized. More broadly, as commenters observe, retaining rate-of-return regulation as historically employed by the Commission risks ''perpetuat[ing the] isolated, ILEC-as-an island operation,'' thus increasing the costs subject to recovery to the extent that, for example, each individual incumbent LEC purchases its own facilities, rather than sharing infrastructure with other carriers where efficient. Of particular relevance here, as one commenter observes, under the preexisting regulatory framework ''there is little evidence of shared investment in local switching, even though such sharing would be engaged in by rational carriers subject to market incentives,'' while, ''[i]n contrast, there is evidence of at least some efforts to engage in joint ventures to invest in transport and tandem switching assets for which there are fewer regulatory incentives for rate-of-return carriers to invest in their own equipment and facilities.'' The Commission is committed to constraining the growth of the CAF, and the recovery mechanism the Commission adopts for interstate rate-of-return carriers advances that goal. To this end, states that have jurisdiction over intrastate access rates should monitor intrastate tariffs filed pursuant to the rules and reforms adopted in this Order to ensure carriers do not shift costs from services subject to incentive regulation to services still subject to rate-of-return regulation.

640. The Commission declines to adopt the recovery mechanism proposed by associations of rate-of-return carriers. Although these carriers contend that their approach would allow intercarrier compensation reform for rate-of-return carriers that would limit the burdens placed on the CAF, the Commission is not persuaded by a number of the assumptions that lead them to this conclusion. The rate-of-return carriers project that their revenue requirement for switched access will decline three percent annually for the next five years. The Commission's approach locks in this historical trend, adjusted to account for the intrastate *status quo.* In the absence of locking in this historical trend, however, the Commission has concerns about whether such declines in the revenue requirement actually will occur. As commenters observe, because ICC costs will be shifted primarily to the CAF to make rate-of-return carriers whole, carriers would face incentives for inefficient investment, and such incentives could be heightened to the extent that carriers seek to offset the effects of intercarrier compensation rate reductions. A more realistic view of the assumptions underlying the associations' projections suggests that the financial impact on the CAF of the associations' proposal is likely far greater than they project. Consequently, adopting their proposal appears likely to lead to one of two results—the CAF would grow significantly, or intercarrier compensation reform would stop once CAF demands outstripped the available budget.

*E. Recovering Eligible Recovery*

641. The Commission now explains the two-step mechanism by which carriers will be allowed to recover their Eligible Recovery. First, incumbent LECs will be permitted to recover Eligible Recovery through limited end-user charges. If these charges are insufficient, carriers will be entitled to CAF support equal to the remaining Eligible Recovery. Carriers electing to forego recovery from the ARC or the CAF must indicate their intention to do so in their 2012 tariff filing. Carriers may also elect to forgo CAF reform in any subsequent tariff filing. A carrier cannot, however, elect to receive CAF funding after a previous election not to do so. Notwithstanding a carrier's election to forego recovery from the ARC or the CAF, tariff filings may require carriers to provide the information necessary to justify the rates and terms in the tariff. Because the Commission views the recovery mechanism as a transitional tool, the Commission implements several measures to ensure it is truly temporary in nature. First, the Eligible Recovery that incumbent LECs are permitted to recover phases down over time, based on a predetermined glide path for price cap carriers and a more gradual framework for rate-of-return carriers. Second, ICC-replacement CAF support for price cap carriers is subject to a defined sunset date. Finally, in the USF/ICC Transformation FNPRM, the Commission seeks further comment on the timing for eliminating the recovery mechanism—including end-user recovery— in its entirety. Carriers recovering eligible recovery will be required to certify annually that they are entitled to receive the recovery they are claiming and that they are complying with all rules pertaining to such recovery.

1. End User Recovery

642. The *USF/ICC Transformation NPRM* sought comment on the role that interstate SLCs should play in intercarrier compensation reform and the ongoing relevance of the SLC as the marketplace moves to IP networks. The subsequent *USF/ICC Transformation Public Notice,* 76 FR 154, August 10, 2011, sought further comment on particular alternatives for using SLCs as part of any recovery mechanism. Although the record reveals a wide variety of proposals, most parties commenting on the matter supported an

increase in end-user charges as a necessary part of ICC reform. In developing the recovery mechanism, the Commission seeks to balance the interests of both end-user customers and USF contributors. The Commission thus agrees that it is appropriate to first look to customers paying lower rates for some limited, reasonable recovery, and adopt a number of safeguards to ensure that rates remain affordable and that consumers are not required to contribute an inequitable share of lost intercarrier revenues.

643. In addition to balancing the needs of ratepayers and USF contributors, the R&O also accounts for differences among different ratepayers, adopting particular protections for consumers. For example, some proposals in the record would require that end-user recovery be borne in the first instance by consumers. Instead, acknowledging that all end users benefit from the network, and consistent with the Commission's approach to end-user recovery in prior intercarrier compensation reform, the Commission concludes that all end users should contribute to reasonable end-user recovery from the beginning of ICC reform.

644. The Commission adopts a transitional ARC that is subject to three important constraints. First, in no case will the monthly ARC increase more than $0.50 per year for a residential or single-line business customer, or more than $1.00 (per line) per year for a multi-line business customer. Price cap incumbent LECs are allowed to increase ARCs for no more than five years; rate-of-return incumbent LECs for no more than six years. The Commission believes that the consumer ARC adopted here, which, even if fully imposed, represents a smaller percentage increase than SLC increases adopted by the Commission in prior reforms, strikes the proper balance. Second, in no case will the consumer ARC increase if that increase would result in certain residential end-user rates exceeding the Residential Rate Ceiling, which the Commission discusses below. Third, ARCs can only be charged in a particular year to recover an incumbent LEC's Eligible Recovery for that year; total revenue from ARCs cannot exceed Eligible Recovery. Thus if a carrier's Eligible Recovery decreases from one year to the next, the total amount of ARCs it may charge its end users will also decrease. Importantly, carriers also are *not* required to charge the ARC.

645. To minimize the consumer burden, the R&O limits increases in the monthly consumer ARC to $0.50 per year. The Commission also makes clear that carriers may not charge any Lifeline customers an ARC. As a result, incumbent LECs' calculation of ARCs for purposes of the recovery mechanism must identify and exclude such customers. Given that the intercarrier compensation reforms also do not alter the operation of the existing SLC, these intercarrier compensation reforms will not affect the Lifeline universal service support mechanism. Furthermore, while some commenters advocate end-user charges only for residential and single-line business customers, the Commission rejects requests to place the entire recovery burden on consumers. The R&O provides for increases in the monthly ARC for multi-line business customers of $1.00 (per line) per year, and the Commission will require potential revenue from such increases to be imputed to carriers, reducing the total amount of consumer ARCs they may charge. Doing so is consistent with the Commission's prior intercarrier compensation reforms, which recognized that ''universal service concerns are not as great for multi-line business lines.'' Consequently, in previous reforms, the Commission has adopted higher increases in end-user charges for multi-line business customers than for consumers, and on a more accelerated timeline. For example, in the *Access Charge Reform Order,* 62 FR 31868, June 11, 1997, the Commission did not raise the SLC cap for primary residential and single-line business users, but concluded that universal service concerns were not as great for multi-line business users, for example, and raised the SLC caps for such users from $6.00 to $9.00 per line. In the *2008 ICC/USF Order and NPRM,* 73 FR 66821, November 12, 2008, the Commission proposed increasing the residential and single-line business and the non-primary residential line SLC by $1.50 and the multi-line business SLC by $2.30. In the *USF/ICC Transformation NPRM* the Commission sought comment on those amounts again. Commenters supported this increase. In fact, some commenters advocated for a higher SLC increase. The ARC adopted today, which is lower on an annual basis than the annual SLC increase proposed in 2008, balances the burdens on consumers and businesses. However, the Commission has taken measures to ensure that charges for multi-line businesses remain just and reasonable. In particular, to ensure that multi-line businesses' total SLC plus ARC line items are just and reasonable and to minimize the burden on businesses, the R&O limits the maximum SLC plus ARC fee to $12.20. This limits the ARC for multi-line businesses for entities at the current $9.20 cap to $3.00, comparable to the overall limit on residential ARCs.

646. The R&O permits carriers to determine at the holding company level how Eligible Recovery will be allocated among their incumbent LECs' ARCs. By providing this flexibility, carriers will be able to spread the recovery of Eligible Recovery among a broader set of customers, minimizing the increase experienced by any one customer. This also will enable carriers to more fully recover Eligible Recovery from end-users with rates below the $30 Residential Rate Ceiling, limiting the potential impact on the CAF. For carriers that elect to receive CAF support, the Commission will impute to each carrier the full ARC revenues they are permitted to collect, regardless of whether they actually collect any or all such revenues. If the imputed amount is insufficient to cover all their Eligible Recovery, they are permitted to recover the remainder from CAF ICC support.

647. In the event a carrier elects not to receive CAF ICC support, the Commission takes measures to limit the burden on residential and single-line business customers. The decision to elect not to receive ICC replacement CAF support, discussed below, is distinct from the decision to assess the full authorized ARC. Absent doing so, carriers potentially could use their holding company-level flexibility to target their ARC recovery primarily or exclusively to residential and single-line business customers, rather than larger multi-line business customers. The Commission therefore requires that a carrier allocate its Eligible Recovery by a proportion of a carrier's mix of residential versus business lines. However, because line counts alone would not reflect the fact that there is a lower cap on ARC increases for residential and single-line business lines ($0.50 per line) than for multi-line business lines ($1.00 per line), the Commission adopts a double-weighting of multi-line business lines for purposes of this calculation. The percentage of ARC revenues a carrier is eligible to recover from residential and single-line business customers cannot exceed the percentage of total residential lines assessed a SLC by such customers where multi-line business lines are given double weight. In addition, this calculation will exclude lines for Lifeline customers because the Commission prevents carriers from assessing an ARC on any Lifeline customer. For example, if a carrier had 1000 residential and single-line business lines and 200 multi-line

business lines, and Eligible Recovery of $600 monthly, under the limitation, it would be permitted to collect no more than 71.43 percent of that amount—approximately $429—from residential and single-line business customers based on the calculation: 1000 residential and single line business lines/(1000 residential and single-line business lines + 2 × 200 multi-line business lines) = 71.43 percent.

648. The Commission declines to implement end user recovery through increases to the pre-existing SLC, as some commenters suggest. SLCs today are designed to recover common line revenues as defined by Commission regulation. The Commission is not formally recategorizing any costs or revenues to be included in that regulatory category, and the calculation of Eligible Recovery for purposes of the reforms the Commission adopts is completely independent of SLC rate calculations. As a result, the Commission leaves current SLCs unmodified for now. Carriers whose current SLCs are below the caps are not otherwise permitted to increase their SLCs to recover revenues reduced by interstate and intrastate access charge reforms, *i.e.,* the Commission is not permitting carriers to raise their SLCs beyond the level they are currently authorized to charge, even if that level is below the relevant regulatory SLC cap. The Commission seeks comment in the accompanying USF/ICC Transformation FNPRM regarding whether existing regulation of SLCs is appropriate, including whether SLCs should be reduced or phased-out over time. Instead, the new ARC will be separately calculated, reduced over time, and separately tariffed and reported to the Commission to enable monitoring to ensure carriers are not assessing ARCs in excess of their Eligible Recovery. The ARC can, however, be combined in a single line item with the SLC on the customer's bill. Moreover, the Commission finds that it is appropriate to reevaluate its SLC rules, and does so in the USF/ICC Transformation FNPRM.

649. *Residential Rate Ceiling.* In the *USF/ICC Transformation Public Notice,* the Commission sought comment on the appropriate level and operation of a ceiling to limit rate increases in states that already had undertaken some intercarrier compensation reforms. To ensure that consumer telephone rates remain affordable and to recognize states that have already undertaken reform, the Commission adopts a Residential Rate Ceiling of $30 per month for all incumbent LECs, both price cap and rate-of-return. Although the Residential Rate Ceiling does not generally limit rates carriers can charge, it prevents carriers from charging an ARC on residential consumers already paying $30 or more.

650. For purposes of comparison with the Residential Rate Ceiling, the Commission considers the rate for basic local service, including additional charges that a consumer actually pays each month in conjunction with that service (referred to collectively as rate ceiling component charges). The rate ceiling component charges consist of the federal SLC and the ARC; the flat rate for residential local service, mandatory extended area service charges, and state subscriber line charges; per-line state high cost and/or access replacement universal service contributions; state E911 charges; and state TRS charges. Carriers are not permitted to charge ARCs to the extent that ARCs would result in rate ceiling component charges exceeding the Residential Rate Ceiling for any residential customer. For example, a consumer in Parsons, Kansas may have a rate of $13.90, a SLC of $6.40, a mandatory contribution to the Kansas Universal Service Fund of $6.75, a mandatory EAS charge of $1.70, and a TRS charge of $1.00—his or her aggregate rate ceiling component charges before the ARC would be $29.75. Accordingly, a carrier could only charge this consumer an ARC of $0.25 before reaching the $30 Residential Rate Ceiling. (The carrier could still charge multi-line business customers a $1.00 per line ARC, provided that any multi-line business customer's total SLC plus ARC does not exceed $12.20). Consistent with the goal of the Residential Rate Ceiling, because non-primary residential SLC lines are charged to residential customers the Commission limits carriers' ARC for non-primary residential SLC lines to an amount equal to the ARC charged for such consumers' primary residential lines. Thus, to the extent that the Residential Rate Ceiling limits the ARC that can be assessed on residential customers' primary lines, it effectively will limit the ARC that can be charged on their non-primary lines, as well. After the ARC, any additional Eligible Recovery would have to be recovered from the CAF rather than from end-users.

651. The Residential Rate Ceiling particularly helps protect consumers in states that have already begun state intercarrier compensation reform. As part of such reform, some states are rebalancing rates, with local rate increases phasing in over time, including potentially after January 1, 2012. These local rate increases will be included in the calculation of end-users rates for comparison to the Residential Rate Ceiling . Further, as part of its universal service reforms, the Commission is adopting an intrastate rate minimum benchmark designed to avoid over-subsidizing carriers whose intrastate rates are not minimally reasonable. To ensure that states are not disincented from rebalancing artificially low local retail rates after January 1, 2012, and to ensure that the Residential Rate Ceiling continues to protect consumers in those states, the Commission will use the *higher* of the relevant rates in effect on January 1, 2012 or of January 1 in the year in which the ARC is to be charged for comparison to the Residential Rate Ceiling, thus accounting for possible increases in consumer rates over time.

652. The Commission finds the $30 Residential Rate Ceiling will help ensure that consumer rates remain affordable and set at reasonable levels by preventing any ARC increases to consumers who already pay $30 or more. The Commission notes that it also adopts a ''local rate benchmark'' as part of universal service reform of HCLS and HCMS. The CAF benchmark serves a different purpose and has a different function from the Residential Rate Ceiling. The CAF benchmark is focused on ensuring that universal service does not overly subsidize carriers with artificially low local rates. As a result, it focuses more narrowly on the specific rates of concern, especially flat-rated local service charges, state SLCs, and state USF contributions and sets a lower bound to encourage carriers to charge reasonably comparable local rates. HCLS and HCMS are federal universal service mechanisms that pick up intrastate loop costs, and the Commission will not use limited universal service funding to subsidize artificially low rates. The CAF benchmark therefore serves as a floor. Although some commenters propose using a $25 (or lower) rate, the Commission notes that several states that have rebalanced rates already have rates above $30, suggesting that this rate is affordable and set at reasonable levels. To the extent that prior surveys of urban rates yielded an average of approximately $25, the Commission observes that the surveys encompassed a more limited set of charges than the Residential Rate Ceiling. As demonstrated by the rates in a number of states that have undertaken significant intercarrier compensation reform—which the Commission finds to be a more relevant data set in this context than average urban rates—rates

including the full ranges of charges can be close to or more than $30. The Commission also declines to adopt separate rate ceilings for different carriers, and instead agree with commenters that it would ''be inappropriate—and inconsistent with Section 254—for the Commission to adopt different benchmarks for different geographic areas or providers.'' Such an approach would mandate rate disparities between geographic areas, contrary to the Commission's goal of promoting reasonably comparable rates throughout the country. The Commission thus concludes that the $30 Residential Rate Ceiling strikes the right balance between ensuring that consumers pay their fair share of recovery and protecting consumers in states that already have undertaken substantial reforms.

2. CAF Recovery

653. The Commission has recognized that, as the Commission moves away from implicit support, some high cost, rural areas may need new explicit support from the universal service fund. Consequently, in the *USF/ICC Transformation NPRM,* the Commission sought comment on the appropriate role of universal service support to offset some intercarrier revenues lost through reform. The Commission agrees with the many commenters advocating that transitional recovery should, in part, come through the CAF. In particular, the limits on ARCs and the Residential Rate Ceiling place important constraints on end user recovery. Consequently, the Commission anticipates that end user recovery alone will not provide the full recovery permitted by the mechanism for many incumbent LECs, particularly rate-of-return carriers. Given the Commission's desire to ensure a measured, predictable transition, the Commission thus finds it appropriate to supplement end user recovery with transitional ICC-replacement CAF support.

654. To that end, as part of the new CAF universal service mechanism, the Commission permits incumbent LECs to recover Eligible Recovery that they do not have the opportunity to recover through permitted ARCs. The ICC-replacement CAF support for carriers that are eligible and elect to receive it is the remainder of Eligible Recovery not recovered through ARCs. As a result, those same data will enable USAC to calculate CAF support as well. Thus, the Commission directs carriers to file those same data with USAC for purposes of CAF distribution under the recovery mechanism. The Commission notes that although incumbent LECs will experience intercarrier compensation reductions on a study area-by-study area basis, they have flexibility at the holding company level to determine where and how to charge ARCs. Thus, USAC needs an approach to attributing those revenues to particular study areas to determine the amount of CAF funding to provide to each such area. In this regard, the Commission notes that one benefit of its universal service reform is the greater accountability associated with the CAF support mechanism. Given that, the Commission directs USAC to attribute ARC revenue to all of the holding company's study areas in proportion to the Eligible Recovery associated with that study area. This will ensure that some study areas are not insulated from the CAF accountability measures by having sufficient ARC revenue attributed to meet their entire Eligible Recovery need. The same oversight and accountability obligations the Commission adopts above apply to CAF support received as part of the recovery mechanism. In addition, all rate-of-return CAF ICC recipients, whether a current recipient of high cost universal service support or not, must satisfy the same public interest obligations as carriers receiving high-cost universal service support. All price cap CAF ICC recipients must use such support for building and operating broadband-capable networks used to offer their own retail broadband service in areas substantially unserved by an unsubsidized competitor of fixed voice and broadband services. The Commission believes it is appropriate to adopt slightly different obligations for receipt of CAF ICC support for price cap and rate-of-return carriers. For one, the price cap CAF support is transitional, and phasing out completely over time as the Commission has adopted a long-term phase II CAF support for areas served by price cap carriers. Thus, the Commission has a mechanism to advance its goal of universal voice and broadband to areas served by price cap carriers that are unserved today. For rate-of-return carriers, however, the Commission has not adopted a different long-term approach for receipt of universal service support. Therefore, the Commission believes it is appropriate to impose the same obligations that such carriers have for receipt of all universal service support that the Commission adopts above, which requires carriers to extend broadband upon reasonable request. Finally, the Commission allows a carrier to elect not to receive ICC replacement CAF support (and therefore to avoid the obligations that accompany support) even if it would otherwise be entitled to do so under the Eligible Recovery calculation. The election to decline CAF support will be made in the carrier's July 1, 2012 tariff filing. A carrier that elects not to receive CAF cannot subsequently change this election. A carrier can, however, initially elect to receive CAF support but elect to end that support at any time. Moreover, like forgone ARC recovery, forgone CAF will be imputed to a carrier seeking any additional recovery under the Total Cost and Earnings Review, discussed below.

655. Providing CAF recovery is consistent with the Commission's mandate under 47 U.S.C. 254 and the Commission's use of universal service funding as a component of prior intercarrier compensation reforms. In light of the broadband obligations the Commission adopts, the decision to establish this funding mechanism is also consistent with the Commission's general authority under section 4(i) of the Act, 47 U.S.C. 154(i), and section 706 of the 1996 Act, 47 U.S.C. 1302, because it furthers the Commission's universal service objectives and promotes the deployment of advanced services.

656. For price cap carriers that elect to receive ICC-replacement CAF support, such support is transitional and phases out in three years, beginning in 2017. Although the Commission does not adopt a similar sunset for rate-of-return carriers' ICC-replacement CAF support in this Order, the Commission seeks comment on alternatives in this regard in the *ICC/USF Transformation FNPRM.*

3. Monitoring Compliance With Recovery Mechanism

657. To monitor compliance with this R&O, the Commission requires all incumbent LECs that participate in the recovery mechanism, including by charging any end user an ARC, to file data on an annual basis regarding their ICC rates, revenues, expenses, and demand for the preceding fiscal year. The Commission also encourages, but does not require, all competitive LECs and CMRS providers to similarly file such data. All such information may be filed under protective order and will be treated as confidential.

658. These data are necessary to monitor compliance with the provisions of this R&O and accompanying rules, including to ensure that carriers are not charging ARCs that exceed their Eligible Recovery and that ARCs are reduced as Eligible Recovery decreases. The data are also needed to monitor the impact of the reforms the Commission adopts

and to enable the Commission to resolve the issues teed up in the *USF/ICC Transformation FNPRM* regarding the appropriate transition to bill-and-keep and, if necessary, the appropriate recovery mechanism for rate elements not reduced in this R&O, including originating access and many transport rates. Such data will enable the Commission to determine the impact that any transition would have on a particular carrier or group of carriers, and to evaluate the trend of ICC revenues, expenses, and minutes and compare such data uniformly across all carriers.

659. To minimize any burden, filings will be aggregated at the holding company level, limited to the preceding fiscal year, and will include data carriers must monitor to comply with the recovery mechanism rules. For carriers eligible and electing to receive CAF ICC support, the Commission will ensure that the data filed with USAC are consistent with the Commission's request, so that carriers can use the same format for both filings. To ensure consistency and further minimize any burden on carriers, the Commission delegates to the Wireline Competition Bureau the authority to adopt a template for submitting the data, which should be done in conjunction with the development of data necessary to be filed with USAC for receipt of CAF ICC support, which has also been delegated to the Wireline Competition Bureau. Given that carriers must be monitoring these data to comply with the revised tariff rules, the Commission requires incumbent LECs to file electronically annually at the same time as their annual interstate access tariff filings.

*F. Requests for Additional Support*

660. Although the Commission provides an opportunity for revenue recovery to promote an orderly transition away from terminating access charges, the Commission declines to adopt a revenue-neutral approach as advocated by some commenters. Rather, the Commission agrees with commenters who maintain that the Commission has no legal obligation to ensure that carriers recover access revenues lost as a result of reform, absent a showing of a taking. The Commission establishes a rebuttable presumption that the reforms adopted in the R&O, including the recovery of Eligible Recovery from the ARC and CAF, allow incumbent LECs to earn a reasonable return on their investment. The Commission establishes a ''Total Cost and Earnings Review,'' through which a carrier may petition the Commission to rebut this presumption and request additional support. The Commission believes the Total Cost and Earnings Review procedure alone is sufficient to meet its legal obligations with regard to recovery. The Commission identifies below certain factors in addition to switched access costs and revenues that *may* affect the analysis of requests for additional support, including: (1) Other revenues derived from regulated services provided over the local network, such as special access; (2) productivity gains; (3) incumbent LEC ICC expense reductions and other cost savings, and (4) other services provided over the local network. Particularly given these factors, it is the Commission's predictive judgment that the limited recovery permitted will be more than sufficient to provide carriers reasonable recovery for regulated services, both as a matter of the constitutional obligations underlying the Commission's rate regulation and as a policy matter of providing a measured transition away from incumbent LECs' historical reliance on intercarrier compensation revenues to recovery that better reflects today's marketplace. Nonetheless, the Commission also adopts a Total Cost and Earnings Review to allow individual carriers to demonstrate that this rebuttable presumption is incorrect and that additional recovery is needed to prevent a taking.

661. To show that the standard recovery mechanism is legally insufficient, a carrier would face a ''heavy burden,'' and need to demonstrate that the regime ''threatens [the carrier's] financial integrity or otherwise impedes [its] ability to attract capital.'' As the Supreme Court has long recognized, when a regulated entity's rates ''enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed,'' the company has no valid claim to compensation under the Takings Clause, even if the current scheme of regulated rates yields ''only a meager return'' compared to alternative rate-setting approaches. For the reasons described above, the Commission believes that its recovery mechanisms provide recovery well beyond any constitutionally-required minimum, and the Commission finds no convincing evidence in the record here that the standard recovery mechanism will yield confiscatory results.

662. Specifically, a carrier can petition for a Total Cost and Earnings Review to request additional CAF ICC support and/or waiver of CAF ICC support broadband obligations. In analyzing such petitions, the Commission will consider the totality of the circumstances, to the extent permitted by law. The Commission's analysis will consider all factors affecting a carrier and its ability to earn a return on its relevant investment, including the factors described below. As a result of this analysis of costs and revenues, the Commission will be able to determine the constitutionally required return and will not be bound by any return historically used in rate-setting nor any specific return resulting from the intercarrier compensation recovery mechanism adopted in this R&O, or possible rate represcription as discussed in the *USF/ICC Transformation FNPRM.* Given the extensive discussion of reform proposals over the years, a carrier could not reasonably ''rely indefinitely'' on the existing system of intercarrier compensation, ''but would simply have to rely on the constitutional bar against confiscatory rates'' in the event the Commission revised its compensation rules. *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 528 (2002).

663. As the Commission seeks to protect consumers from undue rate increases or increases in contributions to USF, the Commission will conduct the most comprehensive review of any requests for additional support allowed by law. The recovery mechanism goes beyond what might strictly be required by the constitutional takings principles underlying historical Commission regulations. Therefore, although the standard recovery mechanism does not seek to precisely quantify and address all considerations relevant to resolution of a takings claim, carriers will need to address these considerations to the extent that they seek to avail themselves of the Total Cost and Earnings Review procedure based on a claim that recovery is legally insufficient.

664. *Revenues Derived from Other Regulated Services Provided Over the Local Network.* The Commission agrees with those who argue that it is appropriate for the Commission to consider the implications of services other than switched access that are provided using supported facilities, to the extent constitutionally permitted. Notwithstanding intercarrier compensation reform, carriers will continue to receive revenues from other uses of the local network. For example, although the reforms adopted in this R&O will bring many intercarrier compensation rates into a bill-and-keep framework, other intercarrier compensation rates will be subject to minimal—or no—reforms at this time. Consequently, incumbent LECs will continue to collect intercarrier

compensation for originating access and dedicated transport, providing continued revenue flows—including the underlying implicit subsidies—from those sources during the transition outlined in this R&O, although the Commission has determined that such rates ultimately will reach bill-and-keep as well. Carriers acknowledge that the subsidies in these remaining intercarrier compensation rates are used for investment in their network to provide regulated services such as special access service. In addition, there was debate in the record regarding whether, and how, to consider special access revenues in this regard. At this time the Commission does not prescribe general rules considering such revenue, but, as with other services that rely on the local network, the Commission will consider such earnings and may reconsider this decision if warranted upon conclusion of the Commission's ongoing special access proceeding.

665. *Productivity Gains.* As discussed above, although incentive regulation commonly involves sharing the benefits of productivity gains between carriers and ratepayers, such a mechanism has not been in place for many years. The standard recovery mechanism adopts a 10 percent reduction in CALLS price cap incumbent LECs' baseline revenues, initially for CALLS price cap study areas, and after five years for non-CALLS price cap study areas to reflect this. However, because the Commission believe that is a conservative approach, the Commission finds it appropriate to consider efficiency gains for particular price cap carriers on an individual basis in the Total Cost and Earnings Review, as well.

666. *LEC Cost Savings and Increased Revenue.* Currently, carriers are frequently embroiled in costly litigation over payment, jurisdiction, and type of traffic. The reforms the Commission adopts in this R&O should substantially reduce such disputes, and the Commission anticipates that comprehensive intercarrier compensation reform will further reduce carriers' costs of administering intercarrier compensation. Likewise, the Commission's actions regarding phantom traffic and intercarrier compensation for VoIP traffic may increase the proportion of traffic for which intercarrier compensation can be collected. Finally, the Commission notes that the reforms should result in expense savings in other lines of business, such as the provision of long distance services. Although the Commission does not adopt a ''net revenues'' approach as part of the standard recovery mechanism, in appropriate circumstances the Commission believes an analysis of intercarrier expenses could be warranted in the examination of an individual carrier's claim under the more fact- and carrier-specific Total Costs and Earnings Review mechanism. The Commission will consider these factors to the extent legally permissible, including but not limited to the following categories:

- *Revenue for Exchanging VoIP Traffic.* A number of carriers have alleged that they are not receiving compensation for exchanging VoIP traffic. In this R&O the Commission adopts rules clarifying the obligation of VoIP traffic to pay intercarrier compensation charges during the transition to bill and keep. The decisions the Commission adopts will provide LECs, including incumbent LECs, with more certain revenue throughout the transition, and will also allow them to avoid the litigation expense associated with attempts to collect access charges for VoIP traffic.
- *Reduced Phantom Traffic.* Similarly, the rules adopted in this R&O will enable carriers to identify and bill for phantom traffic. These rules thus should enable carriers to collect intercarrier compensation charges throughout the transition that they are not currently able to collect. The Commission also anticipates that incumbent LECs will be able to reduce administrative and litigation costs associated with such traffic.
- *Other Reduced Litigation Costs and Administrative Expenses.* In addition to reduced litigation costs and administrative expense associated with VoIP and phantom traffic as a result of the reforms the Commission adopts in this R&O, the record indicates that carriers will benefit more generally from the clarity and relative simplicity of the rules the Commission adopts. The Commission anticipates that this will be reflected in additional savings in litigation and administration costs.
- *Other Services Provided Over the Local Network.* In addition to regulated services provided over the local network, many carriers also provide unregulated services, such as broadband and video. Although parties have identified some uncertainty regarding the Commission's ability to consider revenues from such services in calculating a carrier's return on investment in the local network, the Commission will, at a minimum, carefully scrutinize the allocation of costs associated with such services. As one commenter states, ''[i]t simply no longer makes any sense (if it ever did) for the agency to allow rural carriers to spend as much as they can on their networks, earning a rate of return on these historical costs while only considering the small sliver of regulated local telephony revenues earned using these USF subsidized networks.''

667. The Commission notes that some carriers argued that the Commission should not rely on revenue from unregulated services to offset a carrier's defined eligible revenue, but that if it did, it should only use net unregulated revenue, considering both the costs and revenues from those services. In addition, although there are a range of possible approaches for allocating many types of costs, a number of commenters recognized that historical accounting underlying intercarrier compensation rates and other charges fail to reflect the marketplace reality of the number and types of services provided over the local network. For example, the record revealed concerns about the extent to which loop costs have been allocated to regulated services such as voice telephone service versus services such as broadband Internet access service. Consequently, the Commission will give appropriate consideration to these services as part of the Total Cost and Earnings Review, including an analysis of both the revenue generated by such other services and whether the cost of such services, both regulated and unregulated, have been properly allocated.

668. *Cost Allocation.* The *USF/ICC Transformation NPRM* sought comment on the implications of the jurisdictional separations process, including ongoing reform efforts, on intercarrier compensation reforms. The jurisdictional separations process, which has been frozen for some time, is currently the subject of a referral to the Separations Joint Board. Any carrier seeking additional recovery will be required to conduct a separations study to demonstrate the current use of its facilities. Although this is a burdensome requirement, it is not unduly so given the importance of protecting consumers and the universal service fund.

## XI. Intercarrier Compensation for VOIP Traffic

669. Under the new intercarrier compensation regime, all traffic—including VoIP-PSTN traffic—ultimately will be subject to a bill-and-keep framework. As part of the transition to that end point, the Commission adopts a prospective intercarrier compensation framework for VoIP traffic. In particular, the Commission addresses the prospective treatment of VoIP-PSTN traffic by adopting a transitional compensation framework for such traffic

proposed by commenters in the record. Although the Commission adopts an approach similar to that proposed by some commenters, the approach to adopting and implementing this framework differs in certain respects. For one, the Commission is not persuaded on this record that all VoIP-PSTN traffic must be subject exclusively to federal regulation, and as a result, to adopt this prospective regime the Commission relies on its general authority to specify a transition to bill-and-keep for 47 U.S.C. 251(b)(5) traffic. As a result, tariffing of charges for toll VoIP-PSTN traffic can occur through both federal and state tariffs. In addition, given the recognized concerns with the use of telephone numbers and other call detail information to establish the geographic end-points of a call, the Commission declines to mandate their use in that regard. The Commission does, however, recognize concerns regarding providers' ability to distinguish VoIP-PSTN traffic from other traffic, and, consistent with the recommendations of a number of commenters, permits LECs to address this issue through their tariffs, much as they do with jurisdictional issues today.

670. The Commission believes that this prospective framework best balances the competing policy goals during the transition to the final intercarrier compensation regime. By declining to apply the entire preexisting intercarrier compensation regime to VoIP-PSTN traffic prospectively, the Commission recognizes the shortcomings of that regime. At the same time, the Commission is mindful of the need for a measured transition for carriers that receive substantial revenues from intercarrier compensation. Although the Commission's action clarifying the prospective intercarrier compensation treatment of VoIP-PSTN traffic does not resolve the numerous existing industry disputes, it should minimize future uncertainty and disputes regarding VoIP compensation, and thereby meaningfully reduce carriers' future costs.

*A. Widespread Uncertainty and Disagreement Regarding Intercarrier Compensation for VoIP Traffic*

671. Against this backdrop, and the fact that the current uncertainty and associated disputes are likely deterring innovation and introduction of new IP services to consumers, the Commission finds it appropriate to address the prospective intercarrier compensation obligations associated with VoIP-PSTN traffic. Indeed, despite the varied opinions in the record regarding the appropriate approach to VoIP-PSTN intercarrier compensation, there is widespread agreement that the Commission needed to act to address that issue now.

*B. Prospective Intercarrier Compensation Obligations for VoIP-PSTN Traffic*

1. Scope of VoIP-PSTN Traffic

672. The prospective intercarrier compensation regime the Commission adopts for a LEC's exchange of VoIP traffic with another carrier focuses on what the Commission refers to as ''VoIP-PSTN'' traffic. The Commission uses the term ''VoIP-PSTN'' as shorthand. The Commission recognizes that carriers have been converting portions of their networks to IP technology for years. Nonetheless, many carriers today continue to rely extensively on circuit-switched technology particularly for the exchange of traffic subject to intercarrier compensation rules. Likewise the definition of ''interconnected VoIP'' uses the term ''PSTN'' as distinct from at least certain types of VoIP services. Thus, in the context of VoIP-PSTN intercarrier compensation rules, the reference to ''PSTN'' refers to the exchange of traffic between carriers in (Time Division Multiplexing) TDM format. For purposes of this R&O, the Commission adopts the definition of traffic proposed in the Joint Letter: ''VoIP-PSTN traffic'' is ''traffic exchanged over PSTN facilities that originates and/or terminates in IP format.'' Although the Commission's prospective VoIP-PSTN intercarrier compensation is not circumscribed by the definition of ''interconnected VoIP service'' in section 3(25) of the Act, 47 U.S.C. 153(25) (referencing section 9.3 of the Commission's rules) or the definition of ''non-interconnected VoIP service'' in section 3(36) of the Act, 47 U.S.C. 153(36), nonetheless, informed by those definitions, the Commission believes it is appropriate to focus on traffic for services that require ''Internet protocol-compatible customer premises equipment.'' Sections 3(25) and 3(36) of the Act, 47 U.S.C.153(25), (26), were adopted in section 101 of the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111–260, section 103(b), 124 Stat. 2751 (2010). In this regard, the Commission focuses specifically on whether the exchange of traffic between a LEC and another carrier occurs in Time-Division Multiplexing (TDM) format (and not in IP format), without specifying the technology used to perform the functions subject to the associated intercarrier compensation charges.

673. Although the *USF/ICC Transformation NPRM* proposed focusing specifically on interconnected VoIP services, the Commission notes that its existing definition of interconnected VoIP would exclude traffic associated with some VoIP services that are originated or terminated on the PSTN, such as ''one-way'' services that allow end-users either to place calls to, or receive calls from, the PSTN, but not both. Although these one-way services do not meet the definition of interconnected VoIP, carriers are likely to be providing origination or termination functions with respect to this traffic comparable to that of ''two-way'' traffic that meets the existing definition of interconnected VoIP. Moreover, intercarrier compensation disputes have encompassed all forms of what the Commission defines as VoIP-PSTN traffic, and addressing this traffic more comprehensively helps guard against new forms of arbitrage. Various commenters recommended including such traffic within the scope of the intercarrier compensation framework for VoIP or otherwise expressed support for the approach taken in the ABC Plan and Joint Letter. Based on the foregoing considerations, the Commission is persuaded to adopt that approach.

674. The Commission agrees with concerns raised by NCTA and find it appropriate to adopt a symmetrical framework for VoIP-PSTN traffic, under which providers that benefit from lower VoIP-PSTN rates when their end-user customers' traffic is terminated to other providers' end-user customers also are restricted to charging the lower VoIP-PSTN rates when other providers' traffic is terminated to their end-user customers. The Commission thus declines to adopt an asymmetric approach that would apply VoIP-specific rates for only IP-originated or only IP-terminated traffic, as some commenters propose. The Commission has recognized concerns about asymmetric payment associated with VoIP traffic today, including marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants. An approach that addressed only IP-originated traffic would perpetuate—and expand—such concerns. Commenters advocating a focus solely on IP-originated traffic implicitly recognize as much, noting that providers with IP networks could benefit relative to providers with TDM

networks under such an intercarrier compensation regime.

2. Intercarrier Compensation Charges for VoIP-PSTN Traffic

675. The Commission adopts a prospective intercarrier compensation framework that brings all VoIP-PSTN traffic within the 47 U.S.C. 251(b)(5) framework. As discussed below, the Commission has authority to bring all traffic within the 47 U.S.C. 251(b)(5) framework for purposes of intercarrier compensation, including traffic that otherwise could be encompassed by the interstate and intrastate access charge regimes, and the Commission exercises that authority now for all VoIP-PSTN traffic.

676. The Commission adopts transitional rules specifying, prospectively, the default compensation for VoIP-PSTN traffic: Default charges for ''toll'' VoIP-PSTN traffic will be equal to interstate access rates applicable to non-VoIP traffic, both in terms of the rate level and rate structure; default charges for other VoIP-PSTN traffic will be the otherwise-applicable reciprocal compensation rates; and LECs are permitted to tariff these default charges for toll VoIP-PSTN traffic in relevant federal and state tariffs in the absence of an agreement for different intercarrier compensation.

677. The intercarrier compensation framework for VoIP-PSTN traffic will apply prospectively, during the transition between existing intercarrier compensation rules and the new regulatory regime adopted in this R&O, and is subject to the reductions in intercarrier compensation rates required as part of that transition. The Commission does not address preexisting law, including whether or how the ESP exemption might have applied previously, and the Commission makes clear that, whatever its possible relevance historically, the ESP exemption is not relevant or applicable prospectively in determining the intercarrier compensation obligations for VoIP-PSTN traffic.

a. The Prospective VoIP-PSTN Intercarrier Compensation Framework Best Balances the Relevant Policy Considerations

678. The Commission believes that its prospective, intercarrier compensation regime for VoIP-PSTN traffic best balances the relevant policy considerations of providing certainty regarding the prospective intercarrier compensation obligations for VoIP-PSTN traffic while acknowledging the flaws with preexisting intercarrier compensation regimes, and providing a measured transition to the new intercarrier compensation framework. The framework for VoIP-PSTN traffic will also reduce disputes and provide greater certainty to the industry regarding intercarrier compensation revenue streams while also reflecting the Commission's move away from the pre-existing, flawed intercarrier compensation regimes that have applied to traditional telephone service.

679. Although commenters did not all agree on the treatment of VoIP-PSTN traffic, there was widespread consensus among commenters that, whatever the outcome, it was essential that the Commission address that issue now. The framework seeks to facilitate discussions among the providers exchanging VoIP-PSTN traffic, lessening the need for prescriptive Commission regulations. At the same time, the *USF/ICC Transformation NPRM* recognized the disruptive nature of some providers' unilateral actions regarding VoIP intercarrier compensation, and we seek to prevent such actions here going forward.

680. The Commission is not persuaded by the arguments of some commenters to subject VoIP traffic to the pre-existing intercarrier compensation regime that applies in the context of traditional telephone service, including full interstate and intrastate access charges. For one, many of the advocates of such an approach subsequently endorsed the ABC Plan and Joint Letter. Further, such an outcome would require the Commission to enunciate a policy rationale for expressly imposing that regime on VoIP-PSTN traffic in the face of the known flaws of existing intercarrier compensation rules and notwithstanding the recognized need to move in a different direction. Moreover, requiring payment of all existing intercarrier compensation rates applicable to traditional telephone service traffic as part of a transitional regime for VoIP-PSTN traffic would, in the aggregate, increase providers' reliance on intercarrier compensation at the same time the Commission's broader reform efforts seek to move providers away from reliance on intercarrier compensation revenues. Nor is the Commission persuaded that such an outcome is necessary to advance competitive or technological neutrality. As discussed above, the prospective regime for VoIP-PSTN intercarrier compensation is symmetrical, and thus avoids the marketplace distortions that could arise from an asymmetrical approach to compensation. In particular, the record does not demonstrate that the approach advantages in the aggregate providers relying on TDM networks relative to VoIP providers or vice versa, nor that it advantages in the aggregate certain IXCs relative to others. The transitional VoIP-PSTN intercarrier compensation regime the Commission adopts here can reduce both the intercarrier compensation revenues and long distance and wireless costs associated with VoIP-PSTN traffic. Further, to the extent that particular carriers historically have relied on access revenues to subsidize local services, the record is clear that many providers did not pay the same intercarrier compensation rates for VoIP traffic that would have applied to traditional telephone service traffic. Additionally, the transitional VoIP-PSTN intercarrier compensation framework provides the opportunity for some revenues in conjunction with other appropriate recovery opportunities adopted as part of comprehensive intercarrier compensation and universal service reform.

681. Many of these commenters also argue that comparable uses of the network should be subject to comparable intercarrier compensation charges. The Commission agrees with that policy principle, but observes that the intercarrier compensation regime applicable to traditional telephone service—which they seek to apply to VoIP-PSTN traffic—is at odds with that policy. The pre-existing intercarrier compensation regime imposes significantly different charges for the same use of the network depending upon, among other things, the jurisdiction of the traffic at issue. A more uniform intercarrier compensation framework for all uses of the network will arise from the end-point of reform adopted in this R&O. For purposes of the transition, the Commission concludes that its approach best balances the relevant policy considerations.

682. The Commission also is unpersuaded by concerns that an intercarrier compensation regime for VoIP-PSTN traffic could lead to further arbitrage or undermine the Commission-established transition adopted for intercarrier compensation reform more broadly. An underlying assumption of those arguments is that the carriers delivering traffic for termination will be able to unilaterally determine the portion of their traffic to be subject to the VoIP-PSTN regime. As discussed in greater detail below, the implementation mechanisms for the Commission's approach protect against that outcome, both through protections that can be implemented in tariffs and through the option of negotiated agreements, subject

to arbitration, regarding the portion of traffic subject to the VoIP-PSTN intercarrier compensation regime. The Commission also permits LECs to include language in their tariffs to address the identification of VoIP-PSTN traffic, much as they do to identify the jurisdiction of traffic today.

b. Legal Authority

683. *Authority To Address VoIP-PSTN Traffic Under Section 251(b)(5).* Although the Commission has not classified interconnected VoIP services or similar one-way services as ''telecommunications services'' or ''information services,'' VoIP-PSTN traffic nevertheless can be encompassed by 47 U.S.C. 251(b)(5). As discussed in greater detail above, 47 U.S.C. 251(b)(5) includes ''the transport and termination of all telecommunications exchanged with LECs'' with the exception of ''traffic encompassed by section 251(g) * * * except to the extent that the Commission acts to bring that traffic within its scope.'' The Commission previously has recognized that interconnected VoIP providers are providers of telecommunications. Moreover, the Commission has previously concluded that interconnected VoIP services involve ''transmission of [voice] by aid of wire, cable, or other like connection'' and/or ''transmission by radio,'' and went on to conclude that ''[t]he telecommunications carriers involved in originating or terminating a [VoIP] communication via the PSTN are by definition offering 'telecommunications.' '' Further, although classification questions remain regarding retail VoIP services, commenters observe that the exchange of VoIP-PSTN traffic that is relevant to the Commission's intercarrier compensation regulations typically occurs between two telecommunications carriers, one or both of which are wholesale carrier partners of retail VoIP service providers. Nor does anything in the record persuade us that a different conclusion is warranted in the context of other VoIP-PSTN traffic.

684. *Authority To Adopt Transitional Rates for VoIP-PSTN Traffic.* The legal authority that enables us to specify transitional rates for comprehensive intercarrier compensation reform also enables the Commission to adopt its transitional VoIP-PSTN intercarrier compensation framework pending the transition to bill-and-keep. For one, the Commission's pre-existing regimes for establishing reciprocal compensation rates for 47 U.S.C. 251(b)(5) traffic have been upheld as lawful, and can be applied to non-toll VoIP-PSTN traffic as provided by the transitional intercarrier compensation rules. The Commission also has authority to adopt the transitional framework for toll VoIP-PSTN traffic based on its rulemaking authority to implement 47 U.S.C. 251(b)(5). As discussed above, interpreting the Commission's rulemaking authority in this manner is consistent with court decisions recognizing that avoiding ''market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule.'' Sections 201 and 332, 47 U.S.C. 201, 332, provide additional legal authority specifically for interstate traffic and all traffic exchanged with CMRS providers.

685. *Application of Section 251(g).* Additionally, as described above, 47 U.S.C. 251(g) supports the view that the Commission has authority to adopt transitional intercarrier compensation rules, preserving the access charge regimes that pre-dated the 1996 Act ''until [they] are explicitly superseded by regulations *prescribed by the Commission.''* The Commission rejects the claims of some commenters that VoIP-PSTN traffic did not exist prior to the 1996 Act, and thus cannot be part of the access charge regimes ''grandfathered'' by 47 U.S.C. 251(g). This argument flows from a mistaken interpretation of 47 U.S.C. 251(g). The essential question under 47 U.S.C. 251(g) is not whether a particular service, or traffic involving a particular transmission protocol, existed prior to the 1996 Act. VoIP traffic existed prior to the 1996 Act, although the record here does not reveal whether LECs were exchanging IP-originated or IP-terminated VoIP traffic at that time. Because the Commission otherwise rejects the claim that intercarrier compensation for VoIP-PSTN traffic is categorically excluded from 47 U.S.C. 251(g), the Commission needs not, and does not, consider further the nature and extent of VoIP traffic that existed prior to the 1996 Act. Rather, the question is whether there was a ''pre-Act obligation relating to intercarrier compensation for'' particular traffic exchanged between a LEC and '' 'interexchange carriers and information service providers.''' 686. *Pre-1996 Act Obligations.* Regardless of whether particular VoIP services are telecommunications services or information services, there are pre-1996 Act obligations regarding LECs' compensation for the provision of exchange access to an IXC or an information service provider. Interexchange VoIP-PSTN traffic is subject to the access regime regardless of whether the underlying communication contained information-service elements. Indeed, the Commission has already found that toll telecommunications services transmitted (although not originated or terminated) in IP were subject to the access charge regime, and the same would be true to the extent that telecommunications services originated or terminated in IP. Similarly, to the extent that interexchange VoIP services are transmitted to the LEC directly from an information service provider, such traffic is subject to pre-1996 Act obligations regarding ''exchange access,'' although the access charges imposed on information service providers were different from those paid by IXCs. Specifically, under the ESP exemption, rather than paying intercarrier access charges, information service providers were permitted to purchase access to the exchange as end users, either by purchasing special access services or ''pay[ing] local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices.'' But although the nature of the charge is different from the access charges paid by IXCs, the Commission has always recognized that information-service providers providing interexchange services were obtaining exchange access from the LECs. Accordingly, because they were subject to these exchange access charges, interexchange information service traffic was subject to the over-arching Commission rules governing exchange access prior to the 1996 Act, and therefore subject to the grandfathering provision of 47 U.S.C. 251(g).

687. The DC Circuit's *WorldCom* decision, cited by some commenters, does not compel a different result. In *WorldCom,* the court considered whether dial-up, ISP-bound traffic was covered by 47 U.S.C. 251(g)'s grandfathering provision. Consistent with the language of 47 U.S.C. 251(g), the court focused on whether there was a ''pre-Act obligation relating to intercarrier compensation for ISP-bound traffic'' and found it ''uncontested—and the Commission declared in the Initial Order''—that there was not. Although the court also stated that ''[t]he best the Commission can do'' in indentifying a pre-1996 Act obligation ''is to point to pre-existing LEC obligations to provide interstate access for ISPs,'' the discussion in the initial *ISP-Bound Traffic Order* cited by the court emphasized the uncertainty at that time regarding the regulatory classification of the functions provided by the carrier

serving the ISP—*i.e.,* whether it was providing local service, interexchange service, or exchange access. As the DC Circuit ultimately observed, the fact that the carrier serving the ISP was acting as a LEC—rather than an interexchange carrier or information service provider—would be dispositive that compensation for that traffic exchange could not be encompassed by 47 U.S.C. 251(g). Here, by contrast, there is no evidence that the exchange of toll VoIP-PSTN traffic inherently involves the exchange of traffic between two LECs. Moreover, the Commission notes that to the extent VoIP-PSTN traffic is not ''toll'' traffic, it is subject to the preexisting reciprocal compensation regime under 47 U.S.C. 251(b)(5) rather than the transitional framework for toll VoIP-PSTN traffic that the Commission adopts in this R&O.

c. Implementation

688. *Role of Tariffs.* During the transition, the Commission permits LECs to tariff reciprocal compensation charges for toll VoIP-PSTN traffic equal to the level of interstate access rates. CMRS providers currently are subject to detariffing, and nothing in the intercarrier compensation framework for VoIP-PSTN traffic disrupts that regulatory approach. Under the permissive tariffing regime, providers likewise are free not to file federal and/or state tariffs for VoIP-PSTN traffic, and instead seek compensation solely through interconnection agreements (or, if they wish, to forgo such compensation). Although the Commission is addressing intercarrier compensation for all VoIP-PSTN traffic under the 47 U.S.C. 251(b)(5) framework, the Commission is doing so as part of an overall transition from current intercarrier compensation regimes—which rely extensively on tariffing specifically with respect to access charges—and a new framework more amenable to negotiated intercarrier compensation arrangements. The Commission therefore permits LECs to file tariffs that provide that, in the absence of an interconnection agreement, toll VoIP-PSTN traffic will be subject to charges not more than originating and terminating interstate access rates. This prospective regime thus facilitates the benefits that can arise from negotiated arrangements without sacrificing the revenue predictability traditionally associated with tariffing regimes. For interstate toll VoIP-PSTN traffic, the relevant language will be included in a tariff filed with the Commission, and for intrastate toll VoIP-PSTN traffic, the rates may be included in a state tariff. In this regard, the Commission notes that the terms of an applicable tariff would govern the process for disputing charges.

689. Contrary to some proposals, however, the Commission does not require the use of particular call detail information to dispositively distinguish toll VoIP-PSTN traffic from other VoIP-PSTN traffic, given the recognized limitations of such information. For example, the Commission has recognized that telephone numbers do not always reflect the actual geographic end points of a call. Further, although the phantom traffic rules are designed to ensure the transmission of accurate information that can help enable proper billing of intercarrier compensation, standing alone, those rules do not ensure the transmission of sufficient information to determine the jurisdiction of calls in all instances. Rather, consistent with the tariffing regime for access charges discussed above, carriers today supplement call detail information as appropriate with the use of jurisdictional factors or the like when the jurisdiction of traffic cannot otherwise be determined. The Commission finds this approach appropriate here, as well.

690. The Commission does, however, clarify the approach to identifying VoIP-PSTN traffic for purposes of complying with this transitional intercarrier compensation regime. Although intercarrier compensation rates for VoIP-PSTN traffic during the transition will differ from other rates for only a limited time, the Commission recognizes commenters' concerns regarding the mechanism to distinguish VoIP-PSTN traffic, and thus sought specific comment on that issue. In response, a number of commenters argued that the industry should be permitted to ''work cooperatively'' to address this issue, recognizing that ''[o]ver the years, carriers have developed reasonable methods for distinguishing between calls for billing purposes * * * and can be expected to do so here.'' The Commission agrees that, ''to help manage the transition'' LECs should be permitted to incorporate specific tariff provisions in their intrastate tariffs that ''could, for example, require carriers delivering traffic for termination to identify the percentage of traffic that is'' subject to the transitional VoIP-PSTN intercarrier compensation regime ''and to support those figures with traffic studies or other reasonable analyses that are subject to audit.'' Just as such a tariffing framework already is used to address jurisdiction of traffic, such an approach is a reasonable tool (in addition to information the terminating LEC has about VoIP customers it is serving) to identify the relevant traffic subject to the VoIP-PSTN intercarrier compensation regime. In addition, one commenter noted the potential to rely on interconnected VoIP subscriber and wireline line count data from Form 477 to develop a safe harbor. Thus, as an alternative, the Commission permits the LEC instead to specify in its intrastate tariff that the default percentage of traffic subject to the VoIP-PSTN framework is equal to the percentage of VoIP subscribers in the state based on the Local Competition Report, as released periodically, unless rebutted by the other carrier. In particular, under this approach, the default percentage of VoIP-PSTN traffic in a state would be the total number of incumbent LEC and non-incumbent LEC VoIP subscriptions in a state divided by the sum of those reported VoIP subscriptions plus incumbent LEC and non-incumbent LEC switched access lines. Further, although the Commission does not mandate other approaches as part of its tariffing regime, individual providers remain free to rely on signaling or call detail information, or other measures, to the extent that they enter alternative compensation arrangements through interconnection agreements. In particular, contrary to some suggestions, the Commission does not require filing of certifications with the Commission regarding carriers' reported VoIP-PSTN traffic. Such certifications would be required from not only IXCs but also originating and terminating providers nationwide, even though these issues may be of little or no practical concern in states with intrastate access rates that already are at or near interstate rates. Given the likely significant overbreadth in the burden that would impose, the Commission declines to adopt such a requirement.

691. Although the Commission will allow tariffs during the transition to bill-and-keep, the Commission reaffirms its decision in the *T-Mobile Order* that good-faith negotiations generally are preferable to tariffing as a means of implementing carriers' compensation obligations. Under the circumstances here, the Commission does not believe that the policies underlying the prohibition of wireless termination tariffs for non-access traffic in the *T-Mobile Order* requires us to prohibit use of tariffs for toll VoIP-PSTN traffic during the transition. Although the Commission likewise is moving to facilitate negotiated arrangements for intercarrier compensation more broadly, significant portions of the legacy intercarrier compensation regime have

traditionally relied on tariffs, and the Commission believes flash cutting the whole industry to a new regime would be unduly disruptive. Further, in place of tariffing, the *T-Mobile Order* required CMRS providers to negotiate interconnection agreements in good faith subject to 47 U.S.C. 252 negotiation and arbitration processes at the request of incumbent LECs—a set of requirements that the Commission has not extended more broadly. Thus, maintaining a continuing role for tariffs during the transition to a new intercarrier compensation framework is a reasonable approach. Further, CMRS providers had expressed concerns about potentially excessive rates in wireless termination tariffs. Here, rates are ultimately subject to Commission oversight, including the mandated reductions in those charges as part of comprehensive intercarrier compensation reform. The Commission thus concludes that this approach strikes the right balance here.

692. *Reliance on Interconnection Agreements and SGATs.* As discussed above, the transitional intercarrier compensation framework permits tariffing of charges for toll VoIP-PSTN traffic, but permits carriers to negotiate agreements that reflect alternative rates. In the case of incumbent LECs, they must negotiate in good faith in response to requests for agreements addressing reciprocal compensation for VoIP-PSTN traffic. In this regard, the Commission notes that reciprocal compensation charges generally have been imposed through interconnection agreements or state-approved statements of generally available terms and conditions (SGATs), which carriers may accept in lieu of negotiating individual interconnection agreements. Various commenters also describe the benefits that can arise from an interconnection and intercarrier compensation framework that allows parties to negotiate mutually agreeable outcomes, rather than all parties being categorically bound to a single regime. Likewise, the interconnection and intercarrier compensation framework adopted in sections 251 and 252 of the 1996 Act, 47 U.S.C. 251, 252, reflect a policy favoring negotiated agreements, where possible.

693. The Commission recognizes the concerns of some commenters that instances of disparate negotiating leverage can occur and that, absent an appropriate regulatory backstop, a regime purely relying on commercial negotiations could systematically disadvantage providers with limited negotiating leverage. These concerns arise in part based on the variations in size and make-up of the customers of different networks, and in part based on certain underlying legal requirements, including the general policy against blocking traffic and the lack of a statutory compulsion for certain entities to enter interconnection agreements.

694. The transitional regime for VoIP-PSTN intercarrier compensation accommodates these disparities in several ways. For one, the ability to tariff these charges ensures that LECs have the opportunity to obtain the intercarrier compensation provided for by the rules. In addition, the section 252 framework applicable to interconnection agreements provides procedural protections. For example, it provides carriers the opportunity, outside the tariffing framework, to specify a mutually agreeable approach for determining the amount of traffic that is VoIP-PSTN traffic. To this end, carriers could include an alternative approach in a state-approved SGAT or negotiate such an approach as part of an interconnection agreement. To the extent that the parties pursue a negotiated agreement but cannot agree upon the particular means of determining the amount of traffic that is VoIP-PSTN traffic, this can be subject to arbitration. Although most incumbent LECs are subject to this duty by virtue of the Act, while other carriers, such as competitive LECs, are not, the Commission notes that its rules already anticipate the possibility that two non-incumbent LECs might elect to bring a reciprocal compensation dispute before a state for arbitration under the section 252 framework. To the extent that a state fails to arbitrate a dispute regarding VoIP-PSTN intercarrier compensation, it will be subject to Commission arbitration.

695. *Scope of Charges Imposed by Retail VoIP Providers' LEC Partners.* Some commenters express concern that, absent Commission clarification, certain LECs that provide wholesale inputs to retail VoIP services might not be able to collect all the same intercarrier compensation charges as LECs relying entirely on TDM networks. In particular, providers cite disputes arising from their use of IP technology as well as the structure of the relationship between retail VoIP service providers and their wholesale carrier partners. For the reasons described above, the Commission believes a symmetric approach to VoIP-PSTN intercarrier compensation is warranted for all LECs. One of the goals of the Commission's reform is to promote investment in and deployment of IP networks. Although the Commission believes that its comprehensive reforms best advance this goal, during the transition it does not want to disadvantage providers that already have made these investments. Consequently, the Commission allows providers that have undertaken or choose to undertake such deployment the same opportunity, during the transition, to collect intercarrier compensation under its prospective VoIP-PSTN intercarrier compensation regime as those providers that have not yet undertaken that network conversion. Further, recognizing that these specific questions have given rise to disputes, the Commission believes that addressing this issue under its transitional intercarrier compensation framework will reduce uncertainty and litigation, freeing up resources for investment and innovation. The Commission therefore adopts rules clarifying LECs' ability to impose charges in such circumstances under its transitional regime, as discussed below.

696. The transitional VoIP-PSTN intercarrier compensation rules focus specifically on whether the exchange of traffic occurs in TDM format (and not in IP format), without specifying the technology used to perform the functions subject to the associated intercarrier compensation charges. The Commission thus adopts rules making clear that origination and termination charges may be imposed under its transitional intercarrier compensation framework, including when an entity ''uses Internet Protocol facilities to transmit such traffic to [or from] the called party's premises.''

697. With respect to the issue of whether particular functions are performed by the wholesale LEC or its retail VoIP partner, the Commission recognizes that under the Commission's historical approach in the access charge context, when relying on tariffs, LECs have been permitted to charge access charges to the extent that they are providing the functions at issue. In light of the policy considerations implicated here, the Commission adopts a different approach to address concerns about double billing. As discussed above, the Commission brings all access traffic within 47 U.S.C. 251(b)(5). The Commission had not previously addressed LECs' rights to tariff such charges in that context. Nonetheless, for convenience, the transitional intercarrier compensation framework builds upon rules, or rule language, from the access charge context in a number of ways, and the Commission therefore modifies aspects of that language in the manner discussed above, based on the record received on this issue.

698. The Commission believes that a symmetrical approach to VoIP-PSTN

intercarrier compensation is the best policy, and thus believe that competitive LECs should be entitled to charge the same intercarrier compensation as incumbent LECs do under comparable circumstances. Because the Commission has not broadly addressed the classification of VoIP services, however, retail VoIP providers that take the position that they are offering unregulated services therefore are not carriers that can tariff intercarrier compensation charges. Consequently, just as retail VoIP providers rely on wholesale carrier partners for, among other things, interconnection, access to numbers, and compliance with 911 obligations—a type of arrangement the Commission has endorsed in the past—so too do they rely on wholesale carrier partners to charge tariffed intercarrier compensation charges. Given these distinct circumstances, the Commission adopts rules that permit a LEC to charge the relevant intercarrier compensation for functions performed by it and/or by its retail VoIP partner, regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture. The Commission notes that, notwithstanding its rules, to the extent that these charges are imposed via tariff, a carrier may not impose charges other than those provided for under the terms of its tariff. However, the rules include measures to protect against double billing, and the Commission also makes clear that its rules do not permit a LEC to charge for functions performed neither by itself or its retail service provider partner.

699. This approach is supported by the fact that the Commission is bringing all traffic within 47 U.S.C. 251(b)(5). Under Commission precedent in that context, to the extent that a competitive LEC's rates were set based on the incumbent LEC's reciprocal compensation charges, the Commission's rules were not as limiting regarding the scope of those reciprocal compensation charges as historically was the case in the access charge context. Indeed, in addition to tariffing, providers also remain free to negotiate compensation arrangements for this traffic through interconnection agreements, and to define the scope of charges by mutual agreement or, if relevant, arbitration.

d. Other Issues

i. Interconnection and Traffic Exchange

700. *Use of Section 251(c)(2) Interconnection Arrangements.* Although the Commission brings all VoIP-PSTN traffic within 47 U.S.C. 251(b)(5), and permit compensation for such arrangements to be addressed through interconnection agreements, the Commission recognizes that there is potential ambiguity in existing law regarding carriers' ability to use existing 47 U.S.C. 251(c)(2) interconnection facilities to exchange VoIP-PSTN traffic, including toll traffic. Consequently, the Commission makes clear that a carrier that otherwise has a 47 U.S.C. 251(c)(2) interconnection arrangement with an incumbent LEC is free to deliver toll VoIP-PSTN traffic through that arrangement, as well, consistent with the provisions of its interconnection agreement. The Commission previously held that 47 U.S.C. 251(c)(2) interconnection arrangements may not be used solely for the transmission of interexchange traffic because such arrangements are for the exchange of ''telephone exchange service'' or ''exchange access'' traffic—and interexchange traffic is neither. However, as long as an interconnecting carrier is using the 47 U.S.C. 251(c)(2) interconnection arrangement to exchange some telephone exchange service and/or exchange access traffic, 47 U.S.C. 251(c)(2) does not preclude that carrier from relying on that same functionality to exchange other traffic with the incumbent LEC, as well. This interpretation of 47 U.S.C. 251(c)(2) is consistent with the Commission's prior holding that carriers that otherwise have 47 U.S.C. 251(c)(2) interconnection arrangements are free to use them to deliver information services traffic, as well. Likewise, it is consistent with the Commission's interpretation of the unbundling obligations of 47 U.S.C. 251(c)(3), where it held that, as long as a carrier is using an unbundled network element (UNE) for the provision of a telecommunications service for which UNEs are available, it may use that UNE to provide other services, as well. With respect to the broader use of 47 U.S.C. 251(c)(2) interconnection arrangements, however, it will be necessary for the interconnection agreement to specifically address such usage to, for example, address the associated compensation.

701. *No Blocking.* In addition to the protections discussed above to prevent unilateral actions disruptive to the transitional VoIP-PSTN intercarrier compensation regime, the Commission also finds that carriers' blocking of VoIP calls is a violation of the Communications Act and, therefore, is prohibited just as with the blocking of other traffic. As such, it is appropriate to discuss the Commission's general policy against the blocking of such traffic. As the Commission has long recognized, permitting blocking or the refusal to deliver voice telephone traffic, whether as a means of ''self-help'' to address perceived unreasonable intercarrier compensation charges or otherwise, risks ''degradation of the country's telecommunications network.'' Consequently, ''the Commission, except in rare circumstances[,] * * * does not allow carriers to engage in call blocking'' and ''previously has found that call blocking is an unjust and unreasonable practice under section 201(b) of the Act.'' Although the Commission generally has not classified VoIP services, as discussed above, the exchange of VoIP-PSTN traffic implicating intercarrier compensation rules typically involves two carriers. As a result, those carriers are directly bound by the Commission's general prohibition on call blocking with respect to VoIP-PSTN traffic, as with other traffic.

702. The Commission recognizes, however, that blocking also could be performed by interconnected VoIP providers, or by providers of ''one-way'' VoIP service that allows customers to receive calls from, or place calls to the PSTN, but not both. Just as call blocking concerns regarding interexchange carriers and wireless providers arose in an effort to avoid high access charges, VoIP providers likewise could have incentives to avoid such rates, which they would pay either directly or through the rates they pay for wholesale long distance service. If interconnected VoIP services or one-way VoIP services are telecommunications services, they already are subject to restrictions on blocking under the Act. If such services are information services, the Commission exercises its ancillary authority and prohibits blocking of voice traffic to or from the PSTN by those providers just as the Commission does for carriers. For example, an interexchange carrier that is a wholesale partner of such a VoIP provider could evade the directly-applicable restrictions on blocking under 47 U.S.C. 201 of the Act by having the blocking performed by the VoIP provider instead. An IXC generally would be prohibited from refusing to deliver calls to telephone numbers associated with high intercarrier compensation charges. If that IXC's VoIP provider wholesale customer were free to block calls to such numbers, the IXC thus could evade the directly-applicable restrictions on blocking (and the VoIP provider would benefit from lower wholesale long distance costs to the extent that, for

example, its agreement provided for a pass-through of the intercarrier compensation charges paid by the IXC). In addition, blocking or degrading of a call from a traditional telephone customer to a customer of a VoIP provider, or vice-versa, would deny the traditional telephone customer the intended benefits of telecommunications interconnection under 47 U.S.C. 251(a)(1).

ii. Other Pending Matters

703. The conclusions in this R&O effectively address, in whole or in part, certain pending petitions. For one, Global NAPS filed a petition for declaratory ruling regarding the manner and extent to which VoIP traffic could be subject to access charges generally, and intrastate access charges in particular. AT&T also filed a petition requesting that, on a transitional basis, the Commission declare that interstate and intrastate access charges may be imposed on VoIP traffic in certain circumstances, as well as limited waivers that would enable it to offset forgone revenues from voluntary reductions in intrastate terminating access charges. In addition, Vaya Telecom (Vaya) filed a petition seeking a declaration that ''a LEC's attempt to collect intrastate access charges on LEC-to-LEC VoIP traffic exchanges is an unlawful practice.'' Because the transitional intercarrier compensation framework for VoIP-PSTN declines to apply all existing intercarrier compensation regimes as they currently exist, Global NAPS's and Vaya's petitions are granted in part and AT&T's is denied in part. To the extent that AT&T proposes a specific approach for alternative rate reforms and revenue recovery, the Commission finds the mechanisms adopted in this R&O to be more appropriate for the reasons discussed above, and thus deny its requests in that regard. Further, Grande filed a petition seeking a Commission declaration that carriers categorically may rely on a customer's certification that traffic originated in IP and therefore is enhanced and not subject to access charges. To the extent that this would deviate from the regime the Commission adopts, the petition is denied. The Commission declines to address the classification of VoIP services generally at this time, nor does the Commission otherwise elect to grant the other requests for declaratory rulings raised by the Global NAPS, Vaya, AT&T, and Grande petitions.

## XII. Intercarrier Compensation for Wireless Traffic

### *A. LEC–CMRS Non-Access Traffic*

704. Given the adoption of a uniform, federal framework for comprehensive intercarrier compensation reform, the Commission believes it is now appropriate to clarify the system of intercarrier compensation applicable to non-access traffic exchanged between LECs and CMRS providers. As outlined above, two compensation regimes currently apply to non-access LEC–CMRS traffic, and the Commission has not clarified the intersection between the two. The Commission concludes, based on the record, that it is appropriate for the Commission to clarify the relationship between the obligations in 47 CFR 20.11 and 47 U.S.C. 251(b)(5).

705. To bring the 47 CFR 20.11 and 47 U.S.C. 251 obligations in line, the Commission first harmonizes the scope of the compensation obligations in § 20.11, 47 CFR 20.11 and those in part 51, 47 CFR part 51. The Commission accordingly concludes that 47 CFR 20.11 applies only to LEC–CMRS traffic that, since the *Local Competition First Report and Order,* has been subject to the reciprocal compensation framework under 47 U.S.C. 251(b)(5) of the Act. Thus, 47 CFR 20.11 does not apply to access traffic that, prior to this R&O, was subject to 47 U.S.C. 251(g). Furthermore, the Commission clarifies that the terms ''mutual compensation'' in § 20.11 and ''reciprocal compensation'' in 47 U.S.C. 251(b)(5) and Part 51 are synonymous when applied to non-access LEC–CMRS traffic.

706. Next, the Commission finds that it is in the public interest to establish a default federal pricing methodology for determining reasonable compensation under 47 CFR 20.11. Commenters urge the Commission to address the current absence of guidance on compensation rates for traffic between competitive LECs and CMRS providers and to address the growing problem of traffic stimulation. They argue that the decision in the *North County Order* to defer setting of reasonable compensation under 47 CFR 20.11 for intrastate traffic to the states without providing any guidance has led to CLECs seeking terminating compensation rates far above cost and to a dramatic increase in litigation as CLECs seek to establish or enforce termination rates in state administrative and judicial forums. They recommend that the Commission resolve this problem by establishing a default federal termination rate for CLEC–CMRS traffic of $0.0007 or by adopting a bill-and-keep methodology.

707. Currently, reciprocal compensation under the part 51 rules, 47 CFR part 51, is subject to a federal pricing methodology. Reciprocal compensation under 47 CFR 20.11, however, is not currently subject to a federal pricing methodology. As the Commission recently explained in the *North County Order,* it has instead traditionally regarded state commissions as the ''more appropriate forum for determining the reasonable compensation rate [under § 20.11] for * * * termination of intrastate, intraMTA traffic,'' and have to date declined to provide guidance to the states on how to carry out that responsibility. The Commission has long made clear, however, that it ''would not hesitate to preempt any rates set by the states that would undermine the federal policy that encourages CMRS providers and LECs to interconnect.'' And the Commission observed in the *North County Order* that the various ''policy arguments'' in favor of a greater federal role in implementing 47 CFR 20.11 were ''better suited to a more general rulemaking proceeding,'' citing this proceeding in particular.

708. The Commission now concludes, based on the record in this proceeding, that the Commission should establish a federal methodology for implementing 47 CFR 20.11's reasonable compensation mechanism. Although the Commission believed in the *North County Order* that the interconnection process under 47 CFR 20.11 would likely not be ''procedurally onerous,'' the record shows that the absence of a federal methodology has been a growing source of confusion and litigation. MetroPCS, for example, states that it is embroiled in disputes over traffic stimulation schemes in a number of jurisdictions and notes other proceedings in New York and Michigan. The California commission, the state commission implicated by the *North County Order,* also ''recommends that the FCC provide guidance on what factors should be considered in setting a 'reasonable rate' for such arrangements.'' Adoption of a federal pricing methodology promotes the policy goals of avoiding wasteful arbitrage opportunities caused by disparate intercarrier compensation rates and modernizing and unifying the intercarrier compensation system to promote efficiency and network investment. It is also necessary to effectuate the decision to harmonize 47 CFR 20.11 with 47 U.S.C. 251(b)(5), which, as noted, has long been governed by a federal pricing methodology.

709. The Commission has already concluded above that a bill-and-keep methodology for intercarrier compensation, including reciprocal compensation, best serves the policy goals and requirements of the Act. Consistent with that determination and the clarification above that compensation obligations under § 20.11 are coextensive with reciprocal compensation requirements, the Commission concludes that bill-and-keep should also be the default pricing methodology between LECs and CMRS providers under § 20.11 of the rules, 47 CFR 20.11. By default, the Commission means that bill-and-keep will satisfy terminating compensation obligations except where carriers mutually agree to the contrary. Thus, the Commission concludes that bill-and-keep should be the default applicable to LEC–CMRS reciprocal compensation arrangements under both 47 CFR 20.11 or part 51, 47 CFR part 51. The Commission rejects claims that a default rate set via a bill-and-keep methodology under any circumstances would be inadequate because it would be less than the actual cost of terminating calls that originate with a CMRS provider. As the Commission explains above, a bill-and-keep regime requires each carrier to recover its costs from its own end-users.

710. The Commission further concludes that, under either 47 CFR 20.11 or the Part 51 rules, 47 CFR part 51, for traffic to or from a CMRS provider subject to reciprocal compensation under either 47 CFR 20.11 or the Part 51 rules, 47 CFR part 51, the bill-and-keep default should apply immediately. Although the Commission has adopted a glide path to a bill-and-keep methodology for access charges generally and for reciprocal compensation between two wireline carriers, it finds that a different approach is warranted for non-access traffic between LECs and CMRS providers for several reasons. First, the Commission finds a greater need for immediate application of a bill-and-keep methodology in this context to address traffic stimulation. The record demonstrates there is a significant and growing problem of traffic stimulation and regulatory arbitrage in LEC–CMRS non-access traffic. In contrast, the Commission finds little evidence of such problems with regard to traffic between two LECs, where traffic stimulation appears to be occurring largely within the access regime, rather than for traffic currently subject to reciprocal compensation payments. This likely reflects in part the fact that the applicable ''local calling area'' for CMRS providers within which calls are subject to reciprocal compensation is much larger than it is for LECs. Thus, what would be access stimulation if between a LEC and an IXC will in many cases arise under reciprocal compensation when a CMRS provider is involved. For similar reasons, CMRS providers are more likely to be exposed to traffic stimulation that is not subject to the measures the Commission adopts above to address this problem within the access traffic regime. Further, although the record reflects that LEC–CMRS intraMTA traffic stimulation is growing most rapidly in traffic terminated by competitive LECs, the Commission is concerned that absent any measures to address traffic stimulation for intraMTA LEC–CMRS traffic, incumbent LECs that sought revenues from access stimulation may quickly adapt their stimulation efforts to wireless reciprocal compensation. For these reasons, the Commission finds that addressing the traffic stimulation problem in reciprocal compensation is more urgent for LEC–CMRS traffic, and the bill-and-keep default methodology the Commission adopts should eliminate the opportunity for parties to engage in such practices in connection with such traffic.

711. Although, as discussed above, the Commission finds that adopting a gradual glide path to a bill-and-keep methodology for intercarrier compensation generally, including reciprocal compensation between LECs, will help avoid market disruption to service providers and consumers, the Commission concludes that an immediate transition for reciprocal compensation traffic exchanged between LECs and CMRS providers presents a far smaller risk of market disruption than would an immediate shift to a bill-and-keep methodology for intercarrier compensation more generally. First, for reciprocal compensation between CMRS providers and competitive LECs, the Commission has until recently had no pricing methodology applicable to competitive LEC–CMRS traffic, as reflected in the fact that the carriers in the recent *North County Order* had specifically asked the Commission to establish one for the first time. Competitive LECs thus had no basis for reliance on such a methodology in their business models, and the Commission sees no reason why, in setting a methodology for the first time, it should not require competitive LECs to meet that methodology immediately, particularly given that competitive LECs are not subject to retail rate regulation in the manner of incumbents, and therefore have flexibility to adapt their businesses more quickly.

712. Even for incumbent LECs, the Commission is confident the impact is not significant, particularly when balanced against the overall benefits of providing the clarification. For one, incumbent LECs and CMRS providers that fail to pursue an interconnection agreement do not receive any compensation for intraMTA traffic today. For incumbent LECs that do have agreements for compensation for intraMTA traffic, most large incumbent LECs have already adopted $0.0007 or less as their reciprocal compensation rate. For rate-of-return carriers, there is no allegation in the record that reforming LEC–CMRS reciprocal compensation obligations in this manner would have a harmful impact on them. And, in any event, the Commission has adopted mechanisms that should address any such impacts. First, the Commission adopts a new recovery mechanism, which includes recovery for net reciprocal compensation revenues, to provide all incumbent LECs with a stable, predictable recovery for reduced intercarrier compensation revenues. Second, the Commission adopts an additional measure to further ease the move to bill-and-keep LEC–CMRS traffic for rate-of-return carriers. Specifically, the Commission limits rate-of-return carriers' responsibility for the costs of transport involving non-access traffic exchanged between CMRS providers and rural, rate-of-return regulated LECs.

713. Some commenters proposed a rule allocating the responsibility for transport costs for non-access traffic to the non-rural terminating provider, stating that in the absence of such a rule, rural LECs could be forced to incur unrecoverable transport costs at a time when ICC reforms may already have a negative impact on network cost recovery. The Commission recognizes that immediately moving to a default bill-and-keep methodology for intraMTA traffic raises issues regarding the default point at which financial responsibility for the exchange of traffic shifts from the originating carrier to the terminating carrier. Therefore, in the attached *USF/ICC Transformation FNPRM,* the Commission seeks comment on whether and how to address this aspect of bill-and-keep arrangements. The Commission finds it appropriate, however, to establish an interim default rule allocating responsibility for transport costs applicable to non-access traffic exchanged between CMRS providers and rural, rate-of-return regulated LECs to provide a gradual transition for such

carriers. Given the Commission's commitment to providing a measured transition, the Commission believes it is appropriate to help ensure no flash cuts for rate-of-return carriers. The Commission notes that price cap carriers did not raise concerns about transport costs, and the Commission concludes that no particular transition is required or warranted for traffic exchanged between CMRS providers and these carriers.

714. Specifically, for such traffic, the rural, rate-of-return LEC will be responsible for transport to the CMRS provider's chosen interconnection point when it is located within the LEC's service area. When the CMRS provider's chosen interconnection point is located outside the LEC's service area, the Commission provides that the LEC's transport and provisioning obligation stops at its meet point and the CMRS provider is responsible for the remaining transport to its interconnection point. Although the Commission does not prejudge its consideration of what allocation rule should ultimately apply to the exchange of all telecommunications traffic, including traffic that is considered access traffic today, under a bill-and-keep methodology, the Commission believes that this rule is warranted for the interim period to help minimize disputes and provide greater certainty until rules are adopted to complete the transition to a bill-and-keep methodology for all intercarrier compensation.

715. Beyond adopting these measures, the Commission also emphasizes that, although it establishes bill-and-keep as an immediately applicable default methodology, the Commission is not abrogating existing commercial contracts or interconnection agreements or otherwise allowing for a ''fresh look'' in light of the reforms. Thus, incumbent LECs may have an extended period of time under existing compensation arrangements before needing to renegotiate subject to the new default bill-and-keep methodology. As a result, while the Commission is concerned that an immediate transition from reciprocal compensation to a bill-and-keep methodology more generally would risk overburdening the universal service fund that underlies the interim recovery mechanism, the Commission thinks that the impact on the fund resulting from an immediate transition for LEC–CMRS reciprocal compensation alone will not do so. Adoption of bill-and-keep for this subset of traffic will also inform the Commission's understanding of the potential impact that the larger transition to bill-and-keep will have and, although the Commission does not envision any concerns arising based on the reforms adopted in this R&O, would enable the Commission, if necessary, to make any adjustments as part of that larger transition. For the reasons discussed, the Commission finds that an immediate transition away from reciprocal compensation to a bill-and-keep methodology in this context is practical.

716. As the Commission found above, the Commission believes that 47 U.S.C. 251 and 252 affirmatively provide us authority to establish bill-and-keep as the default methodology applicable to traffic within the scope of 47 U.S.C. 251(b)(5), including for traffic exchanged between LECs and CMRS providers. Further, as the Commission has concluded above that it has authority under 47 U.S.C. 332 to regulate intrastate access traffic exchanged between LECs and CMRS providers and thus authority to specify a transition to bill-and-keep for such traffic, the Commission concludes for similar reasons that it has the authority to regulate intrastate reciprocal compensation between LECs and CMRS providers. Indeed, in *Iowa Utilities Board,* the Eighth Circuit specifically upheld Commission rules regulating LEC–CMRS reciprocal compensation based on these provisions.

717. In the *North County Order,* the Commission found that any decision to reverse course and regulate intrastate rates under 47 CFR 20.11 at the federal level was more appropriately addressed in a general rulemaking proceeding. Now that the Commission is considering the issue in the context of this rulemaking proceeding, it finds it appropriate to take this step for the reasons discussed above, and the Commission concludes that its decision to establish a federal default pricing methodology for termination of LEC–CMRS intraMTA traffic as part of its broader effort in this proceeding to reform, modernize, and unify the intercarrier compensation system is consistent with its authority under the Act.

*B. IntraMTA Rule*

718. In the *Local Competition First Report and Order,* the Commission stated that calls between a LEC and a CMRS provider that originate and terminate within the same Major Trading Area (MTA) at the time that the call is initiated are subject to reciprocal compensation obligations under 47 U.S.C. 251(b)(5), rather than interstate or intrastate access charges. As noted above, this rule, referred to as the ''intraMTA rule,'' also governs the scope of traffic between LECs and CMRS providers that is subject to compensation under 47 CFR 20.11(b). The *USF/ICC Transformation NPRM* sought comment, *inter alia,* on the proper interpretation of this rule.

719. The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes the Commission adopts in this R&O maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, parties must continue to rely on the intraMTA rule to define the scope of LEC–CMRS traffic that falls under the reciprocal compensation regime. The Commission therefore takes this opportunity to remove any ambiguity regarding the interpretation of the intraMTA rule.

720. The Commission first addresses a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers ''Common Carrier wireless exchange services to ESP and enterprise customers'' in which the customer ''connects wirelessly to Halo base stations in each MTA.'' It further asserts that its ''high volume'' service is CMRS because ''the customer connects to Halo's base station using wireless equipment which is capable of operation while in motion.'' Halo argues that, for purposes of applying the intraMTA rule, ''[t]he origination point for Halo traffic is the base station to which Halo's customers connect wirelessly.'' On the other hand, ERTA claims that Halo's traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers. NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used ''in the middle,'' this does not affect the categorization of the call for intercarrier compensation purposes. These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very large amount of traffic. Responding to this dispute, CTIA asserts that ''it is unclear whether the intraMTA rules would even apply in that case.''

721. The Commission clarifies that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider. Where a provider is

merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, the Commission agrees with NECA that the ''re-origination'' of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and the Commission disagrees with Halo's contrary position.

722. The Commission also clarifies that the intraMTA rule means that all traffic exchanged between a LEC and a CMRS provider that originates and terminates within the same MTA, as determined at the time the call is initiated, is subject to reciprocal compensation regardless of whether or not the call is, prior to termination, routed to a point located outside that MTA or outside the local calling area of the LEC. Similarly, intraMTA traffic is subject to reciprocal compensation regardless of whether the two end carriers are directly connected or exchange traffic indirectly via a transit carrier.

723. Further, in response to the *USF/ICC Transformation NPRM,* T-Mobile proposed that the Commission expand the scope of the intraMTA rule to reflect the fact that CMRS licenses are now issued for REAGs, geographic areas that are larger than MTAs. T-Mobile notes that the intraMTA rule was promulgated at a time the MTA was the largest CMRS license area. T-Mobile argues that the REAG is currently the largest license being used to provide CMRS and that this change would move more telecommunications traffic under the reciprocal compensation umbrella pending the unification of all intercarrier compensation rates. The Commission declines to adopt T-Mobile's proposal. Given the long experience of the industry dealing with the current rule, the very broad scope of the changes to the intercarrier compensation rules being made in this R&O that will, after the transition period, make the rule irrelevant, and the limited support in the record for the suggested change even from CMRS commenters, the Commission does not believe it is either necessary or appropriate to expand the scope of this rule as proposed by T-Mobile.

## XIII. Interconnection

724. The Commission anticipates that the reforms it adopts herein will further promote the deployment and use of IP networks. However, IP interconnection between providers also is critical. As such, the Commission agrees with commenters that, as the industry transitions to all IP networks, carriers should begin planning for the transition to IP-to-IP interconnection, and that such a transition will likely be appropriate before the completion of the intercarrier compensation phase down. The Commission seeks comment in the accompanying *USF/ICC Transformation FNPRM* regarding specific elements of the policy framework for IP-to-IP interconnection. The Commission makes clear, however, that its decision to address certain issues related to IP-to-IP interconnection in the *USF/ICC Transformation FNPRM* should not be misinterpreted to suggest any deviation from the Commission's longstanding view regarding the essential importance of interconnection of voice networks.

725. In particular, even while the *USF/ICC Transformation FNPRM* is pending, the Commission expects all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic. The duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, or otherwise. Moreover, the Commission expects such good faith negotiations to result in interconnection arrangements between IP networks for the purpose of exchanging voice traffic. As the Commission evaluates specific elements of the appropriate interconnection policy framework for voice IP-to-IP interconnection in the *USF/ICC Transformation FNPRM,* it will be monitoring marketplace developments, which will inform the Commission's actions in response to the *USF/ICC Transformation FNPRM.*

## XIV. Procedural Matters

### *A. Paperwork Reduction Act Analysis*

726. The Report and Order contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. The new requirements will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. We note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' We describe impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis, infra.

### *B. Congressional Review Act*

727. On Friday December 2, 2011, the Commission sent a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

### *C. Final Regulatory Flexibility Analysis*

[[See 76 FR 73829, 73834 (page where the FRFA starts)]]

Federal Communications Commission

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2011–32411 Filed 12–27–11; 8:45 am]

**BILLING CODE 6712–01–P**

# FEDERAL REGISTER

Vol. 76 Wednesday,

No. 249 December 28, 2011


Part III

## Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Revising the Listing of the Gray Wolf (Canis lupus) in the Western Great Lakes; Final rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[Docket No. FWS–R3–ES–2011–0029; FXES11130900000C6–123–FF09E32000]**

**RIN 1018–AX57**

# Endangered and Threatened Wildlife and Plants; Revising the Listing of the Gray Wolf (Canis lupus) in the Western Great Lakes

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

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service or USFWS) are revising the 1978 listing of the Minnesota population of gray wolves (*Canis lupus*) to conform to current statutory and policy requirements. We rename what was previously listed as the Minnesota population of the gray wolf as the Western Great Lakes (WGL) Distinct Population Segment (DPS), and delineate the boundaries of the expanded Minnesota population segment to include all of Minnesota, Wisconsin, and Michigan and portions of the adjacent states. We are removing the WGL DPS from the List of Endangered and Threatened Wildlife. We are taking this action because the best available scientific and commercial information indicates that the WGL DPS does not meet the definitions of threatened or endangered under the Act.

This final rule also removes the designated critical habitat for the wolf in Minnesota and Michigan and the special regulations under section 4(d) of the Act for wolves in Minnesota.

We are separating our determination on the delisting of the Western Great Lakes DPS from the determination on our proposal regarding all or portions of the 29 eastern States we considered to be outside the historical range of the gray wolf. This rule finalizes our determination for the WGL DPS. A subsequent decision will be made for the rest of the eastern United States.

**DATES:** This rule becomes effective on January 27, 2012.

**ADDRESSES:** This final rule is available on the Internet at *http://www.regulations.gov* and at the U.S. Fish and Wildlife Service, Midwest Regional Office, 5600 American Boulevard West, Suite 990, Bloomington, Minnesota 55437. Comments and materials we received, as well as supporting documentation we used in preparing this final rule, are available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R3–ES–2011–0029, or by appointment, during normal business hours at the following Ecological Services offices:

- Twin Cities, Minnesota Ecological Services Field Office, 4101 American Blvd. E., Bloomington, MN; (612) 725–3548.
- Green Bay, Wisconsin Ecological Services Field Office, 2661 Scott Tower Dr., New Franken, WI; (920) 866–1717.
- East Lansing, Michigan Ecological Services Field Office, 2651 Coolidge Road, Suite 101, East Lansing, MI; (517) 351–2555.

**FOR FURTHER INFORMATION CONTACT:** Laura Ragan, (612) 713–5350. Direct all questions or requests for additional information to: GRAY WOLF QUESTIONS, U.S. Fish and Wildlife Service, 5600 American Boulevard West, Suite 990, Bloomington, Minnesota 55437. Additional information is also available on our Web site at *http://www.fws.gov/midwest/wolf.* Individuals who are hearing-impaired or speech-impaired may call the Federal Relay Service at 1–(800) 877–8337 for TTY assistance.

**SUPPLEMENTARY INFORMATION:**

## Background

### *Previous Federal Actions for WGL Wolves*

The eastern timber wolf (*Canis lupus lycaon*) was listed as endangered in Minnesota and Michigan in the first list of species that were protected under the 1973 Act, published in May 1974 (USDI 1974). On March 9, 1978, we published a rule (43 FR 9607) reclassifying the gray wolf at the species level (*Canis lupus*) as endangered throughout the conterminous 48 States and Mexico, except for the Minnesota population, which we classified to threatened. The separate subspecies listings, including *C. l. lycaon,* thus were subsumed into the listings for the gray wolf in Minnesota and the gray wolf in the rest of the conterminous United States and Mexico. We considered the Minnesota group of gray wolves to be a listable entity under the Act, and listed it as threatened; we considered the gray wolf group in Mexico and the 48 conterminous States other than Minnesota to be another listable entity, and listed it as endangered (43 FR 9607, 9610, respectively, March 9, 1978). This reclassification was undertaken because of uncertainty about the taxonomic validity of some of the previously listed subspecies and because we recognized that wolf populations were historically connected, and that subspecies boundaries were thus malleable.

However, the 1978 rule also stated that ''biological subspecies would continue to be maintained and dealt with as separate entities'' (43 FR 9609), and offered ''the firmest assurance that [the Service] will continue to recognize valid biological subspecies for purposes of its research and conservation programs'' (43 FR 9610, March 9, 1978). Accordingly, recovery plans were developed for the wolf populations in the following regions of the United States: the northern Rocky Mountains in 1980, revised in 1987; the eastern U.S. in 1978, revised in 1992; and the Southwest in 1982, the revision of which is now under way.

In the 1978 rule, we also identified Isle Royale National Park, Michigan, and Minnesota wolf management zones 1, 2, and 3, as critical habitat. We also promulgated special regulations under section 4(d) of the Act for operating a wolf management program in Minnesota at that time. The depredation control portion of the special regulation was later modified (50 FR 50793; December 12, 1985); these special regulations are found in 50 CFR 17.40(d)(2).

On April 1, 2003, we published a final rule revising the listing status of the gray wolf across most of the conterminous United States (68 FR 15804). Within that rule, we identified three DPSs for the gray wolf, including an Eastern DPS, which was reclassified from endangered to threatened, except where already classified as threatened. In addition, we established a second section 4(d) rule that applied provisions similar to those previously in effect in Minnesota to most of the Eastern DPS. The special rule was codified in 50 CFR 17.40(o).

U.S. District Court rulings in Oregon and Vermont on January 31, 2005, and August 19, 2005, respectively, invalidated the April 1, 2003, final rule. Consequently, the status of gray wolves outside of Minnesota reverted back to endangered status, as had been the case prior to the 2003 reclassification. The courts also invalidated the three DPSs identified in the April 1, 2003, rule, as well as the associated special regulations.

On March 27, 2006, we published a proposal (71 FR 15266–15305) to identify a WGL DPS of the gray wolf, to remove the WGL DPS from the protections of the Act, to remove designated critical habitat for the gray wolf in Minnesota and Michigan, and to remove special regulations for the gray wolf in Minnesota. The proposal was followed by a 90-day comment period,

during which we held four public hearings on the proposal.

On February 8, 2007, the Service issued a rule that identified and delisted the WGL DPS of the gray wolf (*Canis lupus*) (72 FR 6052). Three parties challenged this rule (*Humane Society of the United States* v. *Kempthorne,* 579 F. Supp. 2d 7 (D.D.C. 2008)), and on September 29, 2008, the court ruled in favor of the plaintiffs and vacated the rule and remanded it to the Service.

On December 11, 2008, we published a notice reinstating protections for the gray wolf in the western Great Lakes (and northern Rocky Mountains) pursuant to court orders (73 FR 75356).

On April 2, 2009, we published a final rule identifying the western Great Lakes populations of gray wolves as a DPS and revising the List of Endangered and Threatened Wildlife by removing the DPS from that list (74 FR 15070). We did not seek additional public comment on the 2009 final rule. On June 15, 2009, five parties filed a complaint against the Department and the Service alleging that we violated the Act, the Administrative Procedure Act (APA), and the court's remand order by publishing the 2009 final rule (74 FR 15070). On July 2, 2009, pursuant to a settlement agreement between the parties, the court issued an order remanding and vacating the 2009 final rule.

On March 1, 2000, we received a petition from Mr. Lawrence Krak of Gilman, Wisconsin, and on June 28, 2000, we received a petition from the Minnesota Conservation Federation. Mr. Krak's petition requested the delisting of gray wolves in Minnesota, Wisconsin, and Michigan. The Minnesota Conservation Federation requested the delisting of gray wolves in a Western Great Lakes DPS. Because the data reviews resulting from the processing of these petitions would be a subset of the review begun by our July 13, 2000, proposal (65 FR 43450) to revise the current listing of the wolf across most of the conterminous United States, we did not initiate separate reviews in response to those two petitions. While we addressed these petitions in our February 8, 2007, final rule (72 FR 6052), this rule was vacated by the subsequent District Court ruling. While we view our actions on these petitions as final upon publication of the **Federal Register** determinations, we nevertheless restate our 90-day findings that the action requested by each of the petitions may be warranted, as well as our 12-month finding that the action requested by each petition is warranted.

On March 15, 2010, we received a petition from the Minnesota Department of Natural Resources requesting that the gray wolf in Minnesota be removed from the List of Endangered or Threatened Wildlife under the Act. Likewise, on April 26, 2010, we received a petition from the Wisconsin Department of Natural Resources requesting that the gray wolf in Minnesota and Wisconsin be delisted. On April 26, 2010, we received a petition from the Sportsmen's Alliance, representing five other organizations, requesting that gray wolves in the Great Lakes area be delisted. On June 17, 2010, we received a petition from Safari Club International, Safari Club International Foundation, and the National Rifle Association of America requesting that wolves of the western Great Lakes be delisted. In response to those four petitions, on September 14, 2010, we published a 90-day finding determining that the petitions presented substantial information that delisting may be warranted and reinitiated a full status review.

We published a proposal to revise the List of Endangered and Threatened Wildlife for the gray wolf (*Canis lupus*) in the eastern United States and to initiate status reviews for the gray wolf and for the eastern wolf (*Canis lycaon*) on May 5, 2011 (76 FR 26806). On August 26, 2011, we published a notice (76 FR 53379) reopening the public comment period on the May 5, 2011, proposal. We reopened the comment period to allow for additional public review and the inclusion of any new information, specifically concerning North American wolf taxonomy. That notice also informed the public that we were considering issuing separate final rules for our final determinations on the proposed delisting of the Western Great Lakes DPS and the proposed determination regarding all or portions of the 29 States considered to be outside the historical range of the gray wolf. On September 19, 2011, the Service published a notice (76 FR 57943) informing the public that supplementary materials were available. In recognition of intellectual property right laws, the manuscript made available on August 26 provided readers with references to the sources of several copyrighted figures, but did not include the figures themselves. The Service subsequently obtained approval to include all copyrighted figures in the manuscript and on September 7, 2011, uploaded a complete copy of the manuscript to *http://www.regulations.gov.*

*Conformance With the Act's Definition of Species*

Given the assurances we provided in the 1978 *Canis lupus* listing that we would continue to treat gray wolf subspecies as separate entities for conservation purposes (as noted in Previous Federal Actions for WGL Wolves, above), we identified a need to reconsider the listing in light of current statutory and policy standards regarding the Act's definition of species. The Act provides for listing at various taxonomic and subtaxonomic levels through its definition of ''species'' in section 3(16): The term species includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16). As a matter of procedure, then, the Service determines whether it is most appropriate to list an entity as a full species, a subspecies, or a DPS of either a species or subspecies. The gray wolf has a Holarctic range; the current listing encompasses the United States-Mexico segment of the range and consists, in turn, of multiple entities.

The specific provision for listing distinct population segments of vertebrates was enacted through the 1978 amendments to the Act (Pub. L. 95–362, November 10, 1978); these amendments replaced the ability to list ''populations'' with the ability to list ''distinct population segments'' and treat them as ''species'' under the Act. To interpret and implement the 1978 DPS amendment, the Service and the National Marine Fisheries Service jointly published the Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS policy) (61 FR 4722, February 7, 1996), setting policy standards for designating populations as ''distinct.''

The March 1978 gray wolf listing predated the November 1978 amendments to the Act. Although the 1978 rule lists two *C. lupus* entities, *i.e.,* the endangered and threatened entities described above, these listings were not predicated upon a formal DPS analysis and do not comport with current policy standards. Nonetheless, subsequent recovery plans and all gray wolf rulemakings since 1996 have focused on units reflective of the evident intent of the 1978 rule to manage and recover the different gray wolf groups covered by the 1978 listings as ''separate entities'' (43 FR 9609), *i.e.,* subspecies or populations. This rule revises the 1978 threatened listing to bring that listing in line, insofar as possible, with the Act's

requirements and current policy standards.

*Wolf Taxonomy in the Western Great Lakes Region*

The taxonomic status of the wolves in the western Great Lakes region has long been debated. They have been considered a subspecies of gray wolf, *Canis lupus lycaon* (Goldman 1944; Hall and Kelson 1959); a second subspecies of gray wolves, *Canis lupus nubilis* (Nowak 1995, 2002, 2003); a *Canis lupus* population that has been influenced by interbreeding with coyotes (Lehman *et al.* 1991, Koblmüller *et al.* 2009; vonHoldt *et al.* 2011); members of a full species *Canis lycaon* (or eastern wolf) that is considered separate from *Canis lupus* (Wilson *et al.* 2000; Baker *et al.* 2003); possibly the same species as the red wolf, *C. rufus* (Wilson *et al.* 2000); the result of hybridization between *C. rufus* and *C. lupus* (Nowak 2002, 2003, 2009); and as a mixed population of *C. lupus, C. lycaon,* and their intercrosses (hybrids) (Wheeldon and White 2009; Fain *et al.* 2010; Wheeldon *et al.* 2010). These varying interpretations of the taxonomic status of western Great Lakes wolves are summarized, respectively, below.

Wolves in Michigan, Wisconsin, and eastern Minnesota were considered by Goldman (1944, p. 437 and Figure 14) to be within the range of the subspecies *Canis lupus lycaon.* Goldman based his classification on variation in body size and proportions, and in pelage (coat) color. According to Goldman, this was the subspecies of gray wolf historically found across a wide range east of the Mississippi River in the United States and in southeastern Canada. Wolves immediately to the west of the Mississippi River were considered to be part of the subspecies *Canis lupus nubilus.* This taxonomic interpretation was followed by Hall and Kelson (1959, p. 849) and Hall (1981, p. 932).

Based on a study of DNA variation in North American wolves, Wilson *et al.* (2000, p. 2165) proposed that the taxonomic standing of eastern wolves be elevated to full species as *Canis lycaon.* They found that eastern wolves were divergent from *Canis lupus* in both mitochondrial DNA (mtDNA) and autosomal microsatellite DNA composition. They considered the geographic range of *C. lycaon* as extending west across the Great Lakes region to Minnesota and Manitoba.

Nowak's (2002, p. 119; 2003, p. 243) revision of the subspecies taxonomy reduced the range of *C. l. lycaon* to southern Ontario and Quebec and northern portions of New York, Pennsylvania, and Ohio. Nowak's classification was primarily based on statistical analysis of measurements of skull features. He considered gray wolves that historically occupied Michigan, Wisconsin, and Minnesota to be within the range of *C. l. nubilus.* Based on analysis of additional specimens, Nowak (2002, p. 119; 2003; 2009, p. 238) continued to recognize western Great Lakes wolves as *C. l. nubilus,* but noted that historical specimens from the Upper Peninsula (UP) of Michigan were somewhat transitional between the two subspecies.

Leonard and Wayne (2008, pp. 2–3) have reported on maternally inherited mtDNA sequence haplotypes (DNA sequences or groups of alleles of different genes on a single chromosome that are inherited together as a single unit) from historical (''prerecovery'') wolves from Ontario, Quebec, Michigan, and Wisconsin compared with the recent population of the area. Their interpretation of these results is that the 6 unique haplotypes) identified in 15 historical individuals indicate that the pre-recovery population was ''an endemic American wolf,'' which they call ''the Great Lakes wolf'' (p. 1). However, only the two haplotypes most common in the historical sample still occur in the modern wolf population of the western Great Lakes area. Leonard and Wayne (2008) conclude that the modern population does not contain the diversity of Great Lakes wolf haplotypes found in the prerecovery population and that the current population is primarily a mixture of *Canis lupus* and coyote hybrids, with minor influence from the endemic Great Lakes wolf (p. 3).

Koblmüller *et al.* (2009) examined wolves from the Great Lakes region (they do not separate between the western and eastern Great Lakes) using three types of genetic markers: mtDNA; Y-chromosome haplotypes based on microsatellite DNA loci on the Y-chromosome, which is a paternally inherited marker; and autosomal microsatellite DNA, which provides information on recent and ongoing interactions among populations rather than evolutionary lineage information. The historical sample from Minnesota was found to exhibit a third Great Lakes wolf mtDNA haplotype that is common in the modern population. However, the Y-chromosome haplotypes identified in the historical sample were more similar to those of western gray wolves, suggesting that interbreeding between Great Lakes wolves and western gray wolves had taken place before 1910, the year of collection.

Koblmüller *et al.* (2009) conclude that, despite what they consider to be both ancient and recent incidences of interbreeding with coyotes and western gray wolves, Great Lakes wolves remain morphologically distinct and represent a ''distinct taxon'' of gray wolf (*Canis lupus*) that is adapted to the region. They do not, however, conclude that this taxon is differentiated enough to be recognized as a species separate from gray wolves, as proposed by Wilson *et al.* (2000).

Several recent studies conclude that the eastern wolf is a unique species and should be recognized as *C. lycaon* (Wheeldon and White 2009; Wilson *et al.* 2009; Fain *et al.* 2010, p. 15; Wheeldon *et al.* 2010). Wheeldon and White (2009, pp. 3–4) state that both the present-day and pre-recovery wolf populations in the western Great Lakes region are genetically similar and that both were derived from hybridization between *C. lupus* and the eastern wolf, *C. lycaon.* Fain *et al.* (2010, p. 10) recognize *C. lycaon* as a unique species of North American wolf, and based on mtDNA and Y-chromosome haplotypes and autosomal microsatellite markers, they establish that the population of wolves in the western Great Lakes region comprise *C. lupus, C. lycaon,* and their hybrids. Contrary to Koblmüller *et al.* (2009), Fain *et al.* (2010, p. 14) found no evidence of interbreeding with coyotes. Furthermore, they conclude that the western Great Lakes States were included in the historical range of *C. lycaon* and that hybridization between the two species ''predates significant human intervention'' (Fain *et al.* 2010, pp. 13–14).

Wheeldon *et al.* (2010, p. 2) used multiple genetic markers in an attempt to clarify the taxonomic status of *Canis* species in the western Great Lakes region of Minnesota, Wisconsin, Michigan, and western Ontario. They conclude that the current western Great Lakes wolf population is ''composed of gray-eastern wolf hybrids that probably resulted from historic hybridization between the parental species'' (Wheeldon *et al.* 2010, p. 10), and that the appropriate taxonomic designation for the western Great Lakes hybrid wolves is *C. lupus* × *lycaon.*

Recently, vonHoldt *et al.* (2011) examined single nucleotide polymorphisms (SNPs) to investigate the genetic distinctiveness of North American canids. They conclude that wolves from the Great Lakes region are the product of low-level hybridization between coyotes and *C. lupus* that likely occurred prior to the recent invasion of coyotes into the area and found no evidence that *C. lycaon* exists as a distinct species (vonHoldt *et al.* 2011, pp. 8–9). They further find that Great

Lakes wolves are genetically distinct from other North American gray wolves and coyotes, but to what degree remains controversial (vonHoldt *et al.* 2011, p. 8). This study represents a new system for genetic testing using the whole genome of organisms. This new genetic testing system using SNPs promises to open new opportunities for studying the ancestry and relatedness of canid populations.

Chambers *et al.* (2011, in prep.) conducted a review of the available scientific literature to assess the taxonomic standing of wolves in North America. They conclude the most supportable interpretation is that the eastern wolf is not a subspecies (*C. lupus lycaon*), but a full species (*C. lycaon*). This is based on the available mtDNA and Y-chromosome haplotype data (pp. 91–95). The Service believes the Chambers *et al.* (in prep.) manuscript (that includes the information on which we at least partially based our proposal) is an important synthesis of the available data that advances and focuses the debate regarding canid taxonomy in North America. The authors themselves acknowledge, nevertheless, that further research may change some of their conclusions (p. 128).

Wolf taxonomic classification is a fast-changing field in which research capabilities have greatly expanded in recent years. It is clear from the studies discussed above that the taxonomic classification of wolves in the western Great Lakes region is one that has been, and will continue to be, debated in the scientific community. Most researchers, however, agree that there is a unique and genetically identifiable form of wolf that occupies the western Great Lakes region. Researchers differ in whether this unique form of wolf should be recognized as a species, a subspecies, or a distinct taxon or ecotype. The taxonomic identity of eastern wolves has been controversial since Wilson *et al.* (2000) first claimed that eastern wolves are a separate species (*Canis lycaon*) from the western wolf (*Canis lupus*). In our May 5, 2011, proposed rule (76 FR 26806), we proposed to resolve the ongoing controversy over the classification of wolves in the western Great Lakes region by accepting what we considered at the time to be the best scientific interpretation of the available data and information. The scientific community then had the opportunity to review our analysis and respond to it through the public and peer review processes. Comments on the proposed rule, including comments provided by leading researchers in the field of canid biology and genetics, have led us to reconsider our proposed interpretation. While Chambers *et al.* (in prep.) provide a scientific basis for arguing the existence of eastern wolves as a distinct species, this represents neither a scientific consensus nor the majority opinion of researchers on the taxonomy of wolves, as others continue to argue that eastern wolves are forms of gray wolves (Koblmüller *et al.* 2009, vonHoldt *et al.* 2011). In light of the ongoing scientific debate, and the lack of clear resolution concerning the taxonomy of wolves in the western Great Lakes, we are at this time continuing to recognize *C. lupus* as the only species that occurs in the WGL. The wolves that occupy the WGL DPS have long been accepted as gray wolves, *C. lupus,* and until greater scientific consensus is reached regarding whether to revise this taxonomic classification, the better conclusion is to continue to recognize them as gray wolves.

*Wolf-Coyote Relationships*

For a discussion on interpretations of wolf-coyote relationships in the western Great Lakes, see the discussion under Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence in this final rule.

**Biology and Ecology of Wolves in the Western Great Lakes**

For a discussion of the biology and ecology of wolves in the WGL, see the proposed WGL wolf rule published on May 5, 2011 (76 FR 26806–26145).

**Distinct Vertebrate Population Segment Policy Overview**

Pursuant to the Act, we consider whether the best scientific and commercial data available are sufficient to indicate that listing, reclassifying, or delisting any species, subspecies, or, for vertebrates, any DPS of these taxa may be warranted. To interpret and implement the DPS provision of the Act and congressional guidance, the Service and the National Marine Fisheries Service (NMFS) published a policy regarding the identification of distinct vertebrate population segments under the Act (Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 FR 4722, February 7, 1996) (hereafter DPS Policy). Under the DPS policy, two factors are considered in a decision regarding the potential identification of a DPS: (1) Discreteness of the population segment in relation to the remainder of the taxon, and (2) the significance of the population segment to the taxon to which it belongs. If a population meets both tests, it can be identified as a DPS. Then a third factor, the DPS's conservation status, is evaluated in relation to the Act's standards for listing, delisting, or reclassification, meaning that we undertake an analysis to determine whether the DPS is endangered or threatened or does not meet the criteria for listing. All three steps are necessary components of a complete DPS analysis.

**Past Practice and History of Using DPSs**

As of December 8, 2011, of the 388 native vertebrate listings, 80 are listed as less than an entire taxonomic species or subspecies (henceforth referred to in this discussion as populations) under one of several authorities, including the ''distinct population segment'' language in the Act's definition of species (section 3(16)). Thirty-three of these 80 populations, which span 49 different taxa, predate the 1996 DPS Policy; as such, the final listing determinations for these populations did not include formal policy-based analyses or expressly designate the listed entity as a DPS. In several instances, however, the Service and National Marine Fisheries Service (NMFS) have established a DPS and revised the List of Endangered and Threatened Wildlife in a single action, as shown in the following examples.

In February 1985, the Service delisted the brown pelican (*Pelecanus occidentalis*) in the southeastern United States and continued to identify it as endangered throughout the remainder of its range (50 FR 4938). In June 1994, NMFS revised the entry for the gray whale (*Eschrichtius robustus*) to remove the eastern North Pacific population from the List while retaining the western North Pacific population as endangered (59 FR 31094). In July 2003, the Service established two DPSs of the Columbian white-tailed deer (*Odocoileus virginianus leucurus*)—the Douglas County DPS and the Columbia River DPS—and delisted only the Douglas County DPS, while retaining listed status for the Columbia River DPS (68 FR 43647). In March 2007, the Service established a DPS of the grizzly bear (*Ursus arctos horribilis*) for the Greater Yellowstone Area and surrounding area within the existing grizzly bear listing in the lower 48 States, and delisted this DPS (72 FR 14865). This decision was later vacated by the court; however, not on the grounds of the DPS. Also in March 2007, the Service identified the American crocodile (*Crocodylus acutus*) in Florida as a DPS within the existing endangered listing of the American crocodile and reclassified the Florida DPS from endangered to threatened (71

FR 13027). Revising and delisting the WGL DPS of wolves is consistent with the Service's past practice and does not represent a change in agency position.

On February 8, 2007, the Service issued a rule that identified and delisted the WGL DPS of the gray wolf (*Canis lupus*) (72 FR 6052). Three parties challenged this rule (*Humane Society of the United States* v. *Kempthorne,* 579 F. Supp. 2d 7 (D.D.C. 2008)), and on September 29, 2008, the court ruled in favor of the plaintiffs and vacated the rule and remanded it to the Service. On remand, the Service was directed to provide an explanation as to how simultaneously identifying and delisting a DPS is consistent with the Act's text, structure, policy objectives, legislative history, and any relevant judicial interpretations. The court's primary question was whether the Service has the authority to identify a DPS within a larger already-listed entity and, in the same decision, determine the DPS does not warrant the Act's protections even though the other populations of the species retain the original listing status.

Our authority to make these determinations and to revise the list accordingly is a reasonable interpretation of the language of the Act, and our ability to do so is an important component of the Service's program for the conservation of threatened and endangered species. Our authority to revise the existing listing of a species (the gray wolf in Minnesota and the gray wolf in the lower 48 States and Mexico, excluding Minnesota) to identify a Western Great Lakes DPS and determine that it is healthy enough that it no longer needs the Act's protections is found in the precise language of the Act. Moreover, even if that authority were not clear, our interpretation of this authority to make determinations under section 4(a)(1) and to revise the endangered and threatened species list to reflect those determinations under section 4(c)(1) is reasonable and fully consistent with the Act's text, structure, legislative history, relevant judicial interpretations, and policy objectives.

We consulted with the Solicitor of the Department of the Interior to address the issue in the court's opinion. On December 12, 2008, a formal opinion was issued by the Solicitor, ''U.S. Fish and Wildlife Service Authority Under Section 4(c)(1) of the Endangered Species Act to Revise Lists of Endangered and Threatened Species to 'Reflect Recent Determinations' '' (U.S. DOI 2008). The Service fully agrees with the analysis and conclusions set out in the Solicitor's opinion. This final action is consistent with the opinion. The complete text of the Solicitor's opinion can be found at http://www.fws.gov/midwest/wolf/.

**Western Great Lakes Distinct Population Segment**

In 1978, based on what was at that time the best available biological data, the Service stated that there were two ''species'' of gray wolves in the coterminous United States: ''For purposes of this rulemaking, the gray wolf (*Canis lupus*) group in Mexico and the 48 conterminous States of the United States, other than Minnesota, is being considered as one 'species,' and the gray wolf group in Minnesota is being considered as another 'species.' (43 FR 9607, 9610, March 9, 1978). The Service then assigned a different status under the Act to each of those two ''species,'' finding the Minnesota gray wolf 'species' to be threatened, while the other gray wolf ''species'' (the 48 conterminous States, except Minnesota, and in Mexico) to be endangered. The 1978 rule referred to the Minnesota listing as the listing of a ''species'' when, clearly, based on the information available at that time, the Minnesota wolves did not taxonomically constitute a separate species of wolf. However, ever since the amendment to the Act later in 1978 that revised the definition of ''species'' to include distinct population segments of vertebrate fish or wildlife, the 1978 Minnesota gray wolf listing has functioned effectively as a DPS.

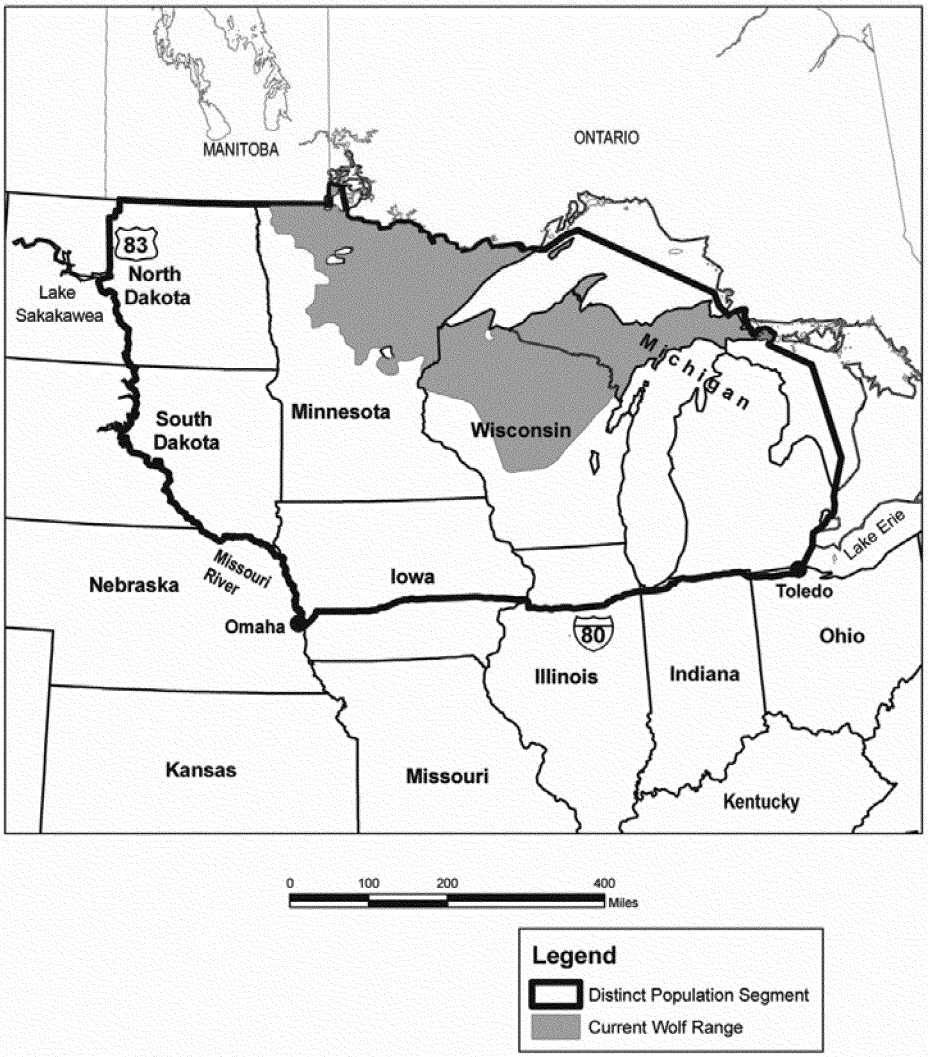
The DPS Policy (61 FR 4725, February 7, 1996) expressly provides for reexamining pre-policy DPS listings: ''Any DPS of a vertebrate taxon that was listed prior to implementation of this policy will be reevaluated on a case-by-case basis as recommendations are made to change the listing status for that distinct population segment. The appropriate application of the policy will also be considered in the 5-year reviews of the status of listed species required by section 4(c)(2) of the Act.'' Based on this provision, we are, within this rule, (1) recognizing that the 1978 Minnesota listing has functioned effectively as a DPS, (2) reevaluating that listing by applying the same reevaluation process to this and other de facto DPSs that we apply to formally established DPSs, and (3) revising that de facto DPS listing to meet the criteria in the DPS policy and to reflect the best available biological data.

A gray wolf DPS including only Minnesota would not meet the criteria in the DPS policy because it would not be discrete ''in relation to the remainder of the species to which it belongs'' (61 FR 4725, February 7, 1996). The Minnesota wolf population has expanded well beyond State boundaries and is connected to the wolf population in Wisconsin and Michigan, as evidenced by frequent movements of wolves among the States (Van Deelen 2009, p. 140; Treves *at al.* 2009, pp. 192–195) and genetic analyses that demonstrate the Wisconsin and Michigan wolves are mostly of the same genetic makeup as Minnesota wolves (Wheeldon and White 2009, p. 4; Fain *et al.* 2010). Therefore, we are revising the boundaries of the Minnesota DPS to meet the criteria in the DPS policy and to reflect the current geographic location of the population as discussed under the *Distinct Population Segment Analysis,* below.

*Geographical Area of the Western Great Lakes DPS*

The geographical area of the WGL DPS is shown in figure 1, below, and is described as all of Minnesota, Wisconsin, and Michigan; the portion of North Dakota north and east of the Missouri River upstream to Lake Sakakawea and east of the centerline of Highway 83 from Lake Sakakawea to the Canadian border; the portion of South Dakota north and east of the Missouri River; the portions of Iowa, Illinois, and Indiana north of the centerline of Interstate Highway 80; and the portion of Ohio north of the centerline of Interstate Highway 80 and west of the Maumee River at Toledo.

Figure 1. Western Great Lakes Distinct Population Segment




*Distinct Population Segment Analysis*

Analysis for Discreteness

Under the 1996 DPS Policy (61 FR 4722), a population segment of a vertebrate taxon may be considered discrete if it satisfies either of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors (quantitative measures of genetic or morphological discontinuity may provide evidence of this separation); or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

*Markedly Separated from Other Populations of the Same Taxon*—The western boundaries of the WGL DPS are approximately 400 mi (644 km) from the nearest known gray wolf packs in Wyoming and Montana. The distance between those western packs and the nearest packs within the WGL DPS is nearly 600 mi (966 km). The area between Minnesota packs and northern Rocky Mountains (NRM) packs largely consists of unsuitable habitat, with only scattered islands of possibly suitable habitat, such as the Black Hills of eastern Wyoming and western South Dakota. There are no known populations of gray wolves to the south or east of the WGL DPS within the United States.

As discussed in the previous section, wolves are known to disperse over vast distances, but straight-line documented dispersals of 400 mi (644 km) or more are very rare. Only three records exist of tagged wolves dispersing from within the core of the WGL DPS that were known to travel a straight-line distance over 400 mi (644 km) (Treves *et al.* 2009). Although we cannot rule out the possibility of a WGL wolf traveling 600 mi (966 km) or more and joining or establishing a pack in the northern Rockies, such a movement has not been documented and is expected to happen very infrequently, if at all. Similar movements from the NRM wolf population into the WGL DPS are unknown and are expected to happen infrequently. The 2006 Sturgis (South Dakota) wolf is the closest that an NRM wolf has come to entering the WGL DPS (Fain in litt. 2006); however, the Sturgis

wolf would still have had to travel over 300 mi (500 km) before encountering the nearest wolf pack in the WGL DPS. As the discreteness criterion requires that the DPS be ''markedly separated'' from other populations of the taxon rather than requiring complete isolation, this high degree of physical separation between the WGL DPS and the northern Rocky Mountains satisfies the discreteness criterion.

Delimited by International Boundaries With Significant Management Differences—The DPS policy allows us to use international borders to delineate the boundaries of a DPS if there are differences in control of exploitation, conservation status, or regulatory mechanisms between the countries. The border between the United States and Canada has been used as the northern boundary of the listed entity since gray wolves were reclassified in the lower 48 States and Mexico in 1978. There remain significant cross-border differences in exploitation, management, conservation status, and regulatory mechanisms. About 52,000 to 60,000 wolves occur in Canada, where suitable habitat is abundant (Boitani 2003, p. 322). Because of this abundance, wolves in Canada are not protected by Federal laws and are only minimally protected in most Canadian provinces (Pletscher *et al.* 1991, p. 546). In the United States, unlike Canada, Federal protection and intensive management has been necessary to recover the wolf (Carbyn 1983).

In general, Canadian gray wolf populations are sufficiently large and healthy so that population regulation, rather than protection and close monitoring, is the management focus. There are an estimated 4,000 wolves in Manitoba (Manitoba Conservation undated). Hunting is allowed nearly province-wide, including in those provincial hunting zones adjoining northwestern Minnesota, with this year's season running from August 31, 2011, through March 31, 2012 (Manitoba Conservation 20011a). Trapping wolves is allowed province-wide, except in and immediately around Riding Mountain National Park (southwestern Manitoba), with this year's season running from September 1, 2011 through August 31, 2012 or October 14, 2011 through March 31, 2012 (varies with trapping zone) (Manitoba Conservation 20011b).

The Ontario Ministry of Natural Resources estimates there are 8,850 wolves in the province, based on prey composition and abundance, topography, and climate, and wolf numbers in most parts of the province are believed to be stable or increasing since about 1993 (Ontario MNR 2005a, pp. 7–9). In 2005, Ontario limited hunting and trapping of wolves by closing the season from April 1 through September 14 in central and northern Ontario (Ontario MNR 2005b). In the portion of Ontario that is adjacent to the WGL DPS, wolf hunting and trapping is permitted year round (Ontario MNR 2005c). If delisted, Minnesota, Wisconsin, and Michigan would carefully monitor and manage wolves to retain populations at or above the recovery goal (see Factor D). Therefore, even though biologically the WGL wolf population is simply a well-connected southern extension of wolves in Canada, we will continue to use the United States–Canada border to mark the northern boundary of the DPS due to the difference in control of exploitation, conservation status, and regulatory mechanisms between the two countries.

*Conclusion*—Based on our analysis of the best available scientific information, the WGL DPS is markedly separated from other U.S. populations of gray wolves and difference in control of exploitation, conservation status, and regulatory mechanisms justifies discreteness between U.S. and Canadian wolf populations. Therefore, the WGL DPS meets the criterion for discreteness under the DPS policy.

Analysis for Significance

If we determine that a population segment is discrete, we next consider available scientific evidence of its significance to the taxon to which it belongs. Our DPS policy states that this consideration may include, but is not limited to, the following: (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon; (2) evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; and/or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics. Factor 2 applies to the WGL DPS and is included in our analysis for significance. Factors 1, 3, and 4 do not apply to the WGL DPS and thus are not included in our analysis for significance.

*Significant Gap in the Range of the Taxon*—Gray wolves once lived throughout most of North America. Gray wolves have been extirpated from most of the southern portions of their historical North American range. The successful restoration of a viable gray wolf metapopulation (a regional group of connected populations of a species) to large parts of Minnesota, Wisconsin, and Michigan has filled a significant gap in the holarctic range of gray wolves in the United States, and it provides an important extension of the range of gray wolves in North America. The loss of the WGL gray wolf population would, therefore, represent a significant gap in the species' holarctic range in that the WGL wolf population is the only gray wolf population in the conterminous States east of the Rocky Mountains and currently holds about 70 percent of North American gray wolves known to occur south of Canada.

*Conclusion*—Based on our analysis of the best available scientific information, the WGL DPS is significant to the taxon to which it belongs because its loss would result in a significant gap in the range of the taxon. Therefore, the WGL DPS meets the criterion for significance under the DPS policy.

Discrete Vertebrate Population Segment Conclusion

Based on our review of the best available scientific data, we determine that the WGL DPS is discrete from other gray wolf populations as a result of physical separation from other gray wolf populations in the United States and the international border with Canada. The DPS is significant to the taxon to which it belongs because it contains a wolf metapopulation that fills a large gap in the historical range of the taxon in the conterminous States. Therefore, we have determined that this population segment of wolves satisfies the discreteness and significance criteria required for a DPS. The evaluation of the appropriate conservation status for the WGL DPS is found below.

*Delineating the Boundaries of the WGL Gray Wolf DPS*

In contrast to a species or a subspecies, a DPS is a biological population that is delineated by a boundary that is based on something other than established taxonomic distinctions. Therefore, the starting point for delineating a DPS is the biological population or metapopulation, and a geographical delineation of the DPS must reasonably represent the population or metapopulation and its biological characteristics and recovery needs.

To delineate the boundary of the WGL DPS, we considered the current distribution of wolves in the Midwest and the characteristic movements of those wolves and of wolves elsewhere. We examined the best available

scientific data on long-distance movements, including long-distance movements followed by return movements to the vicinity of the natal pack. We concluded that wolf behavior and the nature of wolf populations require that we include within the area of the DPS some subset of known long-distance movement locations. However, as explained below, wolf biology and common sense argue against including all known or potential long-distance movements within the DPS's boundaries.

The analysis detailed below resulted in the boundaries of the WGL DPS that are shown in figure 1. This DPS has been delineated to include the core recovered wolf metapopulation plus a wolf movement zone around the core wolf metapopulation. This geographic delineation is not intended to include all areas to which wolves have moved from the Great Lakes population. Rather, it includes the area currently occupied by wolf packs in Minnesota, Wisconsin, and Michigan; the nearby areas in these States in which wolf packs may become established in the foreseeable future; and a surrounding area into which Minnesota, Wisconsin, and Michigan wolves occasionally move but where persistent packs are not expected to be established because suitable habitat is rare and exists only as small patches. The area surrounding the core wolf populations includes the locations of most known dispersers from the core populations, especially the shorter and medium-distance movements from which wolves are most likely to return to the core areas and contribute to the wolf population. Therefore, the DPS encompasses the current range of the population, which is considered to be viable, including the primary range and the peripheral range.

The WGL areas that are regularly occupied by wolf packs are well documented in Minnesota (Erb and Benson 2004, p. 12, fig. 3; Erb and Don Carlos 2009, pp. 57–60), Wisconsin (Wydeven *et al.* 2006, p. 33, fig. 1; Wydeven *et al.* 2009c, pp. 93–98), and the UP of Michigan (Huntzinger *et al.* 2005, pp. 25–27, figs. 4–6; Beyer *et al.* 2009, pp. 73–75). Wolves have successfully colonized most, perhaps all, suitable habitat in Minnesota. Minnesota data from the winter of 2007–08 indicate that wolf numbers and density have stabilized since 1997–98, and there was no expansion of occupied range in the State (Erb 2008, pp. 5–7). Wisconsin wolves now occupy most habitat areas believed to have a high probability of wolf occurrence except for some areas of northeastern Wisconsin, and the State's wolf population continues to annually increase in numbers and, to a lesser degree, in area (Wydeven and Wiedenhoeft 2009, p. 2). The UP of Michigan has wolf packs throughout the peninsula. In the last 22 years, the wolf population in the UP has grown every year except 1997 and 2010 (Roell 2010, pers. comm.). Over the past 5 years, the average annual growth has been about 7 percent. While the population trend continues to increase, the rate of increase has slowed, consistent with any population expanding into and then filling available habitat. The population may continue to grow or remain steady; however, a small or even negative growth rate may occur any year and should be considered a natural fluctuation seen in any wildlife population.

When delineating the WGL DPS, we had to consider the high degree of mobility shown by wolves. The dispersal of wolves from their natal packs and territories is a normal and important behavioral attribute of the species that facilitates the formation of new packs, the occupancy of vacant territories, and the expansion of occupied range by the ''colonization'' of vacant habitat. Data on wolf dispersal rates from numerous North American studies (summarized in Fuller *et al.* 2003, p. 179, Table. 6.6; Boyd and Pletscher 1999, p. 1102, Table 6) show dispersal rates of 13 to 48 percent of the individuals in a pack. Sometimes the movements are temporary, and the wolf returns to a location in or near its natal territory. In some cases, a wolf may continue its movement for scores or even hundreds of miles until it locates suitable habitat, where it may establish a territory or join an existing pack. In other cases, a wolf is found dead at a distance from its original territory, leaving unanswered the questions of how far it would have gone and whether it eventually would have returned to its natal area or population.

*Minnesota*—The current record for a documented movement by a wolf in North America is held by a Minnesota wolf that moved a minimum (that is, the straight-line distance from known starting point to most distant point) of at least 550 mi (886 km) northwest into Saskatchewan (Fritts 1983, pp. 166–167). Nineteen other primarily Minnesota movements summarized by Mech (in litt. 2005) averaged 154 mi (248 km). Their minimum distance of travel ranged from 32 to 532 mi (53–886 km) with the minimum dispersal distance shown by known returning wolves ranging from 54 mi (90 km) to 307 mi (494 km).

*Wisconsin*—In 2004, a wolf tagged in Michigan was killed by a vehicle in Rusk County in northwestern Wisconsin, 295 mi (475 km) west of his original capture location in the eastern UP (Wydeven *et al.* 2005b, p. 4). A north-central Wisconsin yearling female wolf traveled a similar distance (298 mi, 480 km) to the Rainy Lake region of Ontario during 1988–89 (Wydeven *et al.* 1995, p. 149).

*Michigan*—Drummer *et al.* (2002, pp. 14–15) reported 10 long-distance dispersal events involving UP wolves. One of these wolves moved to north-central Missouri and another to southeastern Wisconsin, both beyond the core wolf areas in the WGL. The average straight-line distance traveled by those two wolves was 377 mi (608 km), while the average straight-line distance for all 10 of these wolves was 232 mi (373 km). Their straight-line distances ranged from 41 to 468 mi (66 to 753 km).

*Illinois and Indiana*—In December 2002, a Marshall County (Illinois) wolf likely dispersed from the Wisconsin wolf population, nearly 200 mi (322 km) to the north (Great Lakes Directory 2003). The Randolph County (Indiana) wolf had traveled a minimum distance of at least 428 mi (689 km) to get around Lake Michigan from its central Wisconsin birthplace; it likely traveled much farther than that unless it went through the city or suburbs of Chicago (Wydeven *et al.* 2004, pp. 10–11; Treves *et al.* 2009, p. 194). The Pike County (Illinois) wolf that was shot in late 2005 was about 300 mi (180 km) from the nearest wolf packs in central Wisconsin.

*North Dakota, South Dakota, and Nebraska*—Licht and Fritts (1994, p. 77) tabulated seven wolves found dead in North Dakota and South Dakota from 1981 through 1992 that are believed to have originated from Minnesota, based on skull morphometrics. Although none of these wolves were marked or radio-tracked, making it impossible to determine the point of initiation of their journey, a minimum travel distance for the seven can be determined from the nearest wolf breeding range in Minnesota. For the seven, the average distance to the nearest wolf breeding range was 160 mi (257 km) and ranged from 29 to 329 mi (46 to 530 km). One of these seven wolves moved west of the Missouri River before it died.

Genetic analysis of a wolf killed in Harding County, in extreme northwestern South Dakota, in 2001 indicated that it originated from the Minnesota-Wisconsin-Michigan wolf populations (Fain in litt. 2006). The straight-line travel distance to the

nearest Minnesota wolf pack is nearly 400 mi (644 km).

The wolf from the Greater Yellowstone area that was killed by a vehicle on Interstate 90 near Sturgis, South Dakota, in March of 2006 traveled a minimum straight-line distance of about 270 mi (435 km) from the nearest known Greater Yellowstone pack before it died (USFWS *et al.* 2006, in USFWS Program Report, Figure 1).

A large canid was shot by a Boyd County (Nebraska) rancher in late 1994 or early 1995, likely after crossing the frozen Missouri River from South Dakota (Anschutz in litt. 2006, Jobman in litt. 1995). It was determined to be a wolf that originated from the Great Lakes wolf populations (Fain in litt. 2006), whose nearest pack would have been about 300 mi (480 km) away. A wolf illegally killed near Spalding, Nebraska, in December of 2002 also originated from the Minnesota-Wisconsin-Michigan wolf population, as determined by genetic analysis (Anschutz in litt. 2003, Fain in litt. 2006). The nearest Minnesota wolf pack is nearly 350 mi (563 km) from this location.

*Other notable extra-territorial movements*—The extra-territorial movements of several wolves were radio-tracked in sufficient detail to provide insight into their actual travel routes and total travel distances for each trek, rather than only documenting straight-line distance from beginning to end-point. Merrill and Mech (2000, pp. 429–431) reported on four such Minnesota wolves with documented travel distances ranging from 305 to 2,640 mi (490 to 4,251 km) and an average travel route length of 988 mi (1,590 km). Wydeven (1994, pp. 20–22) described a Wisconsin wolf that moved from northwestern Wisconsin to the northern suburbs of St. Paul, Minnesota, for 2 weeks (apparently not seen or reported to authorities by the local residents), then moved back to north-central Wisconsin. The total travel distance was 278 mi (447 km) from her natal pack into Minnesota and on to the north-central Wisconsin location where she settled down.

While investigating the origins of Scandinavian wolf populations, Linnell *et al.* (2005, p. 387) compiled wolf dispersal data from 21 published studies, including many cited separately here. Twenty-two of 298 compiled dispersals (7.4 percent) were more than 300 km (186 mi). Eleven dispersals (3.7 percent) were more than 500 km (311 mi). Because of the likelihood that many long-distance dispersers are never reported, they conclude that the proportion of long-distance dispersers is probably severely underestimated. Perhaps the longest documented wolf movement is that of a Scandinavian wolf that covered more than 678 miles (1,092 km) (Wabakken *et al.* 2007).

From these extra-territorial movement records, we conclude that wolf movements of more than 200 mi (320 km) straight-line distance have been documented on numerous occasions, while shorter distance movements are more frequent. Movements of 300 mi (480 km) straight-line distance or more are less common, but include one Minnesota wolf that journeyed a straight-line distance of 300 mi (480 km) and a known minimum-travel distance of 2,640 mi (4,251 km) before it reversed direction, as determined by its satellite-tracked collar. This wolf ultimately returned to a spot only 24 mi (40 km) from its natal territory (Merrill and Mech 2000, p. 430). Although much longer movements have been documented, including some by midwestern wolves, return movements to the vicinity of natal territories have not been documented for extra-territorial movements beyond 300 mi (480 km).

Based on these extra-territorial movement data, we conclude that affiliation with the midwestern wolf population is diminished and essentially lost when dispersal takes a Midwest wolf a distance of 250 to 300 mi (400 to 480 km) beyond the outer edge of the areas that are continuously occupied by wolf packs. Although some WGL wolves will move beyond this distance, available data indicate that longer distance dispersers are unlikely to return to their natal population. Therefore, they have lost their functional connection with, and potential conservation value to, the WGL wolf population.

Wolves moving substantial distances outward from the core areas of Minnesota, Wisconsin, and Michigan will encounter landscape features that are at least partial barriers to further wolf movement and that may, if crossed, impede attempts of wolves to return toward the WGL core areas. If such partial barriers are in a location that has separate utility in delineating the biological extent of a wolf population, they can and should be used to delineate the DPS boundary. Such landscape features are the Missouri River in North Dakota and downstream to Omaha, Nebraska, and Interstate Highway 80 from Omaha eastward through Illinois, Indiana, and into Ohio, ending where this highway crosses the Maumee River in Toledo, Ohio. We do not believe these are absolute barriers to wolf movement.

There is evidence that several Minnesota-origin wolves have crossed the Missouri River (Licht and Fritts 1994, pp. 75, 77, Fig. 1 and Table 1; Anschutz in litt. 2003, 2006) and some Midwest wolves have crossed interstate highways (Merrill and Mech 2000, p. 430). There is also evidence that some wolves are hesitant to cross highways (Whittington *et al.* 2004, pp. 7, 9; Wydeven *et al.* 2005b, p. 5; but see Blanco *et al.* 2005, pp. 315–316, 319–320 and Kohn *et al.* 2000, p. 22). Interstate highways and smaller roads are a known mortality factor for wolves and, therefore, pose a partial barrier to wolf movements (Blanco *et al.* 2005, p. 320). The death of a NRM wolf near Sturgis in western South Dakota (Fain in litt. 2006) suggests that the area of the Dakotas west of the Missouri River may be traversed by a small number of wolves coming from both the NRM and WGL wolf populations, as well as wolves from Canada (Licht and Fritts 1994, pp. 75–77). Wolves in this area cannot be assumed to belong to the WGL wolf population, supporting our belief that the boundary should not be designed to include the locations of all known dispersers.

## Recovery of Western Great Lakes Wolves

### *Recovery Criteria*

Recovery plans are intended to provide guidance to the Service, States, and other partners on methods of minimizing threats to listed species and on criteria that may be used to determine when recovery is achieved. They are not regulatory documents and cannot substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. These documents include, among other elements required under section 4(f) of the Act, criteria for determining when a species can be delisted. There are many paths to accomplishing recovery of a species; in fact, recovery of a species is a dynamic process requiring adaptive management that may, or may not, strictly adhere to the guidance provided in a recovery plan.

We use recovery criteria in concert with evidence that threats have been minimized sufficiently and populations have achieved long-term viability to judge when a species can be reclassified from endangered to threatened or delisted. Recovery plans, including recovery criteria, are subject to change based upon new information and are revised accordingly and when practicable. In a similar sense, implementation of planned actions is subject to changing information and

availability of resources. We have taken these considerations into account in the following discussion.

The 1978 Recovery Plan (hereafter Recovery Plan) and the 1992 Revised Recovery Plan for the Eastern Timber Wolf (hereafter Revised Recovery Plan) contain the same two recovery criteria. The first recovery criterion states that the survival of the wolf in Minnesota must be assured. We, and the Eastern Timber Wolf Recovery Team (Peterson in litt. 1997, 1998, 1999a, 1999b), have concluded that this recovery criterion remains valid. It addresses a need for reasonable assurances that future State, tribal, and Federal wolf management and protection will maintain a viable recovered population of wolves within the borders of Minnesota for the foreseeable future.

Although the recovery criteria identified in the Recovery Plan predate identification of the conservation biology principles of representation (conserving the genetic diversity of a taxon), resilience (the ability to withstand demographic and environmental variation), and redundancy (sufficient populations to provide a margin of safety), those principles were incorporated into the recovery criteria. Maintenance of the Minnesota wolf population is vital in terms of representation and resilience, because the remaining genetic diversity of gray wolves in the eastern United States was carried by the several hundred wolves that survived in Minnesota into the early 1970s. The Recovery Team insisted that the remnant Minnesota wolf population be maintained and protected to achieve wolf recovery in the eastern United States. The successful growth of the remnant Minnesota population has maintained and maximized the representation of that genetic diversity among wolves in the WGL.

Although the Revised Recovery Plan did not establish a specific numerical criterion for the Minnesota wolf population, it did identify, for planning purposes only, a population goal of 1,251–1,400 animals for that Minnesota population (USFWS 1992, p. 28). A population of this size would increase the likelihood of maintaining its genetic diversity over the long term. This large Minnesota wolf population also provides resiliency to reduce the adverse impacts of unpredictable demographic and environmental events. Furthermore, the Revised Recovery Plan specifies a wolf population that is spread across about 40 percent of Minnesota (Zones 1 through 4) (USFWS 1992, p. 28), adding a geographic component to the resiliency of the Minnesota wolf population.

The second recovery criterion in the Recovery Plan states that at least one viable wolf population should be reestablished within the historical range of the eastern timber wolf outside of Minnesota and Isle Royale, Michigan (USFWS 1992, pp. 24–26). The reestablished population enhances both the resiliency and redundancy of the WGL metapopulation.

The Recovery Plan provides two options for reestablishing this second population. If it is an isolated population, that is, located more than 100 mi (160 km) from the Minnesota wolf population, the second population should consist of at least 200 wolves for at least 5 years, based upon late-winter population estimates, to be considered viable. Late-winter estimates are made at a time when most winter mortality has already occurred and before the birth of pups, thus, the count is made at the annual low point of the population. Alternatively, if the second population is located within 100 mi (160 km) of a self-sustaining wolf population (for example, the Minnesota wolf population), it should be maintained at a minimum of 100 wolves for at least 5 years, based on late-winter population estimates, to be considered viable. A nearby second population would be considered viable at a smaller size because it would be geographically close enough to exchange wolves with the Minnesota population (that is, they would function as a metapopulation), thereby bolstering the smaller second population both genetically and numerically.

The original Recovery Plan did not specify where in the eastern United States the second population should be reestablished. Therefore, the second population could have been established anywhere within the triangular Minnesota-Maine-Florida area covered by the Recovery Plan and the Revised Recovery Plan, except on Isle Royale (Michigan) or within Minnesota. The Revised Recovery Plan identified potential gray wolf reestablishment areas in northern Wisconsin, the UP of Michigan, the Adirondack Forest Preserve of New York, a small area in eastern Maine, and a larger area of northwestern Maine and adjacent northern New Hampshire (USFWS 1992, pp. 56–58). Neither the 1978 nor the 1992 recovery criteria suggest that the restoration of the gray wolf throughout all or most of what was thought to be its historical range in the eastern United States, or to all of these potential reestablishment areas, is necessary to achieve recovery under the Act.

In 1998, the Eastern Timber Wolf Recovery Team clarified the application of the recovery criterion for the second population to the wolf population that had developed in northern Wisconsin and the adjacent UP of Michigan. This second population is less than 100 mi (160 km) from the Minnesota wolf population. The Recovery Team recommended that the numerical recovery criterion for the Wisconsin-Michigan population be considered met when consecutive late-winter wolf surveys document that the population equals or exceeds 100 wolves (excluding Isle Royale wolves) for the 5 consecutive years between the first and last surveys (Peterson in litt. 1998).

*Recovery Trends for Wolves in the Western Great Lakes Region*

Minnesota Recovery

During the pre-1965 period of wolf bounties and legal public trapping, wolves persisted in the remote northeastern portion of Minnesota but were eliminated from the rest of the State. Estimated numbers of Minnesota wolves before their listing under the Act in 1974 include 450 to 700 wolves in 1950–53 (Fuller *et al.* 1992, p. 43, based on data in Stenlund 1955, p. 19), 350 to 700 wolves in 1963 (Cahalane 1964, p. 10), 750 wolves in 1970 (Leirfallom 1970, p. 11), 736 to 950 wolves in 1971–72 (Fuller *et al.* 1992, p. 44), and 500 to 1,000 wolves in 1973 (Mech and Rausch 1975, p. 85). Although these estimates were based on different methodologies and are not directly comparable, each puts the prelisting abundance of wolves in Minnesota at 1,000 or less. This was the only significant wolf population in the United States outside Alaska during those time periods.

After the gray wolf was listed as endangered under the Act in 1974, the Minnesota population estimates increased (see table 1 below). Mech estimated the population to be 1,000 to 1,200 wolves in 1976 (USFWS 1978, pp. 4, 50–52), and Berg and Kuehn (1982, p. 11) estimated that there were 1,235 wolves in 138 packs in the winter of 1978–79. In 1988–89, the Minnesota Department of Natural Resources (MN DNR) repeated the 1978–79 survey and also used a second method to estimate wolf numbers in Minnesota. The resulting independent estimates were 1,500 and 1,750 wolves in at least 233 packs; the lower number was derived by a method comparable to the 1978–79 survey (Fuller *et al.* 1992, pp. 50–51).

During the winter of 1997–98, the MN DNR repeated a statewide wolf

population and distribution survey, using methods similar to those of the two previous surveys. Field staff of Federal, State, tribal, and county land management agencies and wood products companies were queried to identify occupied wolf range in Minnesota. Data from 5 concurrent radio telemetry studies tracking 36 packs, representative of the entire Minnesota wolf range, were used to determine average pack size and territory area. Those figures were then used to calculate a statewide estimate of wolf and pack numbers in the occupied range, with single (nonpack) wolves factored into the estimate (Berg and Benson 1999, pp. 1–2).

TABLE 1—MINIMUM WINTER WOLF POPULATIONS IN MINNESOTA, WISCONSIN, AND MICHIGAN (EXCLUDING ISLE ROYALE) FROM 1976 THROUGH 2010.

[Note That There are Several Years Between the First Three Estimates. Minnesota Does Not Conduct Annual Surveys.]

| Year | Number of wolves | | | |
|---|---|---|---|---|
| | Minnesota | Wisconsin | Michigan | Wisconsin and Michigan total |
| 1976 | 1,000–1,200 | | | |
| 1978–79 | 1,235 | | | |
| 1988–89 | 1,500–1,750 | 31 | 3 | 34 |
| 1989–90 | | 34 | 10 | 44 |
| 1990–91 | | 40 | 17 | 57 |
| 1991–92 | | 45 | 21 | 66 |
| 1992–93 | | 40 | 30 | 70 |
| 1993–94 | | 57 | 57 | 114 |
| 1994–95 | | 83 | 80 | 163 |
| 1995–96 | | 99 | 116 | 215 |
| 1996–97 | | 148 | 113 | 261 |
| 1997–98 | 2,445 | 180 | 139 | 319 |
| 1998–99 | | 205 | 169 | 374 |
| 1999–2000 | | 248 | 216 | 464 |
| 2000–01 | | 257 | 249 | 506 |
| 2001–02 | | 327 | 278 | 604 |
| 2002–03 | | 335 | 321 | 656 |
| 2003–04 | 3,020 | 373 | 360 | 733 |
| 2004–05 | | 435 | 405 | 840 |
| 2005–06 | | 467 | 434 | 899 |
| 2006–07 | | 546 | 509 | 1,055 |
| 2007–08 | 2,921 | 549 | 520 | 1,069 |
| 2008–09 | | 637 | 577 | 1,214 |
| 2009–10 | | 704 | 557 | 1,247 |
| 2010–11 | | 782 | 687 | 1,469 |

The 1997–98 survey concluded that approximately 2,445 wolves existed in about 385 packs in Minnesota during that winter period (90 percent confidence interval from 1,995 to 2,905 wolves) (Berg and Benson 1999, p. 4). This figure indicated the continued growth of the Minnesota wolf population at an average rate of about 3.7 percent annually from 1970 through 1997–98. Between 1979 and 1989 the annual growth rate was approximately 3 percent, and it increased to between 4 and 5 percent in the next decade (Berg and Benson 1999, p. 5; Fuller *et al.* 1992, p. 51). As of the 1998 survey, the number of Minnesota wolves had reached approximately twice the number specified in the recovery planning goal for Minnesota (USFWS 1992, p. 28).

Minnesota DNR conducted another survey of the State's wolf population and range during the winter of 2003–04, again using methodology similar to the previous surveys. That survey concluded that an estimated 3,020 wolves in 485 packs occurred in Minnesota (90 percent confidence interval for this estimate is 2,301 to 3,708 wolves) (Erb and Benson 2004, pp. 7, 9). The MN DNR conducted its most recent survey of wolf population and range during the winter of 2007–08. That survey concluded that an estimated 2,921 wolves in 503 packs occurred in Minnesota (90 percent confidence interval for this estimate is 2,192 to 3,525 wolves). The results of the past three surveys suggest that the wolf population has been numerically stable over the past 10 or more years (Erb 2008, p. 6).

As wolves increased in abundance in Minnesota, they also expanded their distribution. During 1948–53, the primary wolf range was estimated at 11,954 sq mi (31,080 sq km) (Stenlund 1955, p. 19). A 1970 questionnaire survey in Minnesota resulted in an estimated wolf range of 14,769 sq mi (38,400 sq km) (calculated by Fuller *et al.* 1992, p. 43, from Leirfallom 1970). Fuller *et al.* (1992, p. 44), using data from Berg and Kuehn (1982), estimated that Minnesota primary wolf range encompassed 14,038 sq mi (36,500 sq km) during the winter of 1978–79. By 1982–83, pairs or breeding packs of wolves were estimated to occupy an area of 22,000 sq mi (57,050 sq km) in northern Minnesota (Mech *et al.* 1988, p. 86). That study also identified an additional 15,577 sq mi (40,500 sq km) of peripheral range, where habitat appeared suitable but no wolves or only lone wolves existed. The 1988–89 study produced an estimate of 23,165 sq mi (60,200 sq km) as the contiguous wolf range at that time in Minnesota (Fuller *et al.* 1992, pp. 48–49; Berg and Benson 1999, pp. 3, 5), an increase of 65 percent over the primary range calculated for 1978–79.

The 1997–98 study concluded that the contiguous wolf range had expanded to 33,971 sq mi (88,325 sq km), a 47 percent increase in 9 years (Berg and Benson 1999, p. 5). By that time the Minnesota wolf population was using most of the available primary and peripheral range identified by Mech *et al.* (1988, p. 86). The wolf population in Minnesota had increased in abundance

and distribution to the point that its contiguous range covered approximately 40 percent of the State during 1997–98. In contrast, the 2003–04 survey failed to show a continuing expansion of wolf range in Minnesota, and any actual increase in wolf numbers since 1997–98 was attributed to increased wolf density within a stabilized range (Erb and Benson 2004, p. 7). The results of the 2007–08 survey also indicated that wolf range in Minnesota remained ''essentially unchanged'' since 2004 (Erb 2008, not paginated).

Although the Minnesota DNR does not conduct a formal wolf population survey annually, it includes the species in its annual carnivore track survey. This survey, standardized and operational since 1994, provides an annual index of abundance for several species of large carnivores by counting their tracks along 20-mile (32-km) long standardized survey routes in northern Minnesota. In 2009, wolves were detected on 71 percent of the 58 routes surveyed, and the resulting indices of abundance and distribution were not appreciably different from recent years (Erb 2009, not paginated).

Summary for Minnesota

The Minnesota wolf population has increased from an estimated 1,000 individuals in 1976 to nearly 3,000 today, and the estimated wolf range in the State has expanded by approximately 225 percent (from approximately 15,000 sq mi (38,850 sq km) to approximately 34,000 sq mi (88,060 sq km)) since 1970. Over the past 10–12 years, the population size and range have remained stable, as most of the primary and peripheral habitat has been occupied. Based on the current abundance and distribution of the Minnesota wolf population, we believe its continued survival is ensured, and it achieves the first recovery criterion of the Revised Recovery Plan.

Wisconsin Recovery

Wolves were considered to have been extirpated from Wisconsin by 1960. No formal attempts were made to monitor the State's wolf population from 1960 through 1978. Although individual wolves and an occasional wolf pair were reported from 1960 through 1975, (Thiel 1978, Thiel 1993), there was no documentation of wolf reproduction occurring in Wisconsin, and the wolves that were reported may have been dispersing animals from Minnesota.

Wolves are believed to have reestablished breeding packs in Wisconsin in the winter of 1975–76. The Wisconsin Department of Natural Resources (WI DNR) began wolf population monitoring in 1979–80, estimating a statewide population of 25 wolves at that time (Wydeven and Wiedenhoeft 2000, pp. 151, 159; Wydeven *et al.* 2009c, pp. 93–97). This population remained relatively stable for several years, and then declined to approximately 14 to 19 wolves in the mid-1980s. In the late 1980s, the Wisconsin wolf population began an increase that has continued into 2010, when 690 wolves were counted (Wydeven *et al.* 2010, Figure 3).

Since 1979, WI DNR has intensively surveyed its wolf population on an annual basis using a combination of aerial, ground, and satellite radio telemetry complemented by snow tracking and wolf sign surveys (Wydeven *et al.* 2006a, pp. 4–5; Wydeven *et al.* 2009c, pp. 90–91). Wolves are trapped from May through September and fitted with radio collars, with a goal of having at least one radio-collared wolf in approximately half of the wolf packs in Wisconsin. Aerial locations are obtained from each functioning radio-collar about once per week, and pack territories are estimated and mapped from the movements of the individuals who exhibit localized patterns. From December through March, the pilots make special efforts to visually locate and count the individual wolves in each radio-tracked pack.

Snow tracking is used to supplement the information gained from aerial sightings and to provide pack size estimates for packs lacking a radio-collared wolf. Tracking is done by assigning survey blocks to trained trackers, who then drive snow-covered roads in their blocks and follow all wolf tracks they encounter. Snowmobiles are used to locate wolf tracks in more remote areas with few roads. The results of the aerial and ground surveys are carefully compared to properly separate packs and to avoid overcounting (Wydeven *et al.* 2006a, pp. 4–5). The estimated number of wolves in each pack is based on the aerial and ground observations made of the individual wolves in each pack over the winter.

Because the monitoring methods focus on wolf packs, lone wolves are likely undercounted in Wisconsin. As a result, the annual population estimates are probably slight underestimates of the actual wolf population within the State during the late-winter period. Fuller (1989, p. 19) noted that lone wolves are estimated to compose from 2 to 29 percent of the total population in the area. Wisconsin DNR surveys have estimated 2–15 percent of the winter population as loners (Wydeven *et al.* 2009c, p. 96). These surveys, however, are focused on heavily forested portions of northern and central Wisconsin; therefore, dispersing wolves traveling in other portions of the State are less likely to be detected, and often such wolves are only documented after vehicle collisions or accidental shootings. Broader use of trail cameras by members of the public is improving the WI DNR's ability to detect lone wolves across the State.

As previously stated, population estimates are made at the low point of the annual wolf population cycle. Thus, Wisconsin wolf population estimates are conservative in two respects. They undercount lone wolves, and the count is made at the annual low point of the population. This methodology is consistent with the recovery criteria established in the Revised Recovery Plan, which established numerical criteria to be measured with data obtained by late-winter surveys. Based on these considerations, an estimated 690 to 733 wolves in 181 packs, including 35 wolves on Native American reservations, were in Wisconsin in early 2010, representing an 8 percent increase from 2009 (Wydeven *et al.* 2010, pp. 12–13).

In the winter of 1994–95, wolves were first documented in Jackson County, Wisconsin, well to the south of the area occupied by other Wisconsin wolf packs in the northern part of the State (Thiel *et al* 2009, pp. 109–110). The number of wolves in this central Wisconsin area has dramatically increased since that time. During the winter of 2009–10, there were 100–106 wolves in 25 packs in the central forest wolf range (Zone 2 in the Wisconsin Wolf Management Plan; Wydeven *et al.* 2010, p. 5) and an additional 46 to 48 wolves in 12 or 13 packs in the marginal habitat in Zone 3, located between Zone 1 (northern forest wolf range) and Zones 2 and 4 (Wydeven *et al.* 2010, p. 5).

During the winter of 2004–05, 11 to 13 wolves were believed to be primarily occupying Native American reservation lands in Wisconsin (Wydeven in litt. 2005); this increased to 16 to 17 in 2005–06, 17 to 19 in 2007–08 (Wydeven and Wiedenhoeft 2008, Summary), approximately 27 in 2008–2009 (Wydeven and Wiedenhoeft 2008, p. 1), and approximately 35 in 2009–10 (Wydeven *et al.* 2010, p. 1). The 2009–10 survey consisted of 3 packs totaling 10–11 wolves on the Bad River Chippewa Reservation and a pack of 2 wolves on the Lac Courtes Oreilles Chippewa Reservation, both in northwestern Wisconsin. There also were two packs of five wolves each on the Lac du Flambeau Reservation in north-central Wisconsin. A pack of four wolves and three pairs occurred on the

Menominee Reservation and a three-wolf pack occurred on the Stockbridge Reservation, both in northeastern Wisconsin (Wydeven *et al.* 2010, Table 6). A pack of four to five wolves spent time on portions of the Red Cliff Chippewa Reservation along the Lake Superior shoreline. Wolf packs also used scattered lands of the St. Croix Chippewa in northwest Wisconsin, the Ho Chunk Nation in central Wisconsin, and Potawatomi in northeast Wisconsin. The tribal land of the Ho-Chunk, St. Croix Chippewa, and Potawatomi are composed mostly of scattered parcels of land, and are not likely to provide significant amounts of wolf habitat. About 90 percent of packs in northern Wisconsin Zone 1, and northern portions of Zone 3 are located in ceded territory where Chippewa Bands have retained hunting and gathering rights.

In 2002, wolf numbers in Wisconsin alone surpassed the 1992 Revised Recovery Plan criterion for a second population within 100 miles of the Minnesota population (100 wolves for a minimum of 5 consecutive years (USFWS 1992, p. 4)). Furthermore, in 2004, Wisconsin wolf numbers exceeded the 1992 recovery criterion of 200 animals for 6 successive late-winter surveys for an isolated wolf population (USFWS 1992, p. 4). Wisconsin population estimates for 1985 to 2010 increased from 15 to 690 wolves (see table 1 above) and from 4 to 181 packs (Wydeven *et al.* 2010, figure 3). This represents an annual population increase of 21 percent through 2000, and an average annual increase of 11 percent annually for the period 2004–2010. The slower rates of increase since 2000 are an indication that the State's wolf population growth and geographic expansion are beginning to level off.

Michigan Recovery

Except for Isle Royale, wolves were extirpated from Michigan as a reproducing species long before they were listed as endangered under the Act in 1974. Prior to 1989, the last known breeding population of wild Michigan wolves outside Isle Royale occurred in the mid-1950s. However, as wolves began to reoccupy northern Wisconsin, the Michigan Department of Natural Resources (MI DNR) began noting single wolves at various locations in the UP of Michigan. Wolf recovery in Michigan began with the documentation of three wolves traveling together and making territorial marks in the central UP during the fall of 1988; and the subsequent birth of pups in this territory during spring 1989 (Beyer *et al.* 2009, p. 73). Since that time, wolf packs have spread throughout the UP, with immigration occurring from Wisconsin on the west and possibly from Ontario on the east. Wolves now are found in every county of the UP, with the possible exception of Keweenaw County (Huntzinger *et al* 2005, p. 6; Roell 2009, pers. comm.).

The MI DNR annually monitors the wolf population in the UP by conducting a winter survey. Roads and trails are searched intensively and extensively for wolf tracks and other wolf sign using trucks and snowmobiles (Potvin *et al.* 2005). Complete surveys conducted from 1999 to 2006 provided an opportunity to evaluate multiple sampling approaches (MI DNR 2008). Based on these evaluations, it was determined that a geographically stratified sampling protocol produced unbiased, precise estimates of wolf abundance (Potvin *et al.* 2005; Drummer, unpublished data). The sampling protocol implemented in 2007 allows trackers to spend more time in smaller areas (MI DNR 2008).

The UP is divided into 21 survey units from which a stratified random sample is drawn, covering roughly 50 percent of the UP every year (MI DNR 2008). Pack locations are derived from previous surveys, citizen reports, and extensive ground and aerial tracking of radio-collared wolves. During the winter of 2009–10, the UP had 557 wolves in 109 resident packs (MI DNR in litt. 2010, Table 1). Surveys along the border of adjacent survey units are coordinated to avoid double counting of wolves and packs occupying those border areas. In areas with a high density of wolves, ground surveys by four to six surveyors with concurrent aerial tracking are used to accurately delineate territories of adjacent packs and count their members (Beyer *et al.* 2004, pp. 2–3; Huntzinger *et al.* 2005, pp. 3–6; Potvin *et al.* 2005, p. 1661). As with Wisconsin, the Michigan surveys likely miss lone wolves, thus underestimating the actual population.

Based on annual surveys in late winter, estimates of wolves in the UP increased from 57 wolves in 1994 to 557 in late winter 2009–10 (see table 1 above). Over the last 10 years, the annualized rate of increase has been about 12 percent (MI DNR in litt. 2010, table 1). This rate has varied from year to year, but there appear to be two distinct phases of population growth, with relatively rapid growth (25.8 percent average) from 1995 through 2000 and slower growth (10.1 percent average) from 2001 through 2010. In 2005, the number of wolves in the Michigan population alone surpassed the recovery criterion for an isolated wolf population of 200 animals for 6 successive late-winter surveys, as specified in the Revised Recovery Plan (USFWS 1992, pp. 24–26).

To date, no wolf packs are known to be primarily using tribal-owned lands in Michigan (Roell 2011, pers. comm.). Native American tribes in the UP of Michigan own small, scattered parcels of land relative to the size of wolf pack territories. Thus, no one tribal property would likely support a wolf pack. However, as wolves occur in all counties in the UP and are wide-ranging, tribal land is likely used periodically by wolves.

In October 2004, a coyote trapper mistakenly captured and killed a wolf in Presque Isle County in the northern Lower Peninsula (LP) of Michigan. This was the first verification of a wolf in the northern LP in at least 65 years (Roell *et al.* 2010, p. 4). This wolf had been trapped and radio-collared by the MI DNR the previous year (2003) while it was a member of an eastern UP pack. Since 2004, Michigan has surveyed the northern LP to determine whether wolves had successfully colonized the area. From 2005 through 2007, the survey had two components: a prioritized area search and a targeted area search based on citizen reports of wolves or wolf sign. USDA–Wildlife Services, Little Traverse Bay Band of Odawa Indians, and Central Michigan University worked cooperatively on the surveys. Nine units ranging in size from 200–400 sq mi (322–644 sq km) were surveyed; however, no wolf sign was found (Roell *et al.* 2010, p. 4). Beginning in 2008, a targeted search approach was used. The MI DNR issued a press release asking citizens to report any wolves or wolf sign; again, no wolves were detected in winters of 2008–10 (Roell *et al.* 2009, p. 5; Roell 2010, pers. comm.).

In 2008, the DNR recognized the likelihood that small numbers of wolves would eventually move into the northern LP and form persistent packs (Potvin 2003, pp. 29–30; Gehring and Potter 2005, p. 1242; Beyer *et al.* 2006, p. 35), and revised its Wolf Management Plan in part to incorporate provisions for wolf management in the northern LP (MI DNR 2008a, p. 46). In the summer of 2009, video images of single wolves were recorded in two of the three northern LP counties nearest to the UP (Roell *et al.* 2010, p. 4). The videos, taken in Emmet County in May 19, 2009, and Presque Isle County in July 27, 2009, may have been of the same animal (Roell 2009, pers. comm.). In 2010, USDA Wildlife Services and MI DNR staff reported a single breeding pair with three pups in Cheboygan County in the northern LP (MI DNR 2010). That 2010 report was based on an

assessment of the physical features of three pups that were captured and handled, observations of adult wolf-sized tracks, and remote camera photographs of large wolf-like canids. Subsequent DNA analysis indicated the pups were likely siblings and based on microsatellite genotyping, all three were classified as eastern coyotes rather than some form of Great Lakes wolf. The three pups shared an eastern wolf mtDNA haplotype, which suggests maternal introgression from a female wolf into their pedigree. Wheeldon (unpublished data) considers a likely scenario is that a female wolf bred with a male coyote and their female offspring backcrossed with male coyotes for an undetermined number of generations, culminating in the animals handled.

The wolf population of Isle Royale National Park, Michigan, is not considered to be an important factor in the recovery of wolves in the WGL. The Park population is small and isolated and lacks genetic uniqueness (Wayne *et al.* 1991, pp. 47–49). For genetic reasons and constraints on expansion due to the island's small size, this wolf population does not contribute significantly towards meeting numerical recovery criteria; however, long-term research on this wolf population has added a great deal to our knowledge of the species. The wolf population on Isle Royale has ranged from 12 to 50 wolves since 1959, and was 16 wolves in the winter of 2010–2011 (Vucetich and Peterson 2011, p. 3).

Summary for Wisconsin and Michigan

The two-State wolf population, excluding Isle Royale wolves, has exceeded 100 wolves since late-winter 1993–94 and has exceeded 200 wolves since late-winter 1995–96. Therefore, the combined wolf population for Wisconsin and Michigan has exceeded the second recovery criterion of the 1992 Revised Recovery Plan for a nonisolated wolf population, since 1999. Furthermore, the two-State population has exceeded the recovery criterion for an isolated second population since 2001.

Other Areas In and Near the Western Great Lakes DPS

No surveys have been conducted to document the number of wolves present in North Dakota or South Dakota, but an increasing number of wolves has apparently been detected in the eastern portions of these States. The eastern boundaries of North Dakota and South Dakota are approximately 19 and 81 mi (30 and 130 km), respectively, from occupied habitat in Minnesota. Biologists who are familiar with wolves in these States, however, generally agree that the wolves found there are primarily lone dispersers, although there were reports of pups being seen in the Turtle Mountains of North Dakota, in 1994 (Collins in litt. 1998).

Other records include an adult male shot near Devil's Lake, North Dakota, in 2002, another adult male shot in Richland County in extreme southeastern North Dakota in 2003 (Fain in litt. 2006), and a vehicle-killed adult male found near Sturgis, South Dakota, in 2006 (Larson in litt. 2006). In contrast to the other South Dakota wolves of the last 25 years, the animal found near Sturgis was genetically identified as having come from the Greater Yellowstone area (Fain in litt. 2006). Most recently, a wolf was shot in Roberts County, South Dakota, in January 2009 (reportedly running with two or three other wolves) (Prieksat in litt. 2009), and another wolf was found dead in a foothold trap that was set as part of an ongoing USDA Wildlife Service's coyote control operation in southeastern Eddy County, North Dakota (Bicknell in litt. 2009). See *Delineating the Boundaries of the WGL DPS* in this rule for a detailed discussion of movement of wolves.

Wolf dispersal is expected to continue as wolves travel away from the more saturated habitats in the core range into peripheral areas where wolves are extremely sparse or absent. Unless they return to the primary range and join or start a pack there, they are unlikely to contribute to long-term maintenance of WGL wolf populations.

Although it is possible for these dispersers to encounter and mate with a mature wolf outside the primary range, the lack of large expanses of unfragmented habitat make it unlikely that wolf packs will persist in these peripheral areas; lack of contiguous habitat is expected to seriously impede further expansion. The only exception is the northern LP of Michigan, where several studies indicate that a persistent wolf population may develop (Gehring and Potter 2005, p. 1242; Potvin 2003, pp. 29–30), albeit dependent on occasional to frequent immigration of UP wolves. Despite the constraints on further expansion described here, however, current wolf populations in Minnesota, Wisconsin, and the UP of Michigan have already greatly exceeded the recovery levels defined in the 1992 Revised Recovery Plan, and maintenance of these numbers is not contingent on recruitment of wolves from areas outside the primary range that has been established for the WGL.

*Summary of Wolf Recovery in the Western Great Lakes Region*

Wolves in the WGL DPS greatly exceed the recovery criteria (USFWS 1992, pp. 24–26) for (1) a secure wolf population in Minnesota, and (2) a second population outside Minnesota and Isle Royale consisting of 100 wolves for 5 successive years. Based on the criteria set by the Eastern Wolf Recovery Team in 1992 and reaffirmed in 1997 and 1998 (Peterson in litt. 1997, in litt. 1998), the DPS contains sufficient wolf numbers and distribution to ensure their long-term survival within the DPS.

The maintenance and expansion of the Minnesota wolf population has maximized the preservation of the genetic diversity that remained in the WGL DPS when its wolves were first protected in 1974. Furthermore, the Wisconsin-Michigan wolf population has exceeded the numerical recovery criterion even for a completely isolated second population. Therefore, even in the unlikely event that this two-State population was to become totally isolated and wolf immigration from Minnesota and Ontario completely ceased, it would still remain a viable wolf population for the foreseeable future, as defined by the Revised Recovery Plan (USFWS 1992, pp. 25–26). Finally, each of the wolf populations in Wisconsin and Michigan has exceeded 200 animals for 11 and 10 years, respectively, so if either were somehow to become isolated, they would remain viable, and each State has committed to manage its wolf population at or above viable population levels. The wolf's numeric and distributional recovery criteria in the WGL have been met.

*Have the historical wolves of the western great lakes region been restored?*

Leonard and Wayne (2008, p. 3) have stated that Great Lakes wolves have not been restored based on absence of certain historical mtDNA haplotypes from the current population, an estimated historical population size far greater than the current population size, and the admixture (similar to hybridization, but does not imply the generation in which the mixing occurred) of what they have identified as coyote and western wolf haplotypes in the current population.

The spatial representativeness of both the historical and recent samples reported by Leonard and Wayne (2008) has been questioned by Mech (2009). For example, 16 recent but no historical samples from Minnesota were included in the study. Leonard and Wayne (2009)

responded that they did not believe that genetic differences were likely to be pronounced at the geographic scale discussed by Mech and Paul (2008) and Mech (2009).

The current population of wolves in Minnesota, Wisconsin, and Michigan is derived from expansion of the remnant population in northeastern Minnesota (Fain *et al.* 2010, p. 12), supplemented by western gray wolves (Mech and Frenzel 1971; Mech 2010, p. 135), and in the case of UP Michigan, with possible contributions from wolves from southern Ontario (Fain *et al.* 2010, p. 12).

Subsequent studies with larger samples of the current wolf population find, despite acknowledged influence of western gray wolves, the current population is generally representative of the historical population (Fain *et al.* 2010, p. 14; Wheeldon *et al.* 2010). Koblmüller *et al.* (2009, pp. 10–11) found ''comparatively slight'' differentiation at autosomal microsatellite DNA loci between historical and current Great Lakes wolves. Wheeldon and White (2009, p. 4) present microsatellite DNA evidence that the hybridization processes noted by Leonard and Wayne (2008) were taking place over a century ago, so that the current population is comparable to the historical population with respect to admixture. They believe hybridization between eastern wolves and western wolves in the western Great Lakes region occurred prior to significant human effects on population size or habitat (Fain *et al.* 2010, p. 14). According to Fain *et al.* (2010, p. 14), the current population of wolves in the western Great Lakes ''represents an ancient component of the northeast ecosystem and have been established throughout the region for thousands of years.''

The loss of mtDNA haplotypes found in the historical but not the current western Great Lakes wolf population reported by Leonard and Wayne (2008, pp. 2–3), and the loss of allelic diversity (Fain *et al.* 2010, p. 11), indicate that a genetic bottleneck occurred when wolves were nearly extirpated from the western Great Lakes region and during the period of slow recovery that immediately followed. Despite these ''founder effects'' on the genetic composition of the western Great Lakes population, various measures of genetic diversity remain comparable to other wolf populations (Koblmüller *et al.* 2009; Fain *et al.* 2010, p. 12; Wheeldon *et al.* 2010), at least partially owing to contributions from western gray wolves.

Wolves in the WGL region display a healthy level of heterozygosity (Fain *et al.* 2010, p. 12), and show no evidence that a genetic bottleneck may have influenced genetic diversity (Koblmüller *et al.* 2009, p. 1). Schwartz and Vucetich (2009, p. 2) have stated that ''By all accounts, the return of wolves to the Great Lakes region has been successful * * * they are doing superbly—both in terms of population viability and ecological function.'' Cronin and Mech (2009, p. 2) state, ''It is generally acknowledged that the Great Lakes wolf population is fit, with abundant genetic variation'' (Cronin and Mech 2009, p. 2).

When the Service revised the endangered species list in 1978 to include the species *Canis lupus* in the lower 48 States and Mexico, regulatory protections were applied to all gray wolves in the lower 48 States, including all subspecies of gray wolves. That rule classified the Minnesota gray wolf population as a threatened ''species'' and gray wolves elsewhere in the lower 48 States and Mexico as another ''species'' with endangered status. This reclassification was undertaken because of uncertainty about the taxonomic validity of some of the previously listed subspecies and because we recognized that wolf populations were historically connected, and that subspecies boundaries were thus malleable.

> This listing arrangement [of four subspecies] has not been satisfactory because the taxonomy of wolves is out of date, wolves may wander outside of recognized subspecific boundaries, and some wolves from unlisted subspecies may occur in certain parts of the lower 48 States. In any case, the Service wishes to recognize that the entire species *Canis lupus* is Endangered or Threatened to the south of Canada, and considers that this matter can be handled most conveniently by listing only the species name.'' (43 FR 9607).

Since then, except for the short periods during which wolves were delisted, all wolves in the WGL have been protected under that 1978 listing. The recovery of all wolves in the WGL was guided first by the 1978 Recovery Plan and then by the 1992 revised Recovery Plan for the Eastern Timber Wolf. The wolves that were the subject of those documents are the wolves that have been recovered in the WGL. The debate regarding the *C. lupus* nomenclature that was identified in the 1974 and 1978 listings and in the recovery plans continues to date in the scientific community. Regardless of this debate regarding nomenclature, those listings allowed the wolf population that remained in northern Minnesota to flourish and reestablish the population throughout the core range we have today in Minnesota, Wisconsin, and the UP of Michigan. It is clear that the existing wolves in the WGL are the descendants of the wolves that were listed in 1978; the wolves that were the subject of the recovery plans; the wolves that have met recovery goals; and the wolves that will be managed by States, Tribes, and other Federal agencies after delisting.

**Summary of Comments and Recommendations**

In the proposed rule published on May 5, 2011 (76 FR 26806), we requested that all interested parties submit written comments on the proposal by July 5, 2011. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the Bangor Daily News (Maine), Duluth News-Tribune (Minnesota), Lansing State Journal (Michigan), Marquette Mining Journal (Michigan), Milwaukee Journal Sentinel (Wisconsin), Minneapolis Star Tribune (Minnesota), Portland Press Herald (Maine), and Wausau Daily Herald (Wisconsin). We held a public hearing on May 18, 2011, in Ashland, Wisconsin, and one on June 8, 2011, in Augusta, Maine. We also held two public information meetings, one in Grand Rapids, Minnesota, on June 14, 2011, and the other in Marquette, Michigan on June 16, 2011.

On August 25, 2011, we published a notice in the **Federal Register** (76 FR 53379) reopening the public comment period on the May 5, 2011, proposal. We reopened the comment period to allow for additional public review and the inclusion of any new information, specifically concerning North American wolf taxonomy. That notice also informed the public that we were considering issuing separate final rules for our final determinations on the proposed delisting of the Western Great Lakes DPS and the proposed determination regarding all or portions of the 29 States considered to be outside the historical range of the gray wolf. The second comment period closed on September 26, 2011.

During the first comment period for the proposed rule, we received 713 unique comments directly addressing the proposed delisting of gray wolves in the WGL DPS. During the second comment period for the proposed rule, we received 124 unique comments directly addressing the proposed delisting of gray wolves in the WGL DPS. These comments included verbal and written comments received at the public hearings. Comments were

submitted by 24 nongovernmental organizations representing a variety of interest groups including preservation, conservation, animal welfare, agriculture or livestock, and sportsmen's organizations. Two Federal agency representatives provided comments, six State agency representatives provided comments, and one elected official provided a comment. Six comments were received from Native American Tribes or tribal government agencies or organizations.

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from four knowledgeable individuals with scientific expertise that included familiarity with wolves and their habitat, biological needs, and threats. We received responses from three of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding delisting wolves in the western Great Lakes. The peer reviewers concurred with our conclusion that delisting wolves in the WGL DPS is warranted and provided additional information, clarifications, and suggestions to improve the final rule.

Comments received are addressed in the following summary and incorporated into the final rule as appropriate.

*Comments*

(1) *Comment:* We received numerous comments, including from peer reviewers, regarding wolf taxonomy, primarily with regards to whether *C. lycaon* should be recognized as a separate species from *C. lupus.*

*Our Response:* The extensive information submitted during the comment periods and recent publications on the subject and the widely diverging views expressed in the pertinent scientific studies underscore the enduring debate regarding the taxonomy of North American wolves—a debate that may not be resolved for some time (see Wolf Taxonomy in the Western Great Lakes Region for a full discussion). Although there is not a significant number of new publications that have become available since we published our proposal in May 2011, the substance of those new publications and the substantive comments we received have led us to reconsider our proposed decision.

Based on a reevaluation of the available scientific information and the evolving and ongoing scientific debate, we reconsidered our position, as expressed in the proposed rule (76 FR 26086), that the gray wolf subspecies *Canis lupus lycaon* should be elevated to the full species *Canis lycaon* and that the population of wolves in the WGL is a mix of the two full species, *Canis lupus* and *Canis lycaon.* While there are varying scientific opinions on the taxonomic history of North American wolves, *Canis lupus* is the species that has been recognized in the WGL for a long time and throughout this technical debate, and there is significant information indicating that continuing to recognize *Canis lupus* as the species in the WGL is appropriate (see Wolf Taxonomy in the Western Great Lakes Region). Having reviewed and assessed all of the available scientific information, including, in particular, the comments received on the proposed rule and the information that has become available since the proposed rule was published, we have decided the better conclusion in to retain our previous taxonomic recognition of wolves in the WGL as gray wolves (*Canis lupus*). Therefore, in this final rule we consider all wolves in the WGL DPS to be gray wolves (*Canis lupus*) and are delisting them as such.

(2) *Comment:* We received numerous requests from diverse interest groups and individuals asking that we subdivide our final determination on delisting the WGL DPS from the final determination on the rest of the proposed actions for the eastern United States.

*Our Response:* We are separating our determination on the delisting of the Western Great Lakes DPS from the determination on our proposal regarding all or portions of the 29 eastern States we considered to be outside the historical range of the gray wolf. This rule finalizes our determination for the WGL DPS. A subsequent decision will be made for the rest of the eastern United States.

(3) *Comment:* We received numerous comments from diverse interest groups and individuals stating that the Service should treat wolves in the western Great Lakes area as a single, connected population and analyze them as such. Others commented that the wolves that occupy the WGL DPS, regardless of scientific species classification, were and continue to be the same wolves that were protected under the Act over 30 years ago. The wolves that are in the WGL DPS now are what was listed, what met the recovery goals, and what should be delisted.

*Our Response:* In this final rule we consider all wolves in the WGL DPS to be members of a single species, the gray wolf (*Canis lupus*) and are delisting them as such. When the Service revised the endangered species list in 1978 to include the species *Canis lupus* in the lower 48 States and Mexico, regulatory protections were applied to all gray wolves in the lower 48 States, including all subspecies of gray wolves. The wolf population in Minnesota was listed separately as a threatened species, while the rest of the lower 48 States and Mexico were listed as endangered. The recovery of all wolves in the WGL was guided first by the 1978 Recovery Plan and then by the 1992 revised Recovery Plan for the Eastern Timber Wolf. The wolves that were the subject of those documents are the wolves that have been recovered in the WGL. The debate regarding the *C. lupus* nomenclature that was identified in the 1974 and 1978 listings and in the recovery plans continues to date in the scientific community. Regardless of this debate regarding nomenclature, those listings allowed the wolf population that remained in northern Minnesota to flourish and reestablish the population throughout the core range we have today in Minnesota, Wisconsin, and the UP of Michigan. The existing wolves in the WGL are the descendants of wolves in the Minnesota *C. lupus* population that was protected in the 1978 listing; the wolves that were the subject of the recovery plans; the wolves that have met recovery goals; and the wolves that will be managed by States, Tribes, and other Federal agencies after delisting.

(4) *Comment:* The Service must analyze how hybridization with eastern wolves is affecting the viability of gray wolves.

*Our Response:* In light of the ongoing scientific debate, and the lack of clear resolution concerning the taxonomy of wolves in the western Great Lakes, we are at this time continuing to recognize *C. lupus* as the only species that occurs in the WGL. The wolves that occupy the WGL DPS have long been accepted as gray wolves, *C. lupus,* and until greater scientific consensus is reached regarding whether to revise this taxonomic classification, the better conclusion is to continue to recognize them as gray wolves. See Wolf Taxonomy in the Western Great Lakes Region for a full discussion.

(5) *Comment:* If two species of wolves exist in the WGL, those two species need to be evaluated separately to determine if each has independently been recovered; or the Service must determine whether the gray wolves (*C. lupus*) in the WGL, independent of *C. lycaon,* have met the numerical recovery criteria in the Eastern Timber Wolf Recovery Plan. Others express that because the WGL population is admixed, the Service cannot determine if the gray wolf (*C. lupus*) itself has been

recovered. We also received comments stating that the boundaries of the WGL DPS must be based on the gray wolf alone, not on the two species combined.

*Our Response:* In light of the ongoing scientific debate, and the lack of clear resolution concerning the taxonomy of wolves in the western Great Lakes, we are at this time continuing to recognize *C. lupus* as the only species that occurs in the WGL. The wolves that occupy the WGL DPS have long been accepted as gray wolves, *C. lupus,* and until greater scientific consensus is reached regarding whether to revise this taxonomic classification, it is most logical to continue to recognize them as gray wolves. See Wolf Taxonomy in the Western Great Lakes Region for a full discussion.

(6) *Comment:* A few commenters stated that wolves have not achieved recovery because disease, illegal killing, and other human-caused mortality, or inadequate regulatory mechanisms still threaten wolves in the WGL. Others stated that the Service has not provided a complete analysis of threats to wolves in the WGL.

*Our Response:* Our detailed review of the past, current, and likely future threats to wolves within the WGL DPS identified human-caused mortality of all forms to constitute the majority of documented wolf deaths. However, the wolf populations in Wisconsin and Michigan have continued to expand in numbers and the Minnesota wolf population is at least maintaining itself at well over the population goal recommended in the 1992 Recovery Plan and at about twice the minimum level established in the 2001 Minnesota Wolf Plan. Healthy wolf populations clearly can withstand a high level of mortality, from human and other causes, and remain viable. We believe that, for purposes of this delisting decision, the numerical growth and range expansion shown by WGL DPS wolves indicate that adequate control of human-caused mortality already exists since the species is being maintained at healthy levels.

With regard to disease, several diseases have had noticeable impacts on wolf population growth in the Great Lakes region in the past. Despite these and other diseases and parasites, the overall trend for wolf populations in the WGL DPS continues to be upward. Wolf management plans for Minnesota, Michigan, and Wisconsin include disease monitoring components that we expect will identify future disease and parasite problems in time to allow corrective action to avoid a significant decline in overall population viability. Disease may eventually limit overall wolf carrying capacity and contribute to annual fluctuations in wolf abundance, but at current and foreseeable population levels, diseases are not likely to affect viability or put wolves at risk again of becoming endangered or threatened.

We conducted a thorough analysis of the existing and likely future threats to wolves, giving specific consideration to the five categories of threats set forth in section 4(a)(1) of the Act—(1) habitat destruction or degradation or a reduction in the range of the gray wolf; (2) utilization by humans; (3) disease, parasites, or predatory actions by other animals or humans; (4) State, Tribal, and Federal regulatory measures; and (5) other threats (see Summary of Factors Affecting the Species). Based on our consideration of these factors individually and in combination, we concluded the Western Great Lakes wolf population is neither in danger of extinction nor likely to become so in the foreseeable future, in all or a significant portion of the population's range.

(7) *Comment:* A number of comments expressed opposition to delisting, making statements such as ''wolves should always be protected'' by the Act and ''why do wolves have to be delisted.''

*Our Response:* The Act provides the Federal Government with authority to protect and recover threatened and endangered species. When a species has been recovered to the extent that it no longer meets the definition of ''threatened'' or ''endangered,'' the Act provides that it should be removed from the Federal List of Endangered and Threatened Wildlife and Plants and its management be returned to the appropriate States and tribes (in cases where treaties identify such authorities for tribes). The goal of the Act is to recover listed species and then to delist them when they no longer qualify as threatened or endangered, thereby allowing the Service to focus its efforts on the many other species that do qualify as threatened and endangered. The WGL gray wolf DPS no longer meets the definition of a threatened or endangered species, as it has achieved long-standing recovery criteria by greatly expanding in numbers and geographic range and threats to its long-term viability have been reduced or eliminated. Therefore, the Act requires delisting the species, but it also requires that we continue to monitor the status of the species for a minimum of 5 years after delisting, and we can list it again if the monitoring results show that to be necessary.

(8) *Comment:* The WGL DPS should be reclassified to threatened instead of delisted as this would allow Wisconsin and Michigan to implement depredation control programs while maintaining the Act's protections for wolves.

*Our Response:* We believe the gray wolf has achieved recovery in the WGL DPS and our five-factor analysis indicates that it is no longer endangered or threatened. Therefore, it should be delisted with management returning to the States and tribes.

(9) *Comment:* The Service should encourage North Dakota to revise its classification of the wolf and adopt a wolf management plan for the State.

*Our Response:* The core of the range for the western Great Lakes population of gray wolves is in Minnesota, Wisconsin, and Michigan. Wolf management plans are only needed for these three States for the Service to be assured that WGL wolves will be managed in such a manner that they are not likely to become an endangered species in the foreseeable future. If North Dakota or other States within the WGL DPS wish to develop wolf management plans, the Service will provide technical assistance and guidance as requested.

(10) *Comment:* A couple of commenters stated that the Service improperly designated the WGL DPS for the purpose of delisting, further stating that the DPS tool is intended to be used to protect a population segment without having to list the entire species.

*Our Response:* In this rule we recognize that the Minnesota gray wolf population listed as a species in 1978 has functioned effectively as a DPS ever since the DPS provision was added to the Act later in 1978. Under the Act, the Service is authorized to reevaluate that functional DPS listing and revise it to meet the criteria in the DPS policy and to reflect the ''best available biological data'' (see Western Great Lakes Distinct Population Segment). We are not designating a previously unidentified DPS, but are revising a preexisting listing of *Canis lupus* in Minnesota that functions as a DPS. Our reevaluation of the Minnesota listing demonstrates that a gray wolf DPS including only Minnesota (per the 1978 listing) would not meet the criteria in the DPS policy, because it would not be discrete ''* * * in relation to the remainder of the species to which it belongs'' (61 FR 4725, February 7, 1996). The Minnesota wolf population has expanded well beyond State boundaries and is connected to the wolf population in Wisconsin and Michigan, as evidenced by frequent movements of wolves among the States (Van Deelen 2009, p. 140; Treves *at al.* 2009, pp. 192–195) and genetic analyses that demonstrate

the Wisconsin and Michigan wolves are mostly from the same genetic mix as Minnesota wolves (Wheeldon and White 2009, p. 4; Fain *et al.* 2010). Therefore, we are delineating the boundaries of the expanded Minnesota population segment to meet the criteria in the DPS policy and to reflect the current geographic location of the population.

Moreover, even if we were identifying a new DPS at this time, we interpret the Act to allow DPSs to be used for both listing and delisting species. Section 4(a)(1) of the Act directs the Secretary of the Interior to determine whether ''any species'' is endangered or threatened. Numerous sections of the Act refer to adding and removing ''species'' from the list of threatened or endangered plants and animals. Section 3(16) defines ''species'' to include any subspecies ''and any distinct population segment of any species of vertebrate fish or wildlife'' Therefore, the Act authorizes us to revise the List of Endangered and Threatened Wildlife and Plants to list, reclassify, and delist species, subspecies, and DPSs of vertebrate species. Furthermore, our ''Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act'' states that the policy is intended for ''the purposes of listing, delisting, and reclassifying species under the Endangered Species Act * * *.'' (61 FR 4722, Feb. 7, 1996), and that it ''guides the evaluation of distinct vertebrate population segments for the purposes of listing, delisting, and reclassifying under the Act.'' (61 FR 4725).

On December 12, 2008, the Solicitor of the Department of the Interior issued a formal opinion, ''U.S. Fish and Wildlife Service Authority Under Section 4(c)(1) of the Endangered Species Act to Revise Lists of Endangered and Threatened Species to 'Reflect Recent Determinations' '' (U.S. DOI 2008). This opinion represents the views of the Department of the Interior and fully supports the Department's position that it is authorized in a single action to identify a DPS within a larger listed entity, determine that the DPS is neither endangered nor threatened, and then revise the List of Endangered and Threatened Wildlife to reflect those determinations. The opinion also notes that, although the term ''delist'' is not used in the Act, it is used extensively in the regulations implementing the section 4 listing provisions of the Act, such as 50 CFR 424.11(d). As explained in footnote 8 to the Solicitor's opinion, ''As used by FWS, ''delisting'' applies broadly to *any* action that revises the lists either to remove an already-listed entity from the appropriate list in its entirety, *or* to reduce the geographic or taxonomic scope of a listing to exclude a group of organisms previously included as part of an already-listed entity.'' The complete text of the Solicitor's formal opinion can be found at *http://www.fws.gov/midwest/wolf/.* Therefore, identification and delisting of a DPS is permissible.

(11) *Comment:* Two commenters stated that, when drawing the boundaries of the DPS, the Service must ensure that all significant portions of the range within the DPS support viable wolf populations. The boundaries should include, at most, core areas in which a population has fully recovered.

*Our Response:* We have analyzed whether the species is threatened or endangered in a significant portion of its range in the WGL DPS (see Is the Species Threatened or Endangered in a Significant Portion of Its Range?). We believe all significant portions of the species' range within the DPS support viable wolf populations and that the gray wolf has achieved recovery throughout the WGL DPS and is no longer threatened or endangered. Therefore, it should be delisted with management returning to the States and tribes.

We have delineated the DPS to be closely tied to the biological wolf population in the area, and to be consistent with the two relevant court rulings (*Defenders of Wildlife* v. *Norton,* 354 F. Supp. 2d 1156 (D. Or. 2005); *National Wildlife Federation* v. *Norton,* 386 F. Supp. 2d 553 (D. Vt. 2005)). Wolf biology makes it unreasonable to define a wolf population, and hence a wolf DPS, as solely the area where wolf packs are present at viable levels. Any area that hosts wolf packs also is producing a substantial number of dispersing wolves, some of which return after short absences, while others travel farther and some never return. Delineation of a wolf population must recognize and account for this dispersal behavior to some degree. We believe our DPS delineation is appropriately based on the biological features of the species and the nature of a wolf population by being centered on the areas occupied by the core population, but also including a surrounding area that encompasses a reasonable portion of the areas visited by core population wolves making longer distance movements from their natal areas. We have included nearby areas that are likely to be visited by wolves that have dispersed from the core recovery areas because we believe these wolves should be considered part of that biological population while they are within a reasonable distance from the core areas. The areas of potentially suitable habitat that are currently unoccupied are relatively small, and even if occupied in the future, will not make a significant contribution to the long-term viability of the gray wolf population in the DPS or in the United States, and thus are not considered to be a significant portion of the species range.

A critical component of delineating the boundaries of a DPS is gaining an understanding of the population/metapopulation that is being designated as a DPS. Wolf biology clearly shows that temporary and permanent movements beyond the pack's territory are a key element of wolf population dynamics, and as such, these movements must be considered when delineating a boundary for a DPS. Furthermore, a biologically based DPS boundary cannot follow the edge of the fully occupied core areas, as this comment seems to advocate. Individual wolves would be constantly moving back and forth across such a boundary, and pack territories may form on both sides of the line in some years, and might disappear from one or both sides in subsequent years, depending on a number of physical, biological, and societal factors. We determined that the DPS boundary should recognize and accommodate the normal behavior of the metapopulation members.

(12) *Comment:* A few commenters suggested specific revisions to the DPS boundaries, such as including or not including all of the Dakotas or not including the northern Lower Peninsula of Michigan.

*Our Response:* We considered the best available scientific data on wolf distributions and movements in delineating the boundaries of the Western Great Lakes DPS. We considered several options, among them drawing a tight line around the core Great Lakes wolf population or drawing a very large circle that included the core population as well as all areas visited by known dispersers. In the end, however, we determined that drawing the boundary line to include the core recovered wolf population in the Great Lakes Region, plus a wolf movement zone around the core population that includes areas visited by dispersers known to contribute to the core population, was the most biologically supported alternative. The determination was the result of a thorough review of biological data and the regulatory guidance. Additionally, the delineation of the DPS boundary was supported by the peer-reviewers.

(13) *Comment:* Corridors that allow safe movement of wolves among the

Great Lakes States must be maintained, and the benefits of these corridors must not be undermined by escalated lethal control of wolves.

*Our Response:* Wolves are effective dispersers (Forbes and Boyd 1997), and existing habitat linkages among Minnesota, Wisconsin, Michigan, and Canada allow long-distance movements. Long-distance movements of wolves through human-dominated landscapes in Minnesota and Wisconsin suggest highways and roads are not barriers (Mech *et al.* 1995, p. 368; Merrill and Mech 2000, pp. 429–431). Wolves are capable of traveling through crop and range land (Licht and Fritts 1994, pp. 75, 77; Wydeven *et al.* 1998, pp. 777) and can cross ice-covered lakes and rivers (Mech 1966, accessed at *http://www.cr.nps.gov/history/online_books/fauna7/fauna2a.htm*, not paginated) and unfrozen rivers during the summer (Van Camp and Gluckie 1979, pp. 236–237).

The Minnesota, Wisconsin, and Michigan State management plans all include maintaining habitat linkages and dispersal corridors as a management component. In Minnesota, most of the occupied wolf range is contiguous; that is, most packs occur adjacent to or very near other packs. In addition, all wolves in Minnesota are connected with the much larger population inhabiting southern Canada (MN DNR 2001, p. 27). The dispersal corridor between Minnesota and Wisconsin (within and immediately to the south of management Zone 4) contains large land areas in public ownership (the Nemadji, St. Croix State Forests, Chengwatana State Forest, and St. Croix State Park) that are contiguous with large areas of county forest land in Wisconsin. Because of the habitat security of the public land base that is adjacent to Wisconsin between the Twin Cities and Duluth, wolf dispersal corridors between Minnesota and Wisconsin are well protected. The MN DNR will work in cooperation with the WI DNR on assessments of the effects of future development on dispersal in the interstate area (MN DNR 2001, p. 2).

The Wisconsin management plan (WI DNR 1999, p. 23) promotes cooperative habitat management with public land management agencies, industrial forests, and other private landowners, including protection of dispersal corridors on private, tribal, and public land to promote continued wolf movement to and from Michigan and Minnesota, as well as among Wisconsin packs. Furthermore, the Plan states that protection of corridor habitat should be a factor in considering acquisition of public land for other conservation purposes.

The MI management plan recognized the importance of continued movement of wolves within and among the states and Canada to help ensure the long-term viability of the wolf population. As a component of their management plan, the MI DNR will cooperate with Federal, State and tribal agencies and private landowners to identify and protect wolf habitat linkage zones (MI DNR 2008, pp. 39–40). The wolf management plans currently in place for Minnesota, Wisconsin, and Michigan will be more than sufficient to retain viable wolf populations in each State. These State plans provide a very high level of assurance that wolf populations in these three States will not decline to nonviable levels in the foreseeable future.

(14) *Comment:* Several commenters stated that the Service must ensure that State wolf management strategies accommodate tribal interests within reservation boundaries as well as honor the tribal role and authority in wolf management in the ceded territories. Furthermore, the Federal trust responsibility, as it pertains to wolf management, must be continued after delisting.

*Our Response:* The Service and the Department of the Interior recognize the unique status of federally recognized tribes, their right to self-governance, and their inherent sovereign powers over their members and territory. The Department, the Service, the Bureau of Indian Affairs (BIA), and other Federal agencies, as appropriate, will take the needed steps to ensure that tribal authority and sovereignty within reservation boundaries are respected as the States implement their wolf management plans and revise those plans in the future. Furthermore, there may be tribal activities or interests associated with the wolf encompassed within the tribes' retained rights to hunt, fish, and gather in treaty-ceded territories. The Department is available to assist in the exercise of those rights. If biological assistance is needed, the Service may provide it via our field offices. The Service will remain involved in the post-delisting monitoring of the gray wolf, but all Service management and protection authority under the Act will end with this delisting. Legal assistance may be provided to the tribes by the Department of the Interior, and the BIA will be involved, when needed.

(15) *Comment:* One commenter stated that the delisting process has highlighted the need for improved relationships between Tribes and the Service on wolf management issues. Several issues were highlighted: (a) The proposed rule states that ''Tribal representatives declined to participate'' in the development of a wolf management strategy for the lower 48 States. In fact, most Tribes in the country were given no opportunity to participate in this process, and the few intertribal organizations that had any opportunity were invited only after the process was already under way. (b) Many of the references to tribal management perspectives used in the proposal were 8–13 years old, disregarding the fact that tribal perspectives may change over time, possibly misrepresenting current tribal positions. (c) The section that discusses the Service's government-to-government relationship with the Tribes notes that the Service will ''fully consider all of the comments on the proposed rule that are submitted by Tribes and Tribal members during the public comment period,'' reflecting again the Service's failure to correctly recognize the proper nature of the Service-Tribal relationship.

*Our Response:* As discussed in the proposed rule, the Service embarked on a structured decisionmaking process in 2008 as a means of developing a more integrated and comprehensive strategy for gray wolf conservation in the lower 48 States and Mexico. The overall intent of the process was to identify appropriate wolf entities (*i.e.,* listing units) for full status review, anticipating that such review would lead to either confirmation or revision of the existing gray wolf listing. We first conducted several iterations of the process in an internal Service effort to develop a viable framework for considering the scientific and policy questions that drive decisionmaking for wolves. Following our development of a satisfactory decisionmaking framework, we convened a workshop in August 2010 to generate and assess alternative taxonomic and population units at various scales and in various configurations, including the 1978 listing as the *status quo* alternative. The outcomes from the workshop provided input to our continuing effort to formulate a comprehensive vision of wolf conservation, which evolved into the proposed national wolf strategy discussed in the proposal. This strategy was a broad outline, the components of which are in various stages of execution. The process used to develop the proposed national wolf strategy evolved as we proceeded through our task, and different parties were engaged at different times.

Although the Midwest Tribes and Inter-Tribal Natural Resource Management Agencies were not

participants at the August 2010 workshop, we worked hard to involve them in developing a proposal that was specific to the Midwest area. In doing so, to make sure that our proposal appropriately reflected the current status of Tribal wolf management activities, we contacted each Tribe in the Service's Midwest Region that we knew to be involved in wolf management activities in order to clarify their management efforts to date and the status of any Tribal wolf management plans. We hold our government-to-government relationship with Tribes in very high regard and respect Tribal sovereignty. Accordingly, all of the comments received from Tribes and Inter-Tribal Natural Resource Management Agencies in response to the proposed rule were considered in the final rule. In addition, during the comment period, we met with the Chippewa Ottawa Resources Authority Board and the Great Lakes Indian Fish and Wildlife Commission's Voigt Inter-Tribal Task Force to discuss the proposal. We also offered to meet individually with and discuss the proposal with any Tribe that wanted to do so, however none accepted our offer.

(16) *Comment:* Post-delisting monitoring is critical and should extend beyond the typical 5-year period. Public harvest will likely take 3–5 years to implement, and this is the variable most likely to affect wolf populations. This variable cannot be adequately evaluated within the 5-year PDM period.

*Our Response:* The Service will implement the PDM plan for at least 5 years after delisting the WGL DPS. During the monitoring period, if the Service detects a change in wolf populations or a significant increase in threats, it can evaluate and change monitoring methods or consider relisting. At the end of the PDM period the Service will conduct a final internal review and may request reviews by the former members of the Eastern Gray Wolf Recovery Team and other independent specialists, as appropriate. If the final internal review indicates that substantive changes have been made to how wolves are managed, we may extend the monitoring period to evaluate potential impacts. Based on those final reviews, which will be posted on the Service's Internet site, the Service will decide whether to relist, extend the monitoring period, or end monitoring.

(17) *Comment:* One peer reviewer stated that the recent scientific literature contains a few additional pertinent papers on gray wolf diseases and parasites. She noted that those papers are in agreement with the discussion points and conclusions in the proposed rule (pp. 26112–26114).

*Our Response:* We have incorporated information from those recent scientific papers into our analysis of disease as a potential threat (see the discussion under C. Disease or Predation). That information does not alter our determination that diseases are not likely to affect the viability of wolves or put wolves in the WGL at risk.

(18) *Comment:* Several commenters expressed concern regarding whether the States would implement a public harvest or recreational hunting after wolves are federally delisted. Others commented that they support a public harvest or recreational hunting. A number provided suggestions on how or specifically where such a public harvest should be implemented, if it is.

*Our Response:* Unregulated killing was the primary threat to the species historically. The State management plans that will be implemented after delisting provide protection from unregulated killing. It is not the Service's position to decide whether a regulated harvest in and of itself is an appropriate management tool. Instead the Service is concerned with whether the use of that tool might reduce the number of wolves in such a way that they would again be considered a threatened or endangered species under the Act. A regulated harvest of wolves can be carried out in a manner that would not threaten their continued existence.

(19) *Comment:* A couple of commenters stated that the recovery criteria have not been achieved because either the wolf population data are wrong, or because the Wisconsin-Michigan wolf population is not a second population as is required by the recovery criteria found in the 1992 Recovery Plan.

*Our Response:* We are fully satisfied that the wolf population estimates provided by the Minnesota, Wisconsin, and Michigan DNRs demonstrate that the numerical recovery criteria have been achieved for far longer than the 5 years recommended in the Federal Recovery Plan. The methods used by WI and MI DNRs result in a conservative count of the wolves that are alive at the late-winter annual low point of the wolf population. The method used by the Minnesota DNR for its much larger wolf population is less precise, but even the lower bound of its 90 percent confidence interval (CI) exceeded the Federal Recovery Plan's Minnesota goal of 1,250–1,440 wolves back as far as the 1988–89 survey (Fuller *et al.* 1992, p. 50) and the CI lower bound has been well above that goal since then (Erb and Benson 2004, Table 1). Therefore, we see no problem with using these Minnesota population estimates. Members of the Recovery Team have also expressed confidence in the population estimates of all three States (Peterson in litt. 1999a, in litt. 1999b).

The 1992 Federal Recovery Plan describes two scenarios that would satisfy its goal for a second viable wolf population. One scenario deals with the development of an isolated wolf population; such a population must be composed of at least 200 wolves over five successive years. The second scenario is a population that is located within 100 miles of another viable wolf population; such a population must consist of only 100 wolves for five consecutive years (USFWS 1992, pp. 25–26). The Recovery Plan discusses the conservation tradeoffs of completely separate populations versus adjacent populations, and it specifically states that a wolf population larger than 100 wolves ''closely tied to the Minnesota population'' will be considered a viable population despite its small size, because of immigration of wolves from Minnesota (USFWS 1992, pp. 24–25). Although this Recovery Plan was written prior to the common acceptance and use of the conservation biology term ''metapopulation,'' this clearly was the concept being discussed and advocated in the Federal Recovery Plan. The second scenario describes what has occurred in the WGL DPS, and, therefore, the wolves in Wisconsin and Michigan qualify as a second population (see Recovery Criteria for a full discussion).

(20) *Comment:* Delisting in the WGL will prevent wolves from further expanding into areas of their previous range. The Service cannot delist wolves in one portion of their range when the species remains endangered throughout the remainder of its historical range, and where viable habitat for the species exists such that further recovery within its historical range can be promoted.

*Our Response:* Delisting the Western Great Lakes DPS does not discourage wolf conservation in other parts of their range. The Act 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 chapter are no longer necessary.'' 16 U.S.C. 1532(3). The States, tribes, and conservation groups have all played a key role in the recovery of the WGL wolf population and now, because the wolf population is recovered and healthy, continued conservation efforts under the Act are no longer necessary within

the DPS. The assertion that delisting the WGL DPS is inconsistent with the Act's conservation requirement is based on an apparent confusion of the term ''conservation'' with ''restoration.'' A species is conserved when it no longer meets the Act's definitions of endangered species or threatened species and, at such time, the species should be delisted. This does not require the range-wide restoration of the gray wolf to all areas that it historically inhabited before it may be delisted in the WGL region—an area that is inhabited by a healthy, recovered wolf population.

Because this final rule does not alter the listing status of wolves under the Act outside of the DPS, it does not hinder the Service's or States' ability to implement reintroduction and recovery programs in other areas of the country. The commenters' focus on the alleged inability of wolves within the DPS to disperse to other areas is misdirected because it takes an overly narrow view of wolf recovery possibilities. This final rule in itself does not foreclose further wolf recovery in other areas of suitable habitat via reintroduction programs. Indeed, gray wolf populations in Wyoming, central Idaho, and the southwestern United States did not develop from dispersers, but from wolf reintroductions that were planned and carried out by the Service and partner agencies and organizations. Continued wolf recovery in areas outside of the Western Great Lakes DPS is not prevented by delisting the Western Great Lakes DPS.

(21) *Comment:* Numerous commenters indicated that our delisting proposal was based on unspecified political considerations, pressure from the livestock industry, exaggerated fears for human safety, pressure from deer/bear hunters and furbearer trappers, and pressure from States. We were asked by other commenters to consider the value of wolves for keeping deer numbers in check, to maintaining healthy ungulate populations, for maintaining native vegetation and other species of wildlife, and in balancing nature. Others thought we should consider the economic benefits provided by a large wolf population. We also received numerous comments indicating that wolves should be delisted because of fear for public safety, increased wolf-human conflicts, reduced funding to control depredating wolves, and/or decreasing public tolerance for wolves.

*Our Response:* The Act requires that listing and delisting decisions be based entirely on whether a species is endangered or threatened due to one or more categories of threats (section 4(a)(1)) and that we make this determination ''solely on the basis of the best scientific and commercial data available.'' In compliance with the Act, the other nonscientific considerations and factors described above have not been used in making this decision. The WGL gray wolf DPS no longer meets the definition of a threatened or endangered species, and has achieved the recovery criteria established in the Eastern Timber Wolf Recovery Plan (Service 1992) by greatly expanding in numbers and geographic range, and threats to its long long-term viability have been reduced or eliminated.

(22) *Comment:* Several comments recommended that specific changes be made to the three State wolf management plans or that the State management plans are not ''protective enough'' of wolves.

*Our Response:* We have reviewed the 2001 Minnesota Plan, the 1999 and 2006 Updated Wisconsin Plan, and the 1997 and 2008 revised Michigan Plan. We reviewed these plans to determine if they will provide sufficient protection and reduce threats. We are primarily concerned with the outcome of the plan's implementation. Once a species is delisted, the details of its management are a State or tribal responsibility; the Federal responsibility is to monitor the plan's implementation and the species' response for at least 5 years to ensure that the plan's outcome is as expected. We have concluded that each plan provides adequate protection for wolves, and will keep threats at a sufficiently low level, so that the WGL DPS wolves will not become threatened or endangered in the foreseeable future. Suggestions for changes to the State wolf management plans should be directed to the respective State management agency for consideration.

(23) *Comment:* Several comments expressed distrust for State wolf protection, based on past State programs aimed at wolf eradication.

*Our Response:* We acknowledge the past involvement of State and Federal government agencies in intensive, and largely successful, programs to eradicate wolves. However, we believe that public sentiment and agency mandates have changed dramatically since the 1960s and earlier (see Public Attitudes Toward the Wolf). While wolf eradication might still be the wish of a small number of individuals, we believe there is broad support among the public and within governmental agencies to allow wolves to occupy our landscape, with some degree of management imposed to maintain control of the level of wolf-human conflicts. Based on existing State laws and State management plans, we will rely on the States to provide sufficient protection to wolves until and unless it is shown they are unwilling or unable to do so.

(24) *Comment:* The delisting decision is based on the assumption that the State wolf management plans will be fully implemented and funded after Federal delisting.

*Our Response:* We are required to evaluate the likely future threats that a delisted wolf population will experience. We rely heavily on the State wolf management plans for our assessment of the degree of protection and monitoring that will occur after Federal delisting. Because these plans have received the necessary approvals within the State governments, we believe it is reasonable to assume the plans will be funded and implemented largely as written. Wisconsin and Michigan DNRs have led the efforts to restore wolves to their States for several decades. Based on their proven leadership in Midwest wolf recovery, we see no reason to doubt the continuing commitment of these State agencies to wolf conservation.

We recognize that State wolf plans can be changed by the respective DNR or State legislature, creating some uncertainty regarding plan implementation. However, given the high public visibility of wolf management, the extent of public interest and involvement in the development and updating of the States' plans, the vast amount of scientific data available regarding wolf management, and the status monitoring that we will be maintaining for the next 5 years, we believe it is reasonable and proper to assume that the three State wolf plans will not be significantly changed, nor will their implementation be critically underfunded, in a manner that would jeopardize the viability of any State's wolf population. If this assumption turns out to be incorrect, we have the ability to extend the monitoring period or relist the species, including an emergency relisting, if necessary.

(25) *Comment:* Human-caused mortality poses too high a risk to delist the wolf. The wolf cannot be delisted ''until this threat has been adequately controlled.''

*Our Response:* Our detailed review of the past, current, and likely future threats to wolves within the WGL DPS identified human-caused mortality of all forms to constitute the majority of documented wolf deaths. However, the wolf populations in Wisconsin and Michigan have continued to expand in numbers and the Minnesota wolf population is at least maintaining itself at well over the population goal

recommended in the 1992 Recovery Plan and at about twice the minimum level established in the 2001 Minnesota Wolf Plan. Healthy wolf populations clearly can withstand a high level of mortality, from human and other causes, and remain viable. Although the commenters do not provide any clarification on what is meant by ''adequately controlled'' we believe that, for purposes of this delisting decision, the numerical growth and range expansion shown by WGL DPS wolves indicate that ''adequate control'' already exists since the species is being maintained at healthy levels.

**Summary of Changes From Proposed Rule**

In this final rule, we make two substantive changes from the proposal. First, we are separating our determination on the delisting of the Western Great Lakes DPS from the determination on our proposal regarding all or portions of the 29 States we considered to be outside the historical range of the gray wolf. This rule finalizes our determination for the WGL DPS. A subsequent decision will be made for the rest of the eastern United States.

In this final rule, we also amend our taxonomic interpretation of wolves in the WGL. In the proposed rule, we presented and proposed to recognize recent taxonomic information indicating that the gray wolf subspecies *Canis lupus lycaon* should be elevated to the full species *C. lycaon.* We believed the best available scientific information supported recognition of the eastern wolf, *C. lycaon,* as a species and that this species had intercrossed with *C. lupus* in the western Great Lakes region to constitute a population composed of *C. lupus, C. lycaon,* and their hybrids.

During the public comment period on the proposal, we received comments from diverse interest groups and individuals (including scientific researchers, State natural resource agencies, sportsmen's groups, cattlemen's groups, and conservation groups) highlighting the ongoing debate regarding the taxonomy of North American wolves. Some of those commenters questioned the position that *C. lycaon* be recognized as a species (rather than a subspecies); others stated that, in light of ongoing research and recent papers that present varying taxonomic alternatives, it is premature to accept *C. lycaon* as a separate species. To allow for further consideration of the taxonomy issue, on August 26, 2011, we reopened the public comment period on the proposal to allow for additional public review and comment specifically on the recognition of *C. lycaon* as a separate species. At that time we made available to the public a manuscript prepared by Service employees that is currently undergoing review for publication (Chambers *et al.,* in prep.). The manuscript provides a review of the available scientific literature to assess the taxonomic standing of wolves in North America. Our recognition of *C. lycaon* as a separate species in the proposal was, in part, based on information summarized in that manuscript. During the reopened public comment period, we again received numerous comments focused on taxonomy.

Many of the comments we received during both comment periods came from leading researchers in the field of canid biology and genetics, including many of the scientists responsible for the research upon which we based the decision in our proposal. Many of the scientists who commented regarding taxonomy during the first comment period submitted additional comments after reviewing the Chambers *et al.* (in prep.) manuscript. Several recent publications on the subject were also submitted (*e.g.,* Mech 2011, Mech *et al.* in press, vonHoldt *et al.* 2011).

One particular comment letter was signed by eight leading researchers in this field (Weeldon *et al.* in litt. 2011), many of whom also submitted individual comments on the proposal. In that letter they acknowledge their differing views on wolf taxonomy, yet express that they all disagree with the Service's conclusion in the proposal that two separate species of wolves inhabit the WGL. Those scientists state that research and data collection regarding whether two separate species of wolves inhabit the WGL and whether gray wolves (*Canis lupus*) historically occupied portions of the eastern United States is ongoing, and that such research will continue to elucidate the taxonomic history of wolves in North America.

L. David Mech, preeminent wolf researcher and peer reviewer for the proposal, submitted comments stating that the proposal to delist wolves in the WGL is well supported by the data, except for the data regarding taxonomy (Mech in litt. 2011). He states: ''Although it is true that at the writing of the proposed rule, it seemed like considerable evidence had accumulated supporting the existence of the separate species, *Canis lycaon,* or the eastern wolf, the vonHoldt *et al.* (2011) article published since adds enough doubt as to question that proposition. At the least, the vonHoldt *et al.* (2011) article evinces that there is not consensus by the pertinent scientific community about the existence of *C. lycaon* and therefore about the original range of *C. lupus.''*

The Service also received a number of comments from conservation groups that, while supporting the delisting of wolves in the WGL, asserted that the Service's proposal to recognize *C. lycaon* as a full species was not supported by the best available science. The Natural Resources Defense Council (in litt 2011) cite that ''the Service's decision to recognize a separate species of wolf, *C. lycaon,* in this region is not supported by the best available science'' and ''while the issue of wolf taxonomy has long been debated, the existence of an eastern wolf, *C. lycaon,* as a separate species is not fully supported by the scientific community. Additionally, the taxonomy of wolves in this region is the subject of current and active research. As such, it is premature to declare the existence of *C. lycaon* as a distinct species.'' Defenders of Wildlife (in litt. 2011) state that ''a definitive conclusion cannot be made [regarding the taxonomic status of the eastern wolf] at this time.'' The National Wildlife Federation (in litt. 2011) asserts that ''given the significant taxonomic debate that is currently underway among respected scientists'' and ''because the scientific community remains unsettled, the taxonomic revision proposed in this rule is premature.''

The State natural resource agencies in the WGL also expressed that the debate regarding wolf taxonomy is unsettled. The MN DNR (in litt. 2011) states ''several competing theories exist surrounding the ongoing controversy over wolf taxonomy in the Great Lakes region. There is no general consensus regarding these theories, and * * * it will continue to be of great debate in the scientific community.'' They further contend that vonHoldt *et al.* (2011) ''which contradicts other recent reports, exemplifies the limitations of drawing final conclusions from the relatively new, rapidly evolving, and competing theories from the science of molecular genetics. We recognize the ongoing controversy over wolf taxonomy in the western Great Lakes region and suggest that the Service has prematurely accepted only one of several competing alternatives to the taxonomic classification of wolves.'' The WI DNR (Stepp in litt. 2011) asserts that ''scientists continue to disagree whether the eastern wolf is a separate species from gray wolves'' while the MI DNR (in litt. 2011) states ''we recognize that the science regarding which species of wolves occur in the Western Great Lakes is not settled, but we also recognize that wolf conservation cannot be put on hold

until every scientific question has a consensus answer.''

Numerous other groups also commented on the issue of recognizing *C. lycaon* as a separate species. Safari Club International (in litt. 2011) states ''as is evidenced by the myriad comments offered by experts in wolf biology and taxonomy that are either published in the scientific literature or were submitted in response to the previous comment opportunity, the question of a separate taxonomic species classification for a new species of wolves in the Western Great Lakes (WGL) is highly disputed and controversial at best.'' Both the Sierra Club (in litt. 2011) and the Michigan Environmental Council (in litt. 2011) declare that ''there is still a significant lack of clarity within the scientific community regarding the existence of *Canis lycaon''* while the Center for Biological Diversity (in litt. 2011) states ''the evidence shows that declaring the eastern wolf a distinct species is not supported by the best available science.'' The Society for Conservation Biology (in litt. 2011) contends that ''the proposed rule's use of *Canis lycaon* to designate wolves in the northeastern United States is inconsistent with currently recognized scientific nomenclature'' and ''given this continued scientific controversy.* * *'' The Humane Society of the United States (in litt. 2011) asserts that the Service's proposal ''is based on unsettled science with respect to the recognition of a new species of wolf, the eastern wolf'' and the Service's conclusion regarding the eastern wolf ''is a matter of continuing scientific debate.''

The extensive information submitted during the comment periods and recent publications on the subject and the widely diverging views expressed in the pertinent scientific studies underscore the enduring debate regarding the taxonomy of North American wolves—a debate that may not be resolved for some time (see Wolf Taxonomy in the Western Great Lakes Region for a full discussion). Although there is not a significant number of new publications that have become available since we published our proposal in May 2011, the substance of those new publications and the substantive comments we received have led us to reconsider our proposed decision.

Based on a reevaluation of the available scientific information and the evolving and ongoing scientific debate, we reconsidered our position, as expressed in the proposed rule (76 FR 26086), that the gray wolf subspecies *Canis lupus lycaon* should be elevated to the full species *Canis lycaon* and that the population of wolves in the WGL is a mix of the two full species, *Canis lupus* and *Canis lycaon.* While there are varying scientific opinions on the taxonomic history of North American wolves, for a long time and throughout this technical debate, *Canis lupus* is the species that has been recognized in the WGL, and there is significant information indicating that continuing to recognize *C. lupus* as the species in the WGL is appropriate (see Wolf Taxonomy in the Western Great Lakes Region). Having reviewed and assessed all of the available scientific information, including, in particular, the comments received on the proposed rule and the information that has become available since the proposed rule was published, we have decided the better conclusion to draw at this time is our previous taxonomic recognition that all wolves in the WGL area are gray wolves (*Canis lupus*). Therefore, in this final rule we consider all wolves in the WGL DPS to be gray wolves (*Canis lupus*) and are delisting them as such.

## Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing species, reclassifying species, or removing species from listed status. ''Species'' is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Once the ''species'' is identified, we then evaluate whether that species may be endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. We must consider these same five factors in delisting a species. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered nor threatened because (1) the species is extinct, (2) the species has recovered and is no longer endangered or threatened, or (3) the original scientific data used at the time the species was classified were in error.

A recovered species is one that no longer meets the Act's definition of threatened or endangered. The analysis for a delisting due to recovery must be based on the five factors outlined in section 4(a)(1) of the Act. This analysis must include an evaluation of threats that existed at the time of listing, those that currently exist, and those that could potentially affect the species once the protections of the Act are removed.

In the context of the Act, the term ''threatened species'' means any species or subspecies or, for vertebrates, Distinct Population Segment (DPS) that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The term ''endangered species'' means any species that is in danger of extinction throughout all or a significant portion of its range. The Act does not define the term ''foreseeable future.'' For the purpose of this rule, we define the ''foreseeable future'' to be the extent to which, given the amount and substance of available data, we can anticipate events or effects, or reliably extrapolate threat trends that relate to the status of the WGL DPS.

It took a considerable length of time for public attitudes and regulations to result in a social climate that promoted and allowed for wolf recovery in the WGL DPS. The length of time over which this shift occurred, and the ensuing stability in those attitudes, gives us confidence that this social climate will persist. Also, the States have had a solid history of cooperating and assisting in wolf recovery and have made a commitment, through legislative actions, to continue these activities. We believe this commitment will continue. When evaluating the available information, with respect to foreseeable future, we take into account reduced confidence as we forecast further into the future.

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

A common misconception is that wolves inhabit only remote pristine forests or mountainous areas, where human developments and other activities have produced negligible change to the natural landscape. Their extirpation south of Canada and Alaska, except for the heavily forested portions of northeastern Minnesota, reinforced this popular belief. However, the primary reason wolves survived in those areas was not because of habitat conditions, but, rather, because remote areas were sufficiently free of the human persecution that elsewhere killed wolves faster than the species could reproduce (Mech 1995a, p. 271).

In the western Great Lakes region, wolves in the densely forested northeastern corner of Minnesota have expanded into the more agricultural portions of central and northwestern Minnesota, northern and central Wisconsin, and the entire UP of Michigan. Habitats currently being used

by wolves span the broad range from the mixed hardwood-coniferous forest wilderness area of northern Minnesota, through sparsely settled but similar habitats in Michigan's UP and northern Wisconsin, and into more intensively cultivated and livestock-producing portions of central and northwestern Minnesota and central Wisconsin.

Wolf research and the expansion of wolf range over the last three decades have shown that wolves can successfully occupy a wide range of habitats, and they are not dependent on wilderness areas for their survival. In the past, for instance, wolf populations occupied nearly every type of habitat north of mid-Mexico that contained large ungulate prey species, including bison, elk, white-tailed deer, mule deer, moose, and woodland caribou; thus, wolves historically occupied the entire Midwest. Inadequate prey density or high levels of human-caused mortality appear to be the only factors that limit wolf distribution (Mech 1995a, p 271; 1995b, p. 544).

*Suitable Habitat Within the Western Great Lakes DPS*

Various researchers have investigated habitat suitability for wolves in the central and eastern portions of the United States. In recent years, most of these efforts have focused on using a combination of human density, density of agricultural lands, deer density or deer biomass, and road density, or have used road density alone to identify areas where wolf populations are likely to persist or become established (Mladenoff *et al.* 1995, pp. 284–285; 1997, pp. 23–27; 1998, pp. 1–8, 1999; pp. 39–43; Harrison and Chapin 1997, p. 3; 1998, p. 769–770; Wydeven *et al.* 2001a, pp. 110–113; Erb and Benson 2004, p. 2; Potvin *et al.* 2005, pp. 1661–1668; Mladenoff *et al.* 2009, pp. 132–135).

To a large extent, road density has been adopted as the best predictor of habitat suitability in the Midwest due to the connection between roads and human-related wolf mortality. Several studies demonstrated that wolves generally did not maintain breeding packs in areas with a road density greater than about 0.9 to 1.1 linear miles per sq mi (0.6 to 0.7 km per sq km) (Thiel 1985, pp. 404–406; Jensen *et al.* 1986, pp. 364–366; Mech *et al.* 1988, pp. 85–87; Fuller *et al.* 1992, pp. 48–51). Work by Mladenoff and associates indicated that colonizing wolves in Wisconsin preferred areas where road densities were less than 0.7 mi per sq mi (0.45 km per sq km) (Mladenoff *et al.* 1995, p. 289). However, recent work in the UP of Michigan indicates that, in some areas with low road densities, low deer density appears to limit wolf occupancy (Potvin *et al.* 2005, pp. 1667–1668) and may prevent recolonization of portions of the UP. In Minnesota, a combination of road density and human density is used by MN DNR to model suitable habitat. Areas with a human density up to 8 people per sq km are suitable if they also have a road density less than 0.5 km per sq km. Areas with a human density of less than 4 people per sq km are suitable if they have road densities up to 0.7 km per sq km (Erb and Benson 2004, Table 1).

Road density is a useful parameter because it is easily measured and mapped, and because it correlates directly and indirectly with various forms of other human-related wolf mortality factors. A rural area with more roads generally has a greater human density, more vehicular traffic, greater access by hunters and trappers, more farms and residences, and more domestic animals. As a result, there is a greater likelihood that wolves in such an area will encounter humans, domestic animals, and various human activities. These encounters may result in wolves being hit by motor vehicles, being controlled by government agents after becoming involved in depredations on domestic animals, being shot intentionally by unauthorized individuals, being trapped or shot accidentally, or contracting diseases from domestic dogs (Mech *et al.* 1988, pp. 86–87; Mech and Goyal 1993, p. 332; Mladenoff *et al.* 1995, pp. 282, 291). Based on mortality data from radio-collared Wisconsin wolves from 1979 to 1999, natural causes of death predominate (57 percent of mortalities) in areas with road densities below 1.35 mi per sq mi (0.84 km per sq km), but human-related factors produced 71 percent of the wolf deaths in areas with higher road densities (Wydeven *et al.* 2001a, pp. 112–113).

Some researchers have used a road density of 1 mi per sq mi (0.6 km per sq km) of land area as an upper threshold for suitable wolf habitat. However, the common practice in more recent studies is to use road density to predict probabilities of persistent wolf pack presence in an area. Areas with road densities less than 0.7 mi per sq mi (0.45 km per sq km) are estimated to have a greater than 50 percent probability of wolf pack colonization and persistent presence, and areas where road density exceeded 1 mi per sq mi (0.6 km per sq km) have less than a 10 percent probability of occupancy (Mladenoff *et al.* 1995. pp. 288–289; Mladenoff and Sickley 1998, p. 5; Mladenoff *et al.* 1999, pp. 40–41). Wisconsin researchers view areas with greater than 50 percent probability as ''primary wolf habitat,'' areas with 10 to 50 percent probability as ''secondary wolf habitat,'' and areas with less than 10 percent probability as unsuitable habitat (WI DNR 1997, pp. 47–48).

The territories of packs that do occur in areas of high road density, and hence with low expected probabilities of occupancy, are generally near broad areas of more suitable habitat that are likely serving as a source of wolves, thereby assisting in maintaining wolf presence in the higher road density and, therefore, less-suitable areas (Mech 1989, pp. 387–388; Wydeven *et al.* 2001a, p.112). The predictive ability of this model was questioned (Mech 2006a, 2006b) and responded to (Mladenoff *et al.* 2006), and an updated analysis of Wisconsin pack locations and habitat has been completed (Mladenoff *et al.* 2009). This new model maintains that road density is still an important indicator of suitable wolf habitat; however, lack of agricultural land is also a strong predictor of habitat wolves occupy.

It appears that essentially all suitable habitat in Minnesota is now occupied, range expansion has slowed or possibly ceased, and the wolf population within the State has stabilized (Erb and Benson 2004, p. 7; Erb and Don Carlos 2009, pp. 57, 60). This suitable habitat closely matches the areas designated as Wolf Management Zones 1 through 4 in the Revised Recovery Plan (USFWS 1992, p. 72), which are identical in area to Minnesota Wolf Management Zone A (see Figure 2, below; MN DNR 2001, Appendix III).

Recent surveys for Wisconsin wolves and wolf packs show that wolves have now recolonized the areas predicted by habitat models to have low, moderate, and high probability of occupancy (primary and secondary wolf habitat). The late-winter 2008–09 Wisconsin wolf survey identified packs occurring throughout the central Wisconsin forest area (Wolf Management Zone 2, Figure 3) and across the northern forest zone (Zone 1, Figure 3), with highest pack densities in the northwest and north-central forest; pack densities are lower, but increasing, in the northeastern corner of the State (Wydeven and Wiedenhoeft 2009, Figure 1).

Michigan wolf surveys in winter 2009–2010 continue to show wolf pairs or packs (defined by Michigan DNR as two or more wolves traveling together) in every UP county except Keweenaw County (Huntzinger *et al.* 2005, p. 6; Roell 2011, pers. comm.), which probably lacks a suitable ungulate prey

base during winter months (Potvin *et al.* 2005, p. 1665).

Habitat suitability studies in the Upper Midwest indicate that the only large areas of suitable or potentially suitable habitat areas that are currently unoccupied by wolves are located in the northern LP of Michigan (Mladenoff *et al.* 1997, p. 23; Mladenoff *et al.* 1999, p. 39; Potvin 2003, pp. 44–45; Gehring and Potter 2005, p. 1239). One published Michigan study (Gehring and Potter 2005, p. 1239) estimates that these areas could host 46 to 89 wolves; a graduate thesis estimates that 110–480 wolves could exist in the northern LP (Potvin 2003, p. 39). The northern LP is separated from the UP by the Straits of Mackinac, whose 4-mile (6.4-km) width freezes during mid- and late-winter in some years. In recent years there have been several documented occurrences of wolves in the northern LP, but until 2010, there had been no indication of persistence beyond several months. Prior to those occurrences, the last recorded wolf in the LP was in 1910.

In the first instance a radio-collared female wolf from the eastern UP was trapped and killed by a coyote trapper in Presque Isle County in late October 2004. In late November 2004, tracks from two wolves were verified in the same northern LP county. Follow-up winter surveys by the DNR in early 2005 failed to find additional wolf tracks in the northern LP (Huntzinger *et al.* 2005, p. 7); additional surveys conducted in 2006–10 also failed to find evidence of continued northern LP wolf presence (Roell *et al.* 2009, p. 5; Roell 2010, pers. comm.). A video of a single wolf was taken near Mackinac City in Cheboygan County in May 2009, and another trail-camera video-recorded a wolf in Presque Isle County in July 2009. These two sightings may have been the same animal (Roell 2009, pers. comm.). In 2010, USDA Wildlife Services and MI DNR staff confirmed a single breeding pair with pups in Cheboygan County in the northern LP (MI DNR 2010).

These northern LP patches of potentially suitable habitat contain a great deal of private land, are small in comparison to the occupied habitat on the UP and in Minnesota and Wisconsin, and are intermixed with agricultural and higher road density areas (Gehring and Potter 2005, p. 1240). Therefore, continuing wolf immigration from the UP may be necessary to maintain a future northern LP population. The Gehring and Potter study (2005, p. 1239) predicted 850 sq mi (2,198 sq km) of suitable habitat (areas with greater than a 50 percent probability of wolf occupancy) in the northern LP. Potvin (2003, p. 21), using deer density in addition to road density, believes there are about 3,090 sq mi (8,000 sq km) of suitable habitat in the northern LP. Gehring and Potter (2005, p. 1239) exclude from their calculations those northern LP low-road-density patches that are less than 19 sq mi (50 sq km), while Potvin (2003, pp. 10–15) does not limit habitat patch size in his calculations. Both of these area estimates are well below the minimum area described in the Revised Recovery Plan, which states that 10,000 sq mi (25,600 sq km) of contiguous suitable habitat is needed for a viable isolated gray wolf population, and half that area (5,000 sq mi or 12,800 sq km) is needed to maintain a viable wolf population that is subject to wolf immigration from a nearby population (USFWS 1992, pp. 25–26).

Based on the above-described studies and the guidance of the 1992 Revised Recovery Plan, the Service has concluded that suitable habitat for wolves in the WGL DPS can be determined by considering four factors: road density, human density, prey base, and size. An adequate prey base is an absolute requirement, but in much of the WGL DPS the white-tailed deer density is well above adequate levels, causing the other factors to become the determinants of suitable habitat. Prey base is primarily of concern in the UP where severe winter conditions cause deer to move away from some lakeshore areas, making otherwise suitable areas locally and seasonally unsuitable. Road density and human density frequently are highly correlated; therefore, road density is the best single predictor of habitat suitability. However, areas with higher road density may still be suitable if the human density is very low, so a consideration of both factors is sometimes useful (Erb and Benson 2004, p. 2). Finally, although the territory of individual wolf packs can be relatively small, packs are not likely to persist as a viable population if they occupy a small isolated island of otherwise unsuitable habitat.

Based on the information discussed above, we conclude that Minnesota Wolf Management Zone A (Federal Wolf Management Zones 1–4, Figure 2), Wisconsin Wolf Zones 1 and 2 (Figure 3), and the UP of Michigan contain a sufficient amount of suitable wolf habitat. The other areas within the DPS are unsuitable habitat, or are potentially habitat that is too small or too fragmented to be suitable for maintaining a viable wolf population.

*Wolf Populations on Federal Lands*

National forests, and the prey species found in their various habitats, have been important to wolf conservation and recovery in the core areas of the WGL DPS. There are five national forests in Minnesota, Wisconsin, and Michigan (Superior, Chippewa, Chequamegon-Nicolet, Ottawa, and Hiawatha National Forests) with wolf packs that exclusively or partially reside on them. Their wolf populations range from approximately 484 on the Superior National Forest in northeastern Minnesota, to an estimated 182 on the UP's Ottawa National Forest, 164 on the Chequamegon-Nicolet National Forest in northeastern Wisconsin, and another estimated 49 on the Hiawatha National Forest in the eastern UP (Delphey 2009, pers. comm.; Eklund 2009, pers. comm.; Roell 2011, pers. comm., Wydeven 2011, pers. comm.).

Voyageurs National Park, along Minnesota's northern border, has a land base of nearly 340 sq mi (882 sq km). As of the last survey in 2008, there were 31 to 46 wolves within 7 to 9 packs that exclusively or partially reside within the park, and at least 5 packs are located wholly inside the Park boundaries (Ethier *et al.* 2008, p. 5). The 2008 estimates fall within the range of wolf estimates for the Park from the 1990s (Gogan *et al.* 2004) and early 2000s (Fox *et al.* 2001, pp. 6–7).

Within the boundaries of the WGL DPS, we currently manage seven units within the National Wildlife Refuge System with significant wolf activity. Primary among these are Agassiz National Wildlife Refuge (NWR), Tamarac NWR, and Rice Lake NWR in Minnesota; Seney NWR in the UP of Michigan; and Necedah NWR in central Wisconsin. Agassiz NWR has had as many as 20 wolves in 2 to 3 packs in recent years. Although in 1999 mange and illegal shootings reduced them to a single pack of 5 wolves and a separate lone wolf, since 2001, two packs with a total of 10 to 12 wolves have been using the Refuge. About 60 percent of the packs' territories are located on the Refuge or on an adjacent State-owned wildlife management area (Huschle in litt. 2005).

Data collected by Agassiz NWR staff during winter wolf sign surveys conducted in cooperation with the MN DNR during both the winters of 2007–08 and 2008–09 support the above wolf totals. Winter track data from 2007–08 suggest that one pack on Agassiz had a minimum size of five and one had a minimum size of six. The following winter's survey information suggested a minimum pack size of five for both packs (Knutson 2009, pers. comm.). Two packs of wolves that currently include about eight and five members, respectively, use Tamarac NWR and the

territory of a third occurs partly on the Refuge (Brininger 2009, pers. comm.). The size of the one pack using Rice Lake NWR, in Minnesota, has been reported at six to nine in previous years; in 2009 a maximum of three wolves was confirmed on the Refuge (McDowell 2009, pers. comm.), although total pack size may be greater.

Other single or paired wolves pass through the Refuge frequently (Stefanski 2004, pers. comm.; McDowell in litt. 2005). Seney NWR has 3 packs, representing 8–10 wolves, which partially reside on the Refuge (Roell 2010, pers. comm.). In 2010, two packs of six wolves each and at least one loner were detected on Necedah NWR (Wydeven *et al.* 2010, p. 41). Over the past 10 years, Sherburne and Crane Meadows NWR Complex in central Minnesota have had intermittent, but reliable, observations and signs of individual wolves each year. To date, no established packs have been documented on either of those Refuges. The closest established packs are within 15 mi (24 km) of Crane Meadows NWR at Camp Ripley Military Installation and 30 mi (48 km) north of Sherburne NWR at Mille Lacs State Wildlife Management Area (Berkley 2009, pers. comm.).

*Suitable Habitat Ownership and Protection*

In Minnesota, public lands, including national forests, a national park, national wildlife refuges, tax-forfeit lands (managed mostly by counties), State forests, State wildlife management areas, and State parks, encompass approximately 42 percent of current wolf range. American Indians and Tribes own 3 percent, an additional 1,535 sq mi (2,470 sq km), in Minnesota's wolf range (see Erb and Benson 2004, Table 1). In its 2001 Minnesota Wolf Management Plan, MN DNR states that it ''will continue to identify and manage currently occupied and potential wolf habitat areas to benefit wolves and their prey on public and private land, in cooperation with landowners and other management agencies'' (MN DNR 2001, p. 25). MN DNR will monitor deer and moose habitat and, when necessary and appropriate, improve habitat for these species. MN DNR maintains that several large public land units of State parks and State forests along the Wisconsin border will likely ensure that the connection between the two States' wolf populations will remain open to wolf movements. Nevertheless, MN DNR stated that it would cooperate with Wisconsin DNR to incorporate the effects of future development ''into long-term viability analyses of wolf populations and dispersal in the interstate area'' (MN DNR 2001, p. 27).

The MN DNR Divisions of Forestry and Wildlife directly administer approximately 5,330 sq mi (13,805 sq km) of land in Minnesota's wolf range. The DNR has set goals of enlarging and protecting its forested land base by, in part, ''minimizing the loss and fragmentation of private forest lands'' (MN DNR 2000, p. 20) and by connecting forest habitats with natural corridors (MN DNR 2000, p. 21). It plans to achieve these goals and objectives via several strategies, including the development of (Ecological) Subsection Forest Resource Management Plans (SFRMP) and to expand its focus on corridor management and planning.

In 2005, the Forest Stewardship Council (FSC) certified that 4.84 million acres (1.96 million hectares) of State-administered forest land are ''well managed'' (FSC 2005); the Sustainable Forestry Initiative (SFI) also certified that MN DNR was managing these lands to meet its standards. For the FSC certification, independent certifiers assessed forest management against FSC's Lakes States Regional Standard, which includes a requirement to maximize habitat connectivity to the extent possible at the landscape level (FSC 2005, p. 22).

Efforts to maximize habitat connectivity in the range of wolves would complement measures the MN DNR described in its State wolf plan (MN DNR 2001, pp. 26–27). The Service will review certification evaluation reports issued by FSC to assess MN DNR's ongoing efforts in this area as part of its post-delisting monitoring.

Counties manage approximately 3,860 sq mi (9,997 sq km) of tax forfeit land in Minnesota's wolf range (MN DNR unpublished data). We are aware of no specific measures that any county in Minnesota takes to conserve wolves. If most of the tax-forfeit lands are maintained for use as timber lands or natural areas, however, and if regional prey levels are maintained, management specifically for wolves on these lands will not be necessary. MN DNR manages ungulate populations ''on a regional basis to ensure sustainable harvests for hunters, sufficient numbers for aesthetic and nonconsumptive use, and to minimize damage to natural communities and conflicts with humans such as depredation of agricultural crops'' (MN DNR 2001, p. 17). Moreover, although counties may sell tax-forfeit lands subject to Minnesota State law, they generally manage these lands to ensure that they will retain their productivity as forests into the future. For example, Crow Wing County's mission for its forest lands includes the commitment to ''sustain a healthy, diverse, and productive forest for future generations to come.'' In addition, at least four counties in Minnesota's wolf range—Beltrami, Carlton, Koochiching, and St. Louis—are certified by SFI, and four others (Aitkin, Cass, Itasca, and Lake) have been certified by FSC. About ten private companies with industrial forest lands in Minnesota's wolf range have also been certified by FSC.

There are no legal or regulatory requirements for the protection of wolf habitat, per se, on private lands in Minnesota. Land management activities such as timber harvest and prescribed burning carried out by public agencies and by private land owners in Minnesota's wolf range incidentally and significantly improves habitat for deer, the primary prey for wolves in the State. The impact of these measures is apparent from the continuing high deer densities in Minnesota's wolf range. The State's second largest deer harvest occurred in 2006, and approximately one-half of the Minnesota deer harvest is in the Forest Zone, which encompasses most of the occupied wolf range in the State (MN DNR 2009, Table 1).

Given the extensive public ownership and management of land within Minnesota's wolf range, as well as the beneficial habitat management expected from tribal lands, we believe suitable habitat, and especially an adequate wild prey base, will remain available to the State's wolf population for the foreseeable future. Management of private lands for timber production will provide additional habitat suitable for wolves and white-tailed deer.

Similarly, current lands in northern and central Wisconsin that are judged to be primary and secondary wolf habitat are well protected from significant adverse development and habitat degradation due to public ownership or protective management that preserves the habitat and wolf prey base. Primary habitat (that is, areas with greater than 50 percent probability of wolf pack occupancy; Wydeven *et al.* 1999, pp. 47–48) totals 5,812 sq mi (15,053 sq km). The 1999 Wisconsin wolf plan listed land ownership of primary and secondary wolf habitat (Wydeven *et al.* 1999, p. 48). In 2006, Sickley (2006, pers. comm.) provided an update of the data with more accurate land ownership data. That data show that about 55 percent of primary habitat was in public land including, Federal, State, or county ownership, and 7 percent was on tribal land. County lands, mostly county forests, comprised 29 percent of the

primary habitat, and Federal lands, mostly the Chequamegon–Nicolet National Forest, included another 17 percent.

Most tribal land (7 percent of primary habitat), while not public land, will likely remain as suitable deer and wolf habitat for the foreseeable future. State forest ownership protects 10 percent. Private industrial forest lands comprised another 10 percent of the primary habitat, although some of these lands have been subdivided for second or vacation home sites, reducing this acreage in recent years. The remaining 29 percent is in other forms of private ownership and is vulnerable to loss from the primary habitat category to an unknown extent (Sickley in litt. 2006, unpublished data updating Table C2 of WI DNR 1999, p. 48).

Areas judged to be secondary wolf habitat by WI DNR (10 to 50 percent probability of occupancy by wolf packs; Wydeven *et al.* 1999, pp. 47–48) were somewhat more developed or fragmented habitats and were less well protected overall, because only 43 percent were in public ownership and 5 percent were in Native American reservations. Public land that maintained secure habitat included county (17 percent) and national (18 percent) forests ownership protecting the largest segments, and State land protected 7 percent. Private industrial forest ownership provided protection to 5 percent, and the remaining 47 percent was in other forms of private ownership (Sickley in litt. 2006).

County forest lands represent the single largest category of primary wolf habitat in Wisconsin. Wisconsin Statute 28.11 guides the administration of county forests, and directs management for production of forest products together with recreational opportunities, wildlife, watershed protection, and stabilization of stream flow. This Statute also provides a significant disincentive to conversion for other uses. Any proposed withdrawal of county forest lands for other uses must meet a standard of a higher and better use for the citizens of Wisconsin, and be approved by two-thirds of the County Board. As a result of this requirement, withdrawals are infrequent, and the county forest land base is actually increasing.

This analysis shows that nearly three-quarters of the primary habitat in Wisconsin receives substantial protection due to ownership or management for sustainable timber production. Over half of the secondary habitat is similarly protected. Portions of the primary habitat in northeastern Wisconsin remained sparsely populated with wolf packs until recently, but are filling in lately (Wydeven *et al.* 2010, Fig. 2, p. 66), although still allowing for some continuing wolf population expansion. In general, we believe this degree of habitat protection is more than adequate to support a viable wolf population in Wisconsin for the foreseeable future.

In the UP of Michigan, State and Federal ownership comprises 2.0 and 2.1 million acres respectively, representing 19.3 percent and 20.1 percent of the land surface of the UP. The Federal ownership is composed of 87 percent national forest, 8 percent national park, and 5 percent national wildlife refuge. The management of these three categories of Federal land is discussed elsewhere, but clearly will benefit wolves and their prey.

State lands on the UP are 94 percent State forest land, 6 percent State park, and less than 1 percent in fishing and boating access areas and State game areas. Part 525, Sustainable Forestry on State Forestlands, of the Michigan Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, directs State forestland management in Michigan. It requires the MI DNR to manage the State forests in a manner consistent with sustainable forestry, to prepare and implement a management plan, and to seek and maintain a third party certification that the lands are managed in a sustainable fashion (MI DNR 2005c, p. 1).

Much of the private land on the UP is managed or protected in a manner that will maintain forest cover and provide suitable habitat for wolves and white-tailed deer. Nearly 1.9 million acres (0.8 million hectares) of large-tract industrial forest lands and another 1.9 million acres (0.8 million hectares) of smaller private forest land are enrolled in the Commercial Forest Act (CFA). These 3.7 million acres (1.5 million hectares) are managed for long-term sustainable timber production under forest management plans written by certified foresters; in return, the landowners benefit from a reduction in property taxes. In addition, nearly 37,000 acres on the UP are owned by The Nature Conservancy, and continue to be managed to restore and preserve native plant and animal communities. Therefore, these private land management practices currently are preserving an additional 36 percent of the UP as suitable habitat for wolves and their prey species.

In total, 39 percent of the UP is federally and State-owned land whose management will benefit wolf conservation for the foreseeable future, and another 36 percent is private forest land that is being managed, largely under the incentives of the CFA, in a way that provides suitable habitat and prey for wolf populations. Therefore, a minimum of nearly three-quarters of the UP should continue to be suitable for wolf conservation, and we do not envision UP habitat loss or degradation as a problem for wolf population viability in the foreseeable future.

Hearne *et al.* (2003), determined that a viable wolf population (one having less than 10 percent chance of extinction over 100 years), should consist of at least 175 to 225 wolves (p. 170), and they modeled various likely scenarios of habitat conditions in the UP of Michigan and northern Wisconsin through the year 2020 to determine whether future conditions would support a wolf population of that size. Most scenarios of future habitat conditions resulted in viable wolf populations in each State through 2020. When the model analyzed the future conditions in the two States combined, all scenarios produced a viable wolf population through 2020. Their scenarios included increases in human population density, changes in land ownership that may result in decreased habitat suitability, and increased road density (pp. 101–151).

The large areas of unsuitable habitat in the eastern Dakotas; the northern portions of Iowa, Illinois, Indiana, and Ohio; and the southern areas of Minnesota, Wisconsin, and Michigan; as well as the relatively small areas of unoccupied potentially suitable habitat, will not contribute to the viability of wolves in the WGL DPS. Therefore, we have determined that the existing and likely future threats to wolves outside the currently occupied areas, and especially to wolves outside of Minnesota, Wisconsin, and the UP, do not rise to the level that they threaten the long-term viability of wolf populations in Minnesota, Wisconsin, and the UP of Michigan.

In summary, wolves currently occupy the vast majority of the suitable habitat in the WGL DPS, and that habitat is adequately protected for the foreseeable future. Unoccupied areas that have the characteristics of suitable habitat exist in small and fragmented parcels and are not likely to develop viable wolf populations. Threats to those habitat areas will not adversely impact the recovered wolf metapopulation in the DPS.

*Prey*

Wolf density is heavily dependent on prey availability (for example, expressed as ungulate biomass, Fuller *et al.* 2003, pp. 170–171), but prey availability is not

likely to threaten wolves in the WGL DPS. Conservation of primary wolf prey in the WGL DPS, white-tailed deer and moose, is clearly a high priority for State conservation agencies. As Minnesota DNR points out in its wolf management plan (MN DNR 2001, p. 25), it manages ungulates to ensure a harvestable surplus for hunters, nonconsumptive users, and to minimize conflicts with humans. To ensure a harvestable surplus for hunters, MN DNR must account for all sources of natural mortality, including loss to wolves, and adjust hunter harvest levels when necessary. For example, after severe winters in the 1990's, MN DNR modified hunter harvest levels to allow for the recovery of the local deer population (MN DNR 2001, p. 25). In addition to regulation of human harvest of deer and moose, MN DNR also plans to continue to monitor and improve habitat for these species.

Land management carried out by other public agencies and by private land owners in Minnesota's wolf range, including timber harvest and prescribed fire, incidentally and significantly improves habitat for deer, the primary prey for wolves in the State. The success of these measures is apparent from the continuing high deer densities in the Forest Zone of Minnesota, and the fact that the State's five largest deer harvests have occurred in the last 6 years, with a deer harvest averaging 241,000 deer over the last 5 years. Approximately one-half of the Minnesota deer harvest is in the Forest Zone, which encompasses most of the occupied wolf range in the State (Cornicelli 2008, pp. 208–209). There is no indication that harvest of deer and moose or management of their habitat will significantly depress abundance of these species in Minnesota's core wolf range. Therefore, lack of prey availability is not likely to pose a threat to wolves in the foreseeable future in the State.

The deer populations in Wisconsin and the UP of Michigan declined somewhat from historically high levels in recent years. Wisconsin's preseason deer population has exceeded 1 million animals since 1984 (WI DNR undated a; Rolley 2007, p. 6; Rolley 2008, p. 6), and hunter harvest has exceeded 400,000 deer in 10 of the last 12 years (WI DNR 2010, p. 57). Across northern Wisconsin wolf range (Zone 1), winter deer density in northern deer management units averaged from 22–30 deer per sq mi (8.5–11.6 deer per sq km) between 2001–07, but declined to 17–18 deer per sq mi (6.6–6.9 deer per sq km) in 2009 and 2010. In Central Forest wolf range (Zone 2), winter deer density in deer management units averaged 29–50 deer per sq mi (11.2–19.3 deer per sq km) from 2001 to 2007, and was 35 deer per sq mi (13.5 deer per sq km) in 2009, and 26 deer per sq mi (10.0 deer per sq km) in 2010 (WI DNR data).

Michigan's 2009 October forecast for the deer population was approximately 1.8 million deer, with about 312,800 residing in the UP; the 2010 estimates projected a slightly higher UP deer population (Doepker 2010, pers. comm.; Rudolph 2010, pers. comm.). Because of severe winter conditions (persistent, deep snow) in the UP, deer populations can change dramatically from year to year. Recently (2010) the MI DNR finalized a new deer management plan, to address ecological, social, and regulatory shifts. An objective of this plan is to manage deer at the appropriate scale, considering impacts of deer on the landscape and on other species, in addition to population size (MI DNR 2010, p. 20). Additionally, the Michigan wolf management plan addresses maintaining a sustainable population of wolf prey (MI DNR 2008, p. 36). Short of a major, and unlikely, shift in deer management and harvest strategies, there will be no shortage of prey for Wisconsin and Michigan wolves for the foreseeable future.

*Summary of Factor A*

The wolf population in the WGL DPS currently occupies all the suitable habitat area identified for recovery in the Midwest in the 1978 Recovery Plan and 1992 Revised Recovery Plan and most of the potentially suitable habitat in the WGL DPS. As discussed above under Suitable Habitat Ownership and Protection, much of the important wolf habitat in the DPS is in public ownership, and the suitable habitat in the DPS is adequately protected for the foreseeable future. We therefore conclude that destruction, modification, or curtailment of the species' habitat or range does not pose a significant threat to wolves within this DPS.

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

Threats to wolves resulting from uses for scientific or educational purposes are not likely to increase substantially following delisting of the WGL DPS, and any increased use for these purposes will be regulated and monitored by the States and Tribes in the core recovery areas. Since their listing under the Act, no wolves have been legally killed or removed from the wild in any of the nine States included in the WGL DPS for either commercial or recreational purposes. Some wolves may have been illegally killed for commercial use of the pelts and other parts, but illegal commercial trafficking in wolf pelts or parts and illegal capture of wolves for commercial breeding purposes happens rarely. State wolf management plans for Minnesota, Wisconsin, and Michigan help ensure that wolves will not be killed for commercial or recreational purposes for many years following Federal delisting, so these forms of mortality will not likely emerge as new threats upon delisting. See Factor D for a detailed discussion of State wolf management plans, and for applicable regulations in States without wolf management plans.

We do not expect the use of wolves for scientific purposes to increase in proportion to total wolf numbers in the WGL DPS after delisting. While listed, the intentional or incidental killing, or capture and permanent confinement, of endangered or threatened wolves for scientific purposes has only legally occurred under permits or subpermits issued by the Service (under section 10(a)(1)(A)) or by a State agency operating under a cooperative agreement with the Service pursuant to section 6 of the Act (50 CFR 17.21(c)(5) and 17.31(b)). Although exact figures are not available, throughout the conterminous 48 States, such permanent removals of wolves from the wild have been very limited and probably comprise an average of not more than two animals per year since the species was first listed as endangered. In the WGL DPS, these animals were either taken from the Minnesota wolf population during long-term research activities (about 15 wolves) or were accidental takings as a result of research activities in Wisconsin (5 to 6 mortalities and 1 long-term confinement) and in Michigan (4 mortalities) (Berg in litt. 1998; Mech in litt. 1998; Roell in litt. 2004; Roell in litt. 2005a; Roell 2011, pers. comm.; Wydeven 2009, pers. comm.).

The Minnesota DNR plans to encourage the study of wolves with radio-telemetry after delisting, with an emphasis on areas where they expect wolf–human conflicts and where wolves are expanding their range (MN DNR 2001, p. 19). Similarly, Wisconsin and Michigan DNRs plan to continue to trap wolves for radio-collaring, examination, and health monitoring for the foreseeable future (WI DNR 1999, pp. 19–21; MI DNR 2008a, pp. 31–32; WI DNR 2006a, p. 14). The continued handling of wild wolves for research, including the administration of drugs, may result in some accidental deaths of wolves. We believe that capture and radio-telemetry-related injuries or mortalities will not increase

significantly above the level observed to date in proportion to wolf abundance; adverse effects to wolves associated with such activities have been minimal and would not constitute a threat to wolves in the WGL DPS.

No wolves have been legally removed from the wild for educational purposes in recent years. Wolves that have been used for such purposes are the captive-reared offspring of wolves that were already in captivity for other reasons, and this is not likely to change as a result of Federal delisting. We do not expect taking for educational purposes to constitute any threat to Midwest wolf populations in the DPS for the foreseeable future.

See Factor E for a discussion of Taking of Wolves by Native Americans for Certain Purposes. See the Depredation Control sections under Factor D for discussion of other past, current, and potential future forms of intentional and accidental take by humans, including depredation control, public safety, and under public harvest. While public harvest may include recreational harvest, it is likely that public harvest will also serve as a management tool, so it is discussed in Factor D.

*Summary of Factor B*

Taking wolves for scientific or educational purposes in the other States in the WGL DPS may not be regulated or closely monitored in the future, but the threat to wolves in those States will not be significant to the long-term viability of the wolf population in the WGL DPS. The potential limited commercial and recreational harvest that may occur in the DPS will be regulated by State and/or Tribal conservation agencies and is discussed under Factor D. Therefore, we conclude that overutilization for commercial, recreational, scientific, or educational purposes will not pose a significant threat to wolves in the WGL DPS.

**C. Disease or Predation**

*Disease*

Many diseases and parasites have been reported for the wolf, and several of them have had significant impacts during the recovery of the species in the 48 conterminous States (Brand *et al.* 1995, p. 419; WI DNR 1999, p. 61). If not monitored and controlled by States, these diseases and parasites, and perhaps others, may threaten wolf populations in the future. Thus, to avoid a future decline caused by diseases or parasites, States and their partners will have to diligently monitor the prevalence of these pathogens in order to effectively respond to significant outbreaks.

Canine parvovirus (CPV) is a relatively new disease that infects wolves, domestic dogs, foxes, coyotes, skunks, and raccoons. Recognized in the United States in 1977 in domestic dogs, it appeared in Minnesota wolves (based upon retrospective serologic evidence) live-trapped as early as 1977 (Mech *et al.* 1986, p. 105). Minnesota wolves, however, may have been exposed to the virus as early as 1973 (Mech and Goyal 1995, p. 568). Serologic evidence of wolf exposure to CPV peaked at 95 percent for a group of Minnesota wolves live-trapped in 1989 (Mech and Goyal 1993, p. 331). In a captive colony of Minnesota wolves, pup and yearling mortality from CPV was 92 percent of the animals that showed indications of active CPV infections in 1983 (Mech and Fritts 1987, p. 6), demonstrating the substantial impacts this disease can have on young wolves. It is believed that the population impacts of CPV occur via diarrhea-induced dehydration leading to abnormally high pup mortality (WI DNR 1999, p. 61). CPV has been detected in nearly every wolf population in North America including Alaska (Bailey *et al.* 1995, p. 443), and exposure in wolves is now believed to be almost universal.

There is no evidence that CPV has caused a population decline or has had a significant impact on the recovery of the Minnesota wolf population. Mech and Goyal (1995, p. 566, Table 1, p. 568, Fig. 3), however, found that high CPV prevalence in the wolves of the Superior National Forest in Minnesota occurred during the same years in which wolf pup numbers were low. Because the wolf population did not decline during the study period, they concluded that CPV-caused pup mortality was compensatory, that is, it replaced deaths that would have occurred from other causes, especially starvation of pups. They theorized that CPV prevalence affects the amount of population increase and that a wolf population will decline when 76 percent of the adult wolves consistently test positive for CPV exposure. Their data indicate that CPV prevalence in adult wolves in their study area increased by an annual average of 4 percent during 1979–93 and was at least 80 percent during the last 5 years of their study (Mech and Goyal 1995, pp. 566, 568).

Additional data gathered since 1995 suggests that CPV reduced pup survival both in the Superior National Forest and statewide, between 1984 and 2004; however, statewide there is some evidence of a slight increase in pup survival since about 1995. These conclusions are based on an inverse relationship between pup numbers in summer captures and seroprevalence of CPV antibodies in summer-captured adult wolves (Mech *et al.* 2008, pp. 827–830).

In a more recent study, Mech and Goyal (2011) looked more specifically at CPV influence on the Superior National Forest population by evaluating five 7-year periods to determine when CPV had its greatest effects. They found the strongest effect on wolf pup survival was from 1981 to 1993, and that after that time, little effect was seen despite the continued seroprevalence of CPV antibodies (Mech and Goyal 2011, pp. 28–29). They conclude that, after CPV became endemic in the population, the population developed immunity and was able to withstand severe effects from the disease (Mech and Goyal 2011, pp. 28–29). The observed population effects in the Superior National Forest population are consistent with results for studies in smaller, isolated populations in Wisconsin and on Isle Royale, Michigan (Wydeven *et al.* 1995; Peterson *et al.* 1998), but indicate that CPV also had only a temporary population effect in a larger population.

The WI DNR and the WI DNR Wildlife Health, in conjunction with the U.S. Geological Survey National Wildlife Health Center in Madison, Wisconsin, (formerly the National Wildlife Health Laboratory) have an extensive dataset on the incidence of wolf diseases, beginning in 1981. Canine parvovirus exposure was evident in 5 of 6 wolves tested in 1981, and probably stalled wolf population growth in Wisconsin during the early and mid-1980s when numbers there declined or were static; at that time 75 percent of the 32 wolves tested were positive for CPV. During the following years of population increase (1988–96), only 35 percent of the 63 wolves tested were positive for CPV (WI DNR 1999, p. 62). More recent exposure rates for CPV continue to be high in Wisconsin wolves, with annual rates ranging from 60 to 100 percent among wild wolves handled from 2001 through mid-2006. Part of the reason for high exposure percentages is likely an increased emphasis in sampling pups and Central Forest wolves starting in 2001, so comparisons of post- and pre-2001 data are of limited value.

CPV appears not to be a significant cause of mortality, as only a single wolf (male pup) is known to have died from CPV during this period (Wydeven and Wiedenhoeft 2002, p. 8 Table 4; 2003a, pp. 11–12 Table 4; 2004a, pp. 11–12 Table 5; 2005, pp. 19–20 Table 4; 2006, pp. 23–25 Table 4; 2009, Table 2; Wydeven *et al.* 2007, pp. 12–14; 2008,

pp. 19–21). While the difficulty of discovering CPV-killed pups must be considered, and it is possible that CPV-caused pup mortality is being underestimated, the continuing increase of the Wisconsin wolf population indicates that CPV mortality is no longer impeding wolf population growth in the State. It may be that many Wisconsin wolves have developed some degree of resistance to CPV, and this disease is no longer a significant threat in the State.

Similar to Wisconsin wolves, serological testing of Michigan wolves captured from 1992 through 2001 (most recent available data) shows that the majority of UP wolves have been exposed to CPV. Fifty-six percent of 16 wolves captured from 1992 to 1999 and 83 percent of 23 wolves captured in 2001 showed antibody titers at levels established as indicative of previous CPV exposure that may provide protection from future infection from CPV (Beheler in litt. undated, in litt. 2004). There are no data showing any CPV-caused wolf mortality or population impacts to the wolf population on the UP, but few wolf pups are handled in the UP (Hammill in litt. 2002, Beyer in litt. 2006a), so low levels of CPV-caused pup mortality may go undetected there. Mortality data are primarily collected from collared wolves, which until 2004 received CPV inoculations. Therefore, mortality data for the UP should be interpreted cautiously.

Sarcoptic mange is caused by a mite (*Sarcoptes scabiei*) infection of the skin. The irritation caused by the feeding and burrowing mites results in scratching and then severe fur loss, which in turn can lead to mortality from exposure during severe winter weather. The mites are spread from wolf to wolf by direct body contact or by common use of ''rubs'' by infested and uninfested animals. Thus, mange is frequently passed from infested females to their young pups, and from older pack members to their pack mates. In a long-term Alberta, Canada, wolf study, higher wolf densities were correlated with increased incidence of mange, and pup survival decreased as the incidence of mange increased (Brand *et al.* 1995, p. 428).

From 1991 to 1996, 27 percent of live-trapped Wisconsin wolves exhibited symptoms of mange. During the winter of 1992–93, 58 percent showed symptoms, and a concurrent decline in the Wisconsin wolf population was attributed to mange-induced mortality (WI DNR 1999, p. 61). Seven Wisconsin wolves died from mange from 1993 through October 15, 1998, and severe fur loss affected five other wolves that died from other causes. During that period, mange was the third largest cause of death in Wisconsin wolves, behind trauma (usually vehicle collisions) and shooting (Thomas in litt. 1998). Largely as a result of mange, pup survival was only 16 percent in 1993, compared to a normal 30 percent survival rate from birth to 1 year of age (WI DNR 1999, p. 61).

Mange continues to occur on wolves in Wisconsin. From 2003 through 2007, researchers reported that 25 percent of live-trapped wolves showed signs of mange, but that figure declined to 11 percent of wolves handled in 2009 and 2010. Mortality data from closely monitored radio-collared wolves provides a relatively unbiased estimate of mortality factors, especially those linked to disease or illegal actions, because nearly all carcasses are located within a few days of deaths. Diseased wolves suffering from hypothermia or nearing death generally crawl into dense cover and may go undiscovered if they are not radio-tracked (Wydeven *et al.* 2001b, p. 14). Data from those closely monitored radio-collared wolves show that mange mortality ranged from 22 percent of deaths in 2006 and 12 percent in 2007 to 21 percent of deaths in 2008 (Wydeven in litt. 2009), 15 percent in 2009 (Wydeven *et al.* 2010, p. 13), and 6 percent in 2010 (Wydeven *et al.* 2011, p. 2).

Mange mortality does appear to be stabilizing or perhaps declining in Wisconsin. Not all mangy wolves succumb; other observations showed that some mangy wolves are able to survive the winter (Wydeven *et al.* 2001b, p. 14). Mange has been detected in Wisconsin wolves every year since 1991 when only 45 to 52 wolves occurred in the State, and may have slowed the growth of the wolf population in the early 1990s (Wydeven *et al.* 2009c), but despite its constant presence as an occasional mortality factor, the wolf population grew to its present (2011) level of 782 or more wolves.

The survival of pups during their first winter is believed to be strongly affected by mange. The highest to date wolf mortality (30 percent of radio-collared wolves; Wydeven and Wiedenhoeft 2004a, p. 12) from mange in Wisconsin occurred in 2003 and may have had more severe effects on pup survival than in previous years. The prevalence of the disease may have contributed to the relatively small population increase in 2003 (2.4 percent in 2003 as compared to the average 18 percent to that point since 1985). However, mange has not caused a decline in the State's wolf population, and even though the rate of population increase has slowed in recent years, the wolf population continues to increase despite the continued prevalence of mange in Wisconsin wolves. Although mange mortality may not be the primary limiting factor for wolf population growth in the State, the impacts of mange in Wisconsin need to be closely monitored, as identified and addressed in the Wisconsin wolf management plan (WI DNR 1999, p. 21; 2006a, p. 14).

Disease monitoring in Wisconsin has identified a second form of mange in the wild wolf population—demodectic mange (Wydeven and Wiedenhoeft 2008, p. 8). Demodectic mange mites are relatively common in domestic dogs, where symptoms are often minor. The WI DNR is closely monitoring wolf pups and examining all dead wolves to determine if this becomes a significant new cause of wolf mortality.

Wisconsin wolves had been treated with Ivermectin and vaccinated for CPV and canine distemper virus (CDV) when captured, but the practice was stopped in 1995 to allow the wolf population to experience more natural biotic conditions. Since that time, Ivermectin has been administered only to captured wolves with severe cases of mange. In the future, Ivermectin and vaccines will be used sparingly on Wisconsin wolves, but will be used to counter significant disease outbreaks (Wydeven in litt. 1998).

Seven Michigan wolves died from mange during 1993–1997, making it responsible for 21 percent of all mortalities, and constituted all of the disease-caused deaths, during that period (MI DNR 1997, p. 39). During bioyears (mid-April to mid-April) 1999–2009, mange-induced hypothermia killed 18 radio-collared Michigan wolves, representing 15 percent of the total mortality during those years. From 2004 through 2010, researchers found that 11 radio-collared wolves died from mange in the State (Roell 2010, pers. comm.). Before 2004, MI DNR treated all captured wolves with Ivermectin if they showed signs of mange. In addition, MI DNR vaccinated all captured wolves against CPV and CDV. These inoculations were discontinued in 2004 to provide more natural biotic conditions and to provide biologists with an unbiased estimate of disease-caused mortality rates in the population (Roell in litt. 2005b).

Among Minnesota wolves, mange may always have been present at low levels and may currently infect less than 10 percent of the State's wolves. Of the 407 wolves trapped by Wildlife Services during 2006–2008 in response to depredation complaints, 52 (13 percent)

exhibited signs of mange (Hart 2009, pers. comm.); the proportion of wolves with signs of mange decreased from 17 percent in 2006 to 10 percent in 2008. During the previous 3-year period (2003–2005), the proportion of trapped wolves with signs of mange was also about 13 percent, suggesting that mange has not increased in prevalence among wolves in Minnesota since 2003. The incidence of mange among wolves targeted by Wildlife Services is likely not representative of the prevalence of the disease in the statewide wolf population; wolves targeted for depredation control appear to be more likely to carry the disease (Hart 2009, pers. comm.).

In a separate study, mortality data from 12 years (1994–2005) of monitoring radio-collared wolves in 7 to 9 packs in north-central Minnesota show that 11 percent died from mange (DelGiudice in litt. 2005). However, the sample size (17 total mortalities, 2 from mange in 1998 and 2004) is far too small to deduce trends in mange mortality over time. Furthermore, these data are from mange mortalities, while the Wildlife Services' data are based on mange symptoms, not mortalities. Other data show that from 1998 to 2010 in the Superior National Forest, 7 of approximately 163 radio-collared wolves were known to have died of mange (Mech unpublished).

It is hypothesized that the current incidence of mange is more widespread than it would have otherwise been, because the WGL wolf range experienced a series of mild winters beginning with the winter of 1997–1998 (Van Deelen 2005, Fig. 2). Mange-induced mortality is chiefly a result of winter hypothermia, thus the less severe winters resulted in higher survival of mangy wolves, and increased spread of mange to additional wolves during the following spring and summer. The high wolf population, and especially higher wolf density on the landscape, may also be contributing to the increasing occurrence of mange in the WGL wolf population.

Lyme disease, caused by the spirochete *Borrelia burgdorferi,* is another relatively recently recognized disease, first documented in New England in 1975, although it may have occurred in Wisconsin as early as 1969. It is spread by ticks that pass the infection to their hosts when feeding. Host species include humans, horses, dogs, white-tailed deer, white-footed mice, eastern chipmunks, coyotes, and wolves. The prevalence of Lyme disease exposure in Wisconsin wolves averaged 70 percent of live-trapped animals in 1988–91, dropped to 37 percent during 1992–97 and was back up to 56 percent (32 of 57 tested) in 2002–04 (Wydeven and Wiedenhoeft 2004b, pp. 23–24 Table 7; 2005, pp. 23–24 Table 7). Clinical symptoms have not been reported in wolves, but infected dogs can experience debilitating conditions, and abortion and fetal mortality have been reported in infected humans and horses. It is possible that individual wolves may be debilitated by Lyme disease, perhaps contributing to their mortality; however, Lyme disease is not believed to be a significant factor affecting wolf populations (Kreeger 2003, p. 212).

The dog louse (*Trichodectes canis*) has been detected in wolves in Ontario, Saskatchewan, Alaska, Minnesota, and Wisconsin (Mech *et al* 1985, pp. 404–405; Kreeger 2003, p. 208; Paul in litt. 2005). Dogs are probably the source of the initial infections, and subsequently wild canids transfer lice by direct contact with other wolves, particularly between females and pups. Severe infestations result in irritated and raw skin, substantial hair loss, particularly in the groin. However, in contrast to mange, lice infestations generally result in loss of guard hairs but not the insulating under fur, thus, hypothermia is less likely to occur and much less likely to be fatal (Brand *et al.* 1995, p. 426). Even though observed in nearly 4 percent in a sample of 391 Minnesota wolves in 2003–05 (Paul in litt. 2005), dog lice infestations have not been confirmed as a cause of wolf mortality, and are not expected to have a significant impact even at a local scale.

Canine distemper virus (CDV) is an acute disease of carnivores that has been known in Europe since the sixteenth century and is now infecting dogs worldwide (Kreeger 2003, p. 209). CDV generally infects dog pups when they are only a few months old, so mortality in wild wolf populations might be difficult to detect (Brand *et al* 1995, pp. 420–421). CDV mortality among wild wolves has been documented in two littermate pups and an adult male in Manitoba (Carbyn 1982, pp. 111–112; Stronen *et al.* 2011, p. 224), in two Alaskan yearling wolves (Peterson *et al.* 1984, p. 31), and in two Wisconsin wolves (an adult in 1985 and a pup in 2002) (Thomas in litt. 2006; Wydeven and Wiedenhoeft 2003b, p. 20). Carbyn (1982, pp. 113–116) concluded that CDV was a contributor to a 50 percent decline of the wolf population in Riding Mountain National Park (Manitoba, Canada) in the mid-1970s; current prevalence of CDV in that population is similar to that reported in the past (Stronen *et al.* 2011, pp. 223–226). Almberg *et al.* (2009, pp. 8–9) correlate high wolf pup mortality in Yellowstone National Park in 1999 and 2005 with serologic evidence of high CDV exposure in wolves as well as other canids. They detected CDV in three wolf carcasses in 2008, indicating that distemper deaths also may have occurred during that year. In this and a related paper (Almberg *et al.* 2010, p. 2072), the authors predict periodic short-term declines from CDV, but no long-term threat to the wolf population from maintenance of this virus among multiple hosts in the Yellowstone ecosystem.

Serological evidence indicates that exposure to CDV is high among some Midwest wolves—29 percent in northern Wisconsin wolves and 79 percent in central Wisconsin wolves in 2002–04 (Wydeven and Wiedenhoeft 2004b, pp. 23–24 Table 7; 2005, pp. 23–24 Table 7). However, the continued strong recruitment in Wisconsin and elsewhere in North American wolf populations indicates that distemper is not likely a significant cause of mortality (Brand *et al.* 1995, p. 421).

Other diseases and parasites, including rabies, canine heartworm, blastomycosis, bacterial myocarditis, granulomatous pneumonia, brucellosis, leptospirosis, bovine tuberculosis, hookworm, coccidiosis, and canine hepatitis have been documented in wild wolves, but their impacts on future wild wolf populations are not likely to be significant (Brand *et al.* 1995, pp. 419–429; Hassett in litt. 2003; Johnson 1995, pp. 431, 436–438; Mech and Kurtz 1999, pp. 305–306; Thomas in litt. 1998, Thomas in litt. 2006, WI DNR 1999, p. 61; Kreeger 2003, pp. 202–214). Continuing wolf range expansion, however, likely will provide new avenues for exposure to several of these diseases, especially canine heartworm, raccoon rabies, and bovine tuberculosis (Thomas in litt. 2000, in litt. 2006), further emphasizing the need for disease monitoring programs.

In addition, the possibility of new diseases developing and existing diseases, such as chronic wasting disease (CWD), West Nile Virus (WNV) and canine influenza (Crawford *et al.* 2005, 482–485), moving across species barriers or spreading from domestic dogs to wolves must all be taken into account, and monitoring programs will need to address such threats. Currently there is no evidence that CWD can directly affect canids (Thomas in litt. 2006; Wild *et al.* 2010, p. 87). Wisconsin wolves have been tested for WNV at necropsy since the first spread of the virus across the State: To date, all results have been negative. Although experimental infection of dogs produced

no ill effects, WNV is reported to have killed two captive wolf pups, so young wolves may be at some risk (Thomas in litt. 2006).

In aggregate, diseases and parasites were the cause of 21 percent of the diagnosed mortalities of radio-collared wolves in Michigan from 1999 through 2004 (Beyer 2005, unpublished data) and 27 percent of the diagnosed mortalities of radio-collared wolves in Wisconsin from October 1979 through December 2009 (Wydeven *et al.* 2010, p. 45). In recent years (2006–10), disease has been the cause of death for 14 percent (10 of 70 dead wolves) of the diagnosed mortalities of radio-collared wolves in Wisconsin and 3 to 7 percent of all wolves (radio-collared and not collared) found dead in the State (72 to 94 wolves). During that time period, disease was the cause of death of 12 percent (5 of 43) of the diagnosed mortalities of radio-collared wolves in Michigan, and of 3 percent (6 of 199) of the total known wolf mortalities in Minnesota.

Many of the diseases and parasites are known to be spread by wolf-to-wolf contact. Therefore, the incidence of mange, CPV, CDV, and canine heartworm may increase as wolf densities increase in the more recently colonized areas (Thomas in litt. 2006). Because wolf densities generally are relatively stable following the first few years of colonization, wolf-to-wolf contacts will not likely lead to a continuing increase in disease prevalence in areas that have been occupied for several years or more and are largely saturated with wolf packs (Mech in litt. 1998).

Disease and parasite impacts may increase because several wolf diseases and parasites are carried and spread by domestic dogs. This transfer of pathogens from domestic dogs to wild wolves may increase as wolves continue to colonize non-wilderness areas (Mech in litt. 1998). Heartworm, CPV, and rabies are the main concerns (Thomas in litt. 1998), but dogs may become significant vectors for other diseases with potentially serious impacts on wolves in the future (Crawford *et al.* 2005, pp. 482–485). However, to date wolf populations in Wisconsin and Michigan have continued their expansion into areas with increased contacts with dogs and have shown no adverse pathogen impacts since the mid-1980s impacts from CPV.

Disease and parasite impacts are a recognized concern of the Minnesota, Michigan, and Wisconsin DNRs. The Michigan Gray Wolf Recovery and Management Plan states that necropsies will be conducted on all dead wolves, and that all live wolves that are handled will be examined, with blood, skin, and fecal samples taken to provide disease information. The Michigan Plan states that the Michigan DNR will continue to monitor the prevalence and impact of disease on wolf health following Federal delisting (MI DNR 2008, pp. 32, 40–42).

Similarly, the Wisconsin Wolf Management Plan states that as long as the wolf is State-listed as a threatened or endangered species, the WI DNR will conduct necropsies of dead wolves and test a sample of live-captured wolves for diseases and parasites, with a goal of screening 10 percent of the State wolf population for diseases annually. However, the plan anticipates that following State delisting (which occurred on August 1, 2004), disease monitoring will be scaled back because the percentage of the wolf population that is live-trapped each year will decline. Disease monitoring of captured wolves currently is focusing on diseases known to be causing noteworthy mortality, such as mange, and other diseases for which data are judged to be sparse, such as Lyme disease and ehrlichiosis (Wydeven and Wiedenhoeft 2006, p. 8). The State will continue to test for disease and parasite loads through periodic necropsy and scat analyses. The 2006 update to the 1999 plan also recommends that all wolves live-trapped for other studies should have their health monitored and reported to the WI DNR wildlife health specialists (WI DNR 1999, p.21; 2006c, p. 14). Furthermore, the 2006 update identifies a need for ''continued health monitoring to document significant disease events that may impact the wolf population and to identify new diseases in the population….'' (WI DNR 2006a, p. 24).

The Minnesota Wolf Management Plan states that MN DNR ''will collaborate with other investigators and continue monitoring disease incidence, where necessary, by examination of wolf carcasses obtained through depredation control programs, and also through blood or tissue physiology work conducted by the MN DNR and the U.S. Geological Survey. The DNR will also keep records of documented and suspected incidence of sarcoptic mange (MN DNR 2001, p. 32).'' In addition, it will initiate ''(R)egular collection of pertinent tissues of live captured or dead wolves'' and periodically assess wolf health ''when circumstances indicate that diseases or parasites may be adversely affecting portions of the wolf population (MN DNR 2001, p. 19).'' Unlike Michigan and Wisconsin, Minnesota has not established minimum goals for the proportion of its wolves that will be assessed for disease nor does it plan to treat any wolves, although it does not rule out these measures. Minnesota's less intensive approach to disease monitoring and management seems warranted in light of its much greater abundance of wolves than in the other two States.

In areas within the WGL DPS, but outside Minnesota, Wisconsin, and Michigan, we lack data on the incidence of diseases or parasites in transient wolves. However, the boundary of the WGL DPS is laid out in a manner such that the vast majority of, and perhaps all, wolves that will occur in the DPS in the foreseeable future will have originated from the Minnesota–Wisconsin–Michigan wolf metapopulation. Therefore, they will be carrying the ''normal'' complement of Midwestern wolf parasites, diseases, and disease resistance with them. For this reason, any new pairs, packs, or populations that develop within the DPS are likely to experience the same low to moderate adverse impacts from pathogens that have been occurring in the core recovery areas.

The most likely exceptions to this generalization would arise from exposure to sources of novel diseases or more virulent forms that are being spread by other canid species that might be encountered by wolves dispersing into currently unoccupied areas of the DPS. To increase the likelihood of detecting such novel or more virulent diseases and thereby reduce the risk that they might pose to the core of the metapopulation after delisting, we will encourage these States and Tribes to provide wolf carcasses or suitable tissue, as appropriate, to the USGS National Wildlife Health Center or the Service's National Wildlife Forensics Laboratory for necropsy. This practice should provide an early indication of new or increasing pathogen threats before they reach the core of the metapopulation or impact future transient wolves to those areas.

Disease Summary

We believe that several diseases have had noticeable impacts on wolf population growth in the Great Lakes region in the past. These impacts have been both direct, resulting in mortality of individual wolves, and indirect, by reducing longevity and fecundity of individuals or entire packs or populations. Canine parvovirus stalled wolf population growth in Wisconsin in the early and mid-1980s and has been implicated in the decline in the mid-1980s of the isolated Isle Royale wolf population in Michigan, and in attenuating wolf population growth in

Minnesota (Mech in litt. 2006). Sarcoptic mange has affected wolf recovery in Michigan's UP and in Wisconsin over the last 12 years, and it is recognized as a continuing issue.

Despite these and other diseases and parasites, the overall trend for wolf populations in the WGL DPS continues to be upward. Wolf management plans for Minnesota, Michigan, and Wisconsin include disease monitoring components that we expect will identify future disease and parasite problems in time to allow corrective action to avoid a significant decline in overall population viability. We conclude that diseases and parasites will not prevent continued population growth or the maintenance of viable wolf populations in the DPS. Delisting of wolves in the WGL DPS will not significantly change the incidence or impacts of disease and parasites on these wolves. Disease may eventually limit overall wolf carrying capacity and contribute to annual fluctuations in wolf abundance, but at current and foreseeable population levels, diseases are not likely to affect viability or place wolves at risk of again becoming endangered or threatened. Therefore, we conclude that diseases and parasites do not pose a significant threat to wolves in the WGL DPS

*Natural Predation*

No wild animals habitually prey on wolves. Large prey such as deer, elk, or moose (Mech and Nelson 1989, pp. 207–208; Smith *et al.* 2001, p. 3), or other predators, such as mountain lions (*Puma concolor*), grizzly bears (*Ursus arctos horribilis*), or black bears (*Ursus americanus*) where they are extant (USFWS 2005, p. 3; Ballard *et al.* 2003, pp. 260–264), occasionally kill wolves, but such events have rarely been documented. Coyotes have also attempted to attack wolf pups (Ballard *et al.* 2003, p. 267), and along with bears and various medium-sized predators could pose a risk to wolf pups if adult wolves are not present. Predation and death by prey species are small components of wolf mortality and will not likely increase with delisting.

Wolves frequently are killed by other wolves, most commonly when packs encounter and attack a dispersing wolf as an intruder or when two packs encounter each other along a territorial boundary (Mech 1994, p. 201). This form of mortality is likely to increase as more of the available wolf habitat becomes saturated with wolf pack territories, as is the case in northeastern Minnesota, but such a trend is not yet evident from Wisconsin or Michigan data. From October 1979 through June 1998, researchers found that 7 (12 percent) of the mortalities of radio-collared Wisconsin wolves resulted from wolves killing wolves, and 8 of 73 (11 percent) mortalities were from this cause during 2000–05 (Wydeven 1998, p. 16 Table 4; Wydeven and Wiedenhoeft 2001, p. 8 Table 5; 2002, pp. 8–9 Table 4; 2003a, pp. 11–12 Table 4; 2004a, pp. 11–12 Table 5, 2005, p. 21 Table 5).

Among radio-collared wolves dying from known causes between October 1979 and December 2009, overall rate of intraspecific strife was 17 of 151 mortalities or 11 percent (Wydeven *et al.* 2010, p. 45). Gogan *et al.* (2004, p. 7) studied 31 radio-collared wolves in northern Minnesota from 1987 to 1991 and found that 4 (13 percent) were killed by other wolves, representing 29 percent of the total mortality of radio-collared wolves. Intra-specific strife caused 50 percent of mortality within Voyageurs National Park and 20 percent of the mortality of wolves adjacent to the Park (Gogan *et al.* 2004, p. 22). The DelGiudice data (in litt. 2005) show a 17 percent mortality rate from other wolves in another study area in north-central Minnesota from 1994 to 2005. This behavior is normal in healthy wolf populations and is an expected outcome of dispersal conflicts and territorial defense, as well as occasional intra-pack strife. This form of mortality is something with which the species has evolved, and it should not pose a threat to wolf populations in the WGL DPS once delisted.

*Human-Caused Mortality*

Because our concern about human-caused mortality is its overall effect on wolf mortality, the following discussion addresses the major human causes of wolf mortality, including illegal killing, depredation control, and vehicle collisions.

Humans have functioned as highly effective predators of the wolf in North America for several hundred years. European settlers in the Midwest attempted to eliminate the wolf entirely in earlier times, and the U.S. Congress passed a wolf bounty that covered the Northwest Territories in 1817. Bounties on wolves subsequently became the norm for States across the species' range. In Michigan, an 1838 wolf bounty became the ninth law passed by the First Michigan Legislature; this bounty remained in place until 1960. A Wisconsin bounty was instituted in 1865 and was repealed about the time wolves were extirpated from the State in 1957. Minnesota maintained a wolf bounty until 1965.

Subsequent to the gray wolf's listing as a federally endangered species, the Act and State endangered species statutes prohibited the killing of wolves except under very limited circumstances, such as in defense of human life, for scientific or conservation purposes, or under special regulations intended to reduce wolf depredations of livestock or other domestic animals. The resultant reduction in human-caused wolf mortality is the main cause of the wolf's reestablishment in large parts of its historical range. It is clear, however, that illegal killing of wolves has continued in the form of intentional mortality and incidental deaths.

Illegal killing of wolves occurs for a number of reasons. Some of these killings are accidental (for example, wolves are hit by vehicles, mistaken for coyotes and shot, or caught in traps set for other animals); some of these accidental killings are reported to State, Tribal, and Federal authorities. It is likely that most illegal killings, however, are intentional and are never reported to government authorities. Because they generally occur in remote locations and the evidence is easily concealed, we lack reliable estimates of annual rates of intentional illegal killings.

In Wisconsin, all forms of human-caused mortality accounted for 56 percent of the diagnosed deaths of radio-collared wolves from October 1979 through December 2009 (Wydeven *et al.* 2010, p. 45). Thirty-four percent of the diagnosed mortalities, and 62 percent of the human-caused mortalities, were from illegal killing (mainly shootings). Another 9 percent of all the diagnosed mortalities (15 percent of the human-caused mortalities) resulted from vehicle collisions. (These percentages and those in the following paragraphs exclude seven radio-collared Wisconsin wolves that were killed in depredation control actions by USDA—APHIS—Wildlife Services. The wolf depredation control programs in the Midwest are discussed separately under Depredation Control, below.) Data from 2006 through 2010 (68 diagnosed mortalities of radio-collared wolves) show the mortality percentages for illegal kills to be similar, with 35 percent of the diagnosed mortalities being illegally killed. The mortality percentage for vehicle collisions during this time period remained constant (13 percent) (Wydeven *et al.* 2007, p. 10; and Wydeven and Wiedenhoeft 2008, Summary). In 2010, mortality data from actively monitored wolves show that, of wolves that died, 38 percent were killed illegally (all shootings); 12 percent were euthanized for human safety concerns; 6 percent of the deaths were disease

related; 6 percent died from apparent old age, 6 percent, from intraspecific strife, and 12 percent, from vehicle collisions; and the causes for 19 percent of the deaths were unknown (Wydeven *et al.* 2011, p. 2).

During the periods that wolves were federally delisted (from March 2007 through September 2008 and from April through early July 2009), 92 wolves were killed for depredation control, including 8 legally shot by private landowners (Wydeven and Wiedenhoeft 2008, p. 8; Wydeven *et al.* 2009b, p. 6; Wydeven *et al.* 2010, p. 13).

As the Wisconsin population has increased in numbers and range, vehicle collisions have increased as a percentage of radio-collared wolf mortalities. During the October 1979 through June 1992 period, only 1 of 27 (4 percent) known mortalities was from that cause; but from July 1992 through June 1998, vehicle collisions caused 5 of the 26 (19 percent) known mortalities (Wydeven 1998, p. 6). From 2002 through 2004, of 45 known mortalities, 7 (16 percent) were from that cause (Wydeven and Wiedenhoeft 2003a, pp. 11–12 Table 4; 2004a, pp. 11–12 Table 5; 2005, pp. 19–20 Table 4); and from 2005 through 2009, of 459 known mortalities, 126 (27 percent) were from that cause (Wydeven and Wiedenhoeft 2005, p. 20; Wydeven and Wiedenhoeft 2006, p. 20; Wydeven *et al.* 2007a, p.7; Wydeven *et al.* 2007b, p.10; Wydeven and Wiedenhoeft 2008, p. 7; Wydeven *et al.* 2009a, pp. 19–21; Wydeven and Wiedenhoeft 2009, Table 3; Wydeven *et al.* 2010, Table 7).

A comparison over time for diagnosed mortalities of radio-collared Wisconsin wolves shows that 18 of 57 (32 percent) were illegally killed from October 1979 through 1998, while 12 of 42 (29 percent) were illegally killed from 2002 through 2004, and 24 of 72 (33 percent) were illegally killed from 2005 to March 2007 (WI DNR 1999, p. 63; Wydeven and Wiedenhoeft 2003a, pp. 11–12 Table 4; 2004a, pp. 11–12 Table 4; 2005. pp. 19–20 Table 4; Wydeven *et al.* 2006a, p. 6; 2006b, p. 8; 2007, pp. 6–7; 2008a, p. 10). In 2006, prior to the Federal delisting the following year, 17 of 72 wolves found dead in the State were killed illegally. Among nine radio-collared wolves that had died in 2006, six (67 percent) were illegally killed. In 2007, after Federal delisting, 10 of 90 dead wolves found in the State were illegally killed, and 3 (19 percent) of the radio-collared wolves found dead were illegally killed. In 2008, 14 of 94 dead wolves found in Wisconsin were illegally killed, and 4 (28 percent) of 14 radio-collared wolves found dead were illegal kills. In 2009, when wolves were again federally listed for most of the year, 20 of the 72 dead wolves found in Wisconsin were illegally killed, and 8 (62 percent) of 13 radio-collared wolves found dead were illegal kills. In 2010, when wolves continued to be federally listed, 15 of 72 dead wolves were illegally killed, and 7 (44 percent) of 16 radio-collared wolves were illegally killed.

Thus the number of known illegally killed wolves declined slightly from 17 in 2006, to 10 in 2007 and 14 in 2008, increased to 20 in 2009, and declined to 15 in 2010. Among radio-collared wolves found dead, illegal killing represented 67 percent of all mortality in 2006, 19 percent in 2007, 23 percent in 2008, 62 percent in 2009, and 44 percent in 2010 (Wydeven *et al.* 2010, p. 13; Wydeven *et al.* 2011, p. 2).

In the UP of Michigan, human-caused mortalities accounted for 75 percent of the diagnosed mortalities, based upon 34 wolves recovered from 1960 to 1997, including mostly non-radio-collared wolves. Twenty-eight percent of all the diagnosed mortalities and 38 percent of the human-caused mortalities were from shooting. In the UP during that period, about one-third of all the known mortalities were from vehicle collisions (MI DNR 1997, pp. 5–6). During the 1998 Michigan deer hunting season, three radio-collared wolves were shot and killed, resulting in one arrest and conviction (Hammill in litt. 1999, Michigan DNR 1999). During the subsequent 3 years, eight additional wolves were killed in Michigan by gunshot, and the cut-off radio-collar from a ninth animal was located, but the animal was never found. These incidents resulted in six guilty pleas, with three cases remaining open to date.

Data collected from radio-collared wolves from the 1999 to 2009 bioyears (mid-April to mid-April) show that human-caused mortalities still account for the majority of the wolf mortalities (66 percent) in Michigan. Deaths from vehicular collisions were about 18 percent of total mortality (27 percent of the human-caused mortality) and showed no trend over this 11-year period. Deaths from illegal killing constituted 39 percent of all mortalities (60 percent of the human-caused mortality) over the period. From 1999 through 2001, illegal killings were 31 percent of the mortalities, but this increased to 42 percent during the 2002 through 2004 bioyears and to 40 percent during bioyears 2005 through 2010 (Roell 2010, pers. comm.).

Most Michigan residents place a high priority on wolf management actions that address public concerns for human safety (Beyer *et al.* 2006). Quick and professional responses to wolf conflicts have been important for wolf recovery (Ruid *et al.* 2009, p. 280). In most cases, people can take simple, sensible measures to avoid those situations and protect themselves against harm. Other cases may warrant higher levels of concern and professional assistance. Michigan DNR solved most wolf-human conflicts using nonlethal methods (Roell 2010, pers. comm.). However, in a few incidents lethal control was warranted and carried out under Federal regulations (50 CFR 17.21, which allows the take of an endangered species when there is a ''demonstrable but nonimmediate threat'' to protect human safety, or to euthanize a sick or injured wolf, but only if it is not reasonably possible to translocate the animal alive), or while wolves were not federally protected (Roell 2010 *et al.,* p. 9). Since 2004 the Michigan DNR and USDA–Wildlife Services have killed 13 animals (12 involving human safety and 1 sick wolf) under the authority of this regulation (Roell 2010 *et al.*, p. 9). Two others were killed for human safety concerns while wolves were federally delisted (Roell 2010, pers. comm.).

North-central Minnesota data from 16 diagnosed mortalities of radio-collared wolves over a 12-year period (1994–2005) show that human-causes resulted in 69 percent of the diagnosed mortalities. This includes 1 wolf accidentally snared, 2 vehicle collisions, and 8 (50 percent of all diagnosed mortalities) that were shot (DelGiudice in litt. 2005). However, this data set of only 16 mortalities over 12 years is too small for reliable comparison to Wisconsin and Michigan data.

A smaller mortality dataset is available from a 1987–91 study of wolves in, and adjacent to, Minnesota's Voyageurs National Park, along the Canadian border. Of 10 diagnosed mortalities, illegal killing outside the Park was responsible for a minimum of 60 percent of the deaths (Gogan *et al.* 2004, p. 22). Furthermore, in the Superior National Forest from 1998 to 2010, of approximately 163 radio-collared wolves, 6 were known to have been killed illegally by humans (Mech unpublished).

Two Minnesota studies provide some limited insight into the extent of human-caused wolf mortality before and after the species' listing. On the basis of bounty data from a period that predated wolf protection under the Act by 20 years, Stenlund (1955, p. 33) found an annual human-caused mortality rate of 41 percent. Fuller (1989, pp. 23–24) provided 1980–86 data from a north-central Minnesota study area and found an annual human-caused mortality rate

of 29 percent, a figure that includes 2 percent mortality from legal depredation control actions. Drawing conclusions from comparisons of these two studies, however, is difficult due to the confounding effects of habitat quality, exposure to humans, prey density, differing time periods, and vast differences in study design. Although these figures provide support for the contention that human-caused mortality decreased after the wolf became protected under the Act, it is not possible at this time to determine if human-caused mortality (apart from mortalities from depredation control) has significantly changed over the nearly 35-year period that the gray wolf has been listed as threatened or endangered.

Wolves were largely eliminated from the Dakotas in the 1920s and 1930s and were rarely reported from the mid-1940s through the late 1970s. Ten wolves were killed in these two States from 1981 to 1992 (Licht and Fritts 1994, pp. 76–77). Seven more were killed in North Dakota since 1992, with four of these mortalities occurring in 2002 and 2003; in 2001, one wolf was killed in Harding County in extreme northwestern South Dakota. The number of reported sightings of wolves in North Dakota is increasing. From 1993 to 1998, six wolf depredation reports were investigated in North Dakota, and adequate signs were found to verify the presence of wolves in two of the cases. A den with pups was also documented in extreme north-central North Dakota near the Canadian border in 1994. From 1999 to 2003, residents of North Dakota reported 16 wolf sightings or depredation incidents to USDA–APHIS–Wildlife Services, and 9 of these incidents were verified. Additionally, one North Dakota wolf sighting was confirmed in early 2004, two wolf depredation incidents were verified north of Garrison in late 2005, and one wolf was found dead in Eddy County in 2009. USDA–APHIS–Wildlife Services also confirmed a wolf sighting along the Minnesota border near Gary, South Dakota, in 1996, and a trapper with the South Dakota Game, Fish, and Parks Department sighted a lone wolf in the western Black Hills in 2002.

Several other unconfirmed sightings have been reported from these States, including two reports in South Dakota in 2003. Wolves killed in North and South Dakota were most often shot by hunters after being mistaken for coyotes, or were killed by vehicles. The 2001 mortality in South Dakota and one of the 2003 mortalities in North Dakota were caused by M–44 devices that had been legally set in response to complaints about coyotes.

In and around the core recovery areas in the Midwest, a continuing increase in wolf mortalities from vehicle collisions, both in actual numbers and as a percent of total diagnosed mortalities, is expected as wolves continue their colonization of areas with more human developments and a denser network of roads and vehicle traffic. In addition, the growing wolf populations in Wisconsin and Michigan are producing greater numbers of dispersing individuals each year, and this also will contribute to increasing numbers of wolf–vehicle collisions. This increase in accidental deaths would be unaffected by a removal of wolves in the WGL DPS from the protections of the Act.

In those areas of the WGL DPS that are beyond the areas currently occupied by wolf packs in Minnesota, Wisconsin, and Michigan, we expect that human-caused wolf mortality in the form of vehicle collisions, shooting, and trapping have been removing all, or nearly all, the wolves that disperse into these areas. We expect this to continue after Federal delisting. Road densities are high in these areas, with numerous interstate highways and other freeways and high-speed thoroughfares that are extremely hazardous to wolves attempting to move across them. Shooting and trapping of wolves also is likely to continue as a threat to wolves in these areas for several reasons. Especially outside of Minnesota, Wisconsin, and Michigan, hunters will not expect to encounter wolves, and may easily mistake them for coyotes from a distance, resulting in unintentional shootings.

It is important to note that, despite the difficulty in measuring the extent of illegal killing of wolves, all sources of wolf mortality, including legal (for example, depredation control) and illegal human-caused mortality, have not been of sufficient magnitude to stop the continuing growth of the wolf population in Wisconsin and Michigan, nor to cause a wolf population decline in Minnesota. This indicates that total wolf mortality does not threaten the continued viability of the wolf population in these three States, or in the WGL DPS.

Human-caused Mortality Summary

The high reproductive potential of wolves allows wolf populations to withstand relatively high mortality rates, including human-caused mortality. The principle of compensatory mortality was previously believed to occur in wolf populations. This means that human-caused mortality is not simply added to ''natural'' mortality, but rather replaces a portion of it. Thus, the addition of intentional killing of wolves to a wolf population was thought to reduce the mortality rates from other causes on the population (for example, Fuller *et al.* 2003). Creel and Rotella (2010) reexamined this concept with regards to wolves. They found that, contrary to the previously held belief, wolf population growth declined as human-caused mortality increased (Creel and Rotella 2010, p. 3). Their study concludes that wolves can be harvested within limits, but that human-caused mortality was strongly additive in total mortality (Creel and Rotella 2010, p. 6).

Minnesota, Wisconsin, and Michigan, however, have committed to continue to regulate human-caused mortality so that it does not reduce the WGL wolf population below recovery levels. The wolf populations in Minnesota, Wisconsin, and Michigan will stop growing when they have saturated the suitable habitat and are curtailed in less suitable areas by natural mortality (disease, starvation, and intraspecific aggression), depredation management, incidental mortality (for example, road kill), illegal killing, and other means. At that time, we should expect to see population declines in some years followed by short-term increases in other years, resulting from fluctuations in birth and mortality rates. Adequate wolf monitoring programs, as described in the Michigan, Wisconsin, and Minnesota wolf management plans, are likely to identify high mortality rates or low birth rates that warrant corrective action by the management agencies (see Regulatory Mechanisms in Minnesota, Wisconsin, and Michigan, below). The goals of all three State wolf management plans are to maintain wolf populations well above the numbers recommended in the Recovery Plan for the Eastern Timber Wolf to ensure long-term viable wolf populations. The State management plans recommend a minimum wolf population of 1,600 in Minnesota, 250 in Wisconsin (with a management goal of 350), and 200 in Michigan.

Despite human-caused mortalities of wolves in Minnesota, Wisconsin, and Michigan, these wolf populations have continued to increase in both numbers and range. As long as other mortality factors do not increase significantly and monitoring is adequate to document, and if necessary counteract (see Post-Delisting Monitoring, below), the effects of excessive human-caused mortality should that occur, the Minnesota-Wisconsin-Michigan wolf population will not decline to nonviable levels in the foreseeable future as a result of human-caused killing or other forms of

predation. Therefore, we conclude that predation, including all forms of human-caused mortality, does not pose a significant threat to wolves in the WGL DPS.

**D. The Inadequacy of Existing Regulatory Mechanisms**

The inadequacy of existing regulatory mechanisms is one of five factors that, under the Endangered Species Act (Act), may result in a determination as to whether a species should be listed or not. In analyzing whether the existing regulatory mechanisms are adequate, the Service reviews relevant Federal, State, and tribal laws, plans, regulations, memoranda of understanding, cooperative agreements and other such factors that influence conservation of the species in question, including analyzing the extent to which those mechanisms can be relied upon. Other examples include State governmental actions enforced under a State statute or constitution, or Federal action under statute.

Strongest weight is given to statutes and their implementing regulations, and management direction that stems from those laws and regulations. Some other agreements are more voluntary in nature; in those cases we analyze the specific facts to determine the extent to which it can be relied on in the future, including how it addresses threats to the species. We consider all pertinent information, including the efforts and conservation practices of State governments, whether or not these are enforceable by law. Regulatory mechanisms, if they exist, may preclude the need for listing if such mechanisms are judged to adequately address the threat to the species such that listing is not warranted. Conversely, threats on the landscape are exacerbated when not addressed by existing regulatory mechanisms, or when the existing mechanisms are not adequate (or not adequately implemented or enforced).

The following sections discuss the adequacy of regulatory mechanisms that would be implemented if the WGL DPS were delisted, that is, removed from the List of Endangered and Threatened Wildlife. For the reasons described in the following section, the Service has determined that regulatory mechanisms that will be in place following delisting will be adequate to ensure that this DPS of wolves remains robust.

*Regulatory Mechanisms in Minnesota, Wisconsin, and Michigan*

State Wolf Management Planning

During the 2000 legislative session, the Minnesota Legislature passed wolf management provisions addressing wolf protection, taking of wolves, and directing MN DNR to prepare a wolf management plan. The MN DNR revised a 1999 draft wolf management plan to reflect the legislative action of 2000, and completed the Minnesota Wolf Management Plan (MN Plan) in early 2001 (MN DNR 2001, pp. 8–9).

The Wisconsin Natural Resources Board (NRB) approved the Wisconsin Wolf Management Plan in October 1999 (WI Plan). In 2004 and 2005 the Wisconsin Wolf Science Advisory Committee and the Wisconsin Wolf Stakeholders group reviewed the 1999 Plan, and the Science Advisory Committee subsequently developed updates and recommended modifications to the 1999 Plan. The WI DNR presented the Plan updates and modifications to the Wisconsin NRB on June 28, 2006, and the NRB approved them at that time, with the understanding that some numbers would be updated and an additional reference document would be added (Holtz in litt. 2006). The updates were completed and received final NRB approval on November 28, 2006 (WI DNR 2006a, p. 1).

In late 1997, the Michigan Wolf Recovery and Management Plan (MI Plan) was completed and received the necessary State approvals. It primarily focused on wolf recovery, rather than long-term management of a large wolf population and the conflicts that result as a consequence of successful wolf restoration. In 2006 the MI DNR convened a Michigan Wolf Management Roundtable committee (Roundtable) to provide guiding principles to the DNR on changes and revisions to the 1997 Plan and to guide management of Michigan wolves and wolf-related issues following Federal delisting of the species. The MI DNR relied heavily on those guiding principles as it drafted a new wolf management plan. The Roundtable was composed of representatives from 20 Michigan stakeholder interests in wolf recovery and management, and its membership is roughly equal in numbers from the UP and the LP. During 2006, the Roundtable provided its ''Recommended Guiding Principles for Wolf Management in Michigan'' to the DNR in November (Michigan Wolf Management Roundtable 2006. p. 2). Based on those Roundtable recommendations, a revised Michigan Wolf Management Plan was completed in July 2008 (MI DNR 2008a). The complete text of the Wisconsin, Michigan, and Minnesota wolf plans can be found on our Web site (see **FOR FURTHER INFORMATION CONTACT**).

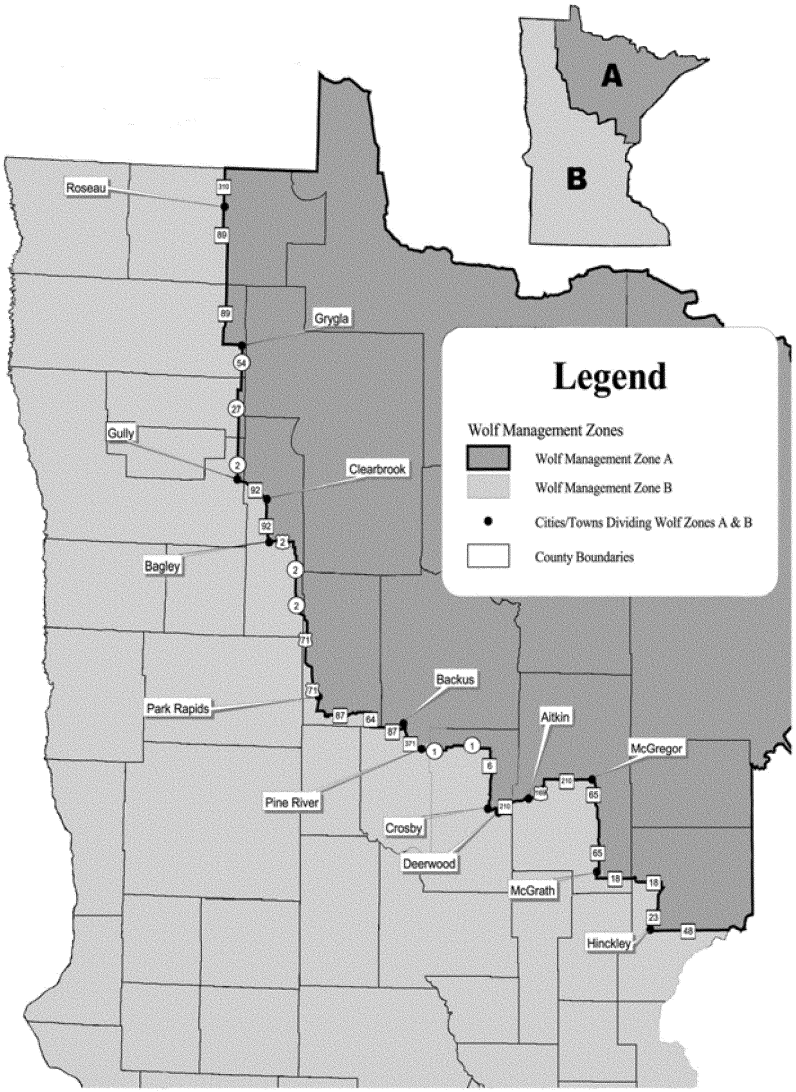
The Minnesota Wolf Management Plan

The Minnesota Plan is based, in part, on the recommendations of a State wolf management roundtable (MN DNR 2001, Appendix V) and on a State wolf management law enacted in 2000 (MN DNR 2001, Appendix I). This law and the Minnesota Game and Fish Laws constitute the basis of the State's authority to manage wolves. The Plan's stated goal is ''to ensure the long-term survival of wolves in Minnesota while addressing wolf-human conflicts that inevitably result when wolves and people live in the same vicinity'' (MN DNR 2001, p. 2). It establishes a minimum goal of 1,600 wolves in the State. Key components of the plan are population monitoring and management, management of wolf depredation of domestic animals, management of wolf prey, enforcement of laws regulating take of wolves, public education, and increased staffing to accomplish these actions. Following Federal delisting, Minnesota DNR's management of wolves would differ from their current management while wolves were listed as threatened under the Act. Most of these differences deal with the control of wolves that attack or threaten domestic animals.

The Minnesota Plan divides the State into two wolf management zones—Zones A and B (see Figure 2 below). Zone A corresponds to Federal Wolf Management Zones 1 through 4 (approximately 30,000 sq mi (77,700 sq km) in northeastern Minnesota) in the Service's Recovery Plan for the Eastern Timber Wolf, whereas Zone B constitutes Zone 5 in that recovery plan (MN DNR 2001, pp. 19–20 and Appendix III; USFWS 1992, p. 72). Within Zone A, wolves would receive strong protection by the State, unless they were involved in attacks on domestic animals. The rules governing the take of wolves to protect domestic animals in Zone B would be less protective than in Zone A (see Post-delisting Depredation Control in Minnesota below).

BILLING CODE 4310–55–P

Figure 2. Minnesota wolf management zones.




Copyright February 2001, Minnesota Department of Natural Resources, Division of Wildlife

BILLING CODE 4310–55–C

The MN DNR plans to allow wolf numbers and distribution to naturally expand, with no maximum population goal, and if any winter population estimate is below 1,600 wolves, it would take actions to ''assure recovery'' to 1,600 wolves (MN DNR 2001 p. 19). The MN DNR plans to continue to monitor wolves in Minnesota to determine whether such intervention is necessary. The MN DNR plans to conduct another statewide population survey in the winter of 2012–13 and at subsequent 5-year intervals. In addition to these statewide population surveys, MN DNR annually reviews data on depredation incident frequency and locations provided by Wildlife Services and winter track survey indices (see Erb 2008) to help ascertain annual trends in wolf population or range (MN DNR 2001, pp. 18–19). The agency is currently evaluating alternatives to its current methodology with the potential to improve the efficiency and accuracy of its statewide population estimates (Stark 2009a, pers. comm.).

Minnesota (MN DNR 2001, pp. 21–24, 27–28) plans to reduce or control illegal mortality of wolves through education, increased enforcement of the State's wolf laws and regulations, discouraging new road access in some areas, and maintaining a depredation control program that includes compensation for livestock losses. The MN DNR plans to use a variety of methods to encourage and support education of the public about the effects of wolves on livestock, wild ungulate populations, and human activities and the history and ecology of wolves in the State (MN DNR 2001, pp. 29–30). These are all measures that have been in effect for years in Minnesota, although increased enforcement of State laws against take of wolves would replace enforcement of the Act's take prohibitions. Financial compensation for livestock losses has increased to the full market value of the animal, replacing previous caps of $400 and $750 per animal (MN DNR 2001, p. 24). We do not expect the State's efforts to result in the reduction of illegal take of wolves from existing levels, but we believe these measures will be crucial in ensuring that illegal mortality does not significantly increase after Federal delisting.

The likelihood of illegal take increases in relation to road density and human population density, but

changing attitudes towards wolves may allow them to survive in areas where road and human densities were previously thought to be too high (Fuller *et al.* 2003, p. 181). The MN DNR does not plan to reduce current levels of road access, but would encourage managers of land areas large enough to sustain one or more wolf packs to ''be cautious about adding new road access that could exceed a density of one mile of road per square mile of land, without considering the potential effect on wolves'' (MN DNR 2001, pp. 27–28).

Under Minnesota law, the illegal killing of a wolf is a gross misdemeanor and is punishable by a maximum fine of $3,000 and imprisonment for up to 1 year. The restitution value of an illegally killed wolf is $2,000 (MN DNR 2001, p. 29). The MN DNR acknowledges that increased enforcement of the State's wolf laws and regulations would be dependent on increases in staff and resources, additional cross-deputization of tribal law enforcement officers, and continued cooperation with Federal law enforcement officers. Minnesota DNR has designated three conservation officers who are stationed in the State's wolf range as the lead officers for implementing the wolf management plan (MN DNR 2001, pp. 29, 32; Stark 2009a, pers. comm.).

Minnesota DNR will consider wolf population management measures, including public hunting and trapping seasons and other methods, in the future. In 2011, the State law was changed to allow the MN DNR to consider a public harvest season when wolves are federally delisted, rather than requiring that such consideration occur no sooner than 5 years after Federal delisting (Minnesota Statutes 97B.645 Subd. 9). With this change, the DNR is allowed to begin the process of determining whether Minnesotans want a wolf harvest season. After wolves are federally delisted, the MN DNR may prescribe open seasons and restrictions for taking gray wolves, but must seek authorization from the legislature and provide opportunity for public comment. The legislation does not change the way the DNR will determine if Minnesota should have a wolf harvest or how such a harvest would be implemented, it only allows them to begin the decision-making process earlier. The Minnesota management plan requires that population management measures be implemented in such a way to maintain a statewide late-winter wolf population of at least 1,600 animals (MN DNR 2001, pp. 19–20), well above the planning goal of 1,251 to 1,400 wolves for the State in the Revised Recovery Plan (USFWS 1992, p. 28), therefore, implementing such management measures under that requirement would ensure the wolf's continued survival in Minnesota.

*Depredation Control in Minnesota*—Although federally protected as a threatened species in Minnesota (since their 1978 reclassification), wolves that have attacked domestic animals have been killed by designated government employees under the authority of a special regulation (50 CFR 17.40(d)) under section 4(d) of the Act. However, no control of depredating wolves was allowed in Federal Wolf Management Zone 1, comprising about 4,500 sq mi (7,200 sq km) in extreme northeastern Minnesota (USFWS 1992, p. 72). In Federal Wolf Management Zones 2 through 5, employees or agents of the Service (including USDA–APHIS–Wildlife Services) have taken wolves in response to depredations of domestic animals within one-half mile of the depredation site. Young-of-the-year captured on or before August 1 must be released. The regulations that allow for this take (50 CFR 17.40(d)(2)(i)(B)(*4*)) do not specify a maximum duration for depredation control, but Wildlife Services personnel have followed internal guidelines under which they trap for no more than 10–15 days, except at sites with repeated or chronic depredation, where they may trap for up to 30 days (Paul 2004, pers. comm.).

During the period 1980–2010, the Federal Minnesota wolf depredation control program euthanized from 20 (in 1982) to 216 (in 1997) wolves annually. Annual averages (and percentage of statewide population) were 30 (2.2 percent) wolves killed from 1980 to 1984; 49 (3.0 percent), from 1985 to 1989; 115 (6.0 percent), from 1990 to 1994; 152 (6.7 percent), from 1995 to 1999; and 128 wolves (4.2 percent), from 2000 to 2005. During 2006–2010 an average of 157 wolves were killed each year—approximately 5.4 percent of wolves in the State (Erb 2008; USDA–Wildlife Services 2010, p. 3). Since 1980, the lowest annual percentage of Minnesota wolves killed under this program was 1.5 percent in 1982; the highest percentage was 9.4 in 1997 (Paul 2004, pp. 2–7; 2006, p. 1). Following the return of wolves in Minnesota to the list of threatened species in 2009, 195 and 192 wolves were killed in 2009 and 2010, respectively, in response to depredation of domestic animals in Minnesota. This is the highest 2-year consecutive total since authorization to control depredating wolves was allowed by special regulation under section 4(d) of the Act while wolves were federally listed.

This level of wolf removal for depredation control has not interfered with wolf recovery in Minnesota, although it may have slowed the increase in wolf numbers in the State, especially since the late-1980s, and may be contributing to the possibly stabilized Minnesota wolf population suggested by the 2003–2004 and 2007–2008 estimates (see additional information in Minnesota Recovery). Minnesota wolf numbers grew at an average annual rate of nearly 4 percent between 1989 and 1998 while the depredation control program was taking its highest percentages of wolves (Paul 2004, pp. 2–7).

Under a Minnesota statute, the Minnesota Department of Agriculture (MDA) compensates livestock owners for full market value of livestock that wolves have killed or severely injured. An authorized investigator must confirm that wolves were responsible for the depredation. The Minnesota statute also requires MDA to periodically update its Best Management Practices (BMPs) to incorporate new practices that it finds would reduce wolf depredation (Minnesota Statutes 2010, Section 3.737, subdivision 5).

*Post-delisting Depredation Control in Minnesota*—When the WGL DPS is delisted, depredation control will be authorized under Minnesota State law and conducted in conformance with the Minnesota Wolf Management Plan (MN DNR 2001). The Minnesota Plan divides the State into Wolf Management Zones A and B. Zone A is composed of Federal Wolf Management Zones 1–4, covering 30,728 sq mi (79,586 sq km), approximately the northeastern third of the State. Zone B is identical to the current Federal Wolf Management Zone 5, and contains the 54,603 sq mi (141,422 sq km.) that make up the rest of the State (MN DNR 2001, pp. 19–20 and Appendix III; USFWS 1992, p. 72). The statewide survey conducted during the winter of 2003–04 estimated that there were approximately 2,570 wolves in Zone A and 450 in Zone B (Erb in litt. 2005). As discussed in *Recovery Criteria* above, the Federal planning goal is 1,251–1,400 wolves for Zones 1–4 and no wolves in Zone 5 (USFWS 1992, p. 28).

In Zone A wolf depredation control is limited to situations of (1) immediate threat and (2) following verified loss of domestic animals. In this zone, if the DNR verifies that a wolf destroyed any livestock, domestic animal, or pet, and if the owner requests wolf control be implemented, trained and certified predator controllers may take wolves (specific number to be determined on a

case-by-case basis) within a 1-mile radius of the depredation site (depredation control area) for up to 60 days. In contrast, in Zone B, predator controllers may take wolves (specific number to be determined on a case-by-case basis) for up to 214 days after MN DNR opens a depredation control area, depending on the time of year. Under State law, the DNR may open a control area in Zone B anytime within 5 years of a verified depredation loss upon request of the landowner, thereby providing more of a preventative approach than is allowed in Zone A, in order to head off repeat depredation incidents (MN DNR 2001, p. 22).

State law and the Minnesota Plan will also allow for private wolf depredation control throughout the State. Persons may shoot or destroy a wolf that poses ''an immediate threat'' to their livestock, guard animals, or domestic animals on lands that they own, lease, or occupy. Immediate threat is defined as ''in the act of stalking, attacking, or killing.'' This does not include trapping because traps cannot be placed in a manner such that they trap only wolves in the act of stalking, attacking, or killing. Owners of domestic pets may also kill wolves posing an immediate threat to pets under their supervision on lands that they do not own or lease, although such actions are subject to local ordinances, trespass law, and other applicable restrictions. The MN DNR will investigate any private taking of wolves in Zone A (MN DNR 2001, p. 23).

To protect their domestic animals in Zone B, individuals do not have to wait for an immediate threat or a depredation incident in order to take wolves. At any time in Zone B, persons who own, lease, or manage lands may shoot wolves on those lands to protect livestock, domestic animals, or pets. They may also employ a predator controller to trap a wolf on their land or within 1 mile of their land (with permission of the landowner) to protect their livestock, domestic animals, or pets (MN DNR 2001, p. 23–24).

The Minnesota Plan will also allow persons to harass wolves anywhere in the State within 500 yards of ''people, buildings, dogs, livestock, or other domestic pets or animals.'' Harassment may not include physical injury to a wolf.

Depredation control will be allowed throughout Zone A, which includes an area (Federal Wolf Management Zone 1) where such control has not been permitted under the Act's protection. Depredation in Zone 1, however, has been limited to 2 to 4 reported incidents per year, mostly of wolves killing dogs, although Wildlife Services received one livestock depredation complaint in Zone 1 in 2008 (Hart pers. comm. 2009), and some dog kills in this zone probably go unreported. In 2009, there was one probable and one verified depredation of a dog near Ely, Minnesota, and in 2010 Wildlife Services confirmed three dogs killed by wolves in Zone 1 (USDA–Wildlife Services 2009, p. 3; USDA–Wildlife Services 2010, p. 3). There are few livestock in Zone 1; therefore, the number of verified future depredation incidents in that Zone is expected to be low, resulting in a correspondingly low number of depredating wolves being killed there after delisting.

The final change in Zone A is the ability for owners or lessees to respond to situations of immediate threat by shooting wolves in the act of stalking, attacking, or killing livestock or other domestic animals. We believe this is not likely to result in the killing of many additional wolves, as opportunities to shoot wolves ''in the act'' will likely be few and difficult to successfully accomplish, a belief shared by the most experienced wolf depredation agent in the lower 48 States (Paul in litt. 2006, p. 5). It is also possible that illegal killing of wolves in Minnesota will decrease, because the expanded options for legal control of problem wolves may lead to an increase in public tolerance for wolves (Paul in litt. 2006, p. 5).

Within Zone B, State law and the Minnesota Plan provide broad authority to landowners and land managers to shoot wolves at any time to protect their livestock, pets, or other domestic animals on land owned, leased, or managed by the individual. Such takings can occur in the absence of wolf attacks on the domestic animals. Thus, the estimated 450 wolves in Zone B could be subject to substantial reduction in numbers, and at the extreme, wolves could be eliminated from Zone B. However, there is no way to reasonably evaluate in advance the extent to which residents of Zone B will use this new authority, nor how vulnerable Zone B wolves will be. While wolves were under State management in 2007–08, landowners in Zone B shot six wolves under this authority. One additional wolf was trapped and euthanized in Zone B by a State certified predator controller in 2009 (Stark 2009b, pers. comm.).

The limitation of this broad take authority to Zone B is fully consistent with the Recovery Plan for the Eastern Timber Wolf's advice that wolves should be restored to the rest of Minnesota but not to Zone B (Federal Zone 5) because that area ''is not suitable for wolves'' (USFWS 1992, p. 20). The Recovery Plan for the Eastern Timber Wolf envisioned that the Minnesota numerical planning goal would be achieved solely in Zone A (Federal Zones 1–4) (USFWS 1992, p. 28), and that has occurred. Wolves outside of Zone A are not necessary to the establishment and long-term viability of a self-sustaining wolf population in the State, and, therefore, there is no need to establish or maintain a wolf population in Zone B. Accordingly, there is no need to maintain significant protection for wolves in Zone B in order to maintain a Minnesota wolf population that continues to satisfy the Federal recovery criteria after Federal delisting.

This expansion of depredation control activities will not threaten the continued survival of wolves in the State or the long-term viability of the wolf population in Zone A, the large part of wolf range in Minnesota. Significant changes in wolf depredation control under State management will primarily be restricted to Zone B, which is outside of the area necessary for wolf recovery (USFWS 1992, pp. 20, 28). Furthermore, wolves may still persist in Zone B despite the likely increased take there. The Eastern Timber Wolf Recovery Team concluded that the changes in wolf management in the State's Zone A would be ''minor'' and would not likely result in ''significant change in overall wolf numbers in Zone A.'' They found that, despite an expansion of the individual depredation control areas and an extension of the control period to 60 days, depredation control will remain ''very localized'' in Zone A. The requirement that such depredation control activities be conducted only in response to verified wolf depredation in Zone A played a key role in the team's evaluation (Peterson in litt. 2001). While wolves were under State management in 2007 and 2008, the number of wolves killed for depredation control (133 wolves in 2007 and 143 wolves in 2008) remained consistent with those killed under the special regulation under section 4(d) of the Act while wolves were federally listed (105, in 2004; 134, in 2005; and 122, in 2006).

Minnesota will continue to monitor wolf populations throughout the State and will also monitor all depredation control activities in Zone A (MN DNR 2001, p. 18). These and other activities contained in their plan will be essential in meeting their population goal of a minimum statewide winter population of 1,600 wolves, well above the planning goal of 1,251 to 1,400 wolves that the Revised Recovery Plan identifies as sufficient to ensure the

wolf's continued survival in Minnesota (USFWS 1992, p. 28).

The Wisconsin Wolf Management Plan

Both the Wisconsin and Michigan Wolf Management Plans are designed to manage and ensure the existence of wolf populations in the States as if they are isolated populations and are not dependent upon immigration of wolves from an adjacent State or Canada, while still maintaining connections to those other populations. We support this approach and believe it provides strong assurances that the wolf in both States will remain a viable component of the WGL DPS for the foreseeable future.

The WI Plan allows for differing levels of protection and management within four separate management zones (see figure 3). The Northern Forest Zone (Zone 1) and the Central Forest Zone (Zone 2) now contain most of the State's wolf population, with approximately 6 percent of the Wisconsin wolves in Zones 3 and 4 (Wydeven and Wiedenhoeft 2009, Table 1). Zones 1 and 2 contain all the larger unfragmented areas of suitable habitat (see Wolf Range Ownership and Protection, above), so most of the State's wolf packs will continue to inhabit those parts of Wisconsin for the foreseeable future. At the time the Wisconsin Wolf Management Plan was completed, it recommended immediate reclassification from State-endangered to State-threatened status, because Wisconsin's wolf population had already exceeded its reclassification criterion of 80 wolves for 3 years. That State reclassification occurred in 1999, after the population exceeded that level for 5 years.

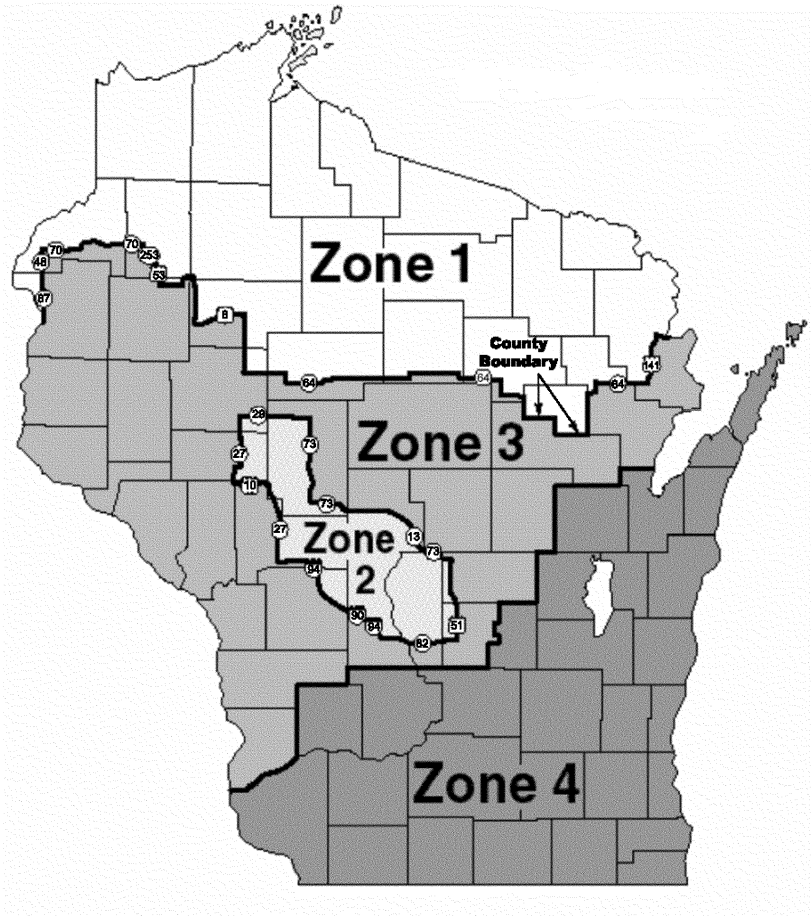
The Wisconsin Plan further recommends that the State manage for a wolf population of 350 wolves outside of Native American reservations, and specifies that the species should be delisted by the State once the population reaches 250 animals outside of reservations. The species was proposed for State delisting in late 2003, and the State delisting process was completed in 2004. Upon State delisting, the species was classified as a ''protected nongame species,'' a designation that continues State prohibitions on sport hunting and trapping of the species (Wydeven and Jurewicz 2005, p. 1; WI DNR 2006b, p. 71). The Wisconsin Plan includes criteria that would trigger State relisting to threatened (a decline to fewer than 250 wolves for 3 years) or endangered status (a decline to fewer than 80 wolves for 1 year). The Wisconsin Plan will be reviewed annually by the Wisconsin Wolf Advisory Committee and will be reviewed by the public every 5 years. Recently the WI DNR began work on updating the State's wolf management plan, which may include increasing the State management goal (Wydeven and Wiedenhoeft 2009, p. 3).

The WI Plan was updated during 2004–06 to reflect current wolf numbers, additional knowledge, and issues that have arisen since its 1999 completion. This update is in the form of text changes, revisions to two appendices, and the addition of a new appendix to the 1999 plan, rather than as a major revision to the plan. Several components of the plan that are key to our delisting evaluation are unchanged. The State wolf management goal of 350 animals and the boundaries of the four wolf management zones remain the same as in the 1999 Plan. The updated 2006 Plan continues access management on public lands and the protection of active den sites. Protection of pack rendezvous sites, however, is no longer considered to be needed in areas where wolves have become well established, due to the transient nature of these sites and the larger wolf population. The updated Plan states that rendezvous sites may need protection in areas where wolf colonization is still underway or where pup survival is extremely poor, such as in northeastern Wisconsin (WI DNR 2006a, p. 17). The guidelines for the wolf depredation control program did not undergo significant alteration during the update process. The only substantive change to depredation control practices is to expand the area of depredation control trapping in Zones 1 and 2 to 1 mi (1.6 km) outward from the depredation site, replacing the previous 0.5 mi (0.8 km) radius trapping zone (WI DNR 2006a, pp. 3–4).

An important component of the WI Plan is the annual monitoring of wolf populations by radio collars and winter track surveys in order to provide comparable annual data to assess population size and growth for at least 5 years after Federal delisting. This monitoring will include health monitoring of captured wolves and necropsies of dead wolves that are found. Wolf scat will be collected and analyzed to monitor for canine viruses and parasites. Health monitoring will be part of the capture protocol for all studies that involve the live capture of Wisconsin wolves (WI DNR 2006a, p. 14).

Cooperative habitat management will be promoted with public and private landowners to maintain existing road densities in Zones 1 and 2, protect wolf dispersal corridors, and manage forests for deer and beaver (WI DNR 1999, pp. 4, 22–23; 2006a, pp. 15–17). Furthermore, in Zone 1, a year-round prohibition on tree harvest within 330 feet (100 m) of den sites, and seasonal restrictions to reduce disturbance within one-half mile of dens, will be WI DNR policy on public lands and will be encouraged on private lands (WI DNR 1999, p. 23; 2006a, p. 17).

**Figure 3. Wisconsin wolf management zones.**




The 1999 WI Plan contains, and the 2006 update retains, other recommendations that will provide protection to assist in maintenance of a viable wolf population in the State: (1) Continue the protection of the species as a ''protected wild animal'' with penalties similar to those for unlawfully killing large game species (fines of $1,000–$2,000, loss of hunting privileges for 3–5 years, and a possible 6-month jail sentence), (2) maintain closure zones where coyotes cannot be shot during deer hunting season in Zone 1, (3) legally protect wolf dens under the Wisconsin Administrative Code, (4) require State permits to possess a wolf or wolf-dog hybrid, and (5) establish a restitution value to be levied in addition to fines and other penalties for wolves that are illegally killed (WI DNR 1999, pp. 21, 27–28, 30–31; 2006a, pp. 3–4).

The 2006 update of the WI Plan continues to emphasize the need for public education efforts that focus on living with a recovered wolf population, ways to manage wolves and wolf-human conflicts, and the ecosystem role of wolves. The Plan continues the State reimbursement for depredation losses (including dogs and missing calves), citizen stakeholder involvement in the wolf management program, and coordination with the Tribes in wolf management and investigation of illegal killings (WI DNR 1999, pp. 24, 28–29; 2006a, pp. 22–23).

Given the decline and ultimate termination in Federal funding for wolf monitoring that would occur upon delisting, Wisconsin and Michigan DNRs are seeking an effective, yet cost-efficient, method for detecting wolf population changes to replace the current labor-intensive and expensive monitoring protocols. Both DNRs have considered implementing a ''Minnesota-type'' wolf survey. Such methodology is less expensive for larger wolf populations than the intensive radio monitoring and track survey methods currently used by the two States, and if the wolf population continues to grow there will be increased need to develop and implement a less expensive method. However, each State conducted independent field testing of the Minnesota method several years ago and found that method to be unsuitable for both States' lower wolf population density and uneven pack distribution. In both States the application of that method resulted in an overestimate of wolf abundance, possibly due to the more patchy distribution of wolves and packs in these States and the difficulty in accurately delineating occupied wolf range in areas where wolf pack density is relatively low in comparison to Minnesota and where agricultural lands are interspersed with forested areas (Wiedenhoeft 2005, pp. 11–12; Beyer in litt. 2006b).

Both States remain interested in developing accurate but less costly alternate survey methods. WI DNR might test other methods following any Federal delisting, but the State will not replace its traditional radio tracking/snow tracking surveys during the 5-year post-delisting monitoring period (Wydeven in litt. 2006b). The 2006 update to the Wisconsin Wolf Management Plan has not changed the

WI DNR's commitment to annual wolf population monitoring in a manner that ensures accurate and comparable data (WI DNR 1999, pp. 19–20), and we are confident that adequate annual monitoring will continue for the foreseeable future.

*Depredation Control in Wisconsin*—The rapidly expanding Wisconsin wolf population has resulted in an increased need for depredation control. From 1979 through 1989, there were only five cases (an average of 0.4 per year) of verified wolf depredations in Wisconsin. Between 1990 and 1997, there were 27 verified depredation incidents in the State (an average of 3.4 per year), and 82 incidents (an average of 16.4 per year) occurred from 1998 to 2002. Depredation incidents increased to 23 cases (including 50 domestic animals killed and 4 injured) in 2003, 35 cases (53 domestic animals killed, 3 injured, and 6 missing) in 2004, and to 45 cases (53 domestic animals killed and 11 injured) in 2005 (Wydeven and Wiedenhoeft 2004a, pp. 2–3, 7–8 Table 3; Wydeven *et al.* 2005b, p. 7; Wydeven *et al.* 2006b, p. 7). From 2005 to 2008, depredation incidents continued to increase, with 52 cases (92 domestic animals killed (includes 50 chickens) and 16 injured) in 2006, 60 cases (51 domestic animals killed, 18 injured, and 14 missing) in 2007, and 57 cases (67 domestic animals killed and 10 injured) in 2008 (Wydeven *et al.* 2007a, p. 7; Wydeven and Wiedenhoeft 2008, pp. 8, 25–32; Wydeven *et al.* 2009a, p. 6). Similar levels of depredations continued to occur in 2009, with 55 cases (65 domestic animals killed and 11 injured), but increased again to 81 cases (99 domestic animals killed and 20 injured) in 2010 (Wydeven *et al.* 2010, pp. 9–10; Wydeven *et al.* 2011, p. 3).

The number of farms experiencing wolf depredations has increased from 5 farms in 2000, to 28–32 farms from 2007 to 2009, and to 47 farms in 2010, a nearly ten-fold increase in the number of farms experiencing depredations during the last decade. The number of counties with wolf depredations on farms also grew during that time period from 5 to 17 counties, indicating that wolf depredation problems on farms are continuing to expand (Wydeven in litt. 2009; Wydeven *et al.* 2009a, p. 23; Wydeven *et al.* 2011, p. 3). Between 1995 and 2002, an average of 7 percent of packs in Wisconsin were involved in livestock depredations (Wydeven *et al.* 2004, p. 36), and between 2002 and 2010, an average of 13 percent (from 7 to 17) of the State's packs were involved in livestock depredation (WI DNR data). More aggressive lethal controls possible in 2007 and 2008 through State management following a temporary period of Federal delisting appear to have started to stabilize levels of livestock depredation in 2007–09, but loss of those control methods allowed major increases in levels of depredation in 2010.

A significant portion of depredation incidents in Wisconsin involve attacks on dogs, primarily those engaged in bear hunting activities or dogs being trained in the field for hunting. In most cases, these have been hunting dogs that were being used for, or being trained for, hunting bears, bobcats, coyotes, and snowshoe hare (Ruid *et al.* 2009, pp. 285–286). It is believed that the dogs entered the territory of a wolf pack and may have been close to a den, rendezvous site, or feeding location, thus triggering an attack by wolves defending their territory or pups. The frequency of attacks on hunting dogs has increased as the State's wolf population has grown. Between 1986 and 2010, wolves in Wisconsin killed 206 dogs and injured 80 (WI DNR data files and summary of wolf survey reports). Generally about 90 percent of dogs killed were hunting hounds, and about 50 percent of dogs injured were pet dogs attacked near homes (Ruid *et al.* 2009).

More than 80 percent of the dog kills occurred since 2001, with an average of 17.2 dogs killed annually (range 6 to 25 dogs killed per year), and 6.8 injured each year (range 1 to 14 dogs) during the period 2001–10 (WI DNR files). Data on recent depredations in 2009 and 2010 show a continued increase in wolf attacks on dogs, with 23 dogs killed and 11 injured by 20 wolf packs (12 percent of Wisconsin packs) in 2009, and 24 dogs killed and 14 injured by 21 wolf packs in 2010 (Wydeven *et al.* 2010, pp. 51–52; Wydeven *et al.* 2011 p. 3). While the WI DNR compensates dog owners for mortalities and injuries to their dogs, the DNR takes no action against the depredating pack unless the attack was on a dog that was leashed, confined, or under the owner's control on the owner's land. Instead, the DNR issues press releases to warn bear hunters and bear dog trainers of the areas where wolf packs have been attacking bear dogs (WI DNR 2008, p. 5) and provides maps and advice to hunters on the WI DNR web site (see *http://www.dnr.state.wi.us/org/land/er/mammals/wolf/dogdepred.htm*). In 2010, 14 wolf attacks on dogs had occurred near homes, which was the highest level seen of this type of depredation (Wydeven *et al.* 2011, p. 3).

*Post-delisting Depredation Control in Wisconsin*—Following Federal delisting, wolf depredation control in Wisconsin will be carried out according to the 2006 Updated Wisconsin Wolf Management Plan (WI DNR 2006a, pp. 19–23), Guidelines for Conducting Depredation Control on Wolves in Wisconsin Following Federal Delisting (WI DNR 2008), and any Tribal wolf management plans or guidelines that may be developed for reservations in occupied wolf range. The 2006 updates have not significantly changed the 1999 State Plan, and the State wolf management goal of 350 wolves outside of Indian reservations (WI DNR 2006a, p. 3) is unchanged. Verification of wolf depredation incidents will continue to be conducted by USDA–APHIS–Wildlife Services, working under a cooperative agreement with WI DNR, or at the request of a Tribe, depending on the location of the suspected depredation incident. If determined to be a confirmed or probable depredation by a wolf or wolves, one or more of several options will be implemented to address the depredation problem. These options include technical assistance, loss compensation to landowners, translocating or euthanizing problem wolves, and private landowner control of problem wolves in some circumstances (WI DNR 2006a, pp. 3–4, 20–22).

Technical assistance, consisting of advice or recommendations to prevent or reduce further wolf conflicts, will be provided. This may also include providing to the landowner various forms of noninjurious behavior modification materials, such as flashing lights, noise makers, temporary fencing, and fladry (a string of flags used to contain or exclude wild animals). Monetary compensation is also provided for all verified and probable losses of domestic animals and for a portion of documented missing calves (WI DNR 2006a, pp. 22–23).

The WI DNR compensates livestock and pet owners for confirmed losses to depredating wolves. The compensation is made at full market value of the animal (up to a limit of $2,500 for dogs) and can include veterinarian fees for the treatment of injured animals (WI DNR 2006c 12.54). Compensation costs have been funded from the endangered resources tax check-off and sales of the endangered resources license plates. Current Wisconsin law requires the continuation of the compensation payment for wolf depredation regardless of Federal listing or delisting of the species (WI DNR 2006c 12.50). In recent years annual depredation compensation payments have ranged from $68,907.88 (2007) to $203,943.51 (2010). From 1985 through December 24, 2010, the WI DNR had spent $1,083,162.62 on

reimbursement for damage caused by wolves in the State, with 82 percent of that total spent since 2000 *(http://dnr.wi.gov/org/land/er/mammals/wolf/pdfs/wolf_damage_payments_2010.pdf).*

For depredation incidents in Wisconsin Zones 1 through 3, where all wolf packs currently reside, wolves may be trapped by Wildlife Services or WI DNR personnel and, if feasible, translocated and released at a point distant from the depredation site. If wolves are captured adjacent to an Indian reservation or a large block of public land, the animals may be translocated locally to that area. As noted above, long-distance translocating of depredating wolves has become increasingly difficult in Wisconsin and is likely to be used infrequently in the future as long as the off-reservation wolf population is above 350 animals. In most wolf depredation cases where technical assistance and nonlethal methods of behavior modification are judged to be ineffective, wolves will be shot or trapped and euthanized by Wildlife Services or DNR personnel. Trapping and euthanizing will be conducted within a 1-mi (1.6-km) radius of the depredation in Zones 1 and 2, and within a 5-mi (8-km) radius in Zone 3. There is no distance limitation for depredation control trapping in Zone 4, and all wolves trapped in Zone 4 will be euthanized, rather than translocated (WI DNR 2006a, pp. 22–23).

Following Federal delisting, Wisconsin landowners who have had a verified wolf depredation will be able to obtain limited-duration permits from WI DNR to kill a limited number of depredating wolves on land they own or lease, based on the size of the pack causing the local depredations (WI DNR 2008, p. 8). Such permits would be issued to: (1) Landowners with verified permits on their property within the last 2 years; (2) landowners within 1 mile of properties with verified wolf depredations during the calendar year; (3) landowners with vulnerable livestock within WI DNR-designated proactive control areas; (4) landowners with human safety concerns on their property, and (5) landowners with verified harassment of livestock on their property (WI DNR 2008, p. 8). Limits on the number of wolves to control will be based on the estimated number of wolves in the pack causing depredation problems. In addition, landowners and lessees of land statewide will be allowed to kill a wolf without obtaining a permit ''in the act of killing, wounding, or biting a domestic animal,'' the incident must be reported to a conservation warden within 24 hours and the landowners are required to turn any dead wolves over to the WI DNR (WI DNR 2006a, pp. 22–23; WI DNR 2008, p. 6). During the 19 months in 2007 and 2008 when wolves were federally delisted, 5 wolves were shot in the act of depredations on domestic animals, and 2 wolves were shot by 1 landowner out of 67 permits issued. One wolf was shot in the act of attack on domestic animals during 2 months when wolves were delisted in 2009.

The updated Wisconsin Plan also envisions the possibility of intensive control management actions in sub-zones of the larger wolf management zones (WI DNR 2006a, pp. 22–23). Triggering actions and type of controls planned for these ''proactive control areas'' are listed in recent versions of the WI DNR depredation control guidelines (WI DNR 2008, pp. 7–9). Controls on these actions would be considered on a case-by-case basis to address specific problems, and would likely be carried out only in areas that lack suitable habitat, have extensive agricultural lands with little forest interspersion, in urban or suburban settings, and only when the State wolf population is well above the management goal of 350 wolves outside Indian reservations in late-winter surveys. The use of intensive population management in small areas will be adapted as experience is gained with implementing and evaluating localized control actions (Wydeven 2006, pers. comm.).

We have evaluated future lethal depredation control based upon verified depredation incidents over the last decade and the impacts of the implementation of similar lethal control of depredating wolves under 50 CFR 17.40(d) for Minnesota, § 17.40(o) for Wisconsin and Michigan, and section 10(a)(1)(A) of the Act for Wisconsin and Michigan. Under those authorities, WI DNR and Wildlife Services trapped and euthanized 17 wolves in 2003; 24 in 2004; 29 in 2005; 18 in 2006; 37 in 2007; 39 in 2008; 9 in 2009; and 16 in 2010 (WI DNR 2006a, p. 32; Wydeven *et al.* 2008, pp. 8–9; Wydeven *et al.* 2009, pp. 6–7; Wydeven *et al.* 2010, p. 15; Wydeven *et al* 2011, p. 3). Although these lethal control authorities applied to Wisconsin and Michigan DNRs for only a portion of 2003 (April through December) and 2005 (all of January for both States; April 1 and April 19, for Wisconsin and Michigan respectively, through September 13), they covered nearly all of the verified wolf depredations during 2003–05, and thus provide a reasonable measure of annual lethal depredation control. Lethal control authority only occurred for about 3.5 months in 2006.

For 2003, 2004, and 2005, this represents 5.1 percent, 6.4 percent, 7.4 percent (including the several possible wolf-dog hybrids), respectively, of the late-winter population of Wisconsin wolves during the previous winter. Note that some of the wolves euthanized after August 1 were young-of-the-year who were not present during the late-winter survey, so the cited percentages are overestimates.

This level of lethal depredation control was followed by a wolf population increase of 11 percent from 2003 to 2004, 17 percent from 2004 to 2005, and 7 percent from 2005 to 2006 (Wydeven and Jurewicz 2005, p. 5; Wydeven *et al* 2006a, p. 10). Limited lethal control authority was granted to WI DNR in 2006 by a section 10 permit resulting in removal of 18 wolves (3.9 percent of winter wolf population), and this permit remained in effect for 3.5 months (Wydeven *et al.* 2007, p. 7). Lethal depredation control was again authorized in the State while wolves were delisted in 2007 (9.5 months) and 2008 (9 months). During those times, 40 and 43 wolves, respectively, were killed for depredation control (by Wildlife Services or by legal landowner action), representing 7 and 8 percent of the late-winter population of Wisconsin wolves during the previous year.

This level of lethal depredation control was followed by a wolf population increase of 0.5 percent from 2007 to 2008, and 12 percent from 2008 to 2009 (Wydeven and Wiedenhoeft 2008, pp. 19–22; Wydeven *et al* 2009a, p. 6). Authority for lethal control on depredating wolves occurred for only 2 months in 2009. During that time, eight wolves were euthanized for depredation control by USDA–WS, and one wolf was shot by a landowner; additionally, later in 2009 after relisting, a wolf was captured and euthanized by USDA–WS for human safety concerns (Wydeven *et al.* 2010, p. 15). Thus in 2009, 10 wolves, or 2 percent of the winter wolf population, was removed in control activities.

The Wisconsin wolf population in winter 2010 grew to 690 wolves, an increase of 8 percent from the wolf population in 2009 (Wydeven *et al.* 2010, pp. 12–13). In 2010, authority for lethal control of wolves depredating livestock was not available in Wisconsin, but 16 wolves or 2 percent of the winter population were removed for human safety concerns (Wydeven *et al.* 2011, p. 3). This provides strong evidence that this form and magnitude of depredation control will not adversely impact the viability of the Wisconsin wolf population. The locations of depredation incidents

provide additional evidence that lethal control will not have an adverse impact on the State's wolf population. Most livestock depredations are caused by packs near the northern forest–farm land interface. Few depredations occur in core wolf range and in large blocks of public land. Thus, lethal depredation control actions will not impact most of the Wisconsin wolf population (WI DNR 2006a, p. 30).

Control actions in Wisconsin also resulted in removal of wolf-dog hybrids from the wild that had begun associating with packs. Wolf-dog hybrid removal in depredation control activity by USDA–WS included 3 in 2005; 1 in 2007; 2 in 2008; and 1 in 2010 (WI DNR files).

One substantive change to lethal control that will result from Federal delisting is the ability of a small number of private landowners, whose farms have a history of recurring wolf depredation, to obtain DNR permits to kill depredating wolves (WI DNR 2006a, p. 23; WI DNR 2008, p. 8). During the time wolves were federally delisted from March 12, 2007, through September 29, 2008, the DNR issued 67 such permits, resulting in 2 wolves being killed. Some landowners received permits more than once, and permits were issued for up to 90 days at a time and restricted to specific calendar years. During that same time period, under Wisconsin depredation management guidelines, landowners were allowed to shoot wolves in the act of attacks on domestic animals on private land without a permit; under that authority, landowners killed a total of five wolves. The death of these seven additional wolves—only one percent of the State's wolves in 2008—did not affect the viability of the population. Another substantive change after delisting may be potential proactive trapping or ''intensive control'' of wolves in limited areas as described above. We are confident that the number of wolves killed by these actions will not impact the long-term viability of the Wisconsin wolf population, because generally less than 15 percent of packs cause depredations that would initiate such controls, and ''proactive'' controls will be carried out only if the State's late-winter wolf population exceeds 350 animals outside Indian reservations.

The State's current guidelines for conducting depredation control actions say that no control trapping will be conducted on wolves that kill ''dogs that are free-roaming, roaming at large, hunting, or training on public lands, and all other lands except land owned or leased by the dog owner'' (WI DNR 2008, p, 5). Controls would be applied on wolves depredating pet dogs attacked near homes and wolves attacking livestock, which in 2010 included 25 packs attacking livestock (23 packs that were also documented in the previous winter surveys), 8 packs attacking dogs at homes, and 5 packs attacking both livestock and dogs. Thus control would have been applied to 31 packs (17 percent of State packs) previously detected and 2 new packs. Because of these State-imposed limitations, we believe that lethal control of wolves depredating on hunting dogs will be rare and, therefore, will not be a significant additional source of mortality in Wisconsin.

Lethal control of wolves that attack captive deer is included in the WI DNR depredation control program, because farm-raised deer are considered to be livestock under Wisconsin law (WI DNR 2008, pp. 5–6; 2006c, 12.52). However, Wisconsin regulations for deer farm fencing have been strengthened, and it is unlikely that more than an occasional wolf will need to be killed to end wolf depredations inside deer farms in the foreseeable future. Claims for wolf depredation compensation are rejected if the claimant is not in compliance with regulations regarding farm-raised deer fencing or livestock carcass disposal (Wisconsin Statutes 90.20 & 90.21, WI DNR 2006c 12.54).

Data from verified wolf depredations in recent years indicate that depredation on livestock is likely to increase as long as the Wisconsin wolf population increases in numbers and range. Wolf packs establishing in more marginal habitat with high acreage of pasture land are more likely to become depredators (Treves *et al.* 2004, pp. 121–122). Most large areas of forest land and public lands are included in Wisconsin Wolf Management Zones 1 and 2, and they have already been colonized by wolves. Therefore, new areas likely to be colonized by wolves in the future will be in Zones 3 and 4, where they will be exposed to much higher densities of farms, livestock, and residences. During 2008, of farms experiencing wolf depredation, 25 percent (8 of 32) were in Zone 3, yet only 4 percent of the State wolf population occurs in this zone (Wydeven *et al.* 2009a, p. 23). Further expansion of wolves into Zone 3 would likely lead to an increase in depredation incidents and an increase in lethal control actions against Zone 3 wolves. However, these Zone 3 mortalities will have no impact on wolf population viability in Wisconsin because of the much larger wolf populations in Zones 1 and 2.

For the foreseeable future, the wolf population in Zones 1 and 2 will continue to greatly exceed the recovery goal in the Recovery Plan for the Eastern Timber Wolf of 200 late-winter wolves for an isolated population and 100 wolves for a subpopulation connected to the larger Minnesota population, regardless of the extent of wolf mortality from all causes in Zones 3 and 4. Ongoing annual wolf population monitoring by WI DNR will provide timely and accurate data to evaluate the effects of wolf management under the Wisconsin Plan.

The possibility of a public harvest of wolves is acknowledged in the Wisconsin Wolf Management Plan and in plan updates (WI DNR 1999, Appendix D; 2006c, p. 23). However, the question of whether a public harvest will be initiated and the details of such a harvest are far from resolved. Public attitudes toward a wolf population in excess of 350 would have to be fully evaluated, as would the impacts from other mortalities, before a public harvest could be initiated.

The Wisconsin Conservation Congress, a group that advises the WI DNR on issues of fishing and hunting regulations, held hearings in 2008 (while wolves were federally delisted in the WGL) to gather information on the public's attitudes toward a public harvest of wolves in the State. Of the people attending those meetings, 86 percent recommended that efforts begin to develop public harvest regulations for wolves in the State, indicating a strong interest among hunters and anglers to begin such development. Establishing a public harvest, however, would be preceded by extensive public input, including public hearings, and would require legislative authorization and approval by the Wisconsin Natural Resources Board. Because of the steps that must precede a public harvest of wolves and the uncertainty regarding the possibility of, and the details of, any such program, we consider public harvest of Wisconsin wolves to be highly speculative at this time. The Service will closely monitor any steps taken by States and Tribes within the WGL DPS to establish any public harvest of wolves during our post-delisting monitoring program.

Future updates for the Wisconsin wolf management and conservation plan will likely contain more specific language on any potential public harvest for the State. The WI DNR is committed to maintaining a wolf population at 350 wolves outside of Indian reservations, which translates to a statewide population of 361 to 385 wolves in late winter. No harvest would be considered

if the wolf population fell below this goal (WI DNR 1999, pp. 15, 16). Any harvest would consist of limited permits on limited portions of the wolf range to reduce wolf-human conflict, and extensive areas in wolf range would be closed to harvest of wolves (WI DNR 1999, p. 21). Also, the fact that the Wisconsin Plan calls for State relisting of the wolf as a threatened species if the population falls to fewer than 250 for 3 years provides a strong assurance that any future public harvest is not likely to threaten the persistence of the population (WI DNR 1999, pp. 15–17). Based on wolf population data, the current Wisconsin Plan and the 2006 updates, we believe that any public harvest plan would continue to maintain the State wolf population well above the recovery goal of 200 wolves in late winter.

The Michigan Wolf Management Plan

In 1997, the Michigan DNR finalized the Michigan Gray Wolf Recovery and Management Plan (MI DNR 1997). That plan was developed when the number of wolves in the State was relatively small, and focused on recovery. In 2001, the MI DNR began reevaluating the 1997 Plan and appointed a committee to evaluate wolf recovery and management in the State. As a result of that evaluation, MI DNR concluded that the 1997 Plan needed revising, which prompted a more formal review, including extensive stakeholder input. Recognizing that wolf recovery had been achieved in Michigan, additional scientific knowledge had been gained, and new social issues had arisen since the 1997 Plan was drafted, the focus of the revised plan shifted from a recovery plan to a wolf management plan. To assist in this endeavor, the DNR convened a Michigan Wolf Management Roundtable, composed of a diverse group of citizens spanning the spectrum of those interested in, and impacted by, wolf recovery and management in Michigan, including Tribal entities and organizations focused on agriculture, hunting and trapping, the environment, animal protection, law enforcement and public safety, and tourism.

The Roundtable was asked to review the 1997 wolf management goal, to set priorities for management issues, and to recommend strategic goals or policies the DNR should use in addressing the management issues. The Roundtable provided ''guiding principles'' for managing wolves and wolf-related issues following Federal delisting (Michigan Wolf Management Roundtable 2006, pp. 6–7). Those guiding principles strongly influenced the 2008 Michigan Wolf Management Plan (MI Plan) (MI DNR 2008a).

The 2008 MI Plan describes the wolf recovery goals and management actions needed to maintain a viable wolf population in the UP of Michigan, while facilitating wolf-related benefits and minimizing conflicts. The four principal goals are to ''1) maintain a viable Michigan wolf population above a level that would warrant its classification as threatened or endangered; 2) facilitate wolf-related benefits; 3) minimize wolf-related conflicts; and 4) conduct science-based wolf management with socially acceptable methods'' (MI DNR 2008a, p. 22). The Michigan Plan details wolf management actions, including public education and outreach activities, annual wolf population and health monitoring, research, depredation control, ensuring adequate legal protection for wolves, and prey and habitat management. It does not address the potential need for wolf recovery or management in the Lower Peninsula, nor wolf management within Isle Royale National Park (where the wolf population is fully protected by the National Park Service).

As with the WI Plan, the MI DNR has chosen to manage the State's wolves as though they are an isolated population that receives no genetic or demographic benefits from immigrating wolves, even though their population will continue to be connected with populations in Minnesota, Wisconsin, and Canada. The Michigan wolf population must exceed 200 wolves in order to achieve the Plan's first goal of maintaining a viable wolf population in the UP. This number is consistent with the Federal Recovery Plan for the Eastern Timber Wolf's definition of a viable, isolated wolf population (USFWS 1992, p. 25). The MI Plan, however, clearly states that 200 wolves is not the target population size, and that a larger population may be necessary to meet the other goals of the Plan. Therefore, the State will maintain a wolf population that will ''provide all of the ecological and social benefits valued by the public'' while ''minimizing and resolving conflicts where they occur'' (MI DNR 2008a, pp. 22–23). We strongly support this approach, as it provides assurance that a viable wolf population will remain in the UP regardless of the future fate of wolves in Wisconsin or Ontario.

The 2008 Michigan Plan identifies wolf population monitoring as a priority activity, and specifically states that the MI DNR will monitor wolf abundance annually for at least 5 years post-delisting (MI DNR 2008a, pp. 31–32). This includes monitoring to assess wolf presence in the northern Lower Peninsula. As discussed previously, the size of the wolf population in Michigan is determined by extensive radio and snow tracking surveys. Recently the MI DNR also conducted a field evaluation of a less expensive ''Minnesota-type'' wolf survey. However, similar to WI DNR's experience, the evaluation concluded that the method overestimated wolf numbers, and is not suitable for use on the State's wolf population as it currently is distributed (Beyer in litt. 2006b).

From 1989 through 2006, the MI DNR attempted to count wolves throughout the entire UP. As the wolf population increased, this method became more difficult. In the winter of 2006–07, the MI DNR implemented a new sampling approach based on an analysis by Potvin *et al.* (2005, p. 1668) to increase the efficiency of the State survey. The new approach is based on a geographically based stratified random sample and produces an unbiased, regional estimate of wolf abundance. The UP was stratified into three sampling areas, and within each stratum the DNR intensively surveys roughly 40 to 50 percent of the wolf habitat area annually. Computer simulations have shown that such a geographically stratified monitoring program will produce unbiased and precise estimates of the total wolf population, which can be statistically compared to estimates derived from the previous method to detect significant changes in the UP wolf population (Beyer in litt 2006b, see attachment by Drummer; Lederle in litt. 2006; Roell *et al.* 2009, p. 3).

Another component of wolf population monitoring is monitoring wolf health. The MI DNR will continue to monitor the impact of parasites and disease on the viability of wolf populations in the State through necropsies of dead wolves and analyzing biological samples from captured live wolves. Prior to 2004, MI DNR vaccinated all captured wolves for canine distemper and parvovirus and treated them for mange. These inoculations were discontinued to provide more natural biotic conditions and to provide biologists with an unbiased estimate of disease-caused mortality rates in the population (Roell in litt. 2005b). Since diseases and parasites are not currently a significant threat to the Michigan wolf population, the MI DNR is continuing the practice of not actively managing disease. If monitoring indicates that diseases or parasites may pose a threat to the wolf population, the MI DNR will again consider more active management similar to that conducted prior to 2004.

The 2008 Plan includes maintaining habitat and prey necessary to sustain a viable wolf population in the State as a management component. This includes maintaining prey populations required for a viable wolf population while providing for sustainable human uses, maintaining habitat linkages to allow for wolf dispersal, and minimizing disturbance at known, active wolf dens (MI DNR 2008a, pp. 36–41).

The Plan does not determine whether a public harvest will be used as a management strategy in Michigan, but it discusses developing a ''socially and biologically responsible policy regarding public harvest'' (MI DNR 2008a, p. 65). Instituting public harvest during a regulated season would first require that the wolf be classified as a ''game animal'' in the State. Game-animal status in Michigan may be designated only by the State Legislature and, additionally, only the State Legislature could authorize the first harvest season. If such designation and authorization were conferred, the Michigan Natural Resources Commission would then need to enact regulations pertaining to the methods of a public harvest.

To minimize illegal take, the 2008 Plan calls for enacting and enforcing regulations to ensure adequate legal protection for wolves in the State. Under State regulations, wolves could be classified as a threatened, endangered, game, or protected animal, all of which prohibit killing (or harming) the species except under a permit, license, or specific conditions. As discussed above, designating a species as a ''game animal'' would require action by the State Legislature. Michigan reclassified wolves from endangered to threatened in June 2002, and in April 2009, removed gray wolves from the State's threatened and endangered species list and amended the Wildlife Conservation Order to grant ''protected animal'' status to the gray wolf in the State (Roell 2009, pers. comm.). A person who commits a violation regarding the possession or taking of most wildlife species with the four legal designations (threatened, endangered, game, or protected animal) in Michigan is guilty of a misdemeanor punishable by imprisonment for not more than 90 days, or a fine of not less than $100 or more than $1,000, or both. Penalties may also include costs of prosecution, loss of hunting privileges, and reimbursing the value of the animal ($1,500 for a threatened or endangered species, $100 to $500 for most game species, and $100 for protected animals) (MI DNR 2008a, p. 35).

The 2008 Plan emphasizes the need for public education efforts that focus on living with a recovered wolf population and ways to manage wolves and wolf-human interaction (both positive and negative). The Plan recommends continuing reimbursement for depredation losses, citizen stakeholder involvement in the wolf management program, continuing important research efforts, and minimizing the impacts of captive wolves and wolf-dog hybrids on the wild wolf population (MI DNR 2008a, pp. 31, 59, 61, and 66).

The 2008 Michigan Plan calls for establishing a wolf management advisory group that would meet annually to monitor the progress made toward implementing the Plan. Furthermore, the Plan will be reviewed and updated at 5-year intervals, to address ''ecological, social, and regulatory'' changes (MI DNR 2008a, p. 66). The plan also addresses currently available and potential new sources of funding to offset costs associated with wolf management. The MI DNR has long been an innovative leader in wolf recovery efforts, exemplified by its initiation of the nation's first attempt to reintroduce wild wolves to vacant historical wolf habitat in 1974 (Weise *et al.* 1975). The MI DNR's history of leadership in wolf recovery and its repeated written commitments to ensure the continued viability of a Michigan wolf population above a level that would trigger State or Federal listing as threatened or endangered further reinforces that the revised 2008 Michigan Wolf Management Plan will provide adequate regulatory mechanisms for Michigan wolves. The DNR's primary goal remains to conduct management to maintain the wolf population in Michigan above the minimum size that is biologically required for a viable, isolated population and to provide for ecological and social benefits valued by the public while resolving conflicts where they occur (MI DNR 2008a, p. 22).

Depredation Control in Michigan—Data from Michigan show a general increase in confirmed events of wolf depredations on livestock (Table 2). These livestock depredations occurred at 59 different UP farms (approximately 7 percent of the existing farms); 16 (27 percent) of those 59 farms have experienced more than one depredation event. Over 80 percent of the depredation events were on cattle, with the rest on sheep, poultry, rabbits, and captive cervids (Roell *et al.* 2009, pp. 9, 11). In 2010, 26 (57 percent) of the depredation events occurred on a single farm. The relationship between the number of wolves and the number of depredation events suggests that for every 100 additional wolves in the population there will be about 3 additional livestock depredation events per year (Roell *et al.* 2010, p. 6).

TABLE 2—NUMBER OF VERIFIED LIVESTOCK DEPREDATION EVENTS BY WOLVES IN MICHIGAN BY YEAR.

| Year | Number of animals killed |
|---|---|
| 1998 | 3 |
| 1999 | 1 |
| 2000 | 5 |
| 2001 | 3 |
| 2002 | 5 |
| 2003 | 13 |
| 2004 | 11 |
| 2005 | 5 |
| 2006 | 10 |
| 2007 | 14 |
| 2008 | 14 |
| 2009 | 12 |
| 2010 | 46 |

Michigan has not experienced as high a level of attacks on dogs by wolves as Wisconsin, although a slight increase in such attacks has occurred over the last decade. Yearly losses vary, and actions of a single pack of wolves can be an important influence. In Michigan, there is not a strong relationship between wolf depredation on dogs and wolf abundance (Roell *et al.* 2010, p. 7). The number of dogs killed in the State between 1996 and 2010 was 34; 12 additional dogs were injured in wolf attacks during that same period. Of the 34 wolf-related dog deaths during that time, 50 percent involved hounds used to hunt bears (Roell 2010, pers. comm.). Similar to Wisconsin, MI DNR has guidelines for its depredation control program, stating that lethal control will not be used when wolves kill dogs that are free-roaming, hunting, or training on public lands. Lethal control of wolves, however, would be considered if wolves have killed confined pets and remain in the area where more pets are being held (MI DNR 2005a, p. 6). However, in 2008, the Michigan Legislature passed a law that would allow dog owners or their designated agents to remove, capture, or, if deemed necessary, use lethal means to destroy a gray wolf that is in the act of preying upon the owner's dog, which includes dogs free-roaming or hunting on public lands.

During the several years that lethal control of depredating wolves had been conducted in Michigan, there was no evidence of resulting adverse impacts to the maintenance of a viable wolf population in the UP. A total of 41 wolves were killed by the MI DNR and

USDA–Wildlife Services in response to depredation events during the time period when permits or special rules were in effect or while wolves were not on the Federal list of threatened and endangered species (Roell *et al.* 2010, p. 8). Wolves were euthanized as follows: 4 (2003), 5 (2004), 2 (2005), 7 (2006), 14 (2007), 8 (2008), and 1 (during 2 months in 2009) (Beyer *et al.* 2006, p. 88; Roell in litt. 2006, p. 1; Roell *et al.* 2010, p. 19; Roell 2010, pers. comm.). This represents 1.2 percent, 1.7 percent, 0.5 percent, 1.6 percent, 2.7 percent, 2.5 percent, and 0.2 percent, respectively, of the UP's late-winter population of wolves during the previous winter. Following this level of lethal depredation control, the UP wolf population increased 12 percent from 2003 to 2004, 13 percent from 2004 to 2005, 7 percent from 2005 to 2006, 17 percent from 2006 to 2007, 2 percent from 2007 to 2008, and 11 percent from 2008 to 2009, demonstrating that the wolf population continues to increase at a healthy rate (Huntzinger *et al.* 2005, p. 6; MI DNR 2006a, Roell *et al.* 2009, p. 4). Lethal control of wolves during livestock depredation was not available in 2010 or 2011.

*Post-delisting Depredation Control in Michigan*—Following Federal delisting, wolf depredation control in Michigan would be carried out according to the 2008 Michigan Wolf Recovery and Management Plan (MI DNR 2008) and any Tribal wolf management plans that may be developed in the future for reservations in occupied wolf range.

To provide depredation control guidance when lethal control is an option, MI DNR has developed detailed instructions for incident investigation and response (MI DNR 2005a). Verification of wolf depredation incidents will be conducted by MI DNR or USDA–APHIS–Wildlife Services personnel (working under a cooperative agreement with MI DNR or at the request of a Tribe, depending on the location) who have been trained in depredation investigation techniques. The MI DNR specifies that the verification process will use the investigative techniques that have been developed and successfully used in Minnesota by Wildlife Services (MI DNR 2005a, Append. B, pp. 9–10). Following verification, one or more of several options will be implemented to address the depredation problem. Technical assistance, consisting of advice or recommendations to reduce wolf conflicts, will be provided. Technical assistance may also include providing to the landowner various forms of noninjurious behavior modification materials, such as flashing lights, noise makers, temporary fencing, and fladry.

Trapping and translocating depredating wolves has been used in the past, resulting in the translocation of 23 UP wolves during 1998–2003 (Beyer *et al.* 2006, p. 88), but as with Wisconsin, suitable relocation sites are becoming rarer, and there is local opposition to the release of translocated depredators. Furthermore, none of the past translocated depredators have remained near their release sites, making this a questionable method to end the depredation behaviors of these wolves (MI DNR 2005a, pp. 3–4). Therefore, reducing depredation problems by relocation is no longer recommended as a management tool in Michigan (MI DNR 2008a, p. 57).

Lethal control of depredating wolves is likely to be the most common future response in situations when improved livestock husbandry and wolf behavior modification techniques (for example, flashing lights, noise-making devices) are judged to be inadequate. As wolf numbers continue to increase on the UP, the number of verified depredations will also increase, and will probably do so at a rate that exceeds the rate of wolf population increase. This will occur as wolves increasingly disperse into and occupy areas of the UP with more livestock and more human residences, leading to additional exposure to domestic animals. In a previous application for a lethal take permit under section 10(a)(1)(A) of the Act, MI DNR requested authority to euthanize up to 10 percent of the late-winter wolf population annually (MI DNR 2005b, p. 1). However, based on 2003–05 and 2007–09 depredation data, it is likely that significantly less than 10 percent lethal control will be needed over the next several years.

The MI Plan provides recommendations to guide management of various conflicts caused by wolf recovery, including depredation on livestock and pets, human safety, and public concerns regarding wolf impacts on other wildlife. We view the MI Plan's depredation and conflict control strategies to be conservative, in that they commit to nonlethal depredation management whenever possible, oppose preventative wolf removal where problems have not yet occurred, encourage incentives for best management practices that decrease wolf-livestock conflicts without impacting wolves, and support closely monitored and enforced take by landowners of wolves ''in the act of livestock depredation'' or under limited permits if depredation is confirmed and nonlethal methods are determined to be ineffective. Based on these components of the revised MI Plan and the stated goal for maintaining wolf populations at or above recovery goals, the Service believes any wolf management changes implemented following delisting would not be implemented in a manner that results in significant reductions in Michigan wolf populations. The MI DNR remains committed to ensuring a viable wolf population above a level that would trigger relisting as either threatened or endangered in the future (MI DNR 2008a, p. 9).

Similar to Wisconsin, Michigan livestock owners are compensated when they lose livestock as a result of a confirmed wolf depredation. Currently there are two complementary compensation programs in Michigan, one funded by the MI DNR and implemented by Michigan Department of Agriculture (MI DA) and another set up through donations (from Defenders of Wildlife and private citizens) and administered by the International Wolf Center (IWC), a nonprofit organization. From the inception of the program to 2000, MI DA has paid 90 percent of full market value of depredated livestock at the time of loss. The IWC account was used to pay the remaining 10 percent from 2000 to 2002 when MI DA began paying 100 percent of the full market value of depredated livestock. The IWC account continues to be used to pay the difference between value at time of loss and the full fall market value for depredated young-of-the-year livestock, and together the two funds have provided nearly $38,000 in livestock loss compensation through 2008 (Roell *et al.,* p. 15). Neither of these programs provides compensation for pets or for veterinary costs to treat wolf-inflicted livestock injuries. The MI DNR plans to continue cooperating with MI DA and other organizations to maintain the wolf depredation compensation program (MI DNR 2008a, pp. 59–60).

In 2008, Michigan passed two House Bills that would become effective after Federal delisting. Those bills authorized a livestock or dog owner (or a designated agent) to ''remove, capture, or use lethal means to destroy a wolf that is in the act of preying upon'' the owner's livestock or dog. During the 2 months that wolves were federally and State delisted in 2009, no wolves were killed under these authorizations. We are confident that the limited number of wolves expected to be taken under these bills would not affect the viability of the Michigan wolf population.

*Regulatory Mechanisms in Other States and Tribal Areas Within the WGL DPS*

North Dakota and South Dakota

North Dakota lacks a State endangered species law or regulation. Any wolves in the State currently are classified as furbearers, with a closed season. North Dakota Game and Fish Department is unlikely to change the species' State classification immediately following Federal delisting. Wolves are included in the State's Wildlife Action Plan as a ''Level 3'' Species of Conservation Priority. Level 3 species are those ''having a moderate level of conservation priority, but are believed to be peripheral or do not breed in North Dakota.'' Placement on this list gives species greater access to conservation funding, but does not afford any additional regulatory or legislative protection (Bicknell in litt. 2009).

Currently any wolves that may be in South Dakota are not State listed as threatened or endangered, nor is there a hunting or trapping season for them. Upon the effective date of any Federal delisting, gray wolves in eastern South Dakota will fall under general protections afforded all State wildlife. These protections require that specific provisions—seasons and regulations—be established prior to initiating any form of legal take. Thus, the State could choose to implement a hunting or trapping season for wolves east of the Missouri River; however, absent some definitive action to establish a season, wolves would remain protected. Following Federal delisting, any verified depredating wolves east of the Missouri will likely be trapped and killed by the USDA-APHIS-Wildlife Services program (Larson in litt. 2005). Non-depredating wolves in North and South Dakota not on the Federal list will continue to receive protection by the States' wildlife protection statutes unless specific action is taken to open a hunting or trapping season or otherwise remove existing protections.

*Post-delisting Depredation Control in North and South Dakota*—Since 1993, five incidents of verified wolf depredation have occurred in North Dakota, with one in September 2003 and two more in December 2005. There have been no verified wolf depredations in South Dakota in recent decades. Following Federal delisting we assume that lethal control of a small number of depredating wolves will occur in one or both of these States. Lethal control of depredating wolves may have adverse impacts on the ability of wolves to occupy any small areas of suitable or marginally suitable habitat that may exist in the States. However, lethal control of depredating wolves in these two States will have no adverse effects on the long-term viability of wolf populations in the WGL DPS as a whole, because the existence of a wolf or a wolf population in the Dakotas will not make a meaningful contribution to the maintenance of the current viable, self-sustaining, and representative metapopulation of wolves in the WGL DPS.

Other States in the Western Great Lakes DPS

The DPS includes the portion of Iowa that is north of Interstate Highway 80, which is approximately 60 percent of the State. The Iowa Natural Resource Commission currently lists wolves as furbearers, with a closed season (Howell in litt. 2005). Following Federal delisting of the DPS, wolves dispersing into northern Iowa will be protected by State law.

The portion of Illinois that is north of Interstate Highway 80, less than one-fifth of the State, is included in the DPS and is part of the geographic area where wolves are removed from Federal protection. Gray wolves are currently protected in Illinois as a threatened species under the Illinois Endangered Species Protection Act (520 ILCS 10). Thus, following Federal delisting, wolves dispersing into northern Illinois would continue to be protected from human take by State law.

The extreme northern portions of Indiana and northwestern Ohio are included within the DPS. Any wolves that are found in this area are no longer federally protected under the Act. The State of Ohio classifies the gray wolf as ''extirpated,'' and there are no plans to reintroduce or recover the species in the State. The species lacks State protection, but State action is likely to apply some form of protection if wolves begin to disperse into the State (Caldwell in litt. 2005). Indiana DNR lists the gray wolf as extirpated in the State, and the species would receive no State protection under this classification following any Federal delisting. The only means to provide State protection would be to list them as State-endangered, but that is not likely to occur unless wolves become resident in Indiana (Johnson in litt. 2005, in litt. 2006). Thus, federally delisted wolves that might disperse into Indiana and Ohio would lack State protection there, unless these two States take specific action to provide new protections.

Because the portions of Iowa, Illinois, Indiana, and Ohio within the WGL DPS do not contain suitable habitat or currently established packs, depredation control in these States would not have any significant impact on the continued viability of wolf populations in the WGL DPS.

Tribal Management and Protection of Wolves

Native American tribes and inter-tribal resource management organizations have indicated to the Service that they will continue to conserve wolves on most, and probably all, Native American reservations in the core recovery areas of the WGL DPS. The wolf retains great cultural significance and traditional value to many Tribes and their members (additional discussion is found in Factor E), and to retain and strengthen cultural connections, many tribes oppose unnecessary killing of wolves on reservations and on ceded lands, even following any Federal delisting (Hunt in litt. 1998; Schrage in litt. 1998a; Schlender in litt. 1998). Some Native Americans view wolves as competitors for deer and moose, whereas others are interested in harvesting wolves as furbearers (Schrage in litt. 1998a). Many tribes intend to sustainably manage their natural resources, wolves among them, to ensure that they are available to their descendants. Traditional natural resource harvest practices, however, often include only a minimum amount of regulation by the Tribal governments (Hunt in litt. 1998).

Although not all Tribes with wolves that visit or reside on their reservations have completed management plans specific to the wolf, several Tribes have informed us that they have no plans or intentions to allow commercial or recreational hunting or trapping of the species on their lands after Federal delisting. The Red Lake Band of Chippewa Indians (Minnesota) and the Little Traverse Bay Band of Odawa Indians (Michigan) have developed wolf monitoring and/or management plans. The Service has also awarded a grant to the Ho-Chunk Nation to identify wolf habitat on reservation lands.

As a result of many past contacts with, and previous written comments from, the Midwestern Tribes and their inter-tribal natural resource management agencies—the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), the 1854 Authority, and the Chippewa Ottawa Treaty Authority—it is clear that their predominant sentiment is strong support for the continued protection of wolves at a level that ensures that viable wolf populations remain on reservations and throughout the treaty-ceded lands surrounding the reservations. While several Tribes stated that their members

may be interested in killing small numbers of wolves for spiritual or other purposes, this would be carried out in a manner that would not impact reservation or ceded territory wolf populations.

The Red Lake Band of Chippewa Indians (Minnesota) completed a wolf management plan in 2010 (Red Lake Band of Chippewa Indians 2010). A primary goal of the management plan is to maintain wolf numbers at a level that will ensure the long-term survival of wolves on Red Lake lands. Key components of the plan are habitat management, public education, and law enforcement. To address human-wolf interactions, the plan outlines how wolves may be taken on Red Lake lands. Wolves thought to be a threat to public safety may be harassed at any time, and if they must be killed, the incident must be reported to tribal law enforcement. Agricultural livestock are not common on Red Lake lands, and wolf-related depredation on livestock or pets is unlikely to be a significant management issue. If such events do occur, tribal members may protect their livestock or pets by lethal means, but ''* * * all reasonable efforts should be made to deter wolves using non-lethal means'' (Red Lake Band of Chippewa Indians 2010, p. 15). Hunting or trapping of wolves on tribal lands will be prohibited. The Reservation currently has 7 or 8 packs with an estimated 40–48 wolves within its boundaries (Red Lake Band of Chippewa Indians 2010, p. 12).

In 2009, the Little Traverse Bay Bands of Odawa Indians (LTBB) finalized a management plan for the 1855 Reservation and portions of the 1836 ceded territory in the northern LP of Michigan (Little Traverse Bay Bands of Odawa Indians Natural Resource Department 2009). The plan provides the framework for managing wolves on the LTBB Reservation with the goal of maintaining a viable wolf presence on the LTBB Reservation or within the northern LP should a population become established by (1) prescribing scientifically sound biological wolf management, research, and monitoring strategies; (2) addressing wolf-related conflicts; (3) facilitating wolf-related benefits; and (4) developing and implementing wolf-related education and public information.

The Tribal Council of the Leech Lake Band of Minnesota Ojibwe (Council) approved a resolution that describes the sport and recreational harvest of wolves as an inappropriate use of the animal. That resolution supports limited harvest of wolves to be used for traditional or spiritual uses by enrolled Tribal members if the harvest is done in a respectful manner and would not negatively affect the wolf population. Over the last several years, the Council has been working to revise the Reservation Conservation Code to allow Tribal members to harvest some wolves after Federal delisting (Googgleye, Jr. in litt. 2004; Johnson 2011, pers. comm.). Until this revision occurs, it is unknown whether harvest will be allowed and how a harvest might be implemented. The Tribe is currently developing a wolf management plan (Mortensen 2011, pers. comm.) In 2005, the Leech Lake Reservation was home to an estimated 75 wolves, the largest population of wolves on a Native American reservation in the 48 conterminous States (Mortensen 2006, pers. comm.; White in litt. 2003). Although no recent surveys have been conducted, the number of wolves on the reservation likely remains about the same (Mortensen 2009, pers. comm.; Johnson 2011, pers. comm.).

The Fond du Lac Band (Minnesota) believes that the ''well being of the wolf is intimately connected to the well being of the Chippewa People'' (Schrage in litt. 2003). In 1998, the Band passed a resolution opposing Federal delisting and any other measure that would permit trapping, hunting, or poisoning of the wolf (Schrage in litt. 1998b; in litt. 2003; 2009, pers. comm.). If this prohibition is rescinded, the Band's Resource Management Division will coordinate with State and Federal agencies to ensure that any wolf hunting or trapping would be ''conducted in a biologically sustainable manner'' (Schrage in litt. 2003).

The Red Cliff Band (Wisconsin) has strongly opposed State and Federal delisting of the gray wolf. Current Tribal law protects wolves from harvest, although harvest for ceremonial purposes would likely be permitted after Federal delisting (Symbal in litt. 2003).

The Menominee Indian Tribe of Wisconsin is committed to establishing a self-sustaining wolf population, continuing restoration efforts, ensuring the long-term survival of the wolf in Menominee, placing emphasis on the cultural significance of the wolf as a clan member, and resolving conflicts between wolves and humans. They are currently working on developing a Menominee Wolf Management Plan (Cox 2011, pers. comm.).

The Tribe has shown a great deal of interest in wolf recovery and protection. In 2002, the Tribe offered their Reservation lands as a site for translocating seven depredating wolves that had been trapped by WI DNR and Wildlife Services. Tribal natural resources staff participated in the soft release of the wolves on the Reservation and helped with the subsequent radio-tracking of the wolves. Although by early 2005 the last of these wolves died on the reservation, the tribal conservation department continued to monitor another pair that had moved onto the Reservation, as well as other wolves near the reservation (Wydeven in litt. 2006a). When that pair produced pups in 2006, but the adult female was killed, Reservation biologists and staff worked diligently with the WI DNR and the Wildlife Science Center (Forest Lake, Minnesota) to raise the pups in captivity in the hope that they could later be released to the care of the adult male. However, the adult male died prior to pup release, and they were moved back to the Wildlife Science Center (Pioneer Press 2006).

The Menominee Tribe continues to support wolf conservation and monitoring activity in Wisconsin. In recent years the Menominee Tribe has assisted the WI DNR in radio-telemetry wolf flights, allowing more regular flights to occur across all of northern Wisconsin.

The Keweenaw Bay Indian Community (Michigan) will continue to list the wolf as a protected animal under the Tribal Code following any Federal delisting, with hunting and trapping prohibited (Mike Donofrio 1998, pers. comm.). Furthermore, the Keweenaw Bay Community plans to develop a management plan that will address wolves (Donofrio in litt. 2003; Warner 20010, pers. comm.). At least four other Tribes (Stock-bridge Munsee Community, Lac Courte Oreilles Band of Ojibwe, the Mille Lacs Band of Ojibwe, and Grand Portage Band of Lake Superior Chippewa) have indicated that they are currently developing Tribal wolf management plans.

Several Midwestern Tribes (for example, the Bad River Band of Lake Superior Chippewa Indians and the LTBB) have expressed concern that Federal delisting will result in increased mortality of wolves on reservation lands, in the areas immediately surrounding the reservations, and in lands ceded by treaty to the Federal Government by the Tribes (Kiogama and Chingwa in litt. 2000). In 2006, a cooperative effort among tribal natural resource departments of several tribes in Wisconsin, WI DNR, the Service, and USDA Wildlife Services led to a wolf management agreement for lands adjacent to several reservations in Wisconsin. The goal is to reduce the threats to reservation wolf packs when they are temporarily off the reservation.

Other Tribes have expressed interest in such an agreement. This agreement, and additional agreements if they are implemented, provides supplementary protection to certain wolf packs in the western Great Lakes area.

The GLIFWC has stated its intent to work closely with the States to cooperatively manage wolves in the ceded territories in the core areas, and will not develop a separate wolf management plan (Schlender in litt. 1998). Furthermore, the Voigt Intertribal Task Force of GLIFWC has expressed its support for strong protections for the wolf, stating ''[delisting] hinges on whether wolves are sufficiently restored and will be sufficiently protected to ensure a healthy and abundant future for our brother and ourselves'' (Schlender in litt. 2004).

According to the 1854 Authority, ''attitudes toward wolf management in the 1854 Ceded Territory run the gamut from a desire to see total protection to unlimited harvest opportunity.'' However, the 1854 Authority would not ''implement a harvest system that would have any long-term negative impacts to wolf populations'' (Edwards in litt. 2003). In comments submitted for our 2004 delisting proposal for a larger Eastern DPS of the gray wolf, the 1854 Authority stated that the Authority is ''confident that under the control of State and tribal management, wolves will continue to exist at a self-sustaining level in the 1854 Ceded Territory. Sustainable populations of wolves, their prey and other resources within the 1854 Ceded Territory are goals to which the 1854 Authority remains committed. As such, we intend to work with the State of Minnesota and other tribes to ensure successful state and tribal management of healthy wolf populations in the 1854 Ceded Territory'' (Myers in litt. 2004). The 1854 Authority is currently developing a wolf management plan for the 1854 Ceded Territory, based on the above principles (Edwards 2011, pers. comm.).

While there are few written Tribal protections currently in place for wolves, the highly protective and reverential attitudes that have been expressed by Tribal authorities and members have assured us that any post-delisting harvest of reservation wolves would be very limited and would not adversely impact the delisted wolf populations. Furthermore, any off-reservation harvest of wolves by tribal members in the ceded territories would be limited to a portion of the harvestable surplus at some future time. Such a harvestable surplus would be determined and monitored jointly by State and tribal biologists, and would be conducted in coordination with the Service and the Bureau of Indian Affairs (BIA), as is being successfully done for the ceded territory harvest of inland and Great Lakes fish, deer, bear, moose, and furbearers in Minnesota, Wisconsin, and Michigan. Therefore, we conclude that any future Native American take of delisted wolves will not significantly impact the viability of the wolf population, either locally or across the WGL DPS.

The Service and the Department of the Interior recognize the unique status of the federally recognized tribes, their right to self-governance, and their inherent sovereign powers over their members and territory. Therefore, the Department, the Service, the Bureau of Indian Affairs, and other Federal agencies, as appropriate, will take the needed steps to ensure that tribal authority and sovereignty within reservation boundaries are respected as the States implement their wolf management plans and revise those plans in the future. Furthermore, there may be tribal activities or interests associated with wolves encompassed within the tribes' retained rights to hunt, fish, and gather in treaty-ceded territories. The Department is available to assist in the exercise of any such rights. If biological assistance is needed, the Service may provide it via our field offices. Upon delisting, the Service will remain involved in the post-delisting monitoring of the wolves in the WGL, but all Service management and protection authority under the Act will end. Legal assistance will be provided to the tribes by the Department of the Interior, and the BIA will be involved, when needed. We strongly encourage the States and Tribes to work cooperatively toward post-delisting wolf management.

Consistent with our responsibilities to tribes and our goal to have the most comprehensive data available for our post-delisting monitoring, we will annually contact tribes and their designated intertribal natural resource agencies within the DPS during the 5-year post-delisting monitoring period to obtain any information they wish to share regarding wolf populations, the health of those populations, or changes in their management and protection. Reservations within the WGL DPS that may have significant wolf data to provide during the post-delisting period include Bois Forte, Bad River, Fond du Lac, Grand Portage, Keweenaw Bay Indian Community, Lac Courte Oreilles, Lac du Flambeau, Leech Lake, Menominee, Oneida, Red Lake, Stockbridge-Munsee Community, and White Earth. Throughout the 5-year post-delisting monitoring period, the Service will annually contact the natural resource agencies of each of these reservations and that of the 1854 Treaty Authority and Great Lakes Indian Fish and Wildlife Commission. We encourage the States and Tribes within the WGL DPS to work together on management and monitoring issues post-delisting.

Federal Lands

The five national forests with resident wolves (Superior, Chippewa, Chequamegon-Nicolet, Hiawatha, and Ottawa National Forests) in Minnesota, Wisconsin, and Michigan are all operating in conformance with standards and guidelines in their management plans that follow the 1992 Recovery Plan for the Eastern Timber Wolf's recommendations for the eastern timber wolf (USDA FS 2004a, chapter 2, p. 31; USDA FS 2004b, chapter 2, p. 28; USDA FS 2004c, chapter 2, p. 19; USDA FS 2006a, chapter 2, p. 17; USDA FS 2006b, chapter 2, pp. 28–29). Delisting is not expected to lead to an immediate change in these standards and guidelines; in fact, the Regional Forester for U.S. Forest Service Region 9 is expected to maintain the classification of the wolf as a Regional Forester Sensitive Species for at least 5 years after Federal delisting (Moore in litt. 2003; Eklund 2011, pers. comm.). Under these standards and guidelines, a relatively high prey base will be maintained, and road densities will be limited to current levels or decreased. For example, on the Chequamegon-Nicolet National Forest in Wisconsin, the standards and guidelines specifically include the protection of den sites and key rendezvous sites, and management of road densities in existing and potential wolf habitat (USDA 2004c, Chap. 2, p. 19).

The trapping of depredating wolves will likely be allowed on national forest lands under the guidelines and conditions specified in the respective State wolf management plans. However, there are relatively few livestock raised within the boundaries of national forests in the upper Midwest, so wolf depredation and lethal control of wolves is neither likely to be a frequent occurrence, nor constitute a significant mortality factor, for the wolves in the WGL DPS. Similarly, in keeping with the practice for other State-managed game species, any public hunting or trapping season for wolves that might be opened in the future by the States will likely include hunting and trapping within the national forests (Lindquist in litt. 2005; Williamson in litt. 2005; Piehler in litt. 2005; Evans in litt. 2005).

The continuation of current national forest management practices will be important in ensuring the long-term viability of wolf populations in Minnesota, Wisconsin, and Michigan.

Wolves regularly use four units of the National Park System in the WGL DPS and may occasionally use three or four other units. Although the National Park Service (NPS) has participated in the development of some of the State wolf management plans in this area, NPS is not bound by States' plans. Instead, the NPS Organic Act and the NPS Management Policy on Wildlife generally require the agency to conserve natural and cultural resources and the wildlife present within the parks. National Park Service management policies require that native species be protected against harvest, removal, destruction, harassment, or harm through human action, although certain parks may allow some harvest in accordance with State management plans. Management emphasis in National Parks after delisting will continue to minimize the human impacts on wolf populations. Thus, because of their responsibility to preserve all native wildlife, units of the National Park System are often the most protective of wildlife. In the case of the wolf, the NPS Organic Act and NPS policies will continue to provide protection following Federal delisting.

Management and protection of wolves in Voyageurs National Park, along Minnesota's northern border is not likely to change after delisting. The park's management policies require that ''native animals will be protected against harvest, removal, destruction, harassment, or harm through human action.'' No population targets for wolves will be established for the National Park (Holbeck in litt. 2005). To reduce human disturbance, temporary closures around wolf denning and rendezvous sites will be enacted whenever they are discovered in the park. Sport hunting is already prohibited on park lands, regardless of what may be allowed beyond park boundaries (West in litt. 2004). A radio-telemetry study conducted between 1987 and 1991 of wolves living in and adjacent to the park found that all mortality inside the park was due to natural causes (for example, killing by other wolves or starvation), whereas the majority (60–80 percent) of mortality outside the park was human-induced (for example, shooting and trapping) (Gogan *et al.* 2004, p. 22). If there is a need to control depredating wolves outside the park, which seems unlikely due to the current absence of agricultural activities adjacent to the park, the park will work with the State to conduct control activities where necessary (West in litt. 2004).

The wolf population in Isle Royale National Park is described above (see Michigan Recovery). The NPS has indicated that it will continue to closely monitor and study these wolves. This wolf population is very small and isolated from the other wolf populations in the WGL DPS; as described above, it is not considered to be significant to the recovery or long-term viability of the wolf (USFWS 1992, p. 28).

Two other units of the National Park System, Pictured Rocks National Lakeshore and St. Croix National Scenic Riverway, are regularly used by wolves. Pictured Rocks National Lakeshore is a narrow strip of land along Michigan's Lake Superior shoreline. Lone wolves periodically use, but do not appear to be year-round residents of, the Lakeshore. If denning occurs after delisting, the Lakeshore would protect denning and rendezvous sites at least as strictly as the Michigan Plan recommends (Gustin in litt. 2003). Harvesting wolves on the Lakeshore may be allowed (if the Michigan DNR allows for harvest in the State), but trapping is not allowed. The St. Croix National Scenic Riverway, in Wisconsin and Minnesota, is also a mostly linear ownership. Approximately 54–58 wolves from 11 packs used the Riverway on the Wisconsin side in 2010 (Wydeven 2011, pers. comm.). The Riverway is likely to limit public access to denning and rendezvous sites and to follow other management and protective practices outlined in the respective State wolf management plans, although trapping is not allowed on NPS lands except possibly by Native Americans (Maercklein in litt. 2003).

At least one pack of 4–5 wolves used the shoreline areas of the Apostle Islands National Lake Shore, with a major deer yard area occurring on portions of the Park Service land. Wolf tracks have been detected on Sand Island, and a wolf was photographed by a trail camera on the island in September 2009. It is not known if wolves periodically swim to this and other islands, or if they only travel to islands on ice in winter.

Wolves occurring on NWRs in the WGL DPS will be monitored, and refuge habitat management will maintain the current prey base for them for a minimum of 5 years after delisting. Trapping or hunting by government trappers for depredation control will not be authorized on NWRs. Because of the relatively small size of these NWRs, however, most or all of these packs and individual wolves also spend significant amounts of time off these NWRs.

Wolves also occupy the Fort McCoy military installation in Wisconsin. In 2003, one pack containing five adult wolves occupied a territory that included the majority of the installation; in 2004 and 2006, the installation had one pack with two adults; in 2005 there was a single pack with four wolves. In 2008–09, there were seven wolves using the installation (Wilder 2009, pers. comm.). In 2010 a pack of three wolves occurred in the northern portions of the Fort, and a pack of two occurred on the south side (Wydeven *et al.* 2010, p.42). Management and protection of wolves on the installation would not change significantly after Federal or State delisting. Den and rendezvous sites would continue to be protected, hunting seasons for other species (coyote) would be closed during the gun-deer season, and current surveys would continue, if resources are available. Fort McCoy has no plans to allow a public harvest of wolves on the installation (Nobles in litt. 2004; Wydeven *et al.* 2005a, p. 25; 2006a, p. 25).

Minnesota National Guard's (MNG) Camp Ripley contains parts of two pack territories, which typically include 10 to 20 wolves. MNG wildlife managers try to have at least one wolf in each pack radio-collared and to fit an additional one or two wolves in each pack with satellite transmitters that may record long-distance movements. There have been no significant conflicts with military training or with the permit-only public deer-hunting program at the camp, and no new conflicts are expected following delisting. Long-term and intensive monitoring has detected only two wolf mortalities within the camp boundaries—both were of natural causes (Dirks 2009, pers. comm.).

The protection afforded to resident and transient wolves, their den and rendezvous sites, and their prey by five national forests, four National Parks, two military facilities, and numerous National Wildlife Refuges in Minnesota, Wisconsin, and Michigan will further ensure the conservation of wolves in the three States after delisting. In addition, wolves that disperse to other units of the National Refuge System or the National Park System within the WGL DPS will also receive the protection afforded by these Federal agencies.

*Summary of Factor D*

In summary, upon delisting, there will be varying State and Tribal classifications and protections provided to wolves. The wolf management plans currently in place for Minnesota, Wisconsin, and Michigan will be more

than sufficient to retain viable wolf populations in each State. These State plans provide a very high level of assurance that wolf populations in these three States will not decline to nonviable levels in the foreseeable future. Furthermore, the 2006 Update to the Wisconsin Wolf Management Plan (WI DNR 2006a, p. 3–4) demonstrates the State's commitment by retaining the previous management goal of 350 wolves, and it did not weaken any significant component of the original 1999 Plan. Similarly, the 2008 revised Michigan wolf plan continues to maintain the State's commitments to maintain viable wolf populations after Federal delisting. While these State plans recognize there may be a need to control or even reduce wolf populations at some future time, none of the plans include a public harvest of wolves, and all would maintain sufficient numbers of wolves to ensure their continued survival.

When federally delisted, wolves in Minnesota, Wisconsin, and Michigan will continue to receive protection from general human persecution by State laws and regulations. Michigan met the criteria established in their management plan for State delisting and in April 2009 removed gray wolves from the State's threatened and endangered species list and amended the Wildlife Conservation Order to grant ''protected animal'' status to the gray wolf in the State (Roell 2009, pers. comm.). That status ''prohibit[s] take, establish[es] penalties and restitution for violations of the Order, and detail[s] conditions under which lethal depredation control measures could be implemented'' (Humphries in litt. 2004).

Since 2004 wolves have been listed as a ''protected wild animal'' by the WI DNR, allowing no lethal take unless special authorization is requested from the WI DNR (Wydeven *et al.* 2009c). Following Federal delisting, Wisconsin will fully implement that ''protected wild animal'' status for the species, including protections that provide for fines of $1,000 to $2,000 for unlawful hunting.

Minnesota DNR will consider population management measures, including public hunting and trapping, but this will not occur sooner than 5 years after Federal delisting, and MN DNR will maintain a wolf population of at least 1,600 animals (MN DNR 2001, p. 2). In the meantime, wolves may be taken legally in Zone A only when they pose an immediate threat to pets, domestic animals, or livestock or to protect human safety (MN DNR 2001, pp. 3–4). Since the wolf management plan was completed in 2001, MN DNR has fully staffed its conservation officer corps in the State's wolf range (Stark 2009a, pers. comm.).

Except for the very small portions of Indiana and Ohio, if delisted, wolves in the WGL DPS are likely to remain protected by various State designations for the immediate future. States within the boundaries of the DPS either currently have mechanisms in place to kill depredating wolves (North Dakota and South Dakota) or can be expected to develop mechanisms following Federal delisting of the DPS, in order to deal with wolf-livestock conflicts in areas where wolf protection would no longer be required by the Act. Because these States (Illinois, Indiana, Iowa, Ohio, North Dakota, and South Dakota) constitute only about one-third of the land area within the DPS, and contain virtually no suitable habitat of sufficient size to host viable wolf populations, it is clear that even complete protection for wolves in these areas would neither provide significant benefits to wolf recovery in the DPS, nor to the long-term viability of the recovered populations that currently reside in the DPS. Therefore, although current and potential future regulatory mechanisms may allow the killing of wolves in these six States, these threats, and the area in which they will be, will not impact the recovered wolf populations in the DPS now or in the foreseeable future.

Finally, based on our review of the completed Tribal management plans and communications with Tribes and Tribal organizations, federally delisted wolves are very likely to be adequately protected on Tribal lands. Furthermore, the numerical recovery criteria (and for Minnesota, the numerical planning goal) in the Recovery Plan will be achieved and maintained (based on the population and range of off-reservation wolves) even without Tribal protection of wolves on reservation lands. In addition, on the basis of information received from other Federal land management agencies in Minnesota, Wisconsin, and Michigan, we expect National Forests, units of the National Park System, military bases, and National Wildlife Refuges will provide protections to wolves in the areas they manage that will match, and in some cases will exceed, the protections provided by State wolf management plans and State protective regulations.

We conclude that the regulatory mechanisms that will be in place subsequent to Federal delisting are adequate to control threats to wolves in the WGL DPS.

**E. Other Natural or Manmade Factors Affecting Its Continued Existence**

*Taking of Wolves by Native Americans for Certain Purposes*

As noted elsewhere in this rule, the wolf has great significance to many Native Americans in the western Great Lakes area, especially to Wolf Clan members, and has a central role in their creation stories. The wolf, Ma''ingan, is viewed as a brother to the Anishinaabe people, and their fates are believed to be closely linked. Ma''ingan is a key element in many of their beliefs, traditions, and ceremonies, and wolf pack systems are used as a model for Anishinaabe families and communities. We are not aware of any takings of wolves in the Midwest for use in these traditions or ceremonies while the wolf has been listed as a threatened or endangered species. While wolves have been listed as threatened in Minnesota, we have instructed Wildlife Services to provide, upon request, wolf pelts and other parts from wolves killed during depredation control actions to Tribes in order to partially serve these traditional needs.

Some Tribal representatives, as well as the GLIFWC, have indicated that if wolves are delisted, there is likely to be interest in the taking of small numbers of wolves for traditional ceremonies (King in litt. 2003; White in litt. 2003). This take could occur on reservation lands where it could be closely regulated by a Tribe to ensure that it does not affect the viability of the reservation wolf population. Such takings might also occur on off-reservation treaty lands on which certain Tribes retained hunting, fishing, and gathering rights when the land was ceded to the Federal Government in the 19th Century. Native American taking of wolves from ceded lands would be limited to a specified portion of a harvestable surplus of wolves that is established in coordination with the Tribes, consistent with past Federal court rulings on treaty rights. Such taking would not occur until such time as a harvestable surplus has been documented based on biological data, and regulations and monitoring have been established by the States and Tribes to ensure a harvest can be carried out in a manner that ensures the continued viability of the wolf population in that State. Previous court rulings have ensured that Native American treaty harvest of fish or wildlife species have not risked endangering the resource.

If requested by the Tribes, multitribal natural resource agencies, or the States, the Service or other appropriate Federal

agencies will work with these parties to help determine if a harvestable surplus exists, and if so, to assist in devising reasonable and appropriate methods and levels of harvest for delisted wolves for traditional cultural purposes.

We conclude that the small number of wolves that may be taken by Native Americans will not be a significant threat to wolves in the WGL DPS.

*Public Attitudes Toward the Wolf*

Human behavior has had a tremendous effect on wolf populations around the world. Theory and social science research have identified attitudes, and the beliefs on which they are based, as important drivers of behavior. Therefore, understanding public attitudes toward wolves is a key component of wolf management. The success of the United States wolf-eradication programs of the late-nineteenth and early twentieth centuries are often accepted as evidence of negative public attitudes that were based on perceptions and beliefs brought by European settlers that portrayed the wolf as an evil, menacing threat (Browne-Nunez and Taylor 2002, p. 1; Fogleman 1988; Kellert 1986; Schanning 2009, pp. 252–253) and were perpetuated by exaggerated accounts of marauding wolves preying on livestock (Schanning 2009, p. 253).

When the wolf populations were in significant decline, there was a shift in management and a parallel shift in attitudes (Kellert *et al.* 1996; Schanning 2009, pp. 253–254; Williams *et al.* 2002, p. 581). In the Great Lakes region, bounty systems were repealed (Wisconsin in 1957, Michigan in 1960, and Minnesota in 1965) and, in 1972, the first of many attitudinal studies regarding wolves was carried out in Minnesota (Johnson 1974). In the last three decades, investigations of attitudes toward wolves and wolf management have burgeoned.

Minnesota

The first empirical examination of attitudes toward wolves was conducted using a convenience sample of 1,692 attendees of the Minnesota State Fair (Johnson 1974). It was based on the premise that children's stories, which typically cast the wolf as a villainous creature, shape attitudes from an early age. Although it found children to be more negative toward the wolf, a vast majority of adults held positive beliefs and attitudes. Most respondents felt that wolves were not a danger to humans, should not be exterminated, had value for Minnesota, and are good for the deer and moose populations.

Llewellyn (1978) reported the results of a content analysis of 1,083 public comment letters received by the Service regarding the proposed reclassification of the timber wolf in Minnesota from endangered to threatened. Of the 700 letters from Minnesota residents (the other letters were from out-of-state), 23 percent favored retention of endangered status, 7 percent supported reclassification, and 70 percent were in favor of delisting and return to State management. Of note were differences between urban and rural residents, with a large majority (78 percent) of urban residents and a minority (16 percent) of rural residents in favor of continued Federal protection of wolves. Support for delisting was largely based on concern for livestock and fear of wolves.

Kellert (1985) conducted a statewide phone survey of Minnesota residents' knowledge, attitudes, and behaviors toward the wolves. The study sample comprised the general public (Minneapolis-St. Paul residents and mostly rural, northern county residents), deer hunters, trappers, and livestock producers. Most respondents held favorable attitudes toward wolves (except farmers), supported protection of wolves and their habitat as long as it did not interfere with human needs, and supported control of problem wolves. Urban residents expressed more protectionist attitudes, while rural residents' attitudes were more utilitarian in nature. There was ''somewhat-limited'' factual knowledge among the general public, but a higher knowledge level among trappers and, to a lesser degree, hunters and individuals with a higher income. Fear of wolves was expressed by some respondents, although most did not feel that wolves are a threat to people. Rather large percentages of farmers (12 percent) and trappers (17 percent) reported capturing or killing a wolf, and a majority of farmer, hunter, trapper, and northern county respondents reported knowing someone who captured or killed a wolf. Additionally, almost one-third of farmers, hunters, and trappers and a quarter of northern county respondents indicated that, given the opportunity, they might shoot a wolf while deer hunting.

In 1999, a second statewide phone survey of Minnesota residents was conducted, similar to the 1985 study, using a stratified random sample of northern residents, southern residents, farmers, hunters, and trappers (Kellert 1999). During this study period, Minnesota wolves were being considered for Federal delisting. Compared to the 1985 survey, this study found an overall increase in positive perceptions of the wolf. The general public expressed more affection and ethical concern for wolves than did farmers, although there was not a significant difference between groups in level of dislike of wolves. Over 70 percent of respondents believed wolves symbolize the beauty in nature and a large portion of the sample perceived other values of wolves, including ecological, scientific, and moral. Suburban and urban residents, the college educated, and younger respondents were more likely to have positive attitudes. Farmers were more knowledgeable about the wolf and more likely to support delisting. Of note was a substantial increase in the number of northern Minnesota residents who reported either killing a wolf themselves or knowing someone who did.

Chavez *et al.* (2005) assessed attitudes of residents of northwestern Minnesota. The sample of 600 rural residents was stratified by location: inside wolf range and outside but adjacent to wolf range. The study did not find large differences between geographic groups or farmers and non-farmers, with all groups indicating slightly unfavorable attitudes toward wolves. The authors suggest this could be attributable to shared rural cultural values and utilitarian attitudes. They also consider the possible influence of immigrant roots in Europe where folklore and early conflicts with wolves fostered negative attitudes. Both geographic groups agreed that wolves cause unacceptable levels of damage to northwestern Minnesota's livestock industry, although predators were perceived as less of an agricultural threat than other threats (*e.g.,* livestock diseases, crop pests).

Using a random sample of 909 respondents (18 percent response rate), Schanning (2005) reported ''pragmatic/utilitarian'' beliefs regarding wolves among Minnesota residents. Most respondents supported compensation to livestock owners and having problem wolves shot by the DNR. Counter to Kellert's earlier findings, there was a significant level of fear of wolves among Schanning's sample, including fear for personal safety (31 percent), the safety of children (64 percent), and pets (70 percent).

Michigan

In Michigan, Hook and Robinson (1982, pp. 388–391) found that only a small percentage of respondents scored high on their anti-predator scale and most respondents were in favor of wolf restoration. Hunters were more positive toward predators than nonhunters. Fear of the wolf was the most important factor related to an anti-predator

attitude, followed by negativistic attitudes toward all animals, and age, with older people holding more negative attitudes.

Kellert (1990) conducted a statewide mail survey of Michigan residents' knowledge, attitudes, and behaviors toward wolves. There were 639 respondents from the Upper (UP) and Lower (LP) peninsulas and members of three special interest groups: hunters, trappers, and livestock producers. Livestock producers were the most likely of the special interest groups to hold negative attitudes toward the wolf. LP residents were more likely than UP residents to express fear and dislike of wolves. A majority of respondents in each group, except livestock producers, supported restoration (64 percent of UP residents, 57 percent of LP residents, 76 percent of hunters, 66 percent of trappers, and 37 percent of livestock producers). Support was primarily motivated by the existence, ecological, and cultural values of the wolf.

A 2002 statewide survey of 557 Michigan residents' attitudes toward wolf recovery found that support for recovery by UP residents had declined since Kellert's 1990 study (Mertig 2004). At the time this study was conducted, the UP's wolf population had risen to about 250 animals (Hammill 2007), but in the LP, where wolves were not known to be present, there was increased support for wolf recovery in the UP. Other differences from Kellert's (1990) findings included increased support for wolf control and for hunting and trapping for pelts.

Based on a sample of 1,017 Michigan residents (20 percent response rate), Schanning (2004) found that a majority of respondents in his survey agreed with pro-wolf statements including ''wolves are a part of our vanishing wilderness and should be protected'' (51 percent). Similar to his 2005 study of Minnesota residents and his 2003 study of Wisconsin residents (reported below), Schanning found a substantial level of fear of wolves among the Michigan sample. Respondents reported fear for their personal safety (40 percent), the safety of children (70 percent), pets (7 percent), and livestock (66 percent).

Using a stratified random sample of respondents from five regions in Michigan, Beyer (2006) measured tolerance of wolves using a scale for social carrying capacity. The scale was based on Michigan wolves' perceived range, numbers, and the type and number of interactions with people. The study found that most people were at the most tolerant end of the scale, with smaller percentages classified as intolerant (7 percent) or least tolerant (20 percent).

Wisconsin

Knight (1985, reported in Schanning 2009, p. 257) surveyed hunter attitudes in two Wisconsin counties in wolf range where a minority (20 percent) of hunters reported negative attitudes toward wolves and most (69 percent) believed that wolves should not be eliminated.

In 1988, when there were only 20 wolves in Wisconsin, Nelson and Franson (1988) compared farmer' and non-farmers' attitudes toward wolves and wolf recovery in six Wisconsin counties. A series of agree-disagree belief statements were used to gauge attitudes toward wolves. Non-farmers were more positive than farmers, and a majority agreed that the wolf ''symbolizes the beauty and wonder in nature'' and ''it would be wonderful to hear the wolf howl in the wild'' (64 percent and 62 percent respectively). Almost half of farmers agreed with the same statements. Both groups disagreed that they would be afraid of an attack if they saw a wolf while walking in the woods. Farmers and non-farmers were divided about wolf restoration, with half of farmers and about one-third of non-famers opposed. Both groups favored trapping and removal of problem wolves.

Wilson (1999) examined knowledge, attitudes, and behaviors toward wolves in a 1997 survey of two random samples: All Wisconsin license plate owners and those who purchased an Endangered Resources (ER) license plate. Fifty percent of all license plate owners and almost 90 percent of ER license plate owners supported efforts to increase the State wolf population. There were slight differences between hunters (47 percent) and non-hunters (54 percent) who support wolf recovery.

Naughton-Teves *et al.* (2003) assessed tolerance of wolves among 535 rural Wisconsin residents using a mail-back questionnaire (82 percent response rate). They examined the influence of compensation for livestock losses to wolves and preferences for wolf management actions among different segments of the sample, including livestock producers, bear hunters, general residents, wolf damage complainants, recipients of compensation, and demographic segments. The strongest predictor of tolerance was social group. A large majority of bear hunters (73 percent) were in favor of reducing or eliminating the wolf population, compared to 45 percent of the livestock producers and 29 percent of general residents. Individuals who had lost a domestic animal to a predator were less tolerant of wolves than those who had not. Preferences for management actions depended on the conflict situation. Approval for lethal control was highest for depredation on livestock and pets. Bear hunters also were highly in favor of lethal control when hunting hounds are killed, but other groups did not muster a majority for this option. Compensation was not associated with higher tolerance when comparing recipients to nonrecipients among those who reported losing a domestic animal to wolves.

Similar to his studies in Minnesota and Michigan, Schanning (2003) surveyed 644 Wisconsin residents' (13 percent response rate) attitudes toward wolves. He found a majority of respondents held pro-wolf attitudes based on their agreement with three belief statements: ''the wolf is a symbol of the beauty and wonder in nature,'' ''wolves are part of our vanishing wilderness and should be protected,'' and ''wolves are essential to maintaining the balance in nature'' (72 percent, 56 percent, and 62 percent in agreement, respectively). There was substantial support for wolf hunting (41 percent), and a majority (60 percent) indicated they would shoot a wolf if it threatened their pet.

In a followup to Naughton-Treves *et al.* (2003), Treves *et al.* (2009) reported attitudes of 1,364 respondents (62 percent response rate) toward compensation after wolf recovery. They compared the attitudes of individuals who contributed to Wisconsin's voluntary compensation fund with those of noncontributors and found that attitudes of each group differed in several ways. Contributors favored nonlethal over lethal problem wolf management actions and supported all types of payments more strongly with the exception of payment for hunting dogs injured or killed by wolves on public land, but a majority of respondents of both groups supported compensation ''even when wolves are no longer threatened or endangered.'' Noncontributors were more likely to believe that wolf damages were part of raising livestock and should not be compensated.

Treves *et al.* (in review) report the first longitudinal results for change in individual attitudes over time using findings from surveys conducted in 2001 (Naughton-Treves *et al.* 2003), 2004 (Treves *et al.* 2009), and 2009. During the data collection period, wolf numbers nearly tripled and greatly exceeded the State population goal, the level of wolf depredation on pets increased and became the third most

frequent conflict after attacks on beef calves and bear-hunting dogs, and wolf management authority was granted to State governments and subsequently revoked several times after Federal court challenges. The 2009 survey found attitudes toward wolves had become less favorable, and fear of wolves, perceived competition for deer, and reported inclination to illegally kill wolves increased. In the 2009 survey, 18 percent of hunters indicated they would shoot a wolf if they saw one while hunting. Nearly half of respondents agreed their tolerance for wolves in Wisconsin would increase if people could hunt them.

Shelley *et al.* (in review) compared attitudes of Ojibwe Indians and nontribal residents of Wisconsin's wolf range. Tribal membership was the best predictor of attitudes. Ojibwe respondents had more positive attitudes toward wolves, were more supportive of wolf protection policy, and were less supportive of a public wolf harvest and lethal control of problem wolves. A considerable percentage (Ojibwe 33 percent, nontribal 44 percent) of each group indicated they would be afraid if wolves lived near their homes. Fewer Ojibwe (8 percent) than nontribal respondents (16 percent) indicated that they would shoot a wolf if they saw one while hunting. Nontribal respondents (57 percent) were more likely than Ojibwe respondents (26 percent) to believe that wolves threaten deer hunting opportunities. Shelley *et al.* (in review) point out the potential significance of treaty rights, which grant the Tribe half of any harvest, including wolves, within the territories ceded by them in nineteenth century Federal treaties upheld by Federal courts in the 1980s.

Treves and Martin (2011) examined the attitudes of 2,320 respondents, hunters and nonhunters, living within or adjacent to wolf range in surveys conducted in Wisconsin in 2001 and 2004 (reported above) and the northern Rocky Mountain (NRM) States of Idaho, Montana, and Wyoming. A majority of respondents supported regulated, public wolf hunting, although support was dependent on potential justifications for a hunting season.

In Wisconsin, bear hunters in 2001, followed by other hunters, were most likely to support an immediate hunt, whereas nonhunters in favor of wolf hunting were more likely to be supportive when managers estimate the wolf population could sustain harvests or when the majority of the public believe damages have become intolerable. There was a shift in 2004 when a majority of hunters indicated they would support wolf hunting when the population was deemed to be at a level that could sustain harvests. More nonhunters agreed with a hunt when the public felt damages had become intolerable. Inclination to kill a wolf illegally in Wisconsin in 2001 and 2004 was high among hunters, particularly among likely carnivore-hunters. These two groups favored a significant reduction (up to half) of the Wisconsin wolf population.

In addition to the studies summarized above, citizen input on the wolf management plans of Minnesota, Wisconsin, and Michigan has provided additional insight on public support for wolf recovery. Namely, it shows strong support for wolf recovery if the adverse impacts on recreational activities and livestock production can be minimized (MI DNR 1997, pp. 13–14, 50–56; MN DNR 1998, p. 2; WI DNR 1999, pp. 51–55; WI DNR 2006c, pp. 9–11).

Summary of Public Attitudes

While there is a lack of empirical data on early attitudes toward wolves, historical accounts describe an antagonist view of wolves during the 19th and early 20th centuries. Attitudinal research conducted throughout the lower 48 States in the last three decades has shown that a shift toward more positive attitudes took place during the 20th century (Browne-Nuñez and Taylor 2002, Kellert *et al.* 1996, Williams *et al.* 2002). Although the basis for this shift is not understood, suggested causes include changes in the portrayal of wolves in the media (Kellert *et al.* 1996) and a broader shift in societal values of wildlife (Manfredo *et al.* 2003).

Although direct comparisons cannot be made of each study summarized here, given different research methods and contextual circumstances, we can summarize some common findings and general conclusions. Similar to research conducted outside the Great Lakes region (summarized in Williams *et al.* 2002), many of the studies reviewed here demonstrate urban-rural differences in attitudes, with urban residents displaying more positive attitudes; farmers and livestock producers are more negative toward wolves; those with higher education levels have more positive attitudes; and compensation does not translate into increased tolerance.

In several studies, hunters were mostly positive toward wolves (Hook and Robinson 1982, Kellert 1990, Knight 1985), with the exception of Wisconsin bear hunters who were the most negative among special interest groups (Naughton-Treves *et al.* 2003). Cross-sectional studies suggest increasing support for control of problem wolves and public harvest of wolves (Kellert 1985, Mertig 2004, Naughton-Treves *et al.* 2003), and one recent study shows this support has increased among individuals re-sampled over time (Treves *et al.,* in review). Some respondents indicated they had or would kill a wolf illegally (Kellert 1985; Treves *et al.,* in review).

While most respondents were positive toward wolves, it is evident that there have long been competing attitudes toward wolves. While attitudes in other regions have been shown to be relatively stable (Williams *et al.* 2002, Wilson and Bruskotter 2009), a troubling finding for managers in the Great Lakes region is the most recent research showing declining support for wolves (Hammill 2007; Mertig 2004; Treves *et al.,* in review) and an increasing inclination to kill wolves illegally (Treves *et al.,* in review). Possible explanations for this decline include increasing wolf numbers, negative interactions with humans, and negative media coverage (Hammill 2007). It is unclear how delisting will affect attitudes and behavior toward wolves. Also in question is how public wolf harvest might affect attitudes and behaviors. However, we expect that when allowed to adequately manage wolf-human conflicts, public attitudes are likely to support wolf restoration. Furthermore, the State wildlife agencies, as well as several other agencies and organizations, have professional education, information, and outreach components and will continue to present balanced science-based information to the public that will continue to foster general public support for wolf restoration and the necessity of conflict resolution to maintain public tolerance of wolves.

While we do not believe the effects of public attitudes on wolves will be a significant threat to the species, as the status and management of the wolf evolves, there will be a need for continued collaboration between managers and researchers to monitor public attitudes toward wolves and their management.

*Hybridization With Coyotes*

Genetic data relevant to possible interbreeding between North American wolves and coyotes were first reported in a study of mtDNA restriction fragment length polymorphisms by Lehman *et al.* (1991). They found mtDNA haplotypes in wolf populations in the Great Lakes region that they interpreted as being derived from coyotes (Lehman *et al.,* p. 108). As wolf

haplotypes were not found in coyotes, the apparent introgression occurred through matings of wolf males with coyote females. They determined that a minimum of six instances of coyote-wolf hybridization could account for the diversity of ''coyote-type'' haplotypes observed in wolves (p. 112). Their general interpretation was that introgression primarily occurred as coyotes expanded their ranges into the Great Lakes region within historical time, although they allow that two coyote-type haplotypes commonly observed in Great Lakes wolves may have been the result of ancient hybridization. Their data also indicated (Lehman *et al.,* Figure 4) that coyote-type haplotypes were less common in the western part of the Great Lakes region than in the east.

Wilson *et al.* (2000, Figure 6, p. 2165) provided a different interpretation of wolf-coyote relationships in the region. They found coyote-like mtDNA sequences in eastern Canadian wolves from Algonquin Provincial Park, Ontario, southern Manitoba, and northeastern Minnesota that were intermediate in sequence divergence between coyotes and gray wolves. As these haplotypes were apparently absent in coyotes, they were thought not to result from hybridization with coyotes, but to represent an eastern wolf species, *Canis lycaon.* They suggest that these *Canis lycaon* haplotypes may have been previously reported as ''coyote-type'' in the study of Lehman *et al.* (1991).

It is now generally agreed that historical and most contemporary Great Lakes wolves have unique mtDNA haplotypes that are distinct from those of other wolves, and more related to but still distinct from those of coyotes. Haplotypes specific to the early 20th century wolf population of the western Great Lakes region were identified by Leonard and Wayne (2008, pp. 2–3), from a study of 17 historical specimens from Michigan, Wisconsin, Ontario, and Quebec. Of the 17 specimens that gave conclusive results, 14 were either the same or most similar to the haplotypes described by Wilson *et al.* (2000) as *C. lycaon.* Only one had a coyote haplotype. Wheeldon and White (2009) reported haplotypes from three additional historical specimens from the western Great Lakes region. Two individuals from Minnesota (collected 1899 and 1900) had the same coyote-like haplotypes (C13) found in a late 19th century specimen from Maine, 50 years before recorded coyote sightings in Maine (Wilson *et al.* 2003), as well as in contemporary western Great Lakes wolves from Minnesota to Quebec (Leonard and Wayne 2008, pp. 2–3). The third specimen, collected in the winter of 1907–1908 in Wisconsin, had the common Great Lakes wolf haplotype C1. Microsatellite DNA analysis of these three specimens grouped them with wolves rather than coyotes.

Koblmüller *et al.* (2009) addressed the issue of coyote hybridization in the Great Lakes region from analyses of mtDNA sequence and both Y-chromosome and autosomal microsatellite DNA. They found evidence of repeated incidences of ancient introgression of coyotes into Great Lakes wolves, although they also suggested that introgression by coyotes is recent and ongoing, especially ''north'' of the Great Lakes. Although they use the term ''north,'' it is apparent they are referring to wolves in Ontario and Quebec, Canada east of the Great Lakes. Koblmüller *et al.* (2009) failed to recognize that in the western Great lakes, especially Minnesota and Wisconsin, wolves were exposed to coyotes throughout historical and recent geological time (Jackson 1961, pp. 285–286; Wydeven and Pils 2008, p. 260). Their paper demonstrates that hybridization of wolves with coyotes occurred mainly east of the Great Lakes and not in the western Great lakes region.

Wheeldon and White (2009, p. 2) and Fain *et al.* (2010) concluded that the coyote-related haplotype C13 is actually an eastern wolf (what they call *C. lycaon*) marker based on its presence mainly in *C. lycaon-C. lupus* hybrids in the western Great Lakes region, the absence of C13 in nonhybridizing coyotes, and its occurrence in historical eastern wolves. Assessments based on mtDNA, Y-chromosome, and autosomal microsatellite DNA data consistently found that the wolf population in the western Great Lakes region does not currently interbreed with coyotes (Fain *et al.* 2010, p. 14; Wheeldon *et al.* 2010).

Lehman *et al.'s* (1991, p. 114) interpretation of coyote introgression into Great Lakes wolves included an explanation that it occurred at a time when wolf population densities were low in the region, so that wolves would be less likely to find mates of the same species and mating with coyotes was more likely to take place. Conversely, Lehman *et al.* (1991) suggested that coyote introgression does not appear to occur when wolf densities are higher. If so, the increase in population size that has occurred over the last 30 years renders the western Great Lakes wolf population less vulnerable to whatever threat may have been presented by coyote introgression. The wolf population of the region has likely been exposed to this factor for centuries and has rebounded from near extirpation, yet retains essential genetic, behavioral, and other biological features of wolves without being displaced by coyotes. This fact suggests that the threat of coyote hybridization to the recovered WGL wolf population is small.

**Conclusion of the 5-Factor Analysis**

As required by the Act, we considered the five potential threat factors to assess whether the wolves in the WGL DPS are threatened or endangered throughout all or a significant portion of their range. When considering the status of the species, the first step in the analysis is to determine whether the species is in danger of extinction or likely to become endangered in the foreseeable future throughout all of its range.

The wolf population in the WGL DPS currently occupies all the suitable habitat area identified for recovery in the Midwest in the 1978 Recovery Plan and 1992 Revised Recovery Plan and most of the potentially suitable habitat in the WGL DPS. Much of the important wolf habitat in the DPS is in public ownership, and the suitable habitat in the DPS is adequately protected for the foreseeable future.

Human-caused mortality is the most significant issue to the long-term conservation status of the wolves in the WGL DPS. Therefore, managing this source of mortality remains the primary challenge to maintaining a recovered wolf population into the foreseeable future. We have concluded that Minnesota, Wisconsin, and Michigan will maintain their share and distribution of the WGL wolf population above recovery levels for the foreseeable future, and that the threats have been sufficiently reduced. All three States have wolf management laws, plans, and regulations that adequately regulate human-caused mortality. Each of the three States has committed to manage its wolf population at or above viable population levels, and this commitment is not expected to change.

Regulatory mechanisms in all three States are adequate to facilitate the maintenance of, and in no way threaten, the recovered status of the wolves in the WGL DPS. When federally delisted, wolves in Minnesota, Wisconsin, and Michigan will continue to receive protection from general human persecution by State laws and regulations. Violation of regulations will be subject to prosecution.

As long as populations are maintained at or above minimum recovery levels, wolf biology (namely the species' reproductive capacity) and the availability of large, secure blocks of suitable habitat will maintain strong

populations capable of withstanding all other foreseeable threats. In terms of habitat, the amount and distribution of suitable habitat in public ownership provides, and will continue to provide, large core areas that contain high-quality habitat of sufficient size to anchor a recovered wolf population. Our analysis of land management shows these areas will maintain their suitability into the foreseeable future, if not indefinitely.

While disease and parasites can temporarily impact population stability, as long as populations are managed above recovery levels, these factors are not likely to threaten the wolf population at any point in the foreseeable future. Natural predation is also likely to remain an insignificant factor in population dynamics into the foreseeable future. Finally, we believe that other natural or manmade factors, such as potential hybridization with coyotes and public attitudes, are unlikely to threaten the wolves in the WGL DPS in the foreseeable future in all portions of the range within the DPS.

We find that the threat of habitat destruction or degradation or a reduction in the range of the wolf; utilization by humans; disease, parasites, or predatory actions by other animals or humans; regulatory measures by State, tribal, and Federal agencies; or other threats will not individually or in combination cause wolves in the WGL DPS to become endangered within the foreseeable future throughout all of the species' range in the DPS. Ongoing effects of recovery efforts over the past decades, which resulted in a significant expansion of the occupied range of wolves in the WGL DPS, in conjunction with future State, tribal, and Federal agency wolf management across that occupied range, will be adequate to ensure the conservation of the WGL DPS. These activities will maintain an adequate prey base, preserve denning and rendezvous sites, monitor disease, restrict human take, and keep wolf populations well above the numerical recovery criteria established in the Revised Recovery Plan (USFWS 1992, pp. 25–28). Thus, the gray wolves in the WGL DPS do not merit continued listing as threatened or endangered throughout all of their range.

**Is the species threatened or endangered in a significant portion of its range?**

Having determined that wolves in the WGL DPS do not meet the definition of endangered or threatened throughout their entire range, we must next consider whether they are in danger of extinction or are likely to become so in a significant portion of their range. The Act does not define the term ''significant portion of its range.'' Therefore, we must give meaning to this phrase based on our experience and expertise. We interpret a portion of a species' range as being significant if it is part of the current range of the species (species used here is as defined in the Act, to include species, subspecies, or DPS) and if it is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the species.

Applying the definition described above for determining whether a species is endangered or threatened in a significant portion of its range, we first address whether any portions of the range of wolves in the WGL DPS warranted further consideration. We evaluated the WGL DPS in the context of whether any potential remaining threats are concentrated in one or more areas, such that if there were concentrated impacts, those wolves might be threatened, and further, whether any such area might constitute a significant portion of the species' ranges.

Wolves are highly adaptable habitat generalists, and their primary biological need is an adequate natural prey base of large ungulates. The primary current and likely future threats to wolves are excessive human-caused mortality and increased mortality from diseases and parasites. Based on the biology of the gray wolf, threats to its continued existence, and conservation biology principles, the Recovery Plan specifies that two populations (or what equates to a single metapopulation) are needed to ensure long-term viability (see *Recovery Criteria,* above). The Revised Recovery Plan states the importance of a large wolf population throughout Minnesota Wolf Management Zones 1 through 4 (geographically identical to Zone A in the 2001 Minnesota Wolf Management Plan, see Figure 2 earlier in the preamble to this rule) and the need for a second viable wolf population occupying 10,000 sq mi or 5,000 sq mi elsewhere in the eastern United States (depending on its isolation from the Minnesota wolf population) (USFWS 1992, pp. 24–29).

The Recovery Plan also discusses the importance of low-road-density areas, the importance of minimizing wolf–human conflicts, and the maintenance of an adequate natural prey base in the areas hosting these two necessary wolf populations. These portions of Minnesota (Management Zones 1 through 4) and the portions of the DPS that support the second viable wolf population (Wisconsin Zones 1 and 2 and the entire UP of Michigan) provide an adequate wild prey base, suitably low levels of human-caused mortality, and sufficient representation, resiliency, and redundancy to buffer the impacts of disease and parasite-induced mortality (See the discussion under *Recovery Criteria,* above, regarding how achieving the goals of the Recovery Plan for the Eastern Timber Wolf assures a viable wolf population in terms of representation, resiliency, and redundancy.).

Post-delisting wolf protection, management, and population and health monitoring by the States, Tribes, and Federal land management agencies will ensure the continuation of viable wolf populations above the Federal recovery criteria for the foreseeable future. The State management plans provide the greatest protections for the species in Minnesota Zone A, Wisconsin Zones 1 and 2, and across the UP of Michigan, (see the discussion of the three plans in *State Wolf Management Planning,* above). Post-delisting threats to wolves in Zone B in Minnesota, Zones 3 and 4 in Wisconsin, and in the Lower Peninsula of Michigan will be more substantial and may preclude the establishment of wolf packs in most or all of these areas. The Recovery Plan specifically recommends against managing for wolves in large areas of unsuitable habitat, stating that Minnesota Zone 5 (identical to Minnesota Wolf Management Zone B, Figure 2) should be managed with a goal of zero wolves there, because ''Zone 5 is not suitable for wolves. Wolves found there should be eliminated by any legal means'' (USFWS 1992, p 20). Therefore, the Recovery Plan views Zone 5, which is roughly 60 percent of the State, as not an important part of the range of the wolf. This portion of the State is predominantly agricultural land, with high road densities, and high potential for wolves to depredate on livestock. Although individual wolves and some wolf packs occupy parts of Zone 5, these wolves are using habitat islands or are existing in other situations where conditions generally are not conducive to their long-term persistence.

The northern LP of Michigan appears to have the only unoccupied potentially suitable wolf habitat in the Midwest that is of sufficient size to maintain wolf packs (Gehring and Potter 2005, p. 1239; Potvin 2003, pp. 44–45), although its small size and fragmented nature may mean that northern LP wolf population viability would be dependent upon continuing immigration from the UP.

The only part of Michigan's LP that may contain suitable habitat are those areas of fragmented habitat studied by Potvin (2003, pp. 44–45) and Gehring and Potter (2005, p. 1239). However, these areas amount to less than half of the minimal area identified by the Recovery Plan for the Eastern Timber Wolf as needed for the establishment of viable populations. These LP areas, therefore, might have difficulty maintaining wolf populations even with the help of occasional immigration of wolves from the UP (see *Suitable Habitat Within the Western Great Lakes DPS,* above, for additional discussion). While the UP wolves may be significant to any LP wolf population (occasional UP to LP movements may provide important genetic and demographic augmentation crucial to a small population founded by only a few individuals), the reverse will not be true—LP wolves would not be important to the wolf population in the UP, as that population is already large enough in size and range to be self-sustaining.

The lack of sufficient areas of suitable habitat in those parts of North Dakota, South Dakota, Iowa, Illinois, Indiana, and Ohio that are within the WGL DPS are expected to preclude the establishment of viable populations in these areas, although dispersing wolves and packs may temporarily occur in some of these areas. As a result, wolf numbers in these areas will have no impact on the continued viability of wolves in the WGL DPS, and are not necessary to maintain adequate representation, resiliency, and redundancy for wolves in the DPS.

In conclusion, Minnesota Zone A, Wisconsin Zones 1 and 2, and the UP of Michigan provide an adequate wild prey base, suitably low levels of human-caused mortality, and sufficient numbers and distribution of wolves to ensure adequate representation, resiliency, and redundancy to buffer the impacts of disease and parasite-induced mortality. Post-delisting wolf protection, management, and population and health monitoring by the States, Tribes, and Federal land management agencies will ensure the continuation of viable wolf populations in those areas above the recovery criteria established in the Recovery Plan for the foreseeable future.

In coming to this determination, we considered the quality, quantity, and distribution of the habitat relative to the biological needs of the species, the need to maintain the remaining genetic diversity, the importance of geographic distribution in coping with catastrophes such as disease, the ability of the habitat to provide adequate wild prey, and the need to otherwise meet the conservation needs of the species. Reasonably foreseeable threats to wolves in all parts of the WGL DPS are not likely to threaten wolf population viability in the WGL DPS in the foreseeable future. Therefore, we find that wolves in the WGL DPS are not in danger of extinction and are not likely to become endangered in the foreseeable future throughout all or a significant portion of their range.

**Determination**

After a thorough review of all available information and an evaluation of the five factors specified in section 4(a)(1) of the Act, as well as consideration of the definitions of ''threatened'' and ''endangered'' contained in the Act and the reasons for delisting as specified in 50 CFR 424.11(d), we are (1) revising the 1978 listing of wolves in Minnesota as threatened by identifying it as the WGL DPS, which includes Minnesota, Wisconsin, and Michigan and portions of the adjacent States and (2) removing that WGL DPS from the List of Endangered and Threatened Wildlife (50 CFR 17.11). Wolves have recovered in the WGL DPS as a result of the reduction of threats as described in the analysis of the five categories of threats and no longer are in danger of extinction, nor are likely to become so in the foreseeable future, throughout all or a significant portion of their range.

**Available Conservation Measures**

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, tribal, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. This final rule removes these Federal conservation measures for gray wolves within the WGL DPS.

**Effects of the Rule**

This final rule revises the pre-DPS policy Minnesota ''species'' listing and establishes it as a WGL DPS of the gray wolf (*C. lupus*), expands the boundaries of that DPS, and removes the protections of the Act for that WGL DPS by removing the gray wolf in that DPS from the List of Endangered and Threatened Wildlife.

This final rule removes the special regulations under section 4(d) of the Act for wolves in Minnesota. These regulations currently are found at 50 CFR 17.40(d).

Critical habitat was designated for the gray wolf in 1978 (43 FR 9607, March 9, 1978). That rule (codified at 50 CFR 17.95(a)) identifies Isle Royale National Park, Michigan, and Minnesota wolf management zones 1, 2, and 3, as delineated in 50 CFR 17.40(d)(1), as critical habitat. Wolf management zones 1, 2, and 3 comprise approximately 25,500 sq km (9,845 sq mi) in northeastern and north-central Minnesota. This final rule removes the designation of critical habitat for gray wolves in Minnesota and on Isle Royale, Michigan.

**Post-Delisting Monitoring**

Section 4(g)(1) of the Act, added in the 1988 reauthorization, requires us to implement a system, in cooperation with the States, to monitor for not less than 5 years the status of all species that have recovered and been removed from the Lists of Endangered and Threatened Wildlife and Plants (50 CFR 17.11 and 17.12). The purpose of this post-delisting monitoring (PDM) is to verify that a species delisted due to recovery remains secure from risk of extinction after it no longer has the protections of the Act. To do this, PDM generally focuses on evaluating (1) demographic characteristics of the species, (2) threats to the species, and (3) implementation of legal and/or management commitments that have been identified as important in reducing threats to the species or maintaining threats at sufficiently low levels. We are to make prompt use of the emergency listing authorities under section 4(b)(7) of the Act to prevent a significant risk to the well-being of any recovered species. Section 4(g) of the Act explicitly requires cooperation with the States in development and implementation of PDM programs, but we remain responsible for compliance with section 4(g) and, therefore, must remain actively engaged in all phases of PDM. We also will seek active participation of other entities that are expected to assume responsibilities for the species' conservation, after delisting.

We developed a PDM plan for the wolves in the WGL DPS with the assistance of the Eastern Wolf Recovery Team. That document is available on our Web site (See **FOR FURTHER INFORMATION CONTACT**).

The PDM program will rely on a continuation of State monitoring activities, similar to those which have been conducted by Minnesota, Wisconsin, and Michigan DNR's in recent years, and tribal monitoring.

Minnesota, Wisconsin, and Michigan comprise the core recovery areas within the DPS, and, therefore, the numerical recovery criteria in the Recovery Plan apply only to the area encompassed by these States' boundaries. These activities will include both population and health monitoring of individual wolves. During the PDM period, the Service and the Recovery Team will conduct a review of the monitoring data and program. We will consider various relevant factors (including but not limited to mortality rates, population changes and rates of change, disease occurrence, range expansion or contraction) to determine if the population of wolves within the DPS warrants expanded monitoring, additional research, consideration for relisting as threatened or endangered, or emergency listing.

Minnesota, Wisconsin, and Michigan DNRs have monitored wolves for several decades with significant assistance from numerous partners, including the U.S. Forest Service, National Park Service, USDA–APHIS–Wildlife Services, Tribal natural resource agencies, and the Service. To maximize comparability of future PDM data with data obtained before delisting, all three State DNRs have committed to continue their previous wolf population monitoring methodology, or will make changes to that methodology only if those changes will not reduce the comparability of pre- and post-delisting data.

In addition to monitoring wolf population numbers and trends, the PDM will evaluate post-delisting threats, in particular human-caused mortality, disease, and implementation of legal and management commitments. If at any time during the monitoring period we detect a substantial downward change in the populations or an increase in threats to the degree that population viability may be threatened, we will work with the States and Tribes to evaluate and change (intensify, extend, and/or otherwise improve) the monitoring methods, if appropriate, and/or consider relisting the WGL DPS, if warranted.

This monitoring program will extend for 5 years beyond the effective delisting date of the DPS. At the end of the 5-year period, we and the Recovery Team will conduct another review and post the results on our Web site. In addition to the above considerations, the review will determine whether the PDM program should be terminated or extended.

## Required Determinations

### *Paperwork Reduction Act*

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

This final rule does not include any collections of information that require approval by OMB under the Paperwork Reduction Act. As described under the Post-delisting Monitoring above, wolf populations in the Western Great Lakes DPS will be monitored by the States of Michigan, Minnesota, and Wisconsin in accordance with their wolf State management plans. There may also be additional voluntary monitoring activities conducted by a small number of tribes in these three States. We do not anticipate a need to request data or other information from 10 or more persons during any 12-month period to satisfy monitoring information needs. If it becomes necessary to collect standardized information from 10 or more non-Federal individuals, groups, or organizations per year, we will first obtain information collection approval from OMB.

### *National Environmental Policy Act*

We have determined that an environmental assessment or an environmental impact statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

### *Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have coordinated the rule with the affected Tribes and, furthermore, throughout several years of development of earlier related rules and this rule, we have endeavored to consult with Native American Tribes and Native American organizations in order to both (1) provide them with a complete understanding of the changes, and (2) to understand their concerns with those changes. If requested, we will conduct additional consultations with Native American Tribes and multitribal organizations subsequent to this final rule in order to facilitate the transition to State and tribal management of wolves within the WGL DPS. We fully considered all of the comments on the proposed rule that were submitted by Tribes and Tribal members during the public comment period and attempted to address those concerns, new data, and new information where appropriate.

### *Data Quality Act*

In developing this rule we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554).

## References Cited

A complete list of all references cited in this document is available on the Internet at *http://www.regulations.gov* or upon request from the Midwest Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

## Authors

The primary authors of this rule are the staff members of the Midwest Regional Office (see **FOR FURTHER INFORMATION CONTACT**), with contributions from staff from Service Regions 2, 4, and 5. Staff from the Michigan DNR, Minnesota DNR, and Wisconsin DNR provided current information regarding wolves in their States. Staff from the Nelson Institute

for Environmental Studies at the University of Wisconsin-Madison compiled the current data on public attitudes toward the wolf.

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

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

**Regulation Promulgation**

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

## PART 17—[AMENDED]

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

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

**§ 17.11—[Amended]**

■ 2. Amend § 17.11(h) by revising the entries for ''Wolf, gray'' and ''Wolf, gray [Northern Rocky Mountain DPS]'' under ''MAMMALS'' in the List of Endangered and Threatened Wildlife to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

* * * * *

(h) * * *

| Species | | Historic range | Vertebrate population where endangered or threatened | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Common name | Scientific name | | | | | | |
| **Mammals** | | | | | | | |
| * | * | * | * | * | * | | * |
| Wolf, gray ..... | *Canis lupus* ..... | Holarctic ..... | U.S.A.: All of AL, AR, CA, CO, CT, DE, FL, GA, KS, KY, LA, MA, MD, ME, MO, MS, NC, NE, NH, NJ, NV, NY, OK, PA, RI, SC, TN, VA, VT and WV; those portions of AZ, NM, and TX not included in an experimental population as set forth below; and portions of IA, IN, IL, ND, OH, OR, SD, UT, and WA as follows:<br>(1) Southern IA, (that portion south of the centerline of Highway 80);<br>(2) Most of IN (that portion south of the centerline of Highway 80);<br>(3) Most of IL (that portion south of the centerline of Highway 80);<br>(4) Western ND (that portion south and west of the Missouri River upstream to Lake Sakakawea and west of the centerline of Highway 83 from Lake Sakakawea to the Canadian border);<br>(5) Most of OH (that portion south of the centerline of Highway 80 and east of the Maumee River at Toledo);<br>(6) Western OR (that portion of OR west of the centerline of Highway 395 and Highway 78 north of Burns Junction and that portion of OR west of the centerline of Highway 95 south of Burns Junction);<br>(7) Western SD (that portion south and west of the Missouri River);<br>(8) Most of Utah (that portion of UT south and west of the centerline of Highway 84 and that portion of UT south of Highway 80 from Echo to the UT/WY Stateline); and | E | 1, 6, 13, 15, 35 | NA | NA. |

| Species | | Historic range | Vertebrate population where endangered or threatened | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Common name | Scientific name | | | | | | |
| | | | (9) Western WA (that portion of WA west of the centerline of Highway 97 and Highway 17 north of Mesa and that portion of WA west of the centerline of Highway 395 south of Mesa). | | | | |
| | | | Mexico. | | | | |
| Do ..... | .....do ..... | .....do ..... | U.S.A. (portions of AZ, NM, and TX—see § 17.84(k)). | XN | 631 | NA | 17.84(k). |
| Wolf, gray [Northern Rocky Mountain DPS]. | *Canis lupus* ..... | U.S.A. (MT, ID, WY, eastern WA, eastern OR, and north central UT). | U.S.A. (WY—see § 17.84(i) and (n)). | XN | 561, 562 | NA | 17.84(i). 17.84(n). |
| * | * | * | * | * | * | | * |

**§ 17.40—[Amended]**

■ 3. Amend § 17.40 by removing and reserving paragraph (d).

**§ 17.95—[Amended]**

■ 4. Amend § 17.95(a) by removing the critical habitat entry for ''Gray Wolf (*Canis lupus*).''

Dated: December 13, 2011.

**Daniel M. Ashe,**

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

[FR Doc. 2011–32825 Filed 12–21–11; 11:15 am]

BILLING CODE 4310–55–P

# FEDERAL REGISTER

Vol. 76 Wednesday,

No. 249 December 28, 2011


Part IV

## Environmental Protection Agency

40 CFR Part 52

Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA–R06–OAR–2010–0190; FRL–9608–4]**

## Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations

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

**ACTION:** Final rule.

**SUMMARY:** EPA is partially approving and partially disapproving a revision to the Oklahoma State Implementation Plan (SIP) submitted by the State of Oklahoma through the Oklahoma Department of Environmental Quality on February 19, 2010, intended to address the regional haze requirements of the Clean Air Act (CAA). In addition, EPA is partially approving and partially disapproving a portion of a revision to the Oklahoma SIP submitted by the State of Oklahoma on May 10, 2007 and supplemented on December 10, 2007 to address the requirements of CAA section 110(a)(2)(D)(i)(II) as it applies to visibility for the 1997 8-hour ozone and 1997 fine particulate matter National Ambient Air Quality Standards. This CAA requirement is intended to prevent emissions from one state from interfering with the visibility programs in another state. EPA is approving certain core elements of the SIP including Oklahoma's: determination of baseline and natural visibility conditions; coordinating regional haze and reasonably attributable visibility impairment; monitoring strategy and other implementation requirements; coordination with states and Federal Land Managers; and a number of $NO_X$, $SO_2$, and PM BART determinations. EPA is finding that Oklahoma's regional haze SIP did not address the sulfur dioxide Best Available Retrofit Technology requirements for six units in Oklahoma in accordance with the Regional Haze requirements, or the requirement to prevent interference with other states' visibility programs. EPA is promulgating a Federal Implementation Plan to address these deficiencies by requiring emissions to be reduced at these six units. This action is being taken under section 110 and part C of the CAA.

**DATES:** This final rule is effective on: January 27, 2012.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2010–0190. All documents in the docket are listed in the Federal eRulemaking portal index at *http://www.regulations.gov* and are available either electronically at *http://www.regulations.gov* or in hard copy at EPA Region 6, 1445 Ross Ave., Dallas, TX, 75202–2733. To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section. A reasonable fee may be charged for copies.

**FOR FURTHER INFORMATION CONTACT:** Joe Kordzi, EPA Region 6, (214) 665–7186, *kordzi.joe@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever ''we,'' ''us,'' ''our,'' or ''the Agency'' is used, we mean the EPA.

### Overview

The CAA requires that states develop and implement SIPs to reduce the pollution that causes visibility impairment over a wide geographic area, known as Regional Haze (RH). CAA sections 110(a) and 169A. Oklahoma submitted a RH plan to us on February 19, 2010. On March 22, 2011, we proposed to partially approve and partially disapprove certain elements of Oklahoma's SIP. 76 FR 16168. Today, we are taking final action by partially approving and partially disapproving the elements of Oklahoma's RH SIP addressed in our proposed rule. As discussed in the proposal for this rule, the CAA requires us to promulgate a Federal Implementation Plan (FIP) if a state fails to make a required SIP submittal or we find that the state's submittal is incomplete or unapprovable. CAA section 110(c)(1). Therefore, we are promulgating a FIP to address the deficiencies in Oklahoma's RH plan.

One important element of the RH requirements of the CAA is that the Best Available Retrofit Technology (BART) must be selected and implemented for certain sources. The process of establishing BART emission limitations can be logically broken down into three steps. First, states identify those sources which meet the definition of ''BART-eligible source'' set forth in 40 CFR 51.301. Second, states determine whether such sources ''emit any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area'' (a source which fits this description is ''subject to BART''). Third, for each source subject to BART, states then identify the appropriate type and the level of control for reducing emissions,'' by conducting a five-step analysis: *Step 1:* Identify All Available Retrofit Control Technologies, *Step 2:* Eliminate Technically Infeasible Options, *Step 3:* Evaluate Control Effectiveness of Remaining Control Technologies, *Step 4:* Evaluate Impacts and Document the Results, and *Step 5:* Evaluate Visibility Impacts.

We agree with Oklahoma's identification of sources that are BART eligible and subject to BART. In addition, we are approving a number of BART determinations from Oklahoma's RH SIP. We are not able to approve Oklahoma's sulfur dioxide ($SO_2$) BART determinations for the OG&E's Sooner Units 1 and 2, the OG&E Muskogee Units 4 and 5, and the AEP/PSO Northeastern Units 3 and 4. In reviewing the $SO_2$ BART determinations for these six units,[1] we noted the state's cost estimates for $SO_2$ scrubbers were high in comparison to other similar units, and we therefore separately assessed the costs of installation of controls for these units using well established costing methodologies for BART determinations. As a result of this review, we proposed disapproval of the Oklahoma's $SO_2$ BART determinations for these six units because the Oklahoma's costing methodology was not in accordance with RH requirements. Consistent with the disparity in cost estimations we identified in our proposed disapproval, our revised cost estimate indicates that dry scrubber control technology is about ½ to ¾ less expensive than was calculated by Oklahoma. We have therefore determined it is appropriate to finalize our proposed disapproval of the Oklahoma's $SO_2$ BART determinations for the six units, because we conclude that the flaws in the state's cost estimations were significant, and that the state therefore lacked adequate record support and a reasoned basis for its determinations regarding the cost effectiveness of controls as needed for the final steps of the BART analysis and as required by the RH Rule (RHR). We are also disapproving the state's submitted Long Term Strategy because it relies on these BART limits which we are disapproving. We will of course consider, and would prefer, approving a SIP if the state submits a revised plan for these units that we can approve.

[1] When we say ''six BART sources,'' or ''six units,'' we mean Units 4 and 5 of the Oklahoma Gas and Electric Muskogee plant in Muskogee County; Units 1 and 2 of the Oklahoma Gas and Electric Sooner plant in Noble County; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant in Rogers County.

We are approving the remaining sections of the RH SIP submission. This includes certain core elements of the SIP including Oklahoma's (1) determination of baseline and natural visibility conditions, (2) coordinating regional haze and reasonably attributable visibility impairment, (3) monitoring strategy and other implementation requirements, (4) coordination with states and Federal Land Managers, and (5) the following BART determinations from Oklahoma's RH SIP:

- The $SO_2$, nitrogen oxides ($NO_X$), and particulate matter (PM) BART determinations for the Oklahoma Gas and Electric (OG&E) Seminole Units 1, 2, and 3.
- The $NO_X$ and PM BART determinations for OG&E's Sooner Units 1 and 2.
- The $NO_X$ and PM BART determinations for the OG&E Muskogee Units 4 and 5.
- The $SO_2$, $NO_X$, and PM BART determinations for the American Electric Power/Public Service Company of Oklahoma (AEP/PSO) Comanche Units 1 and 2.
- The $SO_2$, $NO_X$, and PM BART determinations for the AEP/PSO Northeastern Unit 2.
- The $NO_X$ and PM BART determination for the AEP/PSO Northeastern Units 3 and 4.
- The $SO_2$, $NO_X$, and PM BART determination for the AEP/PSO Southwestern Unit 3.

In addition to the Regional Haze Requirements, CAA section 110(a)(2)(D)(i)(II) requires that the Oklahoma SIP ensure that emissions from sources within Oklahoma do not interfere with measures required in the SIP of any other state under part C of the CAA to protect visibility. This requirement is commonly referred to as the visibility prong of ''interstate transport,'' which is also called the ''good neighbor'' provision of the CAA. Oklahoma submitted a SIP to meet the requirements of interstate transport for the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS) and the fine particulate matter ($PM_{2.5}$) NAAQS on May 10, 2007, and supplemented it on December 10, 2007. In the May 10, 2007, submittal, Oklahoma stated that it intended for its RH submittal to satisfy the requirements of the visibility prong. We proposed to partially approve and partially disapprove this submission as it relied upon the Regional Haze SIP that we were proposing to partially approve and partially disapprove. In evaluating whether Oklahoma's SIP ensures that emissions from sources within Oklahoma do not interfere with the visibility programs of other states, we found that the regional modeling conducted by the Central Regional Air Programs (CENRAP), participated in by Oklahoma, included reductions at the six units that were not required by the Oklahoma SIP. Since this modeling was used by other states and Oklahoma in establishing their Reasonable Progress Goals, we find that the Oklahoma SIP does not ensure that emissions from sources within Oklahoma do not interfere with measures required in the SIP of any other state under Part C of the CAA to protect visibility.

To address the deficiencies identified in our disapproval of these $SO_2$ BART determinations and the disapproval of the SIP submission as it pertains to the visibility prong of interstate transport, we are finalizing a FIP to control emissions from the six units. Our FIP requires that these six units reduce emissions of $SO_2$ to improve the scenic views at four national parks and wilderness areas: the Caney Creek and Upper Buffalo Wilderness Areas in Arkansas, the Wichita Mountains National Wildlife Refuge in Oklahoma, and the Hercules Glades Wilderness Area in Missouri. Improved air quality also results in public health benefits. This FIP can be replaced by a future state plan that meets the applicable CAA requirements.

All six units are coal-fired electricity generating units. Our FIP requires the six units to reduce their $SO_2$ pollution to an emission rate of 0.06 pounds per million BTU, calculated on the basis of a rolling 30 boiler operating day average. This can be accomplished by retrofitting the six units with dry flue gas desulfurization technology, commonly known as ''$SO_2$ scrubbers.'' In addition, any technology that can meet this $SO_2$ emission limit may be implemented at the six subject units. For example, EPA believes that these limits can also be met by wet scrubbing technology or switching to natural gas.

We held a 60 day public comment period on this action, and an open house and a public hearing in both Tulsa and Oklahoma City. Many public commenters disagreed with aspects of our cost analysis for $SO_2$ BART for the six affected units. After careful review of information provided during the public comment period, we revised our calculation of the total project cost for the four OG&E units from our proposed range of approximately $312,423,000 to $605,685,000, to our final range of approximately $589,237,000 to $607,461,000. We made no changes to the cost basis for the two AEP/PSO units from our proposal. As such, the associated cost investment for AEP/PSO is $274,100,000. Even with these changes to our cost analysis we conclude that we cannot approve the SIP's $SO_2$ emission limits and instead must adopt the proposed emission limits for the six units. However, in consideration of comments about the time needed to comply with our FIP, we have extended the time for compliance with the $SO_2$ emission limit from the proposed three years to five years.

This investment will reduce the visibility impacts due to these facilities by over 60 to 80% at each one of the four national parks and wilderness areas in the area, and promote local tourism by decreasing the number of days when pollution impairs scenic views. Although today's action is taken to address visibility impairments, we believe it will also reduce public health impacts by decreasing $SO_2$ pollution by approximately 95%.

This action is being taken under section 110 and part C of the CAA.

**Table of Contents**

I. Summary of Our Proposal
A. Regional Haze
B. Interstate Transport of Pollutants and Visibility Protection
II. Final Decision
A. Regional Haze
B. Interstate Transport of Pollutants and Visibility Protection
C. Compliance Timeframe
III. Analysis of Major Issues Raised by Commenters
A. Comments Generally Favoring Our Proposal
B. Comments Generally Against Our Proposal
C. Comments on Legal Issues
1. General Legal Comments
2. Comments Asking EPA To Consider All Rules
3. Comments on Interstate Transport
D. Comments on Modeling
E. Summary of Responses to Comments on the $SO_2$ BART Cost Calculation
1. Control Cost Manual Methodology
2. Revised Cost Calculations for the OG&E Units
3. Cost Calculations for the AEP/PSO Units
4. Conclusion
F. Summary of Responses to Visibility Improvement Analysis Comments
G. Summary of Responses to Comments Received on the $SO_2$ BART Emission Limit
H. Summary of Responses to Comments Received on the $SO_2$ BART Compliance Timeframe
I. Comments Supporting Conversion to Natural Gas and/or Renewable Energy Sources
J. Comments Arguing Our Proposal Would Hurt the Economy and/or Raise Electricity Rates
K. Comments Arguing Our Proposal Would Help the Economy
L. Comments on Health and Ecosystem Benefits and Other Pollutants

M. Miscellaneous Comments
IV. Statutory and Executive Order Reviews

## I. Summary of Our Proposal

On March 22, 2011, we published the proposal on which we are now taking final action. 76 FR 16168. We proposed to partially approve and partially disapprove Oklahoma's RH SIP revision submitted on February 19, 2010. We also proposed to partially approve and partially disapprove a portion of a SIP revision we received from the State of Oklahoma on May 10, 2007, as supplemented on December 10, 2007, for the purpose of addressing the ''good neighbor'' provisions of the CAA section 110(a)(2)(D)(i)(II) with respect to visibility for the 1997 8-hour ozone NAAQS and the $PM_{2.5}$ NAAQS.

### *A. Regional Haze*

We proposed to approve Oklahoma's determination that Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plant are subject to BART under 40 CFR 51.308(e). However, we proposed to disapprove the $SO_2$ BART determinations for Units 4 and 5 of the OG&E Muskogee plant; Units 1 and 2 of the OG&E Sooner plant; and Units 3 and 4 of the AEP/PSO Northeastern plant because they do not comply with our regulations under 40 CFR 51.308(e). We also proposed to disapprove the long term strategy (LTS) under section 51.308(d)(3) because Oklahoma has not shown that the strategy is adequate to achieve the reasonable progress goals set by Oklahoma and by other nearby states. The visibility modeling Oklahoma used to support its SIP revision submittal assumed $SO_2$ reductions from the six sources identified above that Oklahoma did not secure when making its BART determinations for these sources. The Oklahoma Department of Environmental Quality (ODEQ) participated in the Central Regional Air Planning Association (CENRAP) visibility modeling development that assumed certain $SO_2$ reductions from these six BART sources. ODEQ also consulted with other states with the understanding that these reductions would be secured. We proposed a FIP to address these defects in BART and the LTS.

We proposed a FIP that included $SO_2$ BART emission limits on these sources. We proposed that $SO_2$ BART for Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plant is an $SO_2$ emission limit of 0.06 lbs/MMBtu that applies individually to each of these units on a rolling 30 day calendar average. Additionally, we proposed monitoring, recordkeeping, and reporting requirements to ensure compliance with these emission limitations. We proposed that compliance with the emission limits be within three years of the effective date of our final rule. We solicited comments on alternative timeframes, of from two years up to five years from the effective date of our final rule. We also proposed that, should OG&E and/or AEP/PSO elect to reconfigure the above units to burn natural gas as a means of satisfying their BART obligations under section 51.308(e), conversion should be completed within the same time frame. We solicited comments as to, considering the engineering and/or management challenges of such a fuel switch, whether the full five years allowed under section 51.308(e)(1)(iv) following our final approval would be appropriate.

We proposed to disapprove section VI.E of the Oklahoma RH SIP entitled, ''Greater Reasonable Progress Alternative Determination.'' We also proposed to disapprove the separate executed agreements between ODEQ and OG&E, and ODEQ and AEP/PSO entitled ''OG&E Regional Haze Agreement, Case No. 10–024,'' and ''PSO Regional Haze Agreement, Case No. 10–025,'' housed within Appendix 6–5 of the RH SIP. We proposed that these portions of the submittal are severable from the BART determinations and the LTS. These alternative determinations are not fundamental requirements of a RH program, so disapproval of them does not create a regulatory gap in the SIP. Therefore, no FIP is required.

We proposed no action on whether Oklahoma has satisfied the reasonable progress requirements of EPA's regional haze SIP requirements found at section 51.308(d)(1).

We also proposed to approve the remaining sections of the RH SIP submission.

### *B. Interstate Transport of Pollutants and Visibility Protection*

We proposed to partially approve and partially disapprove a portion of a SIP revision we received from the State of Oklahoma on May 10, 2007, as supplemented on December 10, 2007, for the purpose of addressing the ''good neighbor'' provisions of the CAA section 110(a)(2)(D)(i) with respect to visibility for the 1997 8-hour ozone NAAQS and the $PM_{2.5}$ NAAQS. This proposal addressed the requirement of section 110(a)(2)(D)(i)(II) that emissions from Oklahoma sources do not interfere with measures required in the SIP of any other state under part C of the CAA to protect visibility.

Having proposed to disapprove these provisions of the Oklahoma SIP, we proposed a FIP to address the requirements of section 110(a)(2)(D)(i)(II) with respect to visibility to ensure that emissions from sources in Oklahoma do not interfere with the visibility programs of other states. We proposed to find that the controls proposed under the proposed FIP, in combination with the controls required by the portion of the Oklahoma RH submittal that we proposed to approve, will serve to prevent sources in Oklahoma from emitting pollutants in amounts that will interfere with efforts to protect visibility in other states.

## II. Final Decision

### *A. Regional Haze*

We are partially approving, partially disapproving, and taking no action on various portions of Oklahoma's RH SIP revision submitted on February 19, 2010. We are finalizing a FIP to address the defects in those portions of this SIP that are mandatory requirements that we are disapproving.

We are disapproving the $SO_2$ BART determinations for Units 4 and 5 of the Oklahoma OG&E Muskogee plant; Units 1 and 2 of the OG&E Sooner plant; and Units 3 and 4 of the AEP/PSO Northeastern plant. We are disapproving the LTS under section 51.308(d)(3).

We are finalizing a FIP that specifically imposes $SO_2$ BART emission limits on these sources. We find that $SO_2$ BART for Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plant is an $SO_2$ emission limit of 0.06 lbs/MMBtu that applies individually to each of these units. As we discuss elsewhere in this action and in a supplemental response to comments document (Supplemental RTC),[2] we find there is ample support for this decision. However, in response to a comment we received, we are changing our proposed averaging period for these emission limits from a straight

[2] The full title of the Supplemental RTC document is the ''Response to Technical Comments for Sections E through H of the **Federal Register** Notice for the Oklahoma Regional Haze and Visibility Transport FIP,'' and it is available in the docket for this rulemaking. This document is referred to as the ''Supplemental RTC'' throughout this rulemaking. We received many lengthy, and highly technical, comments concerning our $SO_2$ BART cost analysis, the visibility improvement analysis, the emission limit, and the compliance timeframe. While this notice generally addresses all of the issues commenters raised, the Supplemental RTC is intended to address comments on these four categories in greater detail.

rolling 30 day calendar average to one calculated on the basis of a boiler operating day (BOD). We also received a comment requesting that we revise our proposed unit-by-unit $SO_2$ limit, and replace it with a plant wide average $SO_2$ limit. As we note in our response to this comment, although we are open to combining the BOD and plant wide averaging techniques, this presents a significant technical challenge in having a verifiable, workable, and enforceable algorithm for calculating such an average. Due to our obligation to ensure the enforceability of the emission limits we are imposing in our FIP and the technical challenges of meeting that obligation through a plant wide limit, we are not including a plant wide average $SO_2$ limit in our final FIP. We leave it to Oklahoma to take up this matter in a future SIP revision, should it decide to do so. We are confident that this issue can be addressed prior to the installation of the emission controls required to satisfy our FIP.

We are promulgating monitoring, recordkeeping, and reporting requirements to ensure compliance with these emission limitations.

We are disapproving section VI.E of the Oklahoma RH SIP entitled, ''Greater Reasonable Progress Alternative Determination.'' We are also disapproving the separate executed agreements between ODEQ and OG&E, and ODEQ and AEP/PSO entitled ''OG&E Regional Haze Agreement, Case No. 10–024,'' and ''PSO Regional Haze Agreement, Case No. 10–025,'' housed within Appendix 6–5 of the RH SIP. We find that these portions of the submittal are severable from the BART determinations and the LTS. These alternative determinations are not fundamental requirements of a RH program, so disapproval of them does not create a gap in the SIP. For these reasons, no FIP is required.

We are taking no action on whether Oklahoma has satisfied the reasonable progress requirements of EPA's RH SIP requirements found at section 51.308(d)(1).

We are approving the remaining sections of the RH SIP submission. This includes certain core elements of the SIP including Oklahoma's (1) determination of baseline and natural visibility conditions, (2) coordinating regional haze and reasonably attributable visibility impairment, (3) monitoring strategy and other implementation requirements, (4) coordination with states and Federal Land Managers, and (5) the following BART determinations from Oklahoma's RH SIP:

- The $SO_2$., nitrogen oxides ($NO_X$), and particulate matter (PM) BART determinations for the Oklahoma Gas and Electric (OG&E) Seminole Units 1, 2, and 3.
- The $NO_X$ and PM BART determinations for OG&E's Sooner Units 1 and 2.
- The $NO_X$ and PM BART determinations for the OG&E Muskogee Units 4 and 5.
- The $SO_2$, $NO_X$, and PM BART determinations for the American Electric Power/Public Service Company of Oklahoma (AEP/PSO) Comanche Units 1 and 2.
- The $SO_2$, $NO_X$, and PM BART determinations for the AEP/PSO Northeastern Unit 2.
- The $NO_X$ and PM BART determination for the AEP/PSO Northeastern Units 3 and 4.
- The $SO_2$, $NO_X$, and PM BART determination for the AEP/PSO Southwestern Unit 3.

*B. Interstate Transport of Pollutants and Visibility Protection*

We are partially approving and partially disapproving a portion of a SIP revision we received from the State of Oklahoma on May 10, 2007, as supplemented on December 10, 2007, for the purpose of addressing the ''good neighbor'' provisions of the CAA section 110(a)(2)(D)(i) with respect to visibility for the 1997 8-hour ozone NAAQS and the $PM_{2.5}$ NAAQS.

We are finalizing a FIP to address the requirements of section 110(a)(2)(D)(i)(II) with respect to visibility to ensure that emissions from sources in Oklahoma do not interfere with the visibility programs of other states. We find that the controls under this FIP, in combination with the controls required by the portion of the Oklahoma RH submittal that we are approving, will serve to prevent sources in Oklahoma from emitting pollutants in amounts that will interfere with efforts to protect visibility in other states.

*C. Compliance Timeframe*

In response to comments we received, we find that compliance with the emission limits of our FIP must be within five years of the effective date of this rule. This compliance timeframe includes the election to reconfigure the six units to burn natural gas.

## III. Analysis of Major Issues Raised by Commenters

We received both written comments and oral comments at the Public Hearings in Oklahoma City and Tulsa. We also received comments by the Internet and the mail. The comments are summarized and discussed below. The full text received from these commenters is included in the docket associated with this action.

*A. Comments Generally Favoring Our Proposal*

*Comment:* We received many letters in support of our rulemaking from members representing various organizations that were similar in content and format, and are represented by two types of positive comment letters in the docket for this rulemaking. Each of these comment letters supports our proposed decision for the six coal units identified above. More than 500 of these letters specifically urge us to require emissions reductions from these six units in our final decision.

We received two letters from Federal Land Managers in support of this rulemaking. These comments include support for our proposed disapproval of the Long Term Strategy under Section 51.308(d)(3) and our proposed disapproval of the Greater Reasonable Progress Alternative Determination (section 51.308), as well as support for our proposed FIP requiring an emissions limitation of 0.06 lb of $SO_2$/MMBtu for each of the six units identified above. These comments also include agreement that EPA's proposed controls are cost-effective, reasonable and attainable, and that they constitute BART. These letters also included support for requiring compliance with the proposed emission limitations within three years from the effective date of the final rule, but could accept compliance within five years.

At the Public Hearing in Oklahoma City, positive comments were received from representatives of a natural gas producer and from public citizens. Some comments included support for our proposed disapproval of the Oklahoma SIP submittal, as well as for finalizing our proposed FIP. Included with these comments was the belief expressed that not controlling these sources will not make electricity cheap. Another idea presented at this hearing was that, whereas cheap electricity does not make an economy healthy, renewable energy does. Data for eight states was presented, including Washington State in which 75 percent of the electricity comes from renewable resources. Other comments were that clean air is a basic necessity of life and not a luxury, and that clean air is not something that should be traded or bargained away in the name of profit. Further, these comments included encouragement for the shortest possible timeline for compliance.

Comments were also received in support of our proposal at the Public

Hearing in Tulsa. One commenter noted that in the background for the proposed FIP, we accepted almost all of the methodologies and conclusions put forth by the ODEQ, with the exception of BART for $SO_2$ removal. Another commenter mentioned that the concept of being a good neighbor and reducing air pollution is a critical component of the CAA.

*Response:* We acknowledge these commenters for their support of this action. We also note that several of the specific emissions and timeframe limitations supported by these commenters in the proposal have been modified in this final action based on all of the information received during the comment period. Please see the docket associated with this action for additional detail. Additionally, some of the specific issues that these commenters raised are addressed elsewhere in this notice.

*B. Comments Generally Against Our Proposal*

We received written comments, as well as oral comments at the Public Hearings in Oklahoma City and Tulsa, that generally did not support our proposed rulemaking. Most of these commenters expressed concerns about the economic impact of this rulemaking. Due to the specific nature of these comments, we address them more fully in the remainder of this notice and in the Supplemental RTC. The full text of these comments is included in the docket associated with this action.

We also received one unspecific negative comment from an individual, which did not include documentation, rationale, or data for us to respond to beyond our responses provided elsewhere in this notice.

*C. Comments on Legal Issues*

1. General Legal Comments

*Comment:* We received several comment letters questioning whether we have CAA authority to disapprove Oklahoma's BART determination and determine BART through a FIP. These commenters included the Oklahoma Attorney General, OG&E, several industry trade organizations, and AEP/PSO. We also received a comment letter signed by multiple attorneys general from throughout the United States.[3] The commenters generally contend that our proposal would ''usurp'' or encroach on the state's authority and that EPA lacks the authority to substitute its own judgment or policy preferences for the state's determinations. The Oklahoma Attorney General comments that our role is ''simply one of support'' and that state determinations are entitled to ''special deference.'' Similarly, one commenter states that we cannot ''second-guess'' the state and redo a BART analysis with no deference to the state's findings. That commenter also states that we have not articulated any standard under which we may judge the validity of a state's BART determination.

*Response:* Congress crafted the CAA to provide for states to take the lead in developing implementation plans, but balanced that decision by requiring EPA to review the plans to determine whether a SIP meets the requirements of the CAA. EPA's review of SIPs is not limited to a ministerial type of ''rubber-stamping'' of a state's decisions. EPA must consider not only whether the state considered the appropriate factors but acted reasonably in doing so. In undertaking such a review, EPA does not ''usurp'' the state's authority but ensures that such authority is reasonably exercised. EPA has the authority to issue a FIP either when EPA has made a finding that the state has failed to timely submit a SIP or where EPA has found a SIP deficient. Here, EPA has authority and we have chosen to approve as much of the Oklahoma SIP as possible and to adopt a FIP only to fill the remaining gap. Our action today is consistent with the statute. In finalizing our proposed determinations, we are approving the state's determinations in identifying BART eligible sources and largely approving the state's BART determinations for thirteen different emission units subject to BART. We are, however, disapproving the state's $SO_2$ BART determinations for six of those units. As explained in the proposal, the state's $SO_2$ BART determinations for the six OG&E and AEP/PSO units are not approvable because ODEQ ''did not properly follow the requirements of section 51.308(e)(1)(ii)(A).'' 76 FR 16168, at 16182. Specifically, ODEQ did not properly ''take into consideration the costs of compliance,'' when it relied on cost estimates that greatly overestimated the costs of controls. We have determined that the faults in ODEQ's cost methodology were significant enough that they resulted in BART determinations for $SO_2$ that were both unreasoned and unjustified. Accordingly, those determinations that relied on significantly flawed cost estimations are not approvable.

In the absence of approvable BART determinations in the SIP for $SO_2$ for BART eligible sources in Oklahoma, we are obliged to promulgate a FIP to satisfy the CAA requirements. Likewise, in the absence of an approvable SIP that addresses the requirement that emissions from Oklahoma sources do not interfere with measures required in the SIP of any other state to protect visibility, we are obliged to promulgate a FIP to address the defect. This authority and responsibility exists under CAA section 110(c)(1). We also are required by the terms of a consent decree with WildEarth Guardians, lodged with the U.S. District Court for the Northern District of California to ensure that Oklahoma's CAA requirements for 110(a)(2)(D)(i)(II) are finalized by December 13, 2011. Because we have found the state's SIP submissions do not adequately satisfy either requirement in full and because we have previously found that Oklahoma failed to timely submit these SIP submissions, we have not only the authority but a duty to promulgate a FIP that meets those requirements. Our action in large part approves the RH SIP submitted by Oklahoma; the disapproval of the $SO_2$ BART determinations and imposition of the FIP is not intended to encroach on state authority. This action is only intended to ensure that CAA requirements are satisfied using our authority under the CAA. We note that Oklahoma may submit a new SIP revision addressing the issue of $SO_2$ controls for these six units, in which case we will assess it against Clean Air Act and Regional Haze Rule requirements as a possible replacement for the FIP.

*Comment:* Multiple commenters have cited to various CAA statutory provisions to support their contention that the State of Oklahoma has authority or ''primary authority,'' where EPA has no authority or lesser authority. On this point, commenters have cited CAA Sections 169A(b)(2)(A) and 169A(g)(2). Specifically, Section 169A(b)(2)(A) reads in part that regulations to protect visibility shall require the installation and operation of BART ''as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of the this title).'' Section 169A(g)(2) begins, ''in determining [BART] the State (or the Administrator in determining emissions limitations which reflect such technology) shall'' take into consideration several requisite statutory factors. The commenters place special emphasis on the references to the ''the State'' in these provisions and contend that the plain language of the statute

[3] The signatories of this May 2011 comment letter were the attorney generals of Oklahoma, Alabama, Kentucky, Maine, the N. Mariana Islands, South Carolina, Texas, and Utah.

provides that states, and not EPA, have authority to determine BART.

*Response:* We agree that states have authority to determine BART, but we disagree with commenters' assertions that EPA has no authority or lesser authority to determine BART when promulgating a FIP. As the parenthetical in section 169A(b)(2)(A) indicates, the Administrator has the authority to determine BART ''in the case of a plan promulgated under section 7510(c).'' In other words, the Administrator has explicit authority to determine BART when promulgating a FIP. In our proposal, we stated that we must consider the same factors as states when proposing a FIP to address BART. 76 FR 16168, at 16187. Our BART determination follows the factors prescribed by CAA Section 169A(g)(2). We disagree that the language of the CAA limits our authority to determine BART in the case of a FIP.

*Comment:* Commenters who have argued that the plain language of the CAA requires that states are the primary or only BART determining authorities have also cited our preamble language from past **Federal Register** publications that they believe reinforces their contention. For example, several commenters cited 70 FR 39104, at 39107, which reads in part, ''the State must determine the appropriate level of BART control for each source subject to BART.'' Commenters have also cited the preamble to our proposal, where we wrote, ''States are free to determine the weight and significance to be assigned to each factor'' when making BART determinations. 76 FR 16168, at 16174. Finally, some commenters have stated the preamble of the RHR supports their contentions when it states: ''In some cases, the State may determine that a source has already installed sufficiently stringent emission controls for compliance with other programs (e.g., the acid rain program) such that no additional controls would be needed for compliance with the BART requirement.'' 64 FR 35714, at 35740.

*Response:* We agree that states are assigned statutory and regulatory authority to determine BART and that many past EPA statements have confirmed state authority in this regard. Although the states have the freedom to determine the weight and significance of the statutory factors, they have an overriding obligation to come to a reasoned determination. As detailed in our proposal and the supporting Technical Support Document (TSD), the state's $SO_2$ BART determinations for the six OG&E and AEP/PSO units were premised on flawed cost assumptions. Since these $SO_2$ BART determinations of the state are not approvable, we are obliged to step into the shoes of the state and arrive at our BART determinations.

*Comment:* Commenters have also cited other CAA provisions. One commenter states that 169A(b) only allows for EPA to issue guidelines with technical and procedural guidance for determining BART, not to issue rules that dictate the outcome (except for fossil-fueled power plants with capacity that exceeds 750 MW). That commenter also contends that our lack of authority relative to the states is shown through CAA Section 169A(f), which provides that the meeting of the national visibility goal is not a ''nondiscretionary duty'' of the Administrator. AEP/PSO comments that the provisions of CAA Section 169B shows that states have special authority to act together through visibility transport commissions. The Oklahoma Attorney General cites CAA Section 101(a)(3), which provides that air pollution control at its source ''is the primary responsibility of States and local governments.''

*Response:* States shoulder significant responsibilities in CAA implementation and in effectuating the requirements of the RHR. EPA has the responsibility of ensuring that state plans, including RH SIPs, conform to CAA requirements. None of the CAA provisions cited by commenters change our conclusion that we have authority to issue a FIP to satisfy BART requirements given that Oklahoma's RH SIP is not fully approvable. We cannot approve a RH SIP that fails to address BART with a reasoned consideration of the costs of compliance. Our inability to approve the state's BART determinations for $SO_2$ means we must follow through on our non-discretionary duty to promulgate a FIP. Under the CAA, we were required to do this by January 2011, two years after EPA found that Oklahoma failed to submit a RH SIP. 74 FR 2392. The language of CAA Section 169A(f), which concerns the meeting of the national goal, is not related to the review of a state's BART determinations or our determinations on their adequacy or the timing of our action.

*Comment:* Many commenters expressed the view that their statutory arguments are reinforced by legislative history of the 1977 CAA amendments. Several commenters refer to statements of Senator Edmund Muskie regarding the conference agreement on the provisions for visibility protection in those amendments. Senator Muskie had stated that under the conference agreement the state, ''not the Administrator,'' identifies BART eligible sources and determines BART. 123 Cong. Rec. 26854 (August 4, 1977). Commenters have also noted that *Am. Corn Growers Ass'n* v. *EPA,* 291 F.3d 1 (D.C. Cir. 2002) used legislative history, including the Conference Report on the 1977 amendments, when the Court had invalidated past regulatory provisions regarding BART for constraining state authority. The Court stated that the Conference report confirmed that Congress ''intended the states to decide which sources impair visibility and what BART controls apply to those sources.''

*Response:* We agree that the CAA places the requirements for determining BART for BART-eligible sources on states. As discussed above, the CAA also requires the Administrator to determine BART in the absence of an approvable determination from the state. Because we have determined that Oklahoma's BART determinations for $SO_2$ for the six OG&E and AEP/PSO units do not conform with section 51.308(e) and are not approvable, we are authorized and at this time required to promulgate a FIP.

*Comment:* Several commenters have asserted our proposal is inconsistent with the decision of the DC Circuit in *Am. Corn Growers Ass'n* v. *EPA,* 291 F.3d 1 (D.C. Cir. 2002). They contend that language in the decision affirms their views regarding state authority and EPA's lack of authority in regulating the problem of regional haze. In particular, the *American Corn Growers* decision had described states as playing ''the lead role'' in designing and implementing regional haze programs, *Id.* at 3, and described the CAA as ''giving the states broad authority over BART determinations.'' *Id.* at 8.

*Response:* We disagree that our proposal is inconsistent with the *American Corn Growers* decision. We have determined that Oklahoma utilized flawed cost assessments and incorrectly estimated the visibility impacts of controls. We have determined these issues resulted in non-approvable $SO_2$ BART determinations for the six OG&E and AEP/PSO units. We recognize the state's broad authority over BART determinations, and recognize the state's authority to attribute weight and significance to the statutory factors in making BART determinations. As a separate matter, however, a state's BART determination must be reasoned and based on an adequate record. Although we have largely approved the state's RH SIP, we cannot agree that CAA requirements are satisfied with respect to these $SO_2$ BART determinations.

*Comment:* One commenter contends that states have broader authority for regional haze, because it is not a human

health-based regulation. Another commenter similarly suggests that states are the ''appropriate decision makers'' because regional haze is about haze, not health.

*Response:* We do not agree that the CAA or RHR prescribes a different degree of authority to states based on the program having the goal of improving visibility as opposed to preventing adverse human health effects. Among other things, the CAA requires states to submit plans that satisfy NAAQS standards set to protect both public health and welfare. Nothing in the terms of the CAA or its implementation history directs that SIP submittals addressing visibility are subject to a different standard of evaluation than SIP submittals that directly address public health issues associated with air pollutants. The distinction is not pertinent to state authority to develop RH SIPs and does not diminish our responsibility and authority to require that they conform to the RHR.

*Comment:* Several commenters have more generally asserted that we lack authority to disapprove the RH SIP, because of past cases where we have lacked authority in particular SIP disapproval actions. These commenters have cited, in particular to *Florida Power & Light Co.* v. *Costle,* 650 F.2d 579, 581 (5th Cir. 1981) (EPA must approve a SIP that ''meets statutory criteria''), *Train* v. *NRDC,* 421 U.S. 60, 79 (1975), and *Commonwealth of Vir.* v. *EPA,* 108 F.3d 1397 (D.C. Cir. 1997). Under these cases, the commenters assert that we cannot question the wisdom of a state's choices or require particular control measures if plan provisions satisfy CAA standards.

*Response:* States are required by the CAA to address the BART requirements in their SIP. Our disapproval of the $SO_2$ BART determinations in the Oklahoma RH SIP is authorized under the CAA because the state's $SO_2$ BART determinations for the six OG&E and AEP/PSO units do not satisfy the statutory criteria. The state's analysis of the cost effectiveness of controls was flawed due to reasons discussed elsewhere in this notice. While states have authority to exercise different choices in determining BART, the determinations must be reasonably supported. Oklahoma's errors in taking into consideration the costs of compliance were significant enough that we cannot conclude the state determined BART according to CAA standards. The cases cited by the commenters stress important limits on EPA authority in reviewing SIP submissions, but our disapproval of these $SO_2$ BART determinations for the six units has an appropriate basis in our CAA authority.

*Comment:* A citizen commenter asserts that our proposal is indicative of ''raw unconstitutional power.''

*Response:* The commenter has cited no specific provisions of the Constitution. In any case, we regard neither the RHR, which has previously been subject to review by the D.C. Circuit, nor our underlying statutory authority for this action to be unconstitutional. We are acting under statutory responsibilities established in the 1977 and 1990 amendments to the CAA. As is the case for any executive agency under the authority of the President, the Constitution has charged us with the implementation and enforcement of laws written by Congress. The administration of the CAA and implementation of the RHR is accordingly not unconstitutional.

*Comment:* AEP/PSO and another commenter have commented that our proposed action improperly combines matters under Oklahoma's RH SIP with unrelated matters addressed in the 2007 Interstate Transport SIP. Both commenters have stated that our disapproval of the Interstate Transport SIP would be inconsistent with our guidance in 2006. They contend our 2006 guidance had suggested conclusions regarding whether emissions from any one state could interfere with measures of neighboring states to protect visibility could only be reached when a neighboring state's RH SIP had been approved. These commenters believe Oklahoma's Interstate Transport SIP obligations under CAA Section 110(a)(2)(D)(i)(II) can be approved because there were no EPA-approved regional haze SIPs at the time of submittal or when we reviewed the Oklahoma submission.

*Response:* We disagree with contention of the commenters that RH SIP requirements and the visibility requirements of section 110(a)(2)(D)(i)(II) are unrelated. We are addressing them simultaneously because the purposes and requirements of the interstate transport provisions of the CAA with respect to visibility and the RH program are intertwined. Section 110(a)(2)(D)(i)(II) does not explicitly define what is required in SIPs to prevent the prohibited impact on visibility in other states. However, because the RH program requires measures that must be included in SIPs specifically to protect visibility, EPA's 2006 Guidance [4] recommended that RH SIP submissions meeting the requirements of the visibility program could satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility. Subsequently, in instances in which some states did not make the RH SIP submission, in whole or in part, or did not make an approvable RH SIP submission, we evaluated whether those states could comply with section 110(a)(2)(D)(i)(II) by other means. Thus, we have elsewhere determined that states may also be able to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with something less than an approved RH SIP, see, for example, our determinations regarding Colorado (76 FR 22036) and Idaho (76 FR 36329). In other words, an approved RH SIP is not the only possible means to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility; however, such a SIP could be sufficient. Given this reasoning, we do not agree with commenters' contentions that our action improperly combines two unrelated programs.

Regarding our guidance on submissions in August of 2006, we explicitly stated that ''at this point in time,'' it was not possible to assess whether emissions from sources in the state would interfere with measures in the SIPs of other states. As subsequent events have demonstrated, we were mistaken as to the assumption that all states would submit RH SIPs in December of 2007, as required by the RHR, and mistaken as to the assumption that all such submissions would meet applicable RH program requirements and therefore be approved shortly thereafter. Thus the premise of the 2006 Guidance that it would be appropriate to await submission and approval of such RH SIPs before evaluating SIPs for compliance with section 110(a)(2)(D)(i)(II) was in error. Our 2006 Guidance was clearly intended to make recommendations that were relevant at that point in time, and subsequent events have rendered it inappropriate in this specific action. We must therefore act upon Oklahoma's submission in light of the actual facts, and in light of the statutory requirements of section 110(a)(2)(D)(i). In order to evaluate whether the state's SIP currently in fact contains provisions sufficient to prevent the prohibited impacts on the required programs of other states, we are obligated to consider the current circumstances and investigate the level

[4] See,''Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy Division, OAQPS, to Regional Air Division Director, Regions I–X, dated August 15, 2006 (the ''2006 Guidance'').

of controls at Oklahoma sources and whether those controls are or are not sufficient to prevent such impacts.

We reject the argument that Oklahoma's submittal should be approvable because surrounding states have yet to submit RH SIPs that have been approved. The argument fails to address what would happen if a downwind state were never to submit the required RH SIP, or were never to submit a RH SIP that was approvable. On its face, the commenter's argument is simply inconsistent with the objectives of the statute to protect visibility programs in other states if a state never submits an approvable RH SIP. Second, this approach is flatly inconsistent with the timing requirements of section 110(a)(1) which specifies that SIP submissions to address section 110(a)(2)(D)(i), including the visibility prong of that section, must be made within three years after the promulgation of a new or revised NAAQS. We acknowledge that there have been delays with both RH SIP submissions by states and our actions on those RH SIP submissions, but that fact does not support a reading of the statute that overrides the timing requirements of the statute. At this point in time, states are required to have submitted regional haze plans to EPA that establish reasonable progress goals for Class I areas. This requirement applies whether or not states have in fact submitted such plans. We believe that there are means available now to evaluate whether a state's section 110(a)(2)(d)(i)(II) SIP submission meets the substantive requirement that it contain provisions to prohibit interference with the visibility programs of other states, and therefore that further delay, until all RH SIPs are submitted and fully approved, is unwarranted and inconsistent with the key objective to protect visibility.

As detailed in our proposal, we believe based on the information currently before us that an implementation plan that provides for emissions reductions consistent with the assumptions used in the modeling of other CENRAP states will ensure that emissions from Oklahoma sources do not interfere with the measures designed to protect visibility in other states. 76 FR 16168, at 16193. The Oklahoma $SO_2$ BART determinations for the six OG&E and AEP/PSO units did not require these sources to meet the level of control assumed in the CENRAP modeling. As we discuss elsewhere in our response to comments, Oklahoma engaged in a regional planning process. This regional planning process included a forum in which state representatives built emission inventories that assumed that specific pollution sources would be controlled to specific levels. This included assumptions that the six OG&E and AEP/PSO units would be controlled to presumptive BART emission levels for $SO_2$. Visibility modeling projections subsequently assumed those emission reductions, and other states relied on those reductions as part of their reasonable progress demonstrations. Accordingly and consistent with our proposal, we are partially disapproving the Oklahoma SIP revision submitted to address the requirements of CAA section 110(a)(2)(D)(i)(II). The FIP remedies the inadequacy in the Oklahoma SIP by requiring controls for the six units that at least achieve the level of control assumed in the CENRAP modeling.

*Comment:* AEP/PSO and another commenter have asserted that the promulgation of revised NAAQS for ozone and $PM_{2.5}$ in 1997 did not trigger any additional SIP obligations with respect to section 110(a)(2)(D)(i)(II). A commenter believes that these revised NAAQS are not meaningfully related to visibility requirements in Title I Part C, of the CAA. The commenters ask EPA to determine that no obligation to address Part C visibility components of a SIP arose from those NAAQS revisions.

*Response:* Reduced visibility is an effect of air pollution, and the emissions of $PM_{2.5}$ and ozone and its precursors can contribute to visibility impairment. SIP planning for the control of these pollutants on the promulgation of a new NAAQS will therefore implicate control measures and issues relating to visibility. CAA section 110(a)(1) therefore requires implementation plans submitted in the wake of a newly promulgated NAAQS to address whether the state has adequate provisions to prevent interference with the efforts of other states to protect visibility. The obligation to address Part C visibility components expressly follows from the language of 110(a) concerning when plans must be submitted and what each implementation plan must contain.

*Comment:* OG&E contends that EPA's proposal to disapprove the state's BART determination is faulty, because the agency relied ''without critical review'' on what the commenter describes as the ''opinion'' of a contracted consultant. The commenter contends EPA's our consultant is unqualified to evaluate costs of installing and operating scrubbers at the OG&E Units, because our consultant ''has no experience designing scrubbers or estimating their costs.'' Additionally, OG&E states our consultant lacked relevant knowledge about the OG&E Units and the facilities at which these units are located, and did not attempt to communicate with OG&E or its contractor about the particular design parameters, engineering specifications, or other intricacies associated with the OG&E units. The commenter believes the consultant's report contains opinions that ''lack adequate foundation.'' On this basis, OG&E states that EPA cannot lawfully rely on the consultant's report.

*Response:* As an initial matter, we do not agree that our regulatory actions are subject to evidentiary rules regarding expert testimony, as this comment suggests. Our consultant's detailed report was incorporated as technical support for our regulatory determinations and is not properly characterized as an opinion. The contention that we accepted the consultant's report without critical review is false. As was stated in our proposal, only after we thoroughly reviewed and evaluated the report was it made a part of our TSD. 76 FR 16168, at 16182–16183. Furthermore, we met with OG&E and its consultant concerning the development of our proposal and had extensive communications clarifying particular technical points. This information was coordinated with our consultant and was incorporated into her report. Thus, we worked closely with our consultant in the development of her report.

*Comment:* A commenter states that EPA's proposed BART determination would violate Executive Order 13132, Federalism.

*Response:* We do not agree that our proposal or this final action violates Executive Order 13132. EPA is taking actions specified under the CAA in partially approving and partially disapproving the Oklahoma RH SIP. The CAA also specifies the responsibility of EPA to issue a FIP when states have not met their requirements under the CAA. EPA is promulgating this FIP to fill the regulatory gap created by the partial disapproval. Under the FIP, the state retains its authority to submit future RH SIPs consistent with CAA and RHR requirements; we do not discount the possibility of a future, approvable RH SIP submission that results in the modification or withdrawal of the FIP. This rulemaking does not change the distribution of power between the states and EPA. Consistent with this, in the Executive Orders section of this rulemaking, we have determined that Executive Order 13132 does not apply to this action.

*Comment:* A commenter states that EPA cannot propose a FIP until after it

has taken final action to disapprove a state implementation plan. The commenter cites to part of CAA section 110(c)(1) which states that the Administrator shall promulgate a FIP ''at any time within 2 years after'' the Administrator ''disapproves a State implementation plan submission.'' The commenter states that EPA should withdraw the proposed FIP, take final action only on the SIP, and only then propose a FIP, if one is necessary.

*Response:* We have the authority to promulgate a FIP concurrently with a disapproval action. This timing for FIP promulgation is authorized under CAA section 110(c)(1). As has been noted in past FIP promulgation actions, the language of CAA section 110(c)(1), by its terms, establishes a two-year period within which we must promulgate the FIP, and provides no further constraints on timing. *See, e.g.,* 76 FR 25178, at 25202. Oklahoma failed to submit its regional haze SIP to us by December 2007, as required by Congress. Two years later, Oklahoma had still not submitted its regional haze SIP. When we made a finding in 2009 that Oklahoma had failed to submit its regional haze SIP, (*see* 74 FR 2392), that created an obligation for us to promulgate a FIP by January 2011. We are exercising our discretion to promulgate the FIP concurrently with our disapproval action because of the applicable statutory deadlines requiring us at this time to promulgate RH BART determinations to the extent Oklahoma's BART determinations are not approvable.

*Comment:* OG&E expresses the view that we have improperly combined a proposed disapproval of the Oklahoma SIP with our own BART determination. The commenter contends that the fact we would reach a different BART determination is not ''itself sufficient grounds to disapprove the SIP.'' The commenter believes EPA desired to have scrubbers installed on the OG&E units and is only proposing to substitute its own BART determination ''to mask the fact that it lacks any meritorious grounds to disapprove ODEQ's BART determination.''

*Response:* Our grounds for disapproving ODEQ's $SO_2$ BART determination were articulated in our proposal, and we have not claimed that having arrived at a different $SO_2$ BART determination constitutes a basis for disapproval. Instead, as was clear in our proposal, we were obliged to develop an $SO_2$ BART determination because Oklahoma's $SO_2$ BART determination was flawed and not approvable. The fact that Oklahoma's $SO_2$ BART determination was not approvable caused us to develop a BART determination that adheres to the requirements of section 51.308(e)(1)(ii)(A).

*Comment:* OG&E comments that we cannot justify our disapproval based on aggregate visibility improvements. The commenter asserts that when we review a SIP or propose a FIP, the agency is required to consider the visibility improvement associated with scrubbers on a facility-by-facility basis. The commenter points to a portion of our proposal where we stated that modeling demonstrates a ''2.89 deciview improvement in visibility,'' 76 FR 16168, at 16186, and notes the statement is based on combining impacts from scrubbers at multiple units. The commenter asserts this approach violates the individual facility approach dictated by CAA as outlined in the *American Corn Growers* case and violates the RHR and the guidelines that responded to that case outcome. In particular, the commenter cites to the preamble language at 70 FR 39104, at 39106 which describes how the RHR was amended ''to require the States to consider the degree of visibility improvement resulting from a source's installation and operation of retrofit technology, along with the other statutory factors.'' The commenter attributes significance to EPA's phrasing, which had stated in part, ''* * * States will be required to consider all five factors, including visibility impacts, on an individual source basis when making each individual source BART determination.''

Another commenter also contends we based our $SO_2$ BART proposal for the six OG&E and AEP/PSO units on a visibility estimate of an 8.20 dv cumulative improvement over multiple Class I areas. Further, this commenter contends we have claimed this visibility improvement will result from emission reductions at all three facilities combined, which the commenter characterizes as a form of aggregation that is impermissible, as BART must be determined on a source-by-source basis. The commenter also stated that analysis should be focused on the visibility impacts at the most impacted area, not all areas. The commenter claims our rules indicate that it is appropriate to model impacts at the nearest Class I area as well as impacts at other nearby Class I areas. However, in the case of the latter category of areas, merely for the purpose of ''determin[ing] whether effects at those [other] areas may be greater than at the nearest Class I area.'' 70 FR 39104, at 39170. Further, continues the commenter, the rules state that ''[i]f the highest modeled effects are observed at the nearest Class I area, you may choose not to analyze the other Class I areas any further * * *.'' *Id.* Based on this, the commenter states that that the BART rules contemplate a visibility improvement analysis that only is focused on visibility impacts in the most impacted area, not all areas.

*Response:* We proposed disapproval of the Oklahoma $SO_2$ BART determination for the six OG&E and AEP/PSO units in part because we disagreed with ODEQ's cost analysis, and our own visibility modeling indicated $SO_2$ controls would result in significant visibility improvement. In so doing, we adhered to the requirements of section 51.308(e). Oklahoma's $SO_2$ BART determinations for the six units were based on flawed costing methodologies. Our determinations regarding visibility improvement are not inconsistent with the CAA or the court's interpretation in *American Corn Growers* of the individual facility approach that must be utilized when making BART determinations. Although we noted in the proposal the combined visibility improvement at four Class I areas due to the installation of $SO_2$ controls at the six OG&E and AEP/PSO units, our FIP is not based on an analysis of visibility improvements that are aggregated across multiple facilities. Rather, we assessed the visibility improvement of each facility separately.

Our visibility modeling shows that the six OG&E and AEP/PSO units ''causes or contributes'' to visibility impairment—as the phrase is defined in the RHR [5]—at four Class I areas. As Table 1 indicates, the number of days per year each Class I area is impacted at this level by each facility's emissions are expected to decrease drastically at each Class I area as the result of installation of $SO_2$ BART emission controls at the six units. Clearly, the visibility benefits from $SO_2$ BART emission reductions will be spread among all affected Class I areas, not only the most affected area, and should be considered in evaluation of benefits from proposed reductions. The portion of the BART Guidelines (40 CFR 51 Appendix Y, IV.D.5) that the commenter referenced states: ''If the highest modeled effects are observed at the nearest Class I area, you may choose not to analyze the other Class I areas any further as additional analyses might be unwarranted.'' This section of the BART Guidelines addresses how to determine

[5] States should consider a 1.0 deciview change or more from an individual source to ''cause'' visibility impairment, and a change of 0.5 deciviews to ''contribute'' to impairment. 70 FR 39120.

visibility impacts as part of the BART determination and is intended to make clear that if certain controls would be justified based on the impacts at the nearest Class I area, the state is not required to undertake an exhaustive analysis of impacts across multiple Class I areas. Several paragraphs later in the BART Guidelines is the following: ''You have flexibility to assess visibility improvements due to BART controls by one or more methods. You may consider the frequency, magnitude, and duration components of impairment,'' emphasizing the flexibility in method and metrics that exists in assessing the net visibility improvement.

*Comment:* OG&E comments that we had improperly analyzed the ''contingent BART determination that applies if EPA rejects ODEQ's determination that low sulfur coal is BART and all appeals are exhausted.'' The commenter says the contingent BART determination should not have been analyzed as a BART alternative under 40 CFR 51.308, because it is ''not a BART alternative.'' If the contingent determination were to be effectuated, the commenter asserts that scrubbers would then constitute BART itself, not an alternative to BART scrutinized under separate rules. The commenter also asserts that the contingent BART finding would be consistent with the statutory timeframe for installation of BART (viz., ''in no event later than five years'' under CAA section 169A(g)(4)), because the contingent BART finding would not be triggered until the appellate process had concluded and because a final appellate ruling might be made before 2013, which could result in a time for compliance that is shorter than five years.

*Response:* The RHR does not afford the option of submitting contingent BART determinations that would apply and become effective when EPA disapproves and successfully defends its disapproval of a state's BART determination. This item in the RH SIP could not be evaluated as a BART determination, because it is not on its face a BART finding. This component of the RH SIP submission inherently speculates on the actions and outcomes of review by EPA and the courts, and is contrary to the SIP planning and review expected under the RHR and the CAA, more generally. Accordingly, we properly evaluated these provisions as an alternative to BART and determined that the contingent BART determination was not approvable under 40 CFR 51.308. We disagree that it could be reviewed under any other provision and found to be consistent with the RHR.

*Comment:* OG&E comments that we had improperly analyzed the ''2026 compliance option'' as failing to meet the standards of a BART alternative. In the commenter's view, the 2026 compliance is not a BART alternative but only a measure ''to implement a long-term strategy in the name of reasonable progress.'' OG&E asserts that ODEQ has authority for this under 51.308(d)(3), and that implementation of the compliance option could reduce emissions more than would be possible with dry scrubbers, and that our evaluation of the 2026 compliance option loses sight of the long-term national goal.

*Response:* We disagree that the contingent SIP provision can be recognized as implementing a long-term strategy. As discussed in our response regarding the ''contingent BART determination,'' this component of the RH SIP is not on its face reviewable as a BART determination and fails to satisfy the requirements of Section 51.308. The contingent SIP is predicated on speculative actions and outcomes of review by EPA and courts, and does not comport with established SIP planning and approval processes under the CAA.

*Comment:* A commenter expressed concern that EPA has ignored the regional haze plan supported by ODEQ and local utilities, and states, ''EPA has assumed the State's role under the Clean Air Act and has simply chosen not to exercise its discretion to approve the Greater Reasonable Progress Alternative Determination.'' Another commenter also submitted a comment requesting that EPA use the Oklahoma RH SIP as a guideline in the decision making process. Another commenter from the office of Oklahoma's Attorney General states that we ''should defer to the state plan,'' because Oklahoma is in a superior position to make decisions regarding energy policy.

*Response:* We note that our action today largely approves the regional haze plan submitted by Oklahoma. We are, however, finalizing disapprovals of the state's $SO_2$ BART determinations and the ''Greater Reasonable Progress Alternative Determination'' referenced by the commenter. We have determined that neither of these components of the RH SIP submission conforms to CAA and RHR requirements. Because Oklahoma's $SO_2$ BART determinations are not being approved, we have promulgated a FIP that determines $SO_2$ BART for the six OG&E and AEP/PSO units in a manner consistent with RHR requirements. We agree that this action, as with any FIP, may be said to assume a planning role ordinarily belonging to the state. Even with the finalization of the FIP, the state nevertheless retains its authority to submit future RH SIPs consistent with CAA and RHR requirements; we do not discount the possibility of a future, approvable RH SIP submission that results in the modification or withdrawal of the FIP. In the meantime, sources must comply with the requirements of the FIP and the approved components of Oklahoma's RH SIP.

2. Comments Asking EPA To Consider All Rules

*Comment:* OG&E comments that installation of scrubbers will consume a significant amount of additional power that would need to be generated by burning additional fuel. The commenter suggests that increased GHG emissions from the additional fuel combustion could trigger the requirement to obtain a prevention of significant deterioration (PSD) permit for greenhouse gas emissions (GHGs). The commenter asserts that a PSD permit application process ''can take 18–24 months'' and, if the process is necessary, it might be impossible to accommodate any PSD permit application process in a three-year compliance period. The commenter further contends the permitting process will impose costs and the terms of the PSD permit might impose costs if changes to the method of operation or additional control technologies are required. The commenter says we failed to account for these costs in our cost evaluation.

*Response:* We agree that the installation of $SO_2$ dry scrubbers at the six OG&E and AEP/PSO units could conceivably increase the emissions of other regulated new source review pollutants, including GHGs, to the point where PSD review is triggered. Any PSD permit that is necessary would have to be obtained from ODEQ, which is the permitting authority in Oklahoma. Whether or not PSD permitting is required would be based on design-specific considerations and applicability determinations that will vary with each unit. OG&E has not provided underlying data or facts to substantiate first, that PSD permitting could not be avoided through controls designed to consume less power, and second that a PSD permit, if needed, would impose additional or collateral costs that would materially change our cost evaluation. We also disagree with the assertion that PSD permitting will require 18–24 months; Oklahoma's SIP for PSD permitting, consistent with CAA section 165(c), establishes a one year objective for granting or denying PSD permit applications. As we discuss elsewhere in this notice and in our Supplemental

RTC, we find that compliance with $SO_2$ BART for the six units is extended to five years, which should provide ample opportunity to satisfy PSD permitting requirements, if any.

*Comment:* A commenter states that the proposed three-year compliance period is not justified. The commenter contends that we should consider other regulations that we are formulating for the power sector that will affect the six units covered by the FIP. The commenter mentions the Clean Air Transport Rule, the proposed Air Toxics rule, the projected NSPS, and rules for GHGs, coal combustion waste, and implementation of 316(b) of the Clean Water Act. The commenter states the compliance period is inadequate because utilities would not have sufficient time to develop a plan that addresses all of the regulations we are considering, including BART, because those rules may affect how they choose to comply with any given BART limitations. The commenter also thinks we should be required to analyze whether the compliance timeframe is appropriate by examining whether the other regulations will cause delays because of simultaneous demands for materials, equipment, supplies, and labor.

In related comments, OG&E and another commenter state that other regulatory developments that impact coal burning power plants in the period since Oklahoma submitted its SIP should be considered in our BART analysis, including the utility MACT proposal, the cooling water intake proposal, and the coal ash disposal proposal. OG&E further cites additional possible regulations through revision of the NAAQS, and the clean air transport proposal. OG&E states the control requirements and costs of these other rules should be considered in establishing the remaining useful life of the OG&E units for the BART analysis. OG&E is concerned that depending on the outcome of these rulemaking processes, some or all of the units in question may not continue to be economically viable. The Governor of Oklahoma also submitted a comment requesting EPA to consider the impact that subsequent rulemakings may have on the issue of regional haze.

*Response:* We agree that multiple regulatory actions are pending that will affect the power sector and agree that regulatory development should be coordinated when possible. We also recognize the importance of long-term and coordinated planning on the part of owners of industrial sources that are subject to BART. The visibility requirements of the CAA were put in place in 1977 and 1990, and our implementing regulations adopted in 1999, and the regional haze requirement for installation and operation of BART, in particular, must be carried out expeditiously. We have no basis and no supporting evidence from the commenter or any other source to conclude that significant market constraints for materials, equipment, supplies and labor would arise to make a three-year compliance period unachievable, but we do recognize the importance of planning within any compliance period. As we discuss elsewhere in this notice and in the Supplemental RTC, we have extended the compliance timeframe from the three years we proposed. Compliance with the $SO_2$ BART emission limits in our FIP must be within five years of the effective date of our final rule, which is the maximum time permitted by statute.

With regard to the BART analysis, the BART guidelines do allow for consideration of the remaining useful life of facilities when considering the costs of potential BART controls. Such a claim would have to be secured by an enforceable requirement. Neither OG&E nor AEP/PSO claimed any such restrictions on the operation of these six units. Consequently, we assumed a remaining useful life of 30 years in our BART analysis. If OG&E and/or AEP/PSO decide the units in question have a shorter useful life such that installing scrubbers is no longer cost effective, and are willing to accept an enforceable requirement to that effect, a revised BART analysis could be submitted by the plant(s) in question and our FIP could be re-analyzed accordingly. Similarly, we could also review a revised SIP submitted by ODEQ.

The RHR follows from statutory requirements of the CAA that are separate and independent from the regulatory requirements mandated by other components of the CAA and by other federal statutory schemes cited by the commenters. Even assuming the cited regulations were finalized and costs of these regulations were non-speculative, they have no bearing on the cost effectiveness analysis used to determine BART. Whether or not $SO_2$ BART is cost effective in conjunction with possibly unrelated environmental controls that may be separately required by other statutes such as the Clean Water Act is not part of the statutory formulation that Congress prescribed to address regional haze.

3. Comments on Interstate Transport

*Comment:* We received two comments emphasizing that regional haze is a problem that is not always contained by state boundaries. One of the commenters states that a ''regional approach is critical'' and notes that CAA Section 169B(c)(1) authorizes the establishment of visibility transport regions. The commenter states that visibility issues for the Wichita Mountains Wilderness Area (WMWA) make it a ''candidate for consideration of the establishment of a transport region.'' The commenter believes that a regional examination or study of all the issues will allow development of the long range strategies and lead to cost-effective management of all pollution sources that impair visibility in the region's Class I areas.

*Response:* We agree that pollutants from one or more states can significantly contribute to visibility impairment in the Class I areas of different states. CAA section 110(a)(2)(D)(i)(II) explicitly provides that states must have SIPs with adequate provisions to prevent interference with the efforts of other states to protect visibility. Our FIP action ensures that sources in Oklahoma meet the RH requirements for BART and the visibility requirements of section 110(a)(2)(D)(i)(II). We also agree that a regional approach to addressing visibility transport is important, which is why EPA funded Regional Planning Organizations (RPOs), such as the Central Regional Air Planning Organization (CENRAP), in which Oklahoma participated. States such as Oklahoma engaged in the RPO process for years in order to co-develop strategies for mitigating regional haze. At this time, we do not believe that delaying or setting aside these strategies in order to further study regional haze through the formation of a transport region is appropriate. However, we note the Administrator has statutory discretion to establish a transport region in the future and may do so on the Administrator's own motion or on consideration of a ''petition from the Governors of at least two affected States.'' CAA Section 169B(c)(1).

*D. Comments on Modeling*

*Comment:* AEP/PSO stated that visibility improvements expected by installing controls under our FIP are nearly identical to the improvements from the actions included in the ODEQ SIP submission, and that the FIP controls will not provide a noticeable improvement in visibility. The commenter concludes that the actions included in the ODEQ SIP submission are just as effective in reducing visibility impairment as the FIP. We received additional comments that installation of controls proposed in the FIP would result in imperceptible or nearly

imperceptible improvements in visibility. Information is provided in the comments that claims to support the statement that there is ''virtually no distinguishable'' difference between the controlled and uncontrolled cases.

*Response:* We performed visibility modeling as part of the $SO_2$ BART determination analysis. A change of approximately one deciview (dv) is generally regarded as a perceptible change in visibility. 70 FR 39104, at 39118. ''For purposes of determining which sources are subject to BART, states should consider a 1.0 deciview change or more from an individual source to 'cause' visibility impairment, and a change of 0.5 deciviews to 'contribute' to impairment.'' [6] 70 FR 39104, at 39120. Our modeling indicates that visibility improvements anticipated from the installation of dry scrubbers at each facility will result in reducing modeled impacts (maximum of 98th percentile daily maximum dv) from each facility at all nearby Class I areas to levels below 0.5 dv, with improvements greater than 1.0 dv at some Class I areas. We also evaluated the amount of improvement in the number of days that each facility would either cause or contribute to visibility impairment. As detailed in Table 1 below, the reductions resulting from our FIP would almost completely eliminate days when any of the three facilities' BART units have a perceptible impact (greater than 1.0 dv). These reductions would also significantly decrease the number of days that have a 0.5 deciview impact (or greater).

TABLE 1—AVERAGE NUMBER OF DAYS PER YEAR EACH FACILITY'S VISIBILITY IMPACTS EXCEED 1.0 AND 0.5 DECIVIEWS

| Class I area | Distance to unit (km) | Average # of days/yr > 1.0 dv | | | Average # of days/yr > 0.5 dv | | |
|---|---|---|---|---|---|---|---|
| | | Baseline | LNB | LNB & DFGD | Baseline | LNB | LNB & DFGD |
| **Sooner Units 1 & 2** | | | | | | | |
| Caney Creek | 345 | 3 | 1 | 0 | 14 | 5 | 0 |
| Hercules-Glades | 363 | 2 | 0 | 0 | 9 | 3 | 0 |
| Upper Buffalo | 327 | 2 | 1 | 0 | 11 | 5 | 0 |
| Wichita Mountains | 234 | 18 | 10 | 1 | 38 | 25 | 3 |
| *TOTAL Average # of days/yr* | | 25 | 12 | 1 | 72 | 38 | 3 |
| **Muskogee Units 4 & 5** | | | | | | | |
| Caney Creek | 180 | 17 | 7 | 0 | 46 | 28 | 3 |
| Hercules-Glades | 230 | 7 | 5 | 0 | 22 | 14 | 1 |
| Upper Buffalo | 164 | 15 | 8 | 0 | 34 | 25 | 2 |
| Wichita Mountains | 324 | 12 | 7 | 0 | 26 | 20 | 2 |
| *TOTAL Average # of days/yr* | | 51 | 27 | 0 | 128 | 86 | 8 |
| **Northeastern Units 3 & 4** | | | | | | | |
| Caney Creek | 263 | 10 | 6 | 0 | 30 | 17 | 1 |
| Hercules-Glades | 244 | 6 | 4 | 0 | 17 | 11 | 0 |
| Upper Buffalo | 211 | 8 | 4 | 0 | 21 | 12 | 1 |
| Wichita Mountains | 323 | 11 | 7 | 0 | 24 | 16 | 2 |
| *TOTAL Average # of days/yr* | | 35 | 21 | 0 | 93 | 55 | 4 |

In addition, in a situation where the installation of BART may not result in a perceptible improvement in visibility, the visibility benefit may still be significant, as explained by the preamble of the RHR: ''Failing to consider less-than-perceptible contributions to visibility impairment would ignore the CAA's intent to have BART requirements apply to sources that contribute to, as well as cause, such impairment.'' 70 FR 39104, at 39129. Given that sources are subject to BART based on a contribution threshold of no greater than 0.5 deciviews, it would be inconsistent to automatically rule out additional controls where the improvement in visibility may be less than 1.0 deciview or even 0.5 deciviews. A perceptible visibility improvement is not a requirement of the BART determination because visibility improvements that are not perceptible may still be determined to be significant. We considered the reduction in visibility impairment at Wichita Mountains, Caney Creek, Upper Buffalo, and Hercules-Glades to be significant. Installation of dry scrubbers at each facility will result in significant visibility improvements, reducing the number of days with impaired visibility due to each of these sources at all impacted Class I areas (Table 1).

*Comment:* AEP/PSO stated that we should accept the visibility analysis results provided in ODEQ's SIP for determining BART for $SO_2$ because the results of both our and ODEQ's visibility modeling are not significantly different.

*Response:* We disagree that ODEQ's modeling was sufficient for evaluating the visibility impacts to inform our BART determination. Given that the emission rates that we proposed as $SO_2$ BART differed from those assumed in ODEQ's BART visibility modeling, it was necessary to perform our own CALPUFF visibility modeling. In doing so, we followed EPA/FLM guidance and practices to assess the anticipated visibility improvements from the use of dry and wet scrubbers with emission rates of 0.06 and 0.04 lb of $SO_2$/MMBtu, respectively. ODEQ, in contrast, used emission rates of 0.10 and 0.08 lb of $SO_2$/MMBtu for dry and wet scrubbers, respectively, in its modeling. As a result, ODEQ underestimated the visibility improvements associated with

[6] ''If 'causing' visibility impairment means causing a humanly perceptible change in visibility in virtually all situations (i.e. a 1.0 deciview change), then 'contributing' to visibility impairment must mean having some lesser impact on the conditions affecting visibility that need not rise to the level of human perception.'' 70 FR 39104, at 39120.

the use of dry and wet scrubbers. Furthermore, ODEQ's BART visibility analyses relied on pollutant-specific modeling to evaluate the visibility benefits from the use of available $SO_2$ emission controls. As discussed in the TSD that accompanied the proposed action and elsewhere in our response to comments, due to the complexity of atmospheric chemistry and chemical transformation among pollutants, we modeled all visibility impairing pollutants together to fully assess the visibility improvement anticipated from the use of controls. As detailed in the TSD, we also had updated emission estimates for sulfuric acid emissions based on the latest information, and corrected PM speciation that was included in our modeling. We therefore disagree with the commenter and have explained why we needed to do our own BART CALPUFF visibility analysis. We modeled the emission rates determined to be achievable by the available and technologically feasible controls in accordance with the appropriate procedures, utilizing current practices and model versions that were acceptable to us at the time they were conducted in the latter half of 2010, and we are confident in using our results as one of the five factors in making a BART determination.

*Comment:* A commenter stated that in our visibility analysis, we updated the PM speciation analysis for both Sooner and Muskogee to use National Park Service (NPS) speciation profiles for dry bottom boilers rather than wet bottom boilers calculated in ODEQ's SIP submission and used updated coal properties. The commenter concludes that the difference between ODEQ's PM speciation and EPA's should not impact the BART analysis because primary PM species emitted directly from the stack generally have little overall impact on visibility impairment, and PM specific controls are not being considered for BART. In addition, the commenter states that we used different estimates for sulfuric acid emissions used to represent emissions of sulfate particles. The commenter states that this sulfate emission rate is not likely to be a significant factor in the overall visibility impairment and therefore the differences between ODEQ's modeling and EPA's modeling is not significant. Because the results are not significantly different between EPA's and ODEQ's visibility modeling, the commenter asserts that we have no basis for not accepting the visibility modeling provided in the SIP.

*Response:* As discussed in the TSD, it was necessary for us to perform CALPUFF visibility modeling to assess the anticipated visibility improvements from the use of dry and wet scrubbers at the achievable $SO_2$ emission rates of 0.06 and 0.04 lbs/MMBtu, respectively. Because revised modeling was necessary to support our proposed BART determination, we performed modeling following EPA/FLM guidance and practices, and corrected errors noted during our review of ODEQ's modeling. Our modeling included revised PM speciation to correct errors in PM speciation that was included in ODEQ's modeling. As detailed in the TSD, ODEQ used incorrect coal properties and emission factors in calculating the PM speciation used in their modeling. In addition, we estimated sulfuric acid emissions using the best current information available from the Electric Power Research Institute (EPRI) [7] and the correct coal properties. ODEQ estimates of sulfuric acid emissions for Sooner and Muskogee failed to account for removal in the existing air heater or ESP. ODEQ's estimates of sulfuric acid emissions from the Northeastern units were based on an assumption of 3 ppm sulfur content conversion in the flue gas. Furthermore, sulfuric acid emission estimates used in ODEQ's PM pollutant-specific modeling were based on the erroneous PM speciation discussed above.

We agree with the commenter that primary PM and sulfuric acid emissions from the sources modeled may not significantly impact visibility. However, in performing our own modeling analysis to support our BART determination, we saw no reason to not make corrections and estimate emissions based on accepted methodology using the best current information, correct emission factors and coal properties. Because emissions of PM and sulfuric acid vary between wet and dry scrubbers and do have some impact on visibility conditions, we utilized the best estimates for the emissions of these species to fully account for the difference in visibility impacts between the base case and the two control cases modeled.

*Comment:* AEP/PSO asserted that we incorrectly rejected the ODEQ visibility improvement evaluation because ODEQ applied various controls using pollutant-specific baseline and control model runs, as opposed to using all visibility impairing pollutants in the calculation of the baseline and control model runs. The commenter states that our BART guidelines are not specific as to how to evaluate visibility improvement for the application of BART controls. The commenter asserts that the pollutant specific CALPUFF modeling approach is a reasonable but simplistic method to look at the improvement in visibility impairment attributable to $NO_X$, $SO_2$, or PM and is consistent with our guidance contained in a BART Q&A document that states that the control technology visibility analysis can be conducted for single units and individual pollutants.

*Response:* The referenced BART Q&A document [8] states that it may be appropriate to conduct a unit by unit, pollutant by pollutant analysis, depending on the types of units and control measures under consideration. As discussed in the TSD, due to the nonlinear nature and complexity of atmospheric chemistry and chemical transformation among pollutants, all relevant pollutants should be modeled together to predict the total visibility impact at each Class I area receptor.[9] The referenced Q&A document provides clarification and guidance on performing visibility analyses for BART. The emissions of $NO_X$ and $SO_2$, should be modeled together to determine the visibility impacts, and in evaluation of controls and combinations of controls in determining BART for a source. As seen in our modeling results for wet and dry scrubbers included in our proposal and TSD, the chemical interaction between pollutants and background species can lead to situations where the reduction of emissions of a pollutant can actually lead to an increase in visibility impairment. Therefore, to fully assess the visibility benefit anticipated from the use of controls, all pollutants should be modeled together. As discussed elsewhere in this response to comments, it was necessary for us to perform CALPUFF visibility modeling to assess the anticipated visibility improvements from the use of dry and wet scrubbers at the achievable $SO_2$ emission rates of 0.06 and 0.04 lb/MMBtu, respectively. Because revised modeling was necessary to support our proposed BART determination, we performed modeling following EPA/FLM guidance and practices, including modeling all visibility impairing pollutants together

[7] ''Estimating Total Sulfuric Acid Emissions from Stationary Power Plants: Version 2010a. EPRI, Palo Alto, CA: 2010. 1020636.''

[8] ''Q&A's for Source by Source BART rule,'' dated July 6, 2005. This document is not available on EPA's Web site and is a draft document reflecting the preliminary views of EPA staff on a number of questions submitted by stakeholders.

[9] ''Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations,'' from Joseph Paisie, Geographic Strategies Group, OAQPS, to Kay Prince, Branch Chief, EPA Region 4, dated July 19, 2006.

to fully assess the total visibility benefit anticipated from emission reductions.

*Comment:* AEP/PSO stated that when we calculated visibility improvement during our BART analysis, we used the monthly average humidity adjustment factors provided in Table A–2 of our 2003 Guidance document for the assessment of natural background visibility, whereas, ODEQ used Table A–3 in its visibility calculations. The commenter states that there is no guidance that requires the use of humidity factors from Table A–2 as opposed to Table A–3. In addition, the commenter states that the use of humidity factors from Table A–2 instead of A–3 should not make a significant difference in the overall visibility impairment and does not provide a basis for our rejection of the visibility modeling provided in the SIP submittal.

*Response:* EPA guidance for estimating natural visibility conditions under the RHR provides monthly site-specific relative humidity factors for use in calculating visibility impairment.[10] Table A–2 of the guidance contains the ''recommended'' values based on the representative IMPROVE site location. Table A–3 provides data based on the centroid of the area as ''supplemental information.'' Relative humidity factors are used with the original IMPROVE equation to calculate extinction from measured or predicted pollutant concentrations. The factors used by ODEQ are not the recommended values and are given in the guidance document only as supplemental information. Furthermore, EPA guidance for tracking progress under the RHR contains that same information also labeled Table A–2 and A–3 and is consistent with the above guidance material.[11] This guidance states that the site specific values provided in Table A–2 for each mandatory federal Class I area are recommended to be used for all visibility and tracking progress calculations for that Class I area. Table A–3 is supplemental data provided for informational purposes. We used the recommended values from Table A–2 of these guidance documents to calculate visibility using the original IMPROVE equation.

As discussed elsewhere in this response to comments, we find that our CALPUFF visibility modeling was necessary to assess the anticipated visibility improvements from the use of dry and wet scrubbers at the achievable emission rates that were determined during our analysis of the available control technology. We performed our CALPUFF visibility modeling following EPA/FLM guidance and practices. As detailed in the following response to comment, we used the revised IMPROVE equation to estimate visibility impacts. The revised IMPROVE equation utilizes a separate set of relative humidity adjustment factors available from the Federal Land Managers' Air Quality Related Values Work Group (FLAG) Phase I Report.[12] We also evaluated modeling results using the original IMPROVE equation to quantify the sensitivity of our results to the choice in visibility impairment algorithm. In applying the original IMPROVE equation for this sensitivity analysis, we utilized the recommended relative humidity factors provided in the guidance.

*Comment:* AEP/PSO stated that ODEQ used the most up-to-date version of the visibility model available and utilized the original IMPROVE equation that was approved for use at the time the SIP was prepared. The commenter stated that when we performed our modeling we used the revised IMPROVE equation. The commenter states that the use of this different equation is the largest variable causing the ODEQ modeling results to be different from our modeling results. The commenter concludes that because ODEQ used the most up-to-date version of the equation at the time the SIP was prepared, the subsequent release of new methods should not be the basis for overriding the results provided in the SIP.

*Response:* The original IMPROVE equation and the revised IMPROVE equation refer to two different versions of algorithms used to estimate visibility impairment from pollutant concentrations. The revised equation is a more recently available, refined version of the original equation and is now considered by EPA and FLM representatives to be the better approach to estimating visibility impairment. Compared to the original IMPROVE equation, this revised IMPROVE equation has less bias, accounts for more pollutants, incorporates more recent data, and is based on considerations of relevance for the calculations needed for assessing progress under the RHR.[13]

As discussed elsewhere in this response to comments, it was necessary for us to perform CALPUFF visibility modeling to assess the anticipated visibility improvements from the use of dry and wet scrubbers at the achievable $SO_2$ emission rates of 0.06 and 0.04 lb/MMBtu, respectively for Step 5 of the BART analysis. As part of our BART analysis, we performed CALPUFF modeling to assess the impacts of the $SO_2$ BART proposed controls on the sources at issue on visibility impairment. Because the revised IMPROVE equation is the preferred method for analyses being conducted at this time,[14] we estimated the CALPUFF visibility impacts using this peer reviewed algorithm. We also evaluated modeling results using the original IMPROVE equation to quantify the sensitivity of our results to the choice in visibility impairment algorithm. Visibility benefits estimated using the original IMPROVE equation were larger than those estimated with the revised IMPROVE equation at all four Class I areas included in the modeling. We note that, using either equation, visibility benefits were projected for the installation of scrubbers and support the conclusion that dry scrubbers are the appropriate BART control for each facility.

*Comment:* AEP/PSO states that we incorrectly compared baseline visibility impairment with visibility improvement for controlled cases. The commenter states that both the Oklahoma SIP and the proposed FIP compared an inherently higher 24-hour average for the baseline with an inherently lower 30-day average for the controlled case. The commenter states that the same averaging period should be used so

[10] *See,* ''Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule,'' EPA–454/B–03–005, September 2003.

[11] ''Guidance for Tracking Progress Under the Regional Haze Rule,'' EPA–454/B–03–004, September 2003.

[12] ''Federal Land Managers' Air Quality Related Values Work Group (FLAG) Phase I Report—Revised (2010) Natural Resource Report NPS/NRPC/NRR—2010/232,'' National Park Service, U.S. Department of the Interior, *available at http://www.nature.nps.gov/air/Pubs/pdf/flag/FLAG_2010.pdf.*

[13] Revised IMPROVE algorithm for Estimating Light Extinction from Particle Speciation Data, IMPROVE, January 2006 (*http://vista.cira.colostate.edu/improve/Publications/GrayLit/gray_literature.htm*); Hand, J.L., Douglas, S.G., 2006, Review of the IMPROVE Equation for Estimating Ambient Light Extinction Coefficients—Final Report (*http://vista.cira.colostate.edu/improve/Publications/GrayLit/016_IMPROVEEeqReview/IMPROVEeqReview.htm*).

[14] U.S. EPA. Additional Regional Haze Questions. U.S. Environmental Protections Agency. August 3, 2006, *available at http://www.wrapair.org/forums/iwg/documents/Q_and_A_for_Regional_Haze_8–03–06.pdf#search=%22%22New%20IMPROVE%20equation%22%22;* WRAP presentation, ''Update on IMPROVE Light Extinction Equation and Natural Conditions Estimates'' Tom Moore, May 23, 2006; U.S. Forest Service, National Park Service, and U.S. Fish and Wildlife Service. 2010. Federal land managers' air quality related values work group (FLAG): phase I report—revised (2010). Natural Resource Report NPS/NRPC/NRR—2010/232. National Park Service, Denver, Colorado.

decisions are not biased toward greater $SO_2$ emission reductions. The commenter also states that our analysis is consistent with many other BART analyses and determinations prepared by EPA, states and industry, but inconsistent with the proposed BART determination for the Four Corners Power Plant in New Mexico and BART guidance from the State of Colorado.

*Response:* The approach that we have taken for estimating the visibility impacts of wet and dry scrubbing is appropriate based on the approach set out in the BART Guidelines. The BART guidelines state that in estimating visibility impacts:

> Use the 24-hour average actual emission rate from the highest emitting day of the meteorological period modeled (for the pre-control scenario). Calculate the model results for each receptor as the change in deciviews compared against natural visibility conditions. Post-control emission rates are calculated as a percentage of pre-control emission rates. For example, if the 24-hr pre-control emission rate is 100 lb/hr of $SO_2$, then the post control rate is 5 lb/hr if the control efficiency being evaluated is 95 percent.

The BART guidelines also state:

> The emissions estimates used in the models are intended to reflect steady-state operating conditions during periods of high capacity utilization. We do not generally recommend that emissions reflecting periods of start-up, shutdown, and malfunction be used, as such emission rates could produce higher than normal effects than would be typical of most facilities.

The BART guidelines provide a consistent approach to assess the visibility improvement due to the installation of controls allowing comparison between BART assessments. Setting the baseline using the highest emitting day during the period being assessed provides a consistent approach for sources to assess their baseline impacts and gives an assessment of the maximum impact the source will have on visibility. ODEQ, EPA and AEP agreed on how to model the baseline emissions, including the baseline emission rates, in a previous modeling protocol and subsequent modeling reports. ODEQ's RH SIP, and EPA's proposed FIP incorporated this same baseline emission rate approach that is consistent with previous agreements and analyses that AEP had conducted.

In modeling the post-control emission rates, we considered the reasonably anticipated control efficiency of the available control technology taking into account that the BART modeling should reflect steady-state operating conditions and should not generally reflect periods of start-up, shutdown and malfunction. As discussed previously in our TSD and elsewhere in this notice and the Supplemental RTC, control efficiencies reasonably achievable by dry scrubbing and wet scrubbing were determined to be 95% and 98% respectively. We also note that OG&E directed its vendors to provide bids on a dry $SO_2$ scrubber system that was designed to remove 95% of the $SO_2$. The two AEP sources were modeled with baseline $SO_2$ emission rates of 5230.8 and 5034.6 lb/hr for Units #3 and #4 respectively. These rates for the two AEP sources were modeled using the firing rate of each unit with baseline $SO_2$ emission rates of 0.9 lb/MMBtu which, as discussed above, are the same rates, previously provided by AEP and utilized by ODEQ in the Oklahoma RH SIP for the baseline emission rates. Applying the expected 95% reduction in emission rates for a dry scrubber, in accordance with the example given in the BART guidelines, would result in an emission rate of 0.045 lb/MMBtu. This value is lower than our proposed BART $SO_2$ emission limit of 0.06 lb/MMBtu. The 0.06 lb/MMBtu emission limit we chose was based on a thorough review of achievable emission rates of current Dry Flue Gas Desulfurization (DFGD) scrubbers and the example method for the BART guidelines that yields 0.045 lb/MMBtu is not appropriate in this case for estimating future emission rate for modeling. We chose to model the future $SO_2$ emission rate of 0.06 lb/MMBtu rather than 0.045 lb/MMBtu because this is consistent with our proposed BART emission limit and is a reasonable estimate of future emissions in order to estimate the future visibility improvement from baseline levels. Our approach of modeling the proposed emission limit is consistent with the approach taken by ODEQ in their SIP and in our action on the BART FIP for the State of New Mexico and is not as conservative as using the emission rate based on percentage reduction as outlined in the BART guideline.

As discussed elsewhere, the BART determination is based on consideration of five factors, including the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. The visibility modeling is intended to give a reasonable best estimate of the visibility impacts from an evaluation of emission reductions. The visibility analysis is only one of the factors in a BART determination. In this final action, we are setting a $SO_2$ limit of 0.06 lb/MMBtu to be calculated on a 30-day rolling average Boiler Operating Day. We modeled the 0.06 lb/MMBtu in our proposal, which equates to a 93 percent reduction in emissions, because we have determined this emission rate to be achievable. This percentage reduction is less than would be expected from the installation of a DFGD that has been optimally designed (refer to Figure 7 and 8 of the Supplemental RTC and the associated responses to comments).

We recognize that sources complying with a 30 day average may at times operate above the 30 day average emission limit but they will have to balance those times by operating below the limit at other times. This variability is difficult to assess, though a prudent source will strive to remain below the 30-day emission limit as much as possible. In some instances, it may be appropriate to model a slightly higher emission rate when limiting the emissions using a 30-day average to account for potential variability, when the amount of variability is well understood. In this case, we believe using the 30 day average emission limit is a reasonable approach to project future emissions that would reasonably be anticipated in accordance with BART guidelines because we have no reason to think the variability in the future case will be large enough to impact our evaluation of the five factors.

We did not believe it was appropriate to assess variability based on past history of emissions at the facilities because there is inherently more variability in historic data when facilities are not specifically controlling to achieve low $SO_2$ emissions and the facility emissions instead can vary due to the range of types of coal purchased. As the limits are reduced to a level in the range that was proposed in our action, the amount of variability that would exist is expected to decrease, as the source must demonstrate compliance on a 30-day BOD compliance level with a much tighter limit than it had previously. We have seen this in evaluation of some sources in comparing their pre-control emission variability with their post-control emission variability.

As discussed in a later response to comment, we note the TS Power Plant near Dunphy, Nevada, which has a similar permitted $SO_2$ emission limit to our BART FIP, maintained a 30-day BOD emission rate below 0.06 lb/MMBtu for an approximately 20-month period of time in 2010–2011. This plant burns a similar Powder River Basin (PRB) coal as the six AEP/PSO and OG&E units. In addition, the Wygen II facility, located outside Gillette, Wyoming, and the Weston 4 facility, near Wausua, Wisconsin, also burn coal similar to the OG&E and AEP/PSO's

units and have been able to maintain 30-day BOD $SO_2$ emission rates below 0.06 lb/MMBtu for significant periods of time during the years of 2009–2011. CEM data for the TS Plant (Figure 7 of the Supplemental RTC) shows limited variability in 24-hr emissions. We note that this data includes periods of start-up, shutdown, and malfunction that would normally be considered when evaluating the emission rate to be modeled to represent steady-state operating conditions for BART modeling. In evaluation of other facilities we did find where they had operated for months at a significantly lower emission rate than 0.06 lb/MMBtu, with limited variability under steady-state conditions.

The commenter pointed to other actions and guidance concerning emission rate estimates and indicated that we were not consistent with those approaches. The commenter pointed to the EPA Region 9 proposal for the Four Corners power plant, which used the percent reduction approach and the 24-hour maximum actual baseline emission rate to estimate a future controlled emission rate. We note that we evaluated this technique (see discussion earlier in this response) that is outlined in the BART guideline as one acceptable technique and it resulted in a value (0.045 lb/MMBtu) that was not reasonable compared to the 30-day emission limit (0.06 lb/MMBtu) that we proposed and determined to be technically feasible. The commenter also pointed to guidance that Colorado has developed for their BART sources that indicates a maximum 24-hour future controlled emission rate should be used in conjunction with using the maximum actual 24-hour baseline emission rate.

The BART guidelines state:

> Make the net visibility improvement determination.
>
> Assess the visibility improvement based on the modeled change in visibility impacts for the pre-control and post-control emission scenarios.
>
> You have flexibility to assess visibility improvements due to BART controls by one or more methods. You may consider the frequency, magnitude, and duration components of impairment.

The BART guidelines allow for some flexibility in how to assess visibility improvements due to BART controls. As we discuss elsewhere in this response, we consider issues related to frequency, magnitude and duration of emission levels that may occur in comparison to our proposed 0.06 lb/MMBtu 30-day limit and the potential for impacting the visibility projections. We concluded that the amount of times the variability of emissions would exceed 0.06 lb/MMBtu on a maximum daily process would not be expected to be of sufficient magnitude to have a large impact on our visibility improvement estimates. We agree that the BART guidelines allow for some flexibility in how visibility improvement determinations are conducted. We considered processes similar to Colorado's approach, including the methodology given as an example in the BART guidelines, but determined we did not have sufficient information to accurately estimate the future maximum 24-hour emission rate and furthermore concluded that existing modeling indicated that small changes would not significantly impact our visibility improvement estimates. Overall, the BART guidelines give some flexibility to how the visibility improvements can be calculated and the approach that we have used is reasonable based on the information available and is not inconsistent with the BART guidelines.

We conducted modeling for future emission rates of 0.04 and 0.06 lb/MMBtu of $SO_2$ in our proposal. We note that at these low $SO_2$ emission rates, the most impacted days were more nitrate driven days because the $SO_2$ rates were low. Therefore, a slight increase in emission rates on the order of 10% or so for a maximum 24-hour emission rate would not be expected to result in much change in visibility estimates. We do note that other modeling conducted by the source's consultants and the state indicates that a significant increase in the controlled $SO_2$ emission rate would decrease the visibility impairment improvements from installation of controls and result in much lower relative visibility improvement. As further discussed elsewhere in this response we find our future emission rate to be a reasonable assessment of the visibility improvement due to the setting of a 0.06 lb/MMBtu on a 30-day BOD limit.

In summary, we find our approach to modeling the baseline and control case emissions was a reasonable estimate of reduction in impairment and not inconsistent with the BART guideline. We recognize that it is possible that the facility will operate at slightly higher emission rates at times, but it is also true that to remain in compliance over a 30-day rolling average, it will also have to operate at lower emission rates than 0.06 lbs/MMBtu. Furthermore, we have shown that other facilities have demonstrated that it is feasible to operate below 0.06 lbs/MMBtu for extended periods of time. Finally, we have noted that even if emissions are slightly higher than 0.06 lbs/MMBtu, at times, it would not be expected to increase the visibility impairment significantly because at these low concentrations, visibility impairment due to AEP/PSO sources is primarily due to nitrates. We find the approach for estimating improvements in visibility due to our proposed emission level that we have used is appropriate based on the information available and is not inconsistent with the BART guidelines. For these reasons, we believe the proposal was based on a reasonable assessment of visibility improvements for consideration as one of the five factors of the BART decision.

*Comment:* A commenter submitted a review of our modeling results for controlling $SO_2$ emissions, noting a 2.89 deciview improvement in visibility at the Wichita Mountains and a cumulative improvement in visibility total of 8.20 deciviews. The commenter believes our CALPUFF modeling is appropriate and concurs with our emission calculations and speciation. They do, however, note several ''possibly incorrect input values'' regarding base elevations of several units and the stack gas exit velocity of one unit. The commenter expressed the view that corrected values would not substantially change results and conclusions. The commenter also contends that EPA's proposed $SO_2$ BART may benefit Oklahoma and the facilities, because the commenter believes that based on results of their dispersion modeling, the units are currently contributing to violations of the one-hour $SO_2$ NAAQS.

*Response:* We agree with the commenter that our modeling calculations and speciations are appropriate. We further agree with the commenter's noted visibility improvement resulting from the $SO_2$ controls that we are requiring in the FIP. It is true that states will be required to submit plans demonstrating attainment or maintenance of the new one-hour $SO_2$ NAAQS. However, this is not a consideration for our action, which is directed solely to ensuring the state has met the BART requirements of the RHR and the requirements of CAA section 110(a)(2)(D)(i)(II). With respect to the noted ''possibly incorrect input values,'' we agree that correcting these values would not substantially change our results and conclusions.

### *E. Summary of Responses to Comments on the $SO_2$ BART Cost Calculation*

We received many comments on issues concerning our cost calculations for our proposed $SO_2$ BART determinations on the six OG&E and AEP/PSO units. The full text received

from these commenters is included in the docket associated with this action. Additionally, our summary and response for these comments is provided in the ''Response to Technical Comments for Sections E through H of the **Federal Register** Notice for the Oklahoma Regional Haze and Visibility Transport FIP,'' (or Supplemental RTC), and it is available in the docket. Although we summarize them here, please see the Supplemental RTC for a full accounting of the issues and how they influenced our final decision. We deviate in sections E., F., G., and H., from the comment-response format of the rest of the notice, as many of the comments summarized herein were drawn from multiple, lengthy, and highly technical comments.

The significant aspects of our approach to cost estimations in consideration of all comments are summarized in this section. Overall, our final rulemaking retains the basis for the cost effectiveness evaluation and cost estimates we employed in our proposal. However, as discussed in more detail below, we are changing several factors in the cost calculations for the four OG&E units as a result of the comments we received. We are making no changes to the cost calculations for the two AEP/PSO units.

1. Control Cost Manual Methodology

The Control Cost Manual must be followed to the extent possible when calculating the cost of BART controls.[15] This is necessary to ensure that a consistent methodology is used when comparing cost effectiveness determinations. The Control Cost Manual allows site-specific conditions to be incorporated in certain circumstances. Site-specific conditions can include vendor quotes, space constraints, a design feature that could complicate installing a control, or unusual circumstances that introduce a cost not contemplated by the Control Cost Manual. OG&E incorporated many of these into its cost evaluation. However, the RHR specifically requires that the analyst document any such site-specific conditions.[16] Thus, the RHR places the burden on the analyst to make this demonstration, and on EPA to approve it, disapprove it, or document it when promulgating a FIP. Nevertheless, with the exceptions noted herein and in our Supplemental RTC, we approved many of those site-specific cost modifications.

The Control Cost Manual uses the overnight method of cost estimation, widely used in the utility industry.[17] The U.S. Energy Information Administration (EIA) defines ''overnight cost'' as ''an estimate of the cost at which a plant could be constructed assuming that the entire process from planning through completion could be accomplished in a single day. This concept is useful to avoid any impact of financing issues and assumptions on estimated costs.'' [18] EIA presents all of its projected plant costs in terms of overnight costs. The overnight cost is the present value cost that would have to be paid as a lump sum up front to completely pay for a construction project.[19] The overnight method is appropriate for BART determinations because it allows different pollution control equipment to be compared in a meaningful manner. Because ''different controls have different expected useful lives and will result in different cash flows, the first step in comparing alternatives is to normalize their returns using the principle of the time value of money * * * . The process through which future cash flows are translated into current dollars is called present value analysis. When the cash flows involve income and expenses, it is also commonly referred to as net present value analysis. In either case, the calculation is the same: Adjust the value of future money to values based on the same point in time (generally year zero of the project), employing an appropriate interest (discount) rate and then add them together.'' [20] This is the overnight method, in which costs are calculated based on current dollars. Therefore, consistent with our proposal, we find that the overnight method is appropriate for calculating costs for all six units.

OG&E and others incorrectly assume that BART cost effectiveness should be based on the ''all-in'' cost method, which includes all of the costs of a financial transaction, including interest, commissions, and any other fees from a financial transaction up to the date that the project goes into operation, as of the assumed commercial operating dates of the scrubbers, 2014 and 2015. This is an entirely different method than that prescribed in the Control Cost Manual. OG&E and others conclude that dry scrubbers are not cost effective for the six units, based on all-in costs reported in 2014 to 2015 dollars, compared to costs estimated at other similar facilities based on overnight costs and 2009 and earlier dollars. This comparison is an invalid because OG&E's 2014 and 2015 all-in costs are much higher than the corresponding overnight costs, as prescribed by the Control Cost Manual. This makes the estimated cost of scrubbers at the six units appear to be higher than scrubbers required at other similar facilities costed using the overnight method. Many of the corrections we make to ODEQ's cost estimates for the six OG&E and AEP/PSO units are due to the fact that ODEQ did not follow this provision of the Control Cost Manual in its SIP submittal. Please refer to our Supplemental RTC in the docket for more information about how the overnight costing methodology is employed by the Control Cost Manual.

2. Revised Cost Calculations for the OG&E Units

OG&E's cost estimates deviate from the Control Cost Manual, which is based on the overnight cost approach. In its cost estimates, OG&E has improperly included allowances for excessive contingencies allowances for funds during construction (AFUDC), double counted certain expenses, and improperly relied on the Electric Power Research Institute (EPRI) cost model, CUECost. These deviations from the Control Cost Manual, occurring because of the reliance upon the all-in cost methodology, artificially increase the cost of scrubbing at Sooner and Muskogee, compared to the cost at other similar facilities using the overnight cost methodology.

OG&E's cost estimates relied on vendor quotes and site specific estimates for certain additional costs. We support the use of vendor quotes and site specific estimates but only as used within the parameters of the overnight cost methodology. The Guidelines, cited in this comment, are

[15] Very limited situations exist under which an analyst can depart from the Control Cost Manual methodology under the RH rule. ''The basis for equipment cost estimates also should be documented, either with data supplied by an equipment vendor (i.e., budget estimates or bids) or by a referenced source (such as the OAQPS Control Cost Manual, Fifth Edition, February 1996, EPA 453/B–96–001). In order to maintain and improve consistency, cost estimates should be based on the OAQPS Control Cost Manual, where possible. The Control Cost Manual addresses most control technologies in sufficient detail for a BART analysis.'' 70 FR 39104, at 39166.

[16] A cost determination can deviate from the Control Cost Manual methodology if you ''include documentation for any additional information you used for the cost calculations, including any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, and any other element of the calculation that differs from the Control Cost Manual.'' *Id.*

[17] See Control Cost Manual, Section 2.3 to 2.4.

[18] EIA, ''Updated Capital Cost Estimates for Electricity Generation Plants,'' November 2010, footnote. 2, *available at: http://www.eia.gov/oiaf/beck_plantcosts/?src=email.*

[19] Steven Stoft, *Power Economics: Designing Markets for Electricity,* 2002.

[20] *Id.,* page 2–18.

clear that ''[y]ou should include documentation for any additional information you used for the cost calculations, including any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, and any other element of the calculation that differs from the Control Cost Manual.'' [21] However, much of the documentation OG&E and others cite to support deviations from the Control Cost Manual was not provided to us. Thus, we were unable to analyze their contents and determine whether these deviations were appropriate. Also, although OG&E provided two spreadsheets that listed its cost line items, these spreadsheets, each over 600 lines in length, were stripped of all formulas for cell calculations, preventing any meaningful review, despite our request for that material.

Capital Recovery Factor

We are changing one input to the cost calculations for the four OG&E units based on a comment we received from OG&E concerning the Capital Recovery Factor (CRF). OG&E states that, while the Control Cost Manual includes a default rate of 7% for the social discount interest rate, we should use a site-specific social discount interest rate for the four OG&E units. This rate includes several site-specific variables, including income tax. The commenter states that the CRF includes not only recovery of principal but also a return on the principal, with the rate of return equal to the discount rate. OG&E states that for an investor owned utility, such as itself, which is financed by a mix of debt and equity, the discount rate is equal to the weighted average of the equity return and debt return.

We agree that a site-specific social discount interest rate is appropriate based on the documentation provided by the commenter. However, we disagree that such a rate can include income tax. The Control Cost Manual states ''this Manual methodology does not consider income taxes.'' Control Cost Manual, page 2–9. The site-specific social discount interest rate, excluding income tax, is 6.01%, which is less than the default rate of 7%. Thus, we have revised our cost effectiveness analysis in Exhibits 1 and 2 for Options 1 and 2, to use the levelized interest rate of 6.01%, as reported by OG&E, adjusted to remove income taxes. This rate is consistent with OG&E's real average cost of capital and falls within the range of 3% to 7% recommended by OMB for regulatory cost analyses. This correction moderately improved the cost effectiveness, thus lowering the calculation of $/ton $SO_2$ removed. For detailed information on our calculation, please see the Supplemental RTC.

Construction Management

In our proposal, we revised the cost estimate to remove what we took to be double counting of the Balance of Plant (BOP) construction management costs. OG&E explained in a comment that crew wage rates do not include contractor general and administrative (G&A) costs and that construction management is the cost of third-party construction management, different from the BOP profits contractor and different from the owner. Based on this explanation, we have restored the construction management costs in our revised Options 1 and 2 cost estimates in Exhibits 1 and 2. This correction slightly diminished the cost effectiveness, thus raising the calculation of $/ton $SO_2$ removed.

Scrubber Design and Emission Baseline Mismatch

We retain both our Option 1 and Option 2 cost effectiveness approaches to the mismatch between the design of OG&E's $SO_2$ scrubbers and the coal they currently burn. OG&E specified to its vendors that they provide cost estimates for $SO_2$ scrubber systems designed to treat the exhaust gases from a coal that contains much higher amounts of sulfur than coals that were typically burned in the baseline period (2004–2006). However, in calculating the cost effectiveness, OG&E used its historical baseline emissions, which resulted from the burning of those lower sulfur coals. Thus, OG&E costed scrubbers that were overdesigned based on the coal that was, and is, typically burned. This resulted in two errors that both combined to make the control technology appear less cost effective.

First, the BART Guidelines require that we calculate cost effectiveness on the basis of annualized cost divided by tons of pollutant removed *from the emissions baseline* ($/ton). Therefore, use of a baseline that is lower than would result from burning the higher sulfur coal the scrubber was designed to treat, lowers the denominator in the $/ton equation, and skews the cost effectiveness calculation to appear less cost effective. We account for this mismatch in Option 1 by raising the baseline to match the higher sulfur coal the scrubber system was designed to treat.

Second, although we have adjusted our calculation in response to OG&E's comments, we conclude that the over designed scrubber system was more expensive than necessary to treat the coal OG&E historically burned and continues to burn. We account for this mismatch in Option 2 by slightly decreasing the capital costs to reflect a scrubber designed to treat the exhaust gases from the coal OG&E has historically burned, while retaining the historical emission baseline.

We find that, whether OG&E chooses to burn its current coal, or burn a coal that its scrubber system was designed to treat, the resulting cost effectiveness lies in the range defined by Options 1 and 2 (below). We find that both options are cost effective in light of the five-step BART analysis.

Cost Adjustment of Scrubber in Option 2

As we describe above, in calculating cost effectiveness under Option 2 in our proposal, we also analyzed the cost of a dry scrubber for the OG&E units, assuming the scrubber would be re-sized to scrub the coal being currently burned. We did this using a cost scaling equation based on the differences between the sulfur content of the coal OG&E typically burns versus the coal their scrubber system was designed to treat. OG&E responded in a comment to us that the exhaust gas flow rate, rather than the sulfur content, is the primary variable that affects scrubber sizing. Thus, the use of a higher sulfur coal would not significantly affect the size, and hence the cost of a scrubber. Based on the information OG&E supplied, we re-adjusted the cost of Option 2 based on certain design algorithms in the dry scrubber absorber (SDA) cost model developed by OG&E's contractor, Sargent & Lundy for EPA.[22] The results of this analysis indicate that the use of the lower sulfur coal alone would reduce the capital cost of the scrubber by about $7 million or 3%.

Other Issues Concerning Site-Specific Costs

In addition to those comments that resulted in a modification to our cost basis, two others merit particular emphasis. These comments led us to investigate two other line item costs to determine whether we underestimated the costs of the scrubbers for the four OG&E units by not using site-specific values. We determined that, even if we made changes to the cost calculations to account for these site-specific cost line items, the cost of controls would be

[21] 70 FR 39104, at 39166, footnote 15.

[22] Sargent & Lundy, IPM Model—Revisions to Cost and Performance for APC Technologies, SDA FGD Cost Development Methodology, Final, August 2010, Table 1.

even more cost-effective than our proposed range. These line items costs are: (1) Auxiliary power; and (2) capacity factor for Option 2. These issues were uncovered during the course of preparing our response to comments, but did not directly follow from information provided by the comments. Thus, we did not further modify our cost basis, but discuss these issues as they serve to further illustrate why we believe our cost basis likely overestimates the costs of control and that our conclusions that dry scrubbers for the six OG&E and AEP/PSO units are cost effective and are reasonable.

a. Auxiliary Power

We received a comment that EPA incorrectly lowered OG&E's auxiliary power costs for the DFGD/FF control systems on the premise that the unit cost of electricity used in the cost estimate was higher than the cost to OG&E to produce electricity. Auxiliary power is the sum of the demand by the scrubber, baghouse, and booster fans (the latter required to overcome the increase in backpressure from adding these controls) and is accounted for in a BART cost effectiveness analysis. OG&E used average year-round market retail rates of $85.93/MWh (2015 dollars) for Sooner and $83.83/MWh (2014 dollars) for Muskogee as the best long-run measure of auxiliary power costs. The cost of auxiliary power affects the cost effectiveness calculation in both Option 1 and Option 2.

We have concluded that our proposed cost of $50/MWh is an appropriate estimate of the cost of auxiliary power for the four OG&E units. We arrived at this number because OG&E's summary of auxiliary power costs indicates the range used for other similar facilities is $30/MWh to $50/MWh.[23] We took the most conservative view based on this report and adopted the highest value in this range. However, even if we were to take OG&E's view that a site-specific auxiliary power cost is more appropriate, we disagree that we could use the market-value of power for purposes of the BART determination because the utility would not pay market price. We estimate that the actual site-specific cost of auxiliary power for the four OG&E units is no more than $36/MWh. However, because we arrived at this figure due to independent research that we do not view as being a logical outgrowth of the comment we received, we have not revised our cost effectiveness analysis to use $36/MWh. Instead, we retain the $50/MWh figure we proposed. We view this example as further evidence that OG&E's scrubber costs are artificially inflated, and that the cost of controls under both options in our FIP is reasonable.

b. Capacity Factor in Option 2

ODEQ calculated future annual emissions assuming a 90% capacity factor. In comparison, during the years that established the emission baseline (2004–2006), the units operated only 78.5% of the time, on average. Thus, ODEQ's calculation of emission reductions from scrubbers compares uncontrolled 2004–2006 baseline emissions, when the units operated at 78.5% of capacity, to controlled emissions when burning a higher sulfur coal, with the units operating at 90% capacity. This mismatch results in two errors in estimating the cost of Option 2: The future emissions were overestimated, but certain operating costs were underestimated. Correcting these errors in the cost calculations would make Option 2 even more cost effective than our proposed calculations, as the resulting decrease in the operating costs would offset the increase in the capacity factor in the $/ton calculation. However, because we arrived at these errors due to independent research that we do not view as being a logical outgrowth of the comment we received, we have not revised our cost effectiveness analysis in Option 2. We view this example as further evidence that OG&E's scrubber costs are artificially inflated, and that the cost of controls under both options in our FIP is reasonable.

We made no additional changes to our cost evaluation as a result of the comments we received. As summary of our final $/ton cost effectiveness calculations are provided below:

| | Proposal (Sooner/Muskogee) | Final (Sooner/Muskogee) |
|---|---|---|
| Option 1 | $1,291/$1,317 | $1,239/$1,276 |
| Option 2 | $2,048/$2,366 | $2,747/$3,032 |

3. Cost Calculations for the AEP/PSO Units

We received a number of comments from AEP/PSO concerning our $SO_2$ BART cost estimate for the two Northeastern units. Some of these comments objected to our incorporation of OG&E's site specific information in AEP/PSO's scrubber cost estimate. Other comments objected to specific line item costs in our cost estimates for both wet and dry scrubbers. We proposed the cost effectiveness of dry scrubbing to be $1,544/ton, and the cost effectiveness of wet scrubbers to be approximately 9% more. As we note in more detail in our separate Supplemental RTC, the ODEQ $SO_2$ BART evaluation of AEP/PSO Northeastern units 3 and 4 does not provide any support for its assumption that the cost of dry scrubbers is $555/kW to $582/kW, figures we consider to be high in comparison to other BART scrubber determinations. However, the Northeastern units are very similar to the Sooner and Muskogee units, for which vendor quotes were available for dry scrubbers. We used these vendor quotes to support our cost analysis for the Northeastern units. After having reviewed all comments concerning our $SO_2$ BART cost estimates for the AEP/PSO units, we have determined that no changes were warranted to our proposed cost estimates. Thus, absent any supporting information from AEP/PSO for any of the capital costs it presents, we find our BART $SO_2$ cost evaluation to be well founded, representative of the AEP/PSO units in question, and based on the best information available to us.

4. Conclusion

We find that under Option 1, the costs to comply with the FIP will be $1,239/ton for Units 1 and 2 of the OG&E Sooner plant and $1,276/ton for Units 4 and 5 of the OG&E Muskogee plant. Under Option 2, the cost to comply with the FIP will be $2,747/ton for Units 1 and 2 of the OG&E Sooner plant and $3,032/ton for Units 4 and 5 of the OG&E Muskogee plant. For Units 3 and 4 of the AEP/PSO Northeastern plant, we find that the costs to comply with the FIP remain at $1,544/ton, as we

[23] December 28, 2009 S&L FollowUp Report, Attach. C, pdf 109 (Gerald Gentleman—$45.65/MWh; White Bluff—$47/MWh; Boardman/Northeastern/Naughton—$50/MWh; Nebraska City—$30/MWh).

proposed. We find these ranges to be cost effective for these six units under the five-step analysis for BART under the RHR. As previously stated, our complete, technical responses to comments received on the issue of costs are in the Supplemental RTC in the docket.

*F. Summary of Responses to Visibility Improvement Analysis Comments*

We received comments on Step 5 of BART: Degree of improvement in visibility which may reasonably be anticipated to result from the use of scrubber technology. Commenters contested our determination that OG&E and AEP/PSO's facilities significantly contribute to visibility impairment. We explain that we find that dry scrubbers are cost effective for the six OG&E and AEP/PSO units, in light of the visibility improvement these controls are predicted to achieve. Commenters also disputed our determination not to use the $/deciview metric in the Step 5 BART analysis when this approach was used by ODEQ. OG&E provided a $/deciview analysis for its units and comparable BART determination performed by us. In our analysis for our BART FIP for OG&E and AEP/PSO, we did not evaluate $/deciview. We explain that the BART Guidelines list the $/deciview metric as an optional cost effectiveness measure that can be employed along with the required $/ton metric for use in a BART evaluation. The metric can be useful in comparing control strategies or as additional information in the BART determination process; however, due to the complexity of the technical issues surrounding regional haze, we have never recommended the use of this metric as a cutpoint in making BART determinations. We note that to use the $/deciview metric as the main determining factor would most likely require the development of thresholds of acceptable costs per deciview of improvement for BART determinations for both single and multiple Class I analyses. We have not developed such thresholds for use in BART determination made by us. As OG&E acknowledges, EPA did not use this metric as part of its proposed BART determinations for either the Four Corners Power Plant FIP in AZ, or the San Juan Generating Station FIP in NM. Generally speaking, while the metric can be useful if thoughtfully applied, we view the use of the $/deciview metric as suggesting a level of precision in the calculation of visibility impacts that is not justified in many cases. While we did not use a $/deciview metric, we did, however, consider the visibility benefits and costs of control together, as noted above by weighing the costs in light of the predicted visibility improvement.

*G. Summary of Responses to Comments Received on the $SO_2$ BART Emission Limit*

We received comments stating we did not adequately support our $SO_2$ BART emission limit of 0.06 lbs/MMBtu for the six OG&E and AEP/PSO units. In analyzing the control technology, the RHR mandates that we take into account the most stringent emission control level that the technology is capable of achieving. 70 FR 39104, at 39166. In accordance with the RHR, when identifying an emissions performance level to evaluate under BART, consideration of recent regulatory decisions and performance data (e.g. manufacturer's data, engineering estimates, and the experience of other sources) is required. *Id.* In determining our $SO_2$ BART emission limit of 0.06 lbs/MMBtu, we drew on a number of sources of information. These include industry reports, vendor quotes, the engineering analysis contained in the TSD, and the historical emissions data for other similar coal fired power plants. As we state in the TSD and affirm, a dry scrubber at Sooner or Muskogee, designed as costed, could meet an $SO_2$ emission limit of 0.06 lb/MMBtu based on 30-day BOD average, when burning coal containing 0.51 to 1.18 lb/MMBtu $SO_2$. We conclude the same is true for the AEP/PSO Northeastern units because they have historically burned coal with a sulfur content within this range.[24]

Among other objections, OG&E states we cannot rely on the $SO_2$ emission performance of new facilities as an indicator of the performance potential of retrofit scrubbers. OG&E presents data on what it states are the best performing scrubber installations in the United States, and contends that the lowest emission rate achieved by a retrofit on an annual basis is 0.088 lbs/MMBtu. We explain that a scrubber, regardless of type, is not influenced by whether the flue gas comes from a new boiler or an old boiler located in an existing plant. The scrubber merely reacts to physical and chemical characteristics of the gas stream. Therefore, although we use other sources of information to justify our $SO_2$ BART emission limit, we find that considering emission data from new scrubber installations to support our decision is appropriate. In so doing, we analyzed the historical emissions data of several units that we discuss above in response to another comment, which OG&E included in its comment. We reviewed the performance of three units that are of similar size and burn similar coal. One unit, TS Power Plant, has an emission limit that requires emissions to be significantly controlled and has been able to maintain its emissions below 0.06 lbs/MMBtu on a 30 day BOD basis continuously. We also reviewed the performance of two other units that demonstrate the ability to maintain emissions below the 0.06 lbs/MMBtu limit for long periods of time. We note that these units do not have as constraining emission limits so they do not have to control their emissions as closely. This and other sources of information we outline above and in our Supplemental RTC cause us to conclude our proposed $SO_2$ BART emission limit of 0.06 lbs/MMBtu, calculated on the basis of a 30 day BOD, for the six OG&E and AEP/PSO units is technically feasible and therefore the correct $SO_2$ limit for BART.

OG&E also states that we should include in our proposed $SO_2$ BART emission limit a compliance margin. OG&E suggests that a $SO_2$ emission of 0.10 is required to provide a ''reasonable margin for operating fluctuations and compliance.'' We reply that we are modifying the compliance averaging period from a 30 calendar period to a 30 day Boiler Operating Day (BOD) period. As the BART Guidelines direct, ''[y]ou should consider a boiler operating day to be any 24-hour period between 12:00 midnight and the following midnight during which any fuel is combusted at any time at the steam generating unit.'' [25] To calculate a 30 day rolling average based on boiler operating day, the average of the last 30 ''boiler operating days'' is used. In other words, days are skipped when the unit is down, as for maintenance. This, in effect, provides a margin by eliminating spikes that occur at the beginning and end of outages, and is consistent with the BART Guidelines.

In our separate Supplemental RTC, we also discuss several other objections OG&E raises in its comments. These include objections to our reliance on a National Lime Association scrubber performance chart, OG&E's contention that our proposed $SO_2$ BART emission is more representative of a LAER limit, and the technical capability of dry scrubbing. After addressing these issues, we find that our proposed $SO_2$ BART emission for the six OG&E and AEP/PSO units remains at rate of 0.06 lbs/MMBtu.

[24] TSD, Appendix C, page 43.

[25] 70 FR 39104, at 39172.

*H. Summary of Responses to Comments Received on the $SO_2$ BART Compliance Timeframe*

We proposed that compliance with our $SO_2$ BART emission limits be within three years of the effective date of our final rule. We solicited comments on alternative timeframes, from as few as two (2) years to up to five (5) years from the effective date of our final rule. We received comments that retrofitting of scrubbers is now routine in the United States and that approximately 290 coal-fired units totaling about 116,000 MW nationwide have been retrofit with scrubbers since 1990. The commenter cites to many examples of $SO_2$ scrubbers being installed at coal-fired power plants within a three year timeframe. OG&E and others state that our proposed three year schedule focuses on actual construction timelines, but fails to acknowledge or allow sufficient time for the engineering, design, and permit processes that must be completed prior to the commencement of construction. They state a compliance schedule of from 52–54 months would be required.

Although we do not specify what technology the six OG&E and AEP/PSO units must use to satisfy the $SO_2$ BART emission limit, we expect that either dry or wet $SO_2$ scrubbers will be used, or that the $SO_2$ limit will be met by switching one or more of the units to natural gas. We agree that $SO_2$ scrubbers have been installed at other facilities with construction timeframes of three years or less. However, we also agree with OG&E and AEP/PSO that there may be issues such as PSD permitting, and the construction/expansion of a landfill that may not be reflected in the example compliance times reported by the commenter. Therefore, we find that compliance with the emission limits be within five years of the effective date of our final rule.

*I. Comments Supporting Conversion to Natural Gas and/or Renewable Energy Sources*

*Comment:* Several parties submitted comments noting that switching to natural gas-fired electricity is feasible and demonstrated in practice. One of the commenters points out that, of the three subject sites, two have existing major natural gas supplies (OG&E Muskogee and AEP/PSO Northeastern) and that fuel switching will require construction of new or expanded natural gas supply and electric interconnection facilities. The commenter states that expanding along existing gas supply lines would cost less and take less time than constructing a new line. The commenters have stressed that natural gas produces comparatively low emissions of many pollutants, including haze-causing pollutants, air toxics, and greenhouse gases. Commenters also noted use of natural gas as a fuel source would eliminate the need to manage coal combustion waste and scrubber waste. Several commenters who support the switch from coal combustion to natural gas combustion cited the availability and abundance of natural gas as a natural resource, particularly in Oklahoma.

*Response:* We agree that switching of existing coal-fired power generating units to natural gas, either through conversion of existing boilers or installation of new power generating units, is technically feasible and demonstrated in practice. As stated in our proposal, the owners of the units subject to the FIP may elect to reconfigure the units to burn natural gas as means of satisfying their BART obligations under section 51.308(e). Switching to natural gas would be an acceptable method of complying with the limits proposed in the FIP, because natural gas combustion inherently results in much lower $SO_2$ emissions. We agree that natural gas may result in lower emissions of other pollutants and offer other environmental advantages. The owners of each subject unit may take these advantages, as well as the availability and pricing information, into consideration as they evaluate this option for complying with $SO_2$ BART emission limits.

*Comment:* Eight commenters responded to our request for comments on the compliance deadline for the six BART-subject units and whether it would be appropriate to extend that deadline for those utilities that elected to switch from coal to natural gas in order to comply with the BART emission limits. Several of these commenters note that switching to natural gas can be accomplished in less than three years if utilities enter into long-term power purchase agreements with existing natural gas-fired power generators but utilities that choose to construct new gas-fired units or convert existing units will likely require more time. They indicate that the requirements to engage in competitive bidding, complete engineering designs, prepare budgets, obtain necessary permits, and equipment installation will likely require up to five years to complete. One of these commenters points out that OG&E has already studied fuel-switching at the system and plant levels and that the typical lead time of construction of new natural gas-fired combined cycle combustion turbines is four years.

Numerous commenters express their support for extending the compliance deadline to five years for units that will be converted to, or replaced with, natural gas-fired power generating units. These commenters cite the broad collateral benefits and overall superiority of switching to a cleaner fuel source over installing additional controls on the existing units and continuing to burn coal.

Multiple other commenters, however, expressed the opinion that the utilities have had ample time already to transition away from coal to cleaner or renewable power generation and that the affected utilities should phase out the BART-subject coal-fired units as quickly as possible. These commenters feel that the proposed compliance deadline of three years is adequate.

ODEQ submitted comments supporting a fourteen and one-half month extension (to four years and two and one-half months total) on the installation of scrubbers and a seven and one-half year extension (to ten and one-half years total) for switching to natural gas.

*Response:* We thank the commenters for their responses to our request for comments on the proposed compliance deadline. As we have discussed elsewhere in our response to comments we find that a compliance deadline of five years is appropriate for the six OG&E and AEP/PSO units to comply with our FIP $SO_2$ emission limit. After reviewing the information provided by the commenters, we find that the same compliance deadline of five years is appropriate for any of the six OG&E and AEP/PSO units that elect to comply with the FIP $SO_2$ emission limit by converting an existing unit to natural gas or replacing it with a new, natural gas-fired unit.

*Comment:* Several commenters provided information concerning underutilized electrical generation capacity through natural gas combustion in Oklahoma. One commenter further suggested that fuel switching could be achieved by imposition of annual emissions caps on the BART-subject, coal-fired units. According to the commenter, such a scheme would provide the affected utilities with the flexibility to shift power generation to existing gas-fired generating units or purchase power from merchant generators. The commenter states that there is an exception provision in the RH regulations at 40 CFR 51.308(e)(2) that allows for imposition of operating limits on BART-eligible units in lieu of conventional BART reductions if the regulating authority implements an emission trading program.

Another commenter noted that switching to natural gas-fired generation, either through conversion of existing units or replacement with new units, would result in power plants better suited to integrate with variable wind power generation.

*Response:* Section 51.308(e)(2) allows Oklahoma to implement an emissions trading program or other alternative measure in lieu of BART. Among other requirements, such an alternative to BART must achieve greater reasonable progress than would be achieved through the installation and operation of BART. However, Oklahoma did not include such a program as part of its RH SIP, and we cannot require Oklahoma to establish an emission trading program that would support annual emission caps or operational limits on the six BART-subject units. We also note that as a practical matter, there is no longer adequate time to develop and implement such an emissions trading program and meet our consent decree deadline with WildEarth Guardians of December 13, 2011 if we attempted to develop and implement such an emission trading program as part of our action.[26] Whether or not existing natural gas-fired power generation capacity in Oklahoma and other parts of the Southwest Power Pool is underutilized has no direct bearing on our $SO_2$ BART determinations.

*Comment:* We received multiple comments from numerous parties concerning the economics of switching from coal-fired to natural gas-fired power generation. These comments focused on a wide range of economic issues, including cost-benefit analysis of one BART compliance alternative over another, future risk to ratepayers due to future maintenance and compliance costs, economic impact of increasing reliance on renewable energy sources, and ancillary benefits to the economy of switching from coal to natural gas or renewable energy sources.

Many of the comments we received pertain to the additional economic burden of addressing coal combustion and scrubber waste that would continue to be generated by the six BART-subject coal-fired units if the utilities elect to comply with the BART requirements of the proposed FIP by installing scrubber units, rather than fuel switching. One commenter provided an economic analysis indicating that containment of the coal ash and scrubber waste would cost $180 million in capital investment and $2–$5 million annually for disposal of residuals if the utilities can sell the fly ash, or up to $9 million annually if the fly ash cannot be sold. The commenter further asserts that scrubbing all six of the BART-subject coal-fired units could generate up to 600,000 tons per year of flue gas desulfurization waste byproducts, the disposal of which could cost an additional $22 million annually. Two commenters have asserted that the power generation capacity of the six OG&E and AEP/PSO units can be replaced with the construction of new, modern natural gas-fired combined cycle turbines for less money than would be required to install scrubbers on the coal-fired units to meet BART emission limits.

Other comments focused on the likely imposition of future, additional environmental regulatory compliance costs associated with continued firing of coal, such as requirements for new baghouses to control emissions of particulate matter and metals, construction of improved and expanded containment of coal combustion residuals, and carbon emission reductions or sequestration. These commenters noted that attempting to further extend the lives of the six OG&E and AEP/PSO units is a bad investment when such additional controls for other pollutants are foreseeable, and that switching to natural gas power generation would reduce the risk to ratepayers of the eventual cost increases associated with these additional regulatory requirements.

Several commenters noted that the six OG&E and AEP/PSO units are approaching the end of their useful lives and that switching to natural gas and renewable energy sources will decrease the risk to ratepayers of increased maintenance costs due to the advanced age of the units.

Other commenters, some of whom identified themselves as ratepayers at the affected utilities, indicated that they would be willing to pay an increase in power rates in exchange for power that was generated by cleaner fuels or renewable energy sources. These commenters cited the overall health and environmental benefits that would result from a transition away from coal-fired power and expressed their belief that such benefits would outweigh any potential increase in electricity rates.

Finally, two commenters suggested that switching to natural gas and/or renewable energy sources would have collateral economic benefits by creating new jobs and providing general economic stimulus in the region.

*Response:* We affirm that each of the sources subject to BART under the FIP can acceptably meet the emission limits in the FIP by switching to natural gas. As the companies evaluate how to satisfy their BART obligations, we encourage them to consider switching from coal to natural gas at the six affected units as this may offer numerous, significant long-term financial and environmental benefits over the option of continued use of coal with additional controls. As was stated in our proposal, we do not wish to dissuade companies from exercising this option. As we discuss elsewhere in our response to comments and Supplemental RTC, we find that a compliance deadline of five years is appropriate for any of the six OG&E and AEP/PSO units that elect to comply with the FIP $SO_2$ emission limit by converting an existing unit to natural gas or replacing it with a new, natural gas-fired unit.

*Comment:* Several commenters expressed concern over the potential rate increases that might result from a switch to natural gas or some form of renewable energy sources and the impact of those rate increases on households with low or fixed incomes.

*Response:* The companies owning each of the sources subject to BART are only required to satisfy the $SO_2$ BART emission limits at those sources. Our action only contemplates the reconfiguration of existing units. We have determined that reconfiguration would be cost effective with application of dry and wet scrubbing technology. Though the $SO_2$ BART emission limits may also be met with reconfiguration of the units to burn natural gas, the companies themselves are free to determine whether this option best responds to future customer needs and preferences, including any potential impact on rates. As we state elsewhere in this response to comments and the Supplemental RTC, although we based our BART determination of the use of $SO_2$ dry scrubbers, the owners of the six units in question are free to consider any technology to meet their $SO_2$ BART obligations, including switching to natural gas. We acknowledge the potential benefits that the commenters suggest of switching the units in question to burn natural gas. Renewable energy technology is not a retrofit option for the sources subject to BART and is accordingly outside the scope of our action.

*Comment:* Several commenters have expressed the view that it does not make good economic sense to invest heavily in new control equipment in order to meet BART on units that are so close to retirement. Some of these commenters point out that it makes more sense to invest in new natural gas-fired units

[26] *See, WildEarth Guardians* v. *Jackson,* Case No. 4:09–cv–02453–CW (N. Dist. Cal.).

instead of converting the existing boilers to burn natural gas, given the size of the investments being considered and the advanced age of the existing coal-fired units.

Several of the comments focused on the long-term economic benefits of construction of new natural gas-fired units over conversion of the existing boilers at the six coal-fired units to meet the BART emission limits.

*Response* The BART guidelines do allow for consideration of the remaining useful life of facilities when considering the costs of potential BART controls. Such a claim would have to be secured by an enforceable requirement. Neither OG&E nor AEP/PSO claimed any such restriction on the operation of these six units and Oklahoma did not submit any enforceable document for action by us. Consequently, we assumed a remaining useful life of 30 years in our BART analysis.

If OG&E and/or AEP/PSO decide the units in question have a shorter useful life such that installing scrubbers is no longer cost effective, and are willing to accept an enforceable requirement to that effect, a revised BART analysis could be submitted by the plant(s) in question and our FIP could be re-analyzed accordingly. Similarly, we could also review a revised SIP submitted by ODEQ.

*Comment:* Numerous commenters expressed broad support for transitioning away from coal and other fossil fuels to sources of energy that are completely renewable, such as wind and solar-generated power. These commenters recommend that the BART-subject units should be replaced with wind-powered units where possible and that natural gas should be used for power generation during periods of low wind yield. One of the commenters notes that Oklahoma and other parts of the Southwest Power Pool (SPP) have enormous potential for wind farm development and that as of July 2010 the SPP transmission interconnection queue had 111 wind generation projects totaling over 20,000 MW and an additional 7,470 MW of incremental wind development. Comments received on this subject also noted that wind power can be developed at relatively low costs and that the money the utilities currently spend on the importation of coal and handling the byproducts of its combustion would be better spent on construction of additional wind generating capacity.

*Response:* Renewable energy technology is not a retrofit option for the sources subject to BART and is therefore outside the scope of our $SO_2$ BART determination. We do generally acknowledge that many kinds of renewable energy do not produce haze-causing pollutants, and transitioning to those sources of energy could lead to visibility improvements.

*Comment:* We received opinions and data from four commenters expressing support for increased energy efficiency efforts as a technique for lowering power demand and therefore reducing the combustion of fossil fuels and its impact on the environment. One of these commenters noted that the affected utilities have begun some energy efficiency programs and that with increased effort they should be able to realize the successes of other programs elsewhere in the country that have seen cumulative reductions in annual power consumption of 5–8 percent since 2004. The commenter notes that OG&E, in particular, should be able to reduce power demand by up to 1,200 GWh/year and 2,100 GWh/year after five and ten years, respectively, at an annual reduction goal of one percent, or as much as 1,800 GWh/year and 3,100 GWh/year after five and ten years, respectively, at an annual reduction goal of one and a half percent.

*Response:* While not specifically within the scope by our $SO_2$ BART determination or our approval of other aspects of the state's RH SIP, we acknowledge that efficiency programs that reduce reliance on sources of haze-causing pollutants may promote visibility improvements.

*Comment:* OG&E states that if it is required to decide whether to install scrubbers or retire and replace electric generating units with natural gas on roughly the same time frame, the economic analysis suggests that rate increases to customers will be lower with scrubbers. Installation of scrubbers is projected to cost more than $1.5 billion. OG&E is concerned that with this type of capital investment, it would be locked economically into maximizing the use of its coal-fired units for the foreseeable future. OG&E states the agreement outlined by ODEQ in the SIP (and rejected by EPA) would reduce ''the cumulative $SO_2$ emissions from Sooner Units 1 and 2 and Muskogee Units 4 and 5 [to] approximately fifty-seven percent (57%) less than would be achieved through the installation and operation of Dry FGD with SDA at all four (4) units.'' OG&E states it should have the flexibility to take advantage of evolving technologies and to utilize these local clean energy sources at its plants in the future, while achieving the same (or better) reduction in impact on visibility. OG&E states EPA's failure to consider these issues in the proposal is short-sighted, and arbitrary, capricious and contrary to applicable law.

*Response:* We find the approximately $1.2 billion cost claimed by OG&E in its BART analysis (referenced above as $1.5 billion) for the installation of $SO_2$ dry scrubbers is in error. As discussed elsewhere in our response to comments and Supplemental RTC, based on our Option 1 and Option 2 analyses, we find the total project costs to range between $290,418,007 to $299,400,007 for Sooner Units 1 and 2, and from $298,818,917 to 289,791,940 for Muskogee. Further, as we also discuss in our proposal, although we based our $SO_2$ BART determination on the basis of dry $SO_2$ scrubbers, OG&E is free to employ other technologies to meet this limit, including switching to natural gas, as long as that switch is completed in the same BART timeframe. We discuss the BART compliance deadline in the response to another comment.

*Comment:* A commenter stated we failed to consider ''the costs of compliance'' of converting the six coal-fired generating units to natural gas. Without any explanation, contends OIEC, we proposed that these generating units could be converted to natural gas ''as a means of satisfying their BART obligations.* * *'' 76 FR 16168, at 16194. The commenter states we failed to consider the costs of compliance of conversion to natural gas, as required by the CAA section 169A(g)(2), and the BART Guidelines, Part 51, Appendix. Y(IV)(D)(4)(a). The commenter states the FIP should therefore be withdrawn.

*Response:* The commenter's reference to our proposal [27] is fully reproduced as follows:

> Should OG&E and/or AEP/PSO elect to reconfigure the above units to burn natural gas, as a means of satisfying their BART obligations under section 51.308(e), that conversion should be completed by the same timeframe. We invite comments as to, considering the engineering and/or management challenges of such a fuel switch, whether the full 5 years allowed under section 308(e)(1)(iv) following the effective date of our final rule would be appropriate.

Under the RHR,[28] we cannot, and did not, evaluate the costs associated with switching the six OG&E and AEP/PSO units over to natural gas for BART. However, after conducting the BART analysis and adopting of emissions limits, alternatives to installing control technologies may achieve the same emission limits. We are open to alternative mechanisms to achieve the BART emissions limits we adopted. As

[27] 76 FR 16168, at 16194.

[28] 70 FR 39104, at 39164: ''note that it is not our intent to direct States to switch fuel forms, e.g. from coal to gas.''

stated in our proposal, we merely afforded OG&E and/or AEP/PSO the opportunity to switch to natural gas as a means of satisfying BART. We also indicated we were willing to consider comments to extend the BART compliance timeframe to the full amount of time allowed under the RHR to accommodate that conversion. Although we based our BART determination of the use of $SO_2$ scrubbers, the six units in question are free to consider any technology or alternative mechanism to meet their $SO_2$ BART obligations.

*J. Comments Arguing Our Proposal Would Hurt the Economy and/or Raise Electricity Rates*

*Comment:* Several commenters expressed concern about adverse effects of electrical bill increases, stating that analyses prepared by the state's utilities, business groups and the Oklahoma Corporation Commission estimate our proposal could increase utility bills in Oklahoma significantly, with some estimates as high as 30 percent. Some commenters stated that the rate increase would result in decreased business investment in Oklahoma; while others stated that it will hurt existing businesses, local governments, and families already struggling from the recession. Several commenters noted that the rate increase will have a disproportionate adverse impact on senior citizens and the disadvantaged, especially individuals living on fixed incomes. Commenters urged us to consider the cost implications of our proposal as we balance the goals of the CAA with the economic impact on consumers, communities, and businesses. Specifically, one commenter stated that installation of scrubber technologies on aging coal-fired facilities may not be the most cost-effective or environmental approach. Several commenters ask EPA to consider all of the alternatives available, including switching to natural gas over a longer timeframe. One commenter further stated that EPA's proposal is not cost effective and does not significantly improve visibility. Commenters urged EPA to adopt the Oklahoma State plan. A commenter that supported the proposal stated that while the FIP could cause rates to increase somewhat, Oklahoma has the eighth lowest average electricity rates in the country, rates are higher in neighboring states, and the difference in rates may result from the fact that other states have emission controls on a higher percentage of their coal plants.

*Response:* The federal regulations implementing the CAA's BART provisions require that we evaluate (1) cost of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) any existing pollution control technology in use at the source, (4) remaining useful life of source, and (5) degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. 40 CFR 51.308(e)(1)(ii)(A). After a careful cost review, we have determined that benefits in visibility from implementing our proposal outweigh the increase in costs for the facilities. As discussed in our proposal, we disagree with OG&E's and AEP/PSO's cost estimate for installing scrubbers on the six units addressed by our FIP. After careful review of information provided during the public comment period, we revised our calculation of the total project cost for the four OG&E units from our proposed range of approximately $312,423,000 to $605,685,000, to our final range of approximately $589,237,000 to $607,461,000. We made no changes to the cost basis for the two AEP/PSO units from our proposal. As such, the associated cost investment for AEP/PSO is $274,100,000. In light of the visibility benefits we predict will occur, we consider this to be cost effective. We take our duty to estimate the cost of controls very seriously, and make every attempt to make a thoughtful and well informed determination. We note that our cost estimate, being about half that of OG&E's will result in significantly less costs being passed on to rate payers. We also note that our FIP allows for any of the six units to switch to natural gas within five years of this final action instead of installing the control technology.

*K. Comments Arguing Our Proposal Would Help the Economy*

*Comments:* We also received comments that the proposed FIP would help the economy in a variety of ways. One commenter stated that environmental regulations like the RHR improve the economy and create jobs; and industry always finds a way to manage the cost of implementation. One commenter states that cleaner air will boost Oklahoma's productivity and job creation.

*Response:* Although, we did not consider the potential positive benefits to local economics in making our decision today, we do acknowledge that improved visibility may have a positive impact on tourism. Also, installing the controls required by the BART determination on the six units will take three years or longer to complete. These projects will require well-paid, skilled labor that can potentially be drawn from the local area, which would seem to benefit the economy.

Finally, as we have noted elsewhere in our response to comments, although our action concerns visibility impairment, this action may also result in significant improvements in human health. Improved human health will reduce the healthcare costs and reduce the number of missed school and work days in the community.

*L. Comments on Health and Ecosystem Benefits and Other Pollutants*

*Comments:* Several commenters state that pollutants that cause visibility impairment also harm public health. Specifically, commenters assert the following:

> RH pollutants include $NO_X$, $SO_2$, PM, ammonia, and sulfuric acid. $NO_X$ is a precursor to ground level ozone, which is associated with respiratory diseases, asthma attacks, and decreased lung function. $NO_X$ also reacts with ammonia, moisture, and other compounds to form particulates that can cause and worsen respiratory disease, aggravate heart disease, and lead to premature death. Similarly, $SO_2$ increases asthma symptoms, leads to increased hospital visits, and can form particulates that aggravate respiratory and heart diseases and cause premature death. Both $NO_X$ and $SO_2$ cause acid rain. PM can penetrate into the lungs and cause health problems, such as premature mortality, lung disease, aggravated asthma, chronic bronchitis, and heart attacks.

Commenters cite to EPA's estimates that in 2015, full implementation of the RHR nationally will prevent 1,600 premature deaths, 2,200 non-fatal heart attacks, 960 hospital admissions, and over 1 million lost school and work days. The RHR will result in health benefits valued at $8.4 to $9.8 billion annually. More than 100,000 children and 365,000 adults are diagnosed with asthma in Oklahoma, and hospitalizations in Oklahoma due to asthma cost roughly $57.9 million in 2007 alone. Commenters also cite to a Clean Air Task Force finding that the six units at issue in the proposed rule annually cause approximately 118 deaths, 181 heart attacks, 2,037 asthma attacks, 86 hospital admissions, 74 cases of chronic bronchitis, and 129 emergency room visits.

Some commenters also relay personal stories of the health impacts on themselves and their families from the emissions at issue. One commenter is disappointed that the air quality in Oklahoma is so poor that the ODEQ often warns active adults to avoid prolonged outdoor exposure. She notes that ozone action days prevent children from playing outside in the summer. Several children have been hospitalized

due to asthma and other illnesses that the commenters attribute to the emissions at issue. One commenter contends that many people who are impacted by this rulemaking are not aware of the rulemaking process, or their rights under that process. Commenters further state that it is EPA's responsibility to protect the air quality and prevent these negative health effects.

Several commenters also assert that $NO_X$ and $SO_2$ emissions from coal plants harms crops like pecans, barley, and oats, which puts the livelihoods of local farmers at risk, impacts the health of those who consume the contaminated food, and increases the cost of food.

Some commenters want this rulemaking to address health issues. One commenter states that, while the RHR was designed to provide redress for visibility impairment, the BART Guidelines expressly provide for the consideration of non-air quality environmental impacts in step four of the five-step BART process. This consideration includes the environmental impact on human health.

One commenter states that the power plants have had plenty of time to change operations to comply, but they have failed to do so. Several commenters assert that Oklahoma is unable to properly manage water and air pollution because special interest groups trump science. Another commenter states that coal pollution is devastating tourism and wildlife in Oklahoma. One commenter states that cleaner air will improve the health of its citizens. Some commenters assert that customers are subsidizing the cost of electricity with their health, lives, and livelihoods. One commenter stated that the increase in electricity costs is offset by reducing the healthcare costs to the community to treat illnesses and deaths caused by air pollution from the plants. Another commenter points out that power plants are also built near the most vulnerable and underserved populations in the state, based on the argument that the plants will bring needed jobs. One commenter concludes that it is unfair and unethical to hold citizens hostage to the idea that they must choose between electricity and good health. Several commenters feel that it is appropriate for industry to bear the burden of the cost, rather than pass it on to citizens of the state in the form of healthcare costs. These commenters are amenable to paying higher electricity rates in exchange for healthier air and water. Several commenters request that EPA impose the strongest possible regulation of emissions and enforcement of the CAA.

Another commenter notes that President Nixon created EPA to protect the environment and the CAA was passed to protect air quality in our national parks and wilderness areas. President Reagan's acid rain program cost less than industry or EPA estimated; and hopefully, installing scrubbers on these coal plants will also cost less than estimated. Further, the CAA allows EPA to limit sulfur oxides, nitrogen dioxides, organic compounds, and particulates to ensure the quality of the air in the region. Several commenters state that coal pollutes throughout the process during extraction, burning, and disposal. One commenter states that the true cost of coal is the cost of its transportation, remediation of coal pollution, and lost tourism and bad public relations in states where coal production occurs through mountaintop removal. Many commenters recommend that Oklahoma convert to more efficient sources of energy such as natural gas, wind, and solar power.

One commenter asserts that he suffered from severe childhood asthma caused by allergies before the coal-fired power plants were built. He states that affordable electricity from the plants allows him to keep his windows closed, thereby preventing allergens from entering his home.

*Response:* We appreciate the commenters' concerns regarding the negative health impacts of emissions from the six units at issue. We agree that the same $NO_X$ emissions that cause visibility impairment also contribute to the formation of ground-level ozone, which has been linked with respiratory problems, aggravated asthma, and even permanent lung damage. We also agree that $SO_2$ emissions that cause visibility impairment also contribute to increased asthma symptoms, lead to increased hospital visits, and can form particulates that aggravate respiratory and heart diseases and cause premature death; and that both $NO_X$ and $SO_2$ cause acid rain. We agree that the same PM emissions that cause visibility impairment can be inhaled deep into lungs, which can cause respiratory problems, decreased lung function, aggravated asthma, bronchitis, and premature death. We agree that these pollutants can have negative impacts on plants and ecosystems, damaging plants, trees, and other vegetation, and reducing forest growth and crop yields, which could have a negative effect on species diversity in ecosystems. Therefore, although our action concerns visibility impairment, we note the potential for significant improvements in human health and the ecosystem.

The CAA states that the non-air quality environmental impacts of compliance are a consideration in determining BART. See CAA Section 169A(g)(2). The BART Guidelines allow for the consideration of non-air quality environmental impacts under 40 CFR 51, Appendix Y(IV)(D)(j). *See also,* 70 FR 39104, at 39169. However, this BART factor generally is considered in order to determine if a control option that is otherwise technically feasible should be eliminated due to adverse environmental impacts. Such impacts could include solid or hazardous waste generation and discharges of polluted water as a result of the control device. Although we may note potential health benefits from the reduction of air pollutants due to the installation of a BART control, we do not consider them as part of the BART determination. While we received many comments concerning health impacts from the ongoing operations of BART-eligible sources, we received no comments asserting that dry and wet scrubbers should be differentiated or eliminated as compliance options based on non-air quality environmental impacts.

Although we appreciate the commenters' encouragement that we adopt even stricter standards, after considering all the comments we received, as we have stated elsewhere in this notice, we believe that the standards proposed in our proposal establish BART and will prevent visibility impairment from the six units.

Issues that the commenters raise about the effect of EPA's action on the cost of electricity are addressed elsewhere in this notice. Additionally, comments that recommend that the six units switch to natural gas or other sources of renewable energy are addressed elsewhere in this notice.

*Comments:* Several commenters note that coal-plant emissions contain other toxins including mercury, lead, cadmium, chromium, dioxins, formaldehyde, arsenic, radioactive isotopes, oxide, and radon gas. Another commenter is concerned that the toxicity of the pollutants in regional haze is higher in close proximity to the source of emissions.

Specifically, several commenters state that poor reclamation of coal ash from AEP's Shady Point power plant causes negative health impacts in Bokoshe, Oklahoma. These commenters are concerned about the health effects of fly ash because they state it contains arsenic, mercury, lead, cadmium, and other toxins. They describe the project as consisting of transporting coal ash from the plant to an abandoned lead mine in Bokoshe. Commenters claim

that the result is a fifty foot wall of toxic coal ash at the reclamation site in Bokoshe. Commenters state that pollution from the reclamation project has damaged property and people's health. They state that fugitive emissions from the trucks and the reclamation site run off into the ground water, polluting drinking water supplies. One commenter also states that fly ash has been used in Oklahoma as repair material for county roads. Commenters state that sixteen to twenty families living nearby have cancer, children have asthma, and calves in the area are stillborn. One commenter states that EPA's proposal to put scrubbers on the units at issue will help address asthma, but these scrubbers will cause emissions of toxic fly ash.

Several commenters are concerned that the mercury, chromium, and arsenic from the coal-fired power plants are contaminating food, primarily fish. One commenter contends that these chemicals are carcinogenic and bioaccumulate. As a result, they state, some fish in Oklahoma have high levels of toxic materials and cannot be consumed. Commenters note that mercury contamination is so extreme that larger fish species are unsafe for pregnant women to eat. One commenter states that mercury is a neurotoxin that negatively affects a child's ability to talk, walk, read, and learn. Several commenters point out that ODEQ has issued advisories that prohibit eating fish from certain lakes because the mercury content is dangerously high. One commenter further states that sixteen out of fifty of the lakes in Oklahoma have elevated levels of mercury.

*Response:* Although we appreciate the commenters' concerns regarding the potential negative health impacts from toxic emissions from the six units at issue, we note that we are not quantifying any toxic emissions that may be emitted, and such emissions are not considered to be visibility impairing pollutants. Therefore, consideration of the toxic emissions is outside the scope of this rulemaking under the RHR. However, please note that other provisions of the CAA, as well as other environmental statutes and regulations address toxic emissions, such as the ones noted here. EPA implements such programs to protect human health and the environment from the negative impacts of these pollutants, and Oklahoma's SIP is required to include provisions consistent with these Federal requirements to the extent that they are applicable.

*Comment:* One commenter mentions the impacts of the transport of emissions from existing and planned coal plants in Texas, stating that sixty percent of mercury pollution in Oklahoma comes from Texas. He requests that EPA accelerates mercury testing in Oklahoma's land and lakes.

*Response:* While we understand the commenter's concern with the impacts of transport emission from Texas on water bodies in Oklahoma, mercury testing of water bodies is outside the scope of our action. Mercury is not considered a visibility impairing pollutant; it is an air toxic regulated under CAA requirements that are distinct from the RHR and CAA section 110(a)(2)(D)(i)(II).

*Comments:* Several commenters discuss the impact of coal power on climate change. One commenter also notes that we should regulate $CO_2$ because ninety-seven percent of scientists agree that it is causing climate change. He contends that coal fired power plants are contributing to climate change, stating that the $CO_2$ level has risen from 280 ppm during the pre-industrial age to 380 ppm today. He cites the IPCC and others who state that the $CO_2$ level should not exceed 350 ppm. He also discusses the increasing temperatures and potential for sea level rise in the near future. The commenter states that we need to address climate change now.

*Response:* While we understand the commenters' concerns with respect to climate change, consideration of climate change is outside the scope of our action on the RHR. While $CO_2$ is a greenhouse gas (GHG), it is not considered a visibility impairing pollutant. However, EPA implements regulations that address GHGs in order to protect the public and the environment from the negative impacts of climate change. Additionally, Oklahoma's SIP is required to include provisions consistent with those Federal requirements.

*M. Miscellaneous Comments*

*Comment:* OG&E states that we found a defect in Oklahoma's Long Term Strategy (LTS) because CENRAP modeling assumed the presumptive $SO_2$ BART limit (0.15 lb/mmBtu) for OG&E's Sooner and Muskogee facilities, which was not secured by Oklahoma in its SIP. OG&E states we reasoned that the proposed FIP was necessary to cure these defects. OG&E asserts we may not pre-determine the BART $SO_2$ emissions limit based on assumptions made during regional modeling, but the emissions limit should be determined based on the five statutory factors as applied to an individual facility.

Further, OG&E states our reasoning with respect to the Oklahoma LTS is in error. When setting reasonable progress goals for their own Class I areas, OG&E states, the states are authorized to consider the same five statutory factors that are used in determining BART, including the costs of additional controls. OG&E states that Oklahoma did not specify additional $SO_2$ controls for the Sooner and Muskogee units as part of Oklahoma's LTS for the Wichita Mountains. OG&E notes that for Class I areas in other states, a state must ensure that it has included in its LTS all measures needed to achieve its apportionment of emission reduction obligations agreed upon through the regional planning process. 40 CFR 51.308(d)(2)(ii). OG&E states that ODEQ found that its LTS required no further controls for Oklahoma sources because emissions from Oklahoma were found (through the regional planning process) to impair visibility at all relevant Class I areas other than Wichita Mountains only insignificantly. Thus, OG&E reasons, the Oklahoma LTS is consistent with the agreements reached during regional planning. OG&E states we failed to justify, or explain, our basis for assuming that the regional planning process would have come to a different conclusion concerning Oklahoma's impact on other states' Class I areas if a different $SO_2$ emission rate had been assumed for the Sooner and Muskogee units in question.

*Response:* We disagree with OG&E's assertion that Oklahoma's decision not to require controls for the six OG&E and AEP/PSO units is consistent with the RH requirements for the LTS, section 51.308(d)(3)(ii), which requires:

> Where other States cause or contribute to impairment in a mandatory Class I Federal area, the State must demonstrate that it has included in its implementation plan all measures necessary to obtain its share of the emission reductions needed to meet the progress goal for the area. If the State has participated in a regional planning process, the State must ensure it has included all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process.

Oklahoma did engage in a regional planning process. This regional planning process included a forum in which state representatives built emission inventories that assumed that specific pollution sources would be controlled to specific levels. This included assumptions that the six OG&E and AEP/PSO units would be controlled to presumptive BART emission levels for $SO_2$. Visibility modeling projections subsequently assumed those emission reductions. However, Oklahoma, in its

subsequent RH SIP, did not include these promised reductions on which the other states are presently relying.

We note the CENRAP RPO process was open and representatives from industry occasionally attended CENRAP meetings and had an opportunity to engage in this process. ODEQ engaged in consultations under 51.308(d)(3)(i), which requires that where the State has emissions that are reasonably anticipated to contribute to visibility impairment in any mandatory Class I Federal area located in another State or States, the State must consult with the other State(s) in order to develop coordinated emission management strategies. The State must consult with any other State having emissions that are reasonably anticipated to contribute to visibility impairment in any mandatory Class I Federal area within the State.

All states that engaged in these consultations were involved in the discussions leading up to, and the actual construction of the emission inventories and the modeling strategy. These LTS consultations therefore assumed OG&E's Sooner and Muskogee sources would be controlled to the presumptive limit levels and made decisions regarding whether additional controls to address LTS were needed on that basis. Thus, we are disapproving Oklahoma's LTS.

Furthermore, and notwithstanding the above LTS discussion, we disagree with OG&E's assertion that our BART analysis of the six OG&E and AEP/PSO units is due to the CENRAP modeling. As we discussed in our proposal, we arrived at our proposed BART determination for the six units in question after performing the BART analysis required under the RHR.

*Comment:* AEP/PSO commented that we should clarify that new monitoring systems proposed under section 52.1923(e) do not need to be installed for both Unit 3 and Unit 4 of the Northeastern plant if the same fuel is used for both units. Instead, they reason, stack emissions should be apportioned to the units based on unit to stack load ratios. AEP/PSO claims the equipment necessary to report emissions for each unit individually will add approximately $250,000 to the cost to comply, and provides no better data on emissions to the atmosphere.

*Response:* We are affirming that we are in fact requiring that the monitoring described in section 52.1923(e) must be installed separately for each of Units 3 and 4 of the AEP/PSO Northeastern plant even though the same fuel is used for both units. We do not find that it is proper to calculate the emissions of each unit based on its load ratio, as individual $SO_2$ scrubbers will likely have slightly different performance characteristics and we need to ensure that both units' scrubbers are working properly by monitoring the emissions unit by unit.

*Comment:* AEP/PSO believes there is a conflict between the language in section 52.1923(d) and (e). Section 52.1923(d) states that if a valid $SO_2$ pounds per hour or heat input is not available for any hour for a unit, that heat input and $SO_2$ pounds per hour shall not be used in the calculation of the 30-day rolling average for $SO_2$.

Section 52.1923(e) states that when valid $SO_2$ pounds per hour, or $SO_2$ pounds per million Btu emission data are not obtained because of continuous monitoring system breakdowns, repairs, calibration checks, or zero and span adjustments, emission data must be obtained by using other monitoring systems approved by the EPA to provide emission data for a minimum of 18 hours in each 24 hour period and at least 22 out of 30 successive boiler operating days.

*Response:* We do not see a conflict between the language in sections 52.1923(d) and (e). Paragraph (d) refers to short term, discrete data acquisition problems and paragraph (e) refers to more serious problems that may arise due to fundamental underlying problems with the monitoring system.

*Comment:* One commenter called for an integrated and comprehensive strategy for EGUs to meet CAA requirements, noting that EGU emissions are subject to the RHR, the $PM_{2.5}$ NAAQS, and the National Emissions Standards for Hazardous Air Pollutants. The commenter stated that to effectively address impacts to human health and RH caused by EGU emissions, the FIP or SIP should require (1) SCR to control $NO_X$, (2) wet scrubbers to control $SO_2$, and (3) wet electrostatic precipitators to control condensable particulate matter and acid mists. The commenter also asked us to reconsider our proposal to accept ODEQ's $NO_X$ BART determination, because (1) according to our proposal additional $NO_X$ reductions would achieve significant improvement in visibility over baseline, (2) Nitrate particulates from EGUs are primarily responsible for the majority of visibility impairment during winter days, and (3) the full benefit of wet scrubber controls may not be achieved unless BART controls on $NO_X$ is also required. Concerning $SO_2$, the commenter expressed concern that the proposal would ''approve'' a dry scrubber system, along with an older electrostatic precipitator at the OG&E Sooner facility that would achieve poor control of $PM_{2.5}$ emissions. The commenter added that the proposed rule does not provided adequate information to allow the public to understand and compare control measures or to comprehend the extent of underperformance of $PM_{2.5}$ controls.

Another commenter requested additional controls and monitoring for ammonia and sulfuric acid. Specifically the commenter (1) requested that we set emission limits for ammonia and sulfuric acid mist, similar to those proposed for the San Juan Generating Station in New Mexico (76 FR 491), (2) stated their support for requiring continuous emissions monitors to monitor ammonia, and (3) urged us to require stack testing for sulfuric acid on a more frequent basis than annual monitoring.

*Response:* The purpose of our plan is to address the CAA BART requirements. Our evaluation found that:

- The $NO_X$ controls adopted by the state meet the CAA BART requirements;
- The $SO_2$ BART controls we proposed in our FIP, in addition to the state adopted $NO_X$ controls, would lead to significant improvement in visibility and meet the CAA BART requirements;
- Additional $NO_X$ controls would not be cost effective; and
- Additional pollutant controls are not needed to meet the CAA BART requirements.

Regarding the request for ammonia and sulfuric acid mist emission limits and monitoring, we did propose ammonia and sulfuric acid limits and monitoring, as part of our New Mexico RH FIP for the San Juan Generating Station. 76 FR 491. We did this because we were concerned about the potential for ammonia slip, as a result of the operation of Selective Catalytic Reduction (SCR), and the potential for the growth in sulfuric acid emissions if they were not limited in an enforceable manner. As explained in our response to comments in that action, we ultimately determined that neither an ammonia limit, nor ammonia monitoring was warranted.[29] We did, however, limit sulfuric acid emissions, verified by annual stack testing due to the potential for visibility impairment from increased sulfuric acid emissions associated with operation of SCR. These issues are not applicable here, as our BART FIP is concerned with the reduction of $SO_2$, which is not controlled by SCR, and our visibility modeling does not indicate the

[29] 76 FR 52388, at 52407.

need to control or monitor sulfuric acid or ammonia emissions.

*Comment:* One commenter stated that by mandating scrubbers on coal plants that we are trying to phase out does not make sense. Another commenter asked why switching to low sulfur coal is not considered a viable alternative instead of mandating installation of expensive wet gas scrubbers. A third commenter stated that the EPA continues to bog down electricity producers with burdensome paperwork and legal uncertainty and that the EPA RHR is a perfect example of the EPA's lack of economic reality.

*Response:* We are not attempting to phase out the Oklahoma coal plants that are subject to our FIP. The purpose of our FIP is to control $SO_2$ emissions from six Oklahoma EGUs that contribute to RH in order to meet the CAA BART requirements. To that end we are setting emissions limits for $SO_2$. We are not requiring certain control technologies or fuel sources. As discussed earlier, we used the CAA's BART evaluation criteria for our plan and found that it is reasonable and realistic. The paperwork required will ensure compliance with the BART FIP.

*Comment:* One commenter expressed his view that citizens should ask EPA to set and enforce regulations for haze because the state regulations were inadequate. Another commenter stated that we should reject lower standards suggested by others.

*Response:* We agree with the commenter that Oklahoma's RH SIP was inadequate in its control of $SO_2$ from the six OG&E and AEP/PSO units. We find that our FIP will require the proper amount of $SO_2$ control in order to comply with the RHR.

*Comment:* A request was submitted that we hold a public hearing on our proposal in Tulsa, Oklahoma.

*Response:* Originally we scheduled one public hearing in Oklahoma City. In response to the request we added a second hearing in Tulsa on April 14, 2011. The transcripts of both public hearings are available in the docket.

*Comment:* One commenter asked us to work with ODEQ and the electrical power providers to develop a cost effective plan.

*Response:* We find that the $SO_2$ controls required by our FIP are, for the reasons discussed elsewhere in our response to comments and Supplemental RTC, cost effective. We are, however, willing to work with ODEQ and others to develop a SIP that could replace our FIP. Such a SIP will need to meet the CAA and EPA's RH regulations and be consistent with EPA's guidance.

*Comment:* One commenter supported our proposal's (1) determination that Oklahoma's $SO_2$ BART limits do not meet the RH regulations, (2) analysis of the visibility improvement resulting from BART controls, (3) determination that low $NO_X$ burners are appropriate as BART, and (4) determination that existing electrostatic precipitators and a 0.1 lbs/MMBtu emissions limit is appropriate as BART for particulate matter.

*Response:* We appreciate the comments.

*Comment:* Comments were received expressing concern over other sources of air pollution, such as landfills, coal-fired power plants, the Tar Creek superfund site and sources in Texas.

*Response:* While we understand the commenter's concern with the impacts of other sources of pollution, the scope of this action is limited to assessing whether certain elements of the Oklahoma RH SIP meet the RH requirements of the CAA, including BART, and addressing any deficiencies identified. We note also that other state and federal statutes and regulations address other sources of air pollution, such as those referenced by the commenters, to protect human health and the environment from the negative impacts of these pollutants.

*Comment:* Two commenters provided questions at the Oklahoma City public hearing. Several questions relate to Class 1 areas, such as: designation of Class 1 areas; location of Class 1 areas in relation to the six units and other coal-fired units; frequency, degree, and season of visibility impact in Class 1 areas; and tourism at the Class 1 areas. Other questions concern cost of compliance by the six units, such as: annual and total cost; cost and benefit analysis of comparing the cost of compliance to ''visitor impact days''; economic impacts to the region; and EPA's authority to implement the FIP. Finally, some questions concern the Wichita Wildlife Refuge specifically and contemplate sources of haze impacting that Class 1 area, other than the six units.

*Response:* In general, answers to these questions are: (1) Found in our proposal or in supporting documents for our proposal, (2) furnished in response to other comments, or (3) not a necessary or relevant consideration for our action. For responses to these comments, please see the ''Addendum Responding to Questions Received'' available in the electronic docket for this rulemaking.

*Comment:* We received comments not related to the proposal. These included comments on:

- Enforcement by EPA and ODEQ;
- A RH educational plan;
- Emissions from the LaFarge cement company; and
- Eliminating coal as a source of energy.

*Response:* While these and other comments may be important topics for discussion, we are not addressing these topics as they are outside the scope of our rulemaking.

## IV. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action finalizes a source-specific FIP for six units at coal-fired power plants in Oklahoma (OG&E Sooner Plant Units 1 and 2, OG&E Muskogee Plant Units 4 and 5, and AEP/PSO Northeastern Plant Units 3 and 4). This type of action is exempt from Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

### *B. Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). Under the Paperwork Reduction Act, a ''collection of information'' is defined as a requirement for ''answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *.'' 44 U.S.C. 3502(3)(A). Because the FIP only applies to six units at three power plants (OG&E Sooner Plant, OG&E Muskogee Plant, and AEP/PSO Northeastern Plant) the Paperwork Reduction Act does not apply. See 5 CFR 1320(c).

### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a

city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The FIP for the OG&E Sooner Plant, the Muskogee Plant, and the AEP/PSO Northeastern Plant being finalized today does not impose any new requirements on small entities. See *Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985).

*D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule does not contain a Federal mandate that may result in expenditures of $100 million or more, adjusted for inflation, for state, local, and tribal governments, in the aggregate, or the private sector in any one year. Our cost estimate indicates that the total annual cost of compliance with this rule is below this threshold. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule contains regulatory requirements that apply only to six units at coal-fired power plants in Oklahoma (OG&E Sooner Plant Units 1 and 2, OG&E Muskogee Plant Units 4 and 5, and AEP/PSO Northeastern Plant Units 3 and 4).

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely prescribes EPA's action to address the state not fully meeting its obligation to prohibit emissions from interfering with other states measures to protect visibility. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposed rule from state and local officials.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This final action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 6, 2000), because the action EPA is taking neither imposes substantial direct compliance costs on tribal governments, nor preempts tribal law. Therefore, the requirements of section 5(b) and 5(c) of the Executive Order do not apply to this rule. Consistent with EPA policy, EPA nonetheless provided outreach to Oklahoma Tribes on several occasions in March and April 2011, and offered consultation regarding this action. EPA did not receive any requests for consultation on this rule.

*G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it implements specific standards established by Congress in statutes.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rule would require the affected units at the OG&E Sooner Plant, the Muskogee Plant, and the AEP/PSO Northeastern Plant to meet the applicable monitoring requirements of 40 CFR part 75. Part 75 already incorporates a number of voluntary consensus standards. Consistent with the Agency's Performance Based Measurement System (PBMS), Part 75 sets forth performance criteria that allow the use of alternative methods to the ones set forth in Part 75. The PBMS approach is intended to be more flexible and cost effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved data quality. At this time, EPA is not recommending any revisions to Part 75; however, EPA periodically revises the test procedures set forth in Part 75. When EPA revises the test procedures set forth in Part 75 in the future, EPA will address the use of any new voluntary consensus standards that are equivalent. Currently, even if a test procedure is not set forth in Part 75, EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified; however, any alternative methods must be approved through the petition process under 40 CFR 75.66 before they are used.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994), establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. Our FIP limits emissions of $SO_2$ from six units at coal-fired power plants in Oklahoma (OG&E Sooner Plant Units 1 and 2, OG&E Muskogee Plant Units 4

and 5, and AEP/PSO Northeastern Plant Units 3 and 4). In addition to our FIP, we also approve SIP elements that also limit the emission of other pollutants, including PM and $NO_X$.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on January 27, 2012.

*L. Judicial Review*

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 27, 2012. Pursuant to CAA section 307(d)(1)(B), this action is subject to the requirements of CAA section 307(d) as it promulgates a FIP under CAA section 110(c). Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See CAA section 307(b)(2).

**List of Subjects in 40 CFR Part 52**

Air pollution control, Environmental protection, Best available retrofit technology, Incorporation by reference, Intergovernmental relations, Interstate transport of pollution, Nitrogen dioxide, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide, Visibility.

Dated: December 13, 2011.

**Lisa P. Jackson,**

*Administrator.*

For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

## PART 52—[AMENDED]

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

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

## Subpart LL—[Amended]

■ 2. Section 52.1920 is amended as follows:

■ a. The table in paragraph (c) is amended by adding in sequential order under ''Subchapter 8. Permits for Part 70 Sources'' a new heading for part 11 and a new entry for ''(252:100:8–70 to 252:100:8–77)''.

■ b. The first table in paragraph (e) is amended by adding at the end a new entry for ''Interstate transport for the 1997 ozone and $PM_{2.5}$ NAAQS (Noninterference with measures required to prevent significant deterioration of air quality or to protect visibility in any other State)'', immediately followed by an entry for ''Regional haze SIP''. ''

■ c. The second table in paragraph (e) entitled ''EPA Approved Statutes in the Oklahoma SIP'' is amended by removing the entry for ''Interstate transport for the 1997 ozone and $PM_{2.5}$ NAAQS.''

The amendments read as follows:

**§ 52.1920 Identification of plan.**

* * * * *

(c) * * *

EPA APPROVED OKLAHOMA REGULATIONS

| State citation | Title/subject | State effective date | EPA approval date | Explanation |
|---|---|---|---|---|
| * * | * | * | * * | * |
| PART 11. Visibility Protection Standards | | | | |
| (252:100:8–70 to 252:100:8–77) ..... | Visibility Protection Standards. | 6/15/2007 | 12/28/11 [Insert FR page number where document begins] | |

(e) * * *

EPA APPROVED NON-REGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE OKLAHOMA SIP

| Name of SIP provision | Applicable geographic or nonattainment area | State submittal/effective date | EPA approval date | Explanation |
|---|---|---|---|---|
| * * | * | * | * * | * |
| Interstate transport for the 1997 ozone and $PM_{2.5}$ NAAQS (Noninterference with measures required to prevent significant deterioration of air quality or to protect visibility in any other State). | Statewide ..... | 5/1/2007 | 11/26/2010, 75 FR 72701 12/28/11 [Insert citation of publication]. | Noninterference with measures required to prevent significant deterioration of air quality in any other State approved 11/26/2010. Noninterference with measures required to protect visibility in any other State partially approved 12/28/11. |

EPA APPROVED NON-REGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE OKLAHOMA SIP—Continued

| Name of SIP provision | Applicable geographic or nonattainment area | State submittal/effective date | EPA approval date | Explanation |
|---|---|---|---|---|
| Regional haze SIP: (a) Determination of baseline and natural visibility conditions. (b) Coordinating regional haze and reasonably attributable visibility impairment. (c) Monitoring strategy and other implementation requirements. (d) Coordination with States and Federal Land Managers. (e) BART determinations except for the following $SO_2$ BART determinations: Units 4 and 5 of the Oklahoma Gas and Electric (OG&E) Muskogee plant; Units 1 and 2 of the OG&E Sooner plant; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma (AEP/PSO) Northeastern plant. | Statewide | 2/17/2010 | 12/28/11 [Insert citation of publication]. | Core requirements of 40 CFR 51.308 |

■ 3. Section 52.1923 is added to read as follows:

**§ 52.1923 Best Available Retrofit Requirements (BART) for $SO_2$ and Interstate pollutant transport provisions; What are the FIP requirements for Units 4 and 5 of the Oklahoma Gas and Electric Muskogee plant; Units 1 and 2 of the Oklahoma Gas and Electric Sooner plant; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant affecting visibility?**

(a) *Applicability.* The provisions of this section shall apply to each owner or operator, or successive owners or operators, of the coal burning equipment designated as: Units 4 or 5 of the Oklahoma Gas and Electric Muskogee plant; Units 1 or 2 of the Oklahoma Gas and Electric Sooner plant; and Units 3 or 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant.

(b) *Compliance Dates.* Compliance with the requirements of this section is required within five years of the effective date of this rule unless otherwise indicated by compliance dates contained in specific provisions.

(c) *Definitions.* All terms used in this part but not defined herein shall have the meaning given them in the CAA and in parts 51 and 60 of this title. For the purposes of this section:

*24-hour period* means the period of time between 12:01 a.m. and 12 midnight.

*Air pollution control equipment* includes selective catalytic control units, baghouses, particulate or gaseous scrubbers, and any other apparatus utilized to control emissions of regulated air contaminants that would be emitted to the atmosphere.

*Boiler-operating-day* means any 24-hour period between 12:00 midnight and the following midnight during which any fuel is combusted at any time at the steam generating unit.

*Daily average* means the arithmetic average of the hourly values measured in a 24-hour period.

*Heat input* means heat derived from combustion of fuel in a unit and does not include the heat input from preheated combustion air, recirculated flue gases, or exhaust gases from other sources. Heat input shall be calculated in accordance with 40 CFR part 75.

*Owner or Operator* means any person who owns, leases, operates, controls, or supervises any of the coal burning equipment designated as:

Unit 4 of the Oklahoma Gas and Electric Muskogee plant; or
Unit 5 of the Oklahoma Gas and Electric Muskogee plant; or
Unit 1 of the Oklahoma Gas and Electric Sooner plant; or
Unit 2 of the Oklahoma Gas and Electric Sooner plant; or
Unit 3 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant; or
Unit 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant.

*Regional Administrator* means the Regional Administrator of EPA Region 6 or his/her authorized representative.

*Unit* means one of the coal fired boilers covered under Paragraph (a), above.

(d) *Emissions Limitations.*

$SO_2$ *emission limit.* The individual sulfur dioxide emission limit for a unit shall be 0.06 pounds per million British thermal units (lb/MMBtu) as averaged over a rolling 30 boiler-operating-day period. For each unit, $SO_2$ emissions for each calendar day shall be determined by summing the hourly emissions measured in pounds of $SO_2$. For each unit, heat input for each boiler-operating-day shall be determined by adding together all hourly heat inputs, in millions of BTU. Each boiler-operating-day the thirty-day rolling average for a unit shall be determined by adding together the pounds of $SO_2$ from that day and the preceding 29 boiler-operating-days and dividing the total pounds of $SO_2$ by the sum of the heat input during the same 30 boiler-operating-day period. The result shall be the 30 boiler-operating-day rolling average in terms of lb/MMBtu emissions of $SO_2$. If a valid $SO_2$ pounds per hour or heat input is not available for any hour for a unit, that heat input and $SO_2$ pounds per hour shall not be used in the calculation of the 30 boiler-operating-day rolling average for $SO_2$.

(e) *Testing and monitoring.*

(1) No later than the compliance date of this regulation, the owner or operator shall install, calibrate, maintain and operate Continuous Emissions Monitoring Systems (CEMS) for $SO_2$ on Units 4 and 5 of the Oklahoma Gas and Electric Muskogee plant; Units 1 and 2 of the Oklahoma Gas and Electric Sooner plant; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant in accordance with 40 CFR 60.8 and 60.13(e), (f), and (h), and Appendix B of Part 60. The owner or operator shall comply with the quality assurance procedures for CEMS found in 40 CFR part 75. Compliance with the emission

limits for $SO_2$ shall be determined by using data from a CEMS.

(2) Continuous emissions monitoring shall apply during all periods of operation of the coal burning equipment, including periods of startup, shutdown, and malfunction, except for CEMS breakdowns, repairs, calibration checks, and zero and span adjustments. Continuous monitoring systems for measuring $SO_2$ and diluent gas shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period. Hourly averages shall be computed using at least one data point in each fifteen minute quadrant of an hour. Notwithstanding this requirement, an hourly average may be computed from at least two data points separated by a minimum of 15 minutes (where the unit operates for more than one quadrant in an hour) if data are unavailable as a result of performance of calibration, quality assurance, preventive maintenance activities, or backups of data from data acquisition and handling system, and recertification events. When valid $SO_2$ pounds per hour, or $SO_2$ pounds per million Btu emission data are not obtained because of continuous monitoring system breakdowns, repairs, calibration checks, or zero and span adjustments, emission data must be obtained by using other monitoring systems approved by the EPA to provide emission data for a minimum of 18 hours in each 24 hour period and at least 22 out of 30 successive boiler operating days.

(f) *Reporting and Recordkeeping Requirements.* Unless otherwise stated all requests, reports, submittals, notifications, and other communications to the Regional Administrator required by this section shall be submitted, unless instructed otherwise, to the Director, Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, Region 6, to the attention of Mail Code: 6PD, at 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. For each unit subject to the emissions limitation in this section and upon completion of the installation of CEMS as required in this section, the owner or operator shall comply with the following requirements:

(1) For each emissions limit in this section, comply with the notification, reporting, and recordkeeping requirements for CEMS compliance monitoring in 40 CFR 60.7(c) and (d).

(2) For each day, provide the total $SO_2$ emitted that day by each emission unit. For any hours on any unit where data for hourly pounds or heat input is missing, identify the unit number and monitoring device that did not produce valid data that caused the missing hour.

(g) *Equipment Operations.* At all times, including periods of startup, shutdown, and malfunction, the owner or operator shall, to the extent practicable, maintain and operate the unit including associated air pollution control equipment in a manner consistent with good air pollution control practices for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Regional Administrator which may include, but is not limited to, monitoring results, review of operating and maintenance procedures, and inspection of the unit.

(h) *Enforcement.*

(1) Notwithstanding any other provision in this implementation plan, any credible evidence or information relevant as to whether the unit would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, can be used to establish whether or not the owner or operator has violated or is in violation of any standard or applicable emission limit in the plan.

(2) Emissions in excess of the level of the applicable emission limit or requirement that occur due to a malfunction shall constitute a violation of the applicable emission limit.

■ 4. Section 52.1928 is added to read as follows:

**§ 52.1928 Visibility protection.**

(a) The following portions of the Oklahoma Regional Haze (RH) State Implementation Plan submitted on February 19, 2010 are disapproved:

(1) The $SO_2$ BART determinations for Units 4 and 5 of the Oklahoma Gas and Electric (OG&E) Muskogee plant; Units 1 and 2 of the OG&E Sooner plant; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma (AEP/PSO) Northeastern plant;

(2) The long-term strategy for regional haze;

(3) ''Greater Reasonable Progress Alternative Determination'' (section VI.E), and

(4) Separate executed agreements between ODEQ and OG&E, and ODEQ and AEP/PSO entitled ''OG&E Regional Haze Agreement, Case No. 10–024, and ''PSO Regional Haze Agreement, Case No. 10–025,'' housed within Appendix 6–5 of the RH SIP.

(b) The portion of the State Implementation Plan pertaining to adequate provisions to prohibit emissions from interfering with measures required in another state to protect visibility, submitted on May 10, 2007 and supplemented on December 10, 2007 is disapproved.

(c) The $SO_2$ BART requirements for Units 4 and 5 of the Oklahoma Gas and Electric (OG&E) Muskogee plant; Units 1 and 2 of the OG&E Sooner plant; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma (AEP/PSO) Northeastern plant, the deficiencies in the long-term strategy for regional haze, and the requirement for a plan to contain adequate provisions to prohibit emissions from interfering with measures required in another state to protect visibility are satisfied by § 52.1923.

[FR Doc. 2011–32572 Filed 12–27–11; 8:45 am]

BILLING CODE 6560–50–P

# FEDERAL REGISTER

Vol. 76 Wednesday,

No. 249 December 28, 2011


Part V

## Securities and Exchange Commission

17 CFR Parts 229, 239 and 249
Mine Safety Disclosure; Final Rule

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 229, 239 and 249

**[Release Nos. 33–9286; 34–66019; File No. S7–41–10]**

**RIN 3235–AK83**

## Mine Safety Disclosure

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting amendments to our rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1503(a) of the Act requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8–K disclosing the receipt of certain orders and notices from the Mine Safety and Health Administration.

**DATES:** *Effective Date:* January 27, 2012.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Zepralka, Senior Special Counsel, or Jennifer Riegel, Special Counsel, Division of Corporation Finance at (202) 551–3300, at the Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** We are adding new Item 104 to Regulation S–K,[1] amending Item 601 of Regulation S–K,[2] and amending Forms 8–K,[3] 10–Q,[4] 10–K,[5] 20–F[6] and 40–F[7] under the Securities Exchange Act of 1934 (''Exchange Act'').[8] In addition, we are amending General Instruction I.A.3(b) of Form S–3[9] under the Securities Act of 1933 (''Securities Act'').[10]

## I. Background and Summary

On December 15, 2010, we proposed amendments to our rules and forms relating to mine safety disclosure.[11] We proposed these rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Act'').[12] Section 1503(a) of the Act requires issuers that are required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose specified information about mine health and safety in their periodic reports filed with the Commission.[13] Section 1503(b) of the Act requires each issuer that is an operator, or that has a subsidiary that is an operator, of a coal or other mine to file a current report on Form 8–K with the Commission reporting receipt of certain shutdown orders and notices of patterns or potential patterns of violations.[14]

As discussed in the Proposing Release, the disclosure requirements set forth in Section 1503 of the Act refer to and are based on the safety and health requirements applicable to mines under the Federal Mine Safety and Health Act of 1977 (the ''Mine Act''),[15] which is administered by the U.S. Department of Labor's Mine Safety and Health Administration (''MSHA''). Under the Mine Act, MSHA is required to inspect surface mines at least twice a year and underground mines at least four times a year[16] to determine whether there is compliance with health and safety standards or with any citation, order or decision issued under the Mine Act and whether an imminent danger exists. MSHA also conducts spot inspections[17] and inspections pursuant to miners' complaints.[18] If violations of safety or health standards are found, MSHA inspectors will issue citations or orders to the mine operators. Among other activities under the Mine Act, MSHA also assesses and collects civil monetary penalties for violations of mine safety and health standards.[19] MSHA maintains a data retrieval system on its Web site that allows users to examine, on a mine-by-mine basis, data on inspections, violations, and accidents, as well as information about dust samplings, at all mines in the United States.[20]

In addition, an independent adjudicative agency, the Federal Mine Safety and Health Review Commission (the ''FMSHRC''), provides administrative trial and appellate review of legal disputes arising under the Mine Act.[21] Most cases deal with civil penalties proposed by MSHA to be assessed against mine operators and address whether the alleged safety and health violations occurred, as well as the appropriateness of proposed penalties. Other types of cases include miners' complaints of safety- or health-related discrimination and miners' applications for compensation after a mine has been idled by a closure order.[22] The FMSHRC's administrative law judges decide cases at the trial level and the five-member FMSHRC provides appellate review. Appeals from the FMSHRC's decisions are to the U.S. courts of appeals.[23]

The disclosure requirements set forth in Section 1503 of the Act are currently in effect.[24] Issuers have been providing disclosure in their periodic and current reports filed with the Commission since the effective date of Section 1503. However, the Act states that the Commission is ''authorized to issue such rules or regulations as are necessary or appropriate for the protection of investors and to carry out the purposes of [Section 1503].''[25] In order to facilitate consistent compliance with the Act's requirements by reporting companies, we proposed rule amendments that would implement the Act's requirements by codifying them into our disclosure rules and specifying their scope and application. We also proposed to require a limited amount of additional disclosure to provide context for certain items required by the Act.

We received over 30 comment letters in response to the proposed amendments, and one letter, received prior to our proposal, relating to Section 1503 of the Act.[26] These letters came

[1] 17 CFR 229.10 *et seq.*

[2] 17 CFR 229.601.

[3] 17 CFR 249.308.

[4] 17 CFR 249.308a.

[5] 17 CFR 249.310.

[6] 17 CFR 249.220f.

[7] 17 CFR 249.240f.

[8] 15 U.S.C. 78a *et seq.*

[9] 17 CFR 239.13.

[10] 15 U.S.C. 77a *et seq.*

[11] *See* Release No. 33–9164, 34–63548 (December 15, 2010) [75 FR 80374] (the ''Proposing Release'').

[12] Public Law 111–203 (July 21, 2010).

[13] Section 1503(a) of the Act.

[14] Section 1503(b) of the Act.

[15] 30 U.S.C. 801 *et seq.*

[16] 30 U.S.C. 813(a). Seasonal or intermittent operations are inspected less frequently. *See* Mine Safety and Health Administration, Program Policy Manual, Volume I, Section 103, available at *http://www.msha.gov/REGS/COMPLIAN/PPM/PMMAINTC.HTM.*

[17] 30 U.S.C. 813(i).

[18] 30 U.S.C. 813(g).

[19] 30 U.S.C. 820. *See also* ''MSHA's Statutory Functions'' available at *http://www.msha.gov/MSHAINFO/MSHAINF1.HTM.*

[20] *See http://www.msha.gov/DRS/DRSHOME.HTM.*

[21] 30 U.S.C. 815(d).

[22] *See* ''About FMSHRC'' on *http://www.fmshrc.gov/fmshrc.html.*

[23] 30 U.S.C. 816.

[24] *See* Section 1503(f) of the Act.

[25] Section 1503(d)(2) of the Act.

[26] The public comments we received on the Proposing Release are available on our Web site at *http://www.sec.gov/comments/s7–41–10/s74110.shtml.* In addition, to facilitate public input on the Act, the Commission provided a series of email links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml.* The letter we received prior to publication of the Proposing Release on Section 1503 of the Act is available on our Web site at *http://www.sec.gov/comments/df-title-xv/*

from investors and issuers, as well as professional and trade associations, trade unions, law firms and other interested parties. In general, the commentators supported the proposed amendments, although several commentators opposed some of the proposed amendments that would require additional disclosure to provide context to the information required by the Act. Many commentators suggested modifications or alternatives to the proposals.[27] As discussed in detail below, we have taken into consideration the comments received on the proposed amendments, as well as the staff's experience with the disclosure already being provided under Section 1503, and are adopting several amendments to our rules. In general, we have decided not to adopt the proposals that would have expanded the required disclosure beyond that required by Section 1503 since we are persuaded by comments asserting that the added burden of these proposed requirements likely would have outweighed the potential incremental benefits of the additional disclosure. The final rules we adopt today adhere closely to Section 1503 of the Act, and reflect changes made from the proposals in response to comments.

We are adopting amendments to Form 10–K, Form 10–Q, Form 20–F and Form 40–F to require the disclosure required by Section 1503(a) of the Act. We are adopting new Item 104 of Regulation S–K, which sets forth the disclosure requirements for Forms 10–Q and 10–K, and amending Item 601 of Regulation S–K to add a new exhibit to Form 10–K and Form 10–Q for provision of this information. We are also adopting amendments to Forms 20–F and 40–F to include the same disclosure requirements as those adopted for issuers that are not foreign private issuers. In addition, we are adding a new item to Form 8–K to implement the requirement imposed by Section 1503(b) of the Act, and amending Form S–3 to add the new Form 8–K item to the list of Form 8–K items the untimely filing of which will not result in loss of Form S–3 eligibility.

## II. Discussion Of The Amendments

### *A. Required Disclosure in Periodic Reports*

#### 1. Scope

#### a. Proposed Amendments

Section 1503(a) of the Act mandates that specified disclosure be provided in each periodic report filed with the Commission by every issuer that is required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and that is ''an operator, or that has a subsidiary that is an operator, of a coal or other mine.'' The Act specifies that the term ''operator'' has the meaning given such term in Section 3 of the Mine Act.[28] The Act also specifies that the term ''coal or other mine'' means a coal or other mine as defined in Section 3 of the Mine Act,[29] that is subject to the provisions of the Mine Act.[30]

We proposed to include references to these definitions in new items of Regulation S–K, the instructions to a new item of Form 20–F and the notes to a new paragraph of General Instruction B of Form 40–F. The proposed rules did not provide for any other defined terms, but the Proposing Release noted our view that the definition of ''subsidiary'' in Item 1–02(x) of Regulation S–X[31] would apply to this disclosure in the absence of another definition.

The Proposing Release also explained that, because the Act's definition of ''coal or other mine'' is limited to those mines that are subject to the provisions of the Mine Act, and the Mine Act applies only to mines located in the United States,[32] the proposed mine safety disclosure would be required only for coal or other mines (as defined in the Mine Act) located in the United States. Under the proposed rules, this disclosure would be made for each distinct mine covered by the Mine Act, and issuers would not be permitted to group mines by project or geographic region.

The proposed rules would include smaller reporting companies and foreign private issuers[33] within the scope of the rules implementing Section 1503(a) of the Act.

The Proposing Release requested comment on whether the special provisions of Form 10–K and Form 10–Q permitting the omission of certain information by wholly owned subsidiaries and asset-backed issuers should apply to the proposed mine safety disclosure.

#### b. Comments on the Proposed Amendments

Many commentators supported the proposal to apply the disclosure requirements of Section 1503 only to

*specialized-disclosures/specialized-disclosures.shtml.*

[27] We received three comment letters noting Executive Order No. 13563 (Jan. 18, 2011), which instructs federal agencies to, among other things, minimize burdens on the private sector and simplify and harmonize their regulations. *See* letters from Industrial Minerals Association—North America (''IMA–NA''), National Stone, Sand, Gravel Association (''NSSGA'') and Wyoming Mining Association (''WMA''). As these commentators acknowledge, the Executive Order does not apply to the Commission. (We note that, subsequent to the submission of these comment letters, the President issued a comparable Executive Order, No. 13579 (July 11, 2011), directed to independent regulatory agencies.) However, these commentators assert that it would be within the spirit of the Executive Order if the final rules implemented Section 1503 by simply reiterating the statutory provision in the regulatory text of 17 CFR Parts 229, 239 and 249. While we are not adopting in its entirety the approach recommended by these commentators, as discussed in more detail in this release, we are modifying some of the disclosure requirements from the proposals so that the final rules adhere closely to the statutory text.

[28] Section 1503(e)(3) of the Act. Section 3(d) of the Mine Act provides that an ''operator'' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine. 30 U.S.C. 802.

[29] Section 3(h) of the Mine Act states that ''coal or other mine'' means an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, private ways and roads appurtenant to such area, and lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment; for purposes of titles II, III, and IV, ''coal mine'' means an area of land and all structures, facilities, machinery tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

[30] Section 1503(e)(2) of the Act.

[31] Under Item 1–02(x) of Regulation S–X, a ''subsidiary'' of a specified person is ''an affiliate controlled by such person directly, or indirectly through one or more intermediaries.'' This definition is identical to the definition of ''subsidiary'' in Rule 12b–2 under the Exchange Act and Rule 405 under the Securities Act.

[32] The Mine Act covers each ''coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine * * *'' 30 U.S.C. 803. '''Commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof.'' 30 U.S.C. 802(b). '''State' includes a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.'' 30 U.S.C. 802(c).

[33] See the definition of ''smaller reporting company'' in 17 CFR 240.12b–2 and the definition of ''foreign private issuer'' in 17 CFR 240.3b–4.

mines that are subject to the Mine Act, and not to mines located outside the United States.[34] These commentators generally agreed with our view that references to the Mine Act in Section 1503 indicate that the statutory disclosures are required only for coal or other mines covered by the Mine Act. One commentator noted its belief that it would be impractical to apply the disclosure provisions to mines in jurisdictions other than the United States because there is no common mine safety regulatory approach across jurisdictions, and warned that an attempt to do so would yield inconsistent and confusing standards in terms of the application of the standard both between companies and between operating locations.[35] Another commentator noted that, to the extent that mine safety information relating to an issuer's non-U.S. mines is material, disclosure would be required under the Commission's existing disclosure requirements.[36]

Other commentators, however, supported expanding the disclosure requirement to cover mines in all jurisdictions, noting their belief that the health and safety risks related to mines in all jurisdictions are as material to investors as health and safety concerns for U.S. mines,[37] and asserting that the data required to be disclosed under the Mine Act and Section 1503(a) is as readily available for an issuer's non-U.S. mines as it is for U.S. mines.[38]

Several commentators supported the proposed rule that would require disclosure to be provided for each mine for which the issuer or a subsidiary of the issuer is an operator, on a mine-by-mine basis.[39] One commentator stated its view that the statutory language should be interpreted to be consistent with a group of operations considered a ''mine'' for purposes of Mine Act reporting.[40] Other commentators similarly noted that this is how operators report information to MSHA, so issuers would be able to prepare the required disclosure on a mine-by-mine basis without a significant administrative burden.[41]

Conversely, three commentators requested that the final rules specify that issuers may group all integrated facilities of a mine site when complying with the disclosure requirements of the Act, notwithstanding the fact that some of those facilities may have been issued separate mine identification numbers by MSHA.[42] These commentators claimed that doing so could help promote investor understanding because the health and safety information would then be reported in a manner consistent with the company's reporting of operating and financial data in their periodic reports.[43]

We received a comment requesting that we clarify that only those orders and citations issued to mines with an MSHA identification number are to be included in the disclosure.[44] Similarly, a few commentators requested clarification that the final rules require disclosure only of orders and citations issued directly to mine operator issuers and their subsidiaries, and not to contractors or other entities operating at the mining site, who would have their own MSHA identification numbers.[45]

Several commentators agreed that it is appropriate for the definition of the term ''subsidiary'' for purposes of Section 1503 to be consistent with the meaning of the term as defined under Item 1–02(x) of Regulation S–X, and supported our proposal not to adopt a different definition of ''subsidiary.''[46] One of these commentators suggested that this definition should be specified in the new rules.[47] However, one commentator stated that the definition of subsidiary and entity under the control of the corporation must be comprehensive and should include unconsolidated equity investees and joint ventures.[48]

Commentators generally concurred with our proposal that smaller reporting companies should not be exempted from the disclosure requirements, generally noting that Section 1503 of the Act does not contemplate an exception from disclosure for smaller reporting companies.[49] Similarly, commentators generally agreed with the proposal that foreign private issuers should not be exempted from the disclosure requirement.[50] Many commentators expressed the view that Section 1503 of the Act does not contemplate any exception from disclosure for foreign private issuers,[51] while others asserted that foreign private issuers are as likely to have risks associated with worker safety issues as domestic reporting companies and therefore should be required to report the same information.[52]

Commentators had differing views on whether either wholly owned subsidiaries or asset-backed issuers should be permitted to omit the proposed mine safety disclosure in accordance with the special provisions in General Instruction I to Form 10–K and General Instruction H to Form 10–Q. Two commentators argued that wholly owned subsidiaries should be permitted to omit the disclosure if the information is disclosed by the wholly owned subsidiary's parent entity.[53] Other commentators stated their view that the special provisions should not apply.[54]

c. Final Rule

We are adopting the final rules as proposed, with a clarifying change to the instructions regarding the definition of the term ''subsidiary.'' The final rules apply only to mines in the United States. Although we have considered the views of commentators that request application of the disclosure requirement to non-U.S. mines, we continue to believe that the statutory language referencing the Mine Act clearly indicates that the Section 1503 disclosures are required only for coal or other mines covered by the Mine Act. We also agree with commentators who

[34] *See* letters from AngloGold Ashanti Limited (''AngloGold''), Barrick Gold Corporation (''Barrick Gold''), Cleary Gottlieb Steen & Hamilton LLP (''Cleary''), Davis Graham & Stubbs LLP (''DGS Law''), National Mining Association (''NMA''), New York State Bar Association (''NYSBA'') and Rio Tinto plc (''Rio Tinto'').

[35] *See* letter from Rio Tinto.

[36] *See* letter from AngloGold.

[37] *See e.g,* letters from California Public Employees' Retirement System (''CalPERS''), EARTHWORKS' No Dirty Gold Campaign (''EARTHWORKS''), Social Investment Forum (''SIF'') and Trillium Asset Management Corporation (''Trillium'').

[38] *See* letters from SIF and Trillium.

[39] *See* letters from American Federal of Labor and Congress of Industrial Organizations (''AFL-CIO''), Barrick Gold, EARTHWORKS, John H. Estess (''Estess'') and United Mine Workers of America (''UMWA'').

[40] *See* letter from Barrick Gold.

[41] *See* letters from AFL-CIO, Barrick Gold and UMWA.

[42] *See* letters from Freeport-McMoRan Copper and Gold Inc. (''Freeport-McMoRan''), NMA and Rio Tinto.

[43] *See* letters from Freeport-McMoRan and NMA.

[44] *See* letter from NMA.

[45] *See* letters from Barrick Gold and DGS Law.

[46] *See* letters from AngloGold, Cleary, Estess, NMA, Rio Tinto, SIF and Trillium.

[47] *See* letter from Estess.

[48] *See* letter from EARTHWORKS.

[49] *See e.g,* letters from AFL-CIO, CalPERS, California State Teachers' Retirement System (''CalSTRS''), EARTHWORKS, NMA, Rio Tinto, SIF, Trillium and UMWA. One commentator agreed that smaller reporting companies should be required to provide the disclosure, but noted concerns about the costs of compliance for smaller reporting companies and suggested the Commission consider a simpler disclosure system for such companies. *See* letter from Estess.

[50] *See* letters from CalPERS, CalSTRS, DGS Law, EARTHWORKS, NMA, Rio Tinto, SIF and Trillium.

[51] *See* letters from DGS Law, NMA and Rio Tinto.

[52] *See* letters from SIF and Trillium.

[53] See letters from NMA and NYSBA.

[54] *See* letters from Estess and EARTHWORKS (neither wholly owned subsidiaries nor asset-backed issuers should be permitted to omit the information); SIF and Trillium (no reason for exemptions for asset-backed issuers); and AFL-CIO and UMWA (information of wholly owned subsidiaries should not be excluded).

expressed concerns that application of the Act's disclosure requirement to non-U.S. mines would be difficult to implement and could result in different disclosure from jurisdiction to jurisdiction, which would not be directly comparable. Although the final rules are limited to implementing the requirements of the Act and, therefore, do not extend to foreign mines, we reiterate, as noted in the Proposing Release, that to the extent mine safety issues are material, under our current rules disclosure could be required pursuant to the following items of Regulation S–K: Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations), Item 503(c) (Risk Factors), Item 101 (Description of Business) or Item 103 (Legal Proceedings).

The final rules require disclosure on a mine-by-mine basis. We continue to believe that the disclosure of the information on a mine-by-mine basis accords with the plain language of the Act. We understand the concern raised by commentators about groupings of mines that may more logically be reported together but for having separate MSHA mine identification numbers. However, we note that MSHA's data retrieval system provides information on a mine-by-mine basis using the MSHA mine identification number assigned to each mine or facility. MSHA has a detailed process for assigning identification numbers.[55] We believe it is more appropriate to require disclosure for each specific identified mine, consistent with MSHA reporting, as well as with Section 1503.

We note that orders and citations issued to independent contractors (who are not subsidiaries of the issuer) who are working at the issuer's mine site would not need to be reported by the issuer. This is consistent with the approach discussed above, under which the reporting will be for each mine that has an MSHA identification number, and is consistent with the Act's use of terms defined in the Mine Act. The definition of ''operator'' in the Mine Act includes independent contractors. Therefore, we note that independent contractors that are required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and are operators, or have a subsidiary that is an operator, of a coal or other mine would need to include the disclosure required by Section 1503 and our new rules in their reports. We recognize that the result of this approach could be some orders or citations will go unreported if the independent contractor is not a reporting company, but believe this approach is consistent with the way MSHA reports orders and citations, as well as with Section 1503. We note that if individual orders or citations, or a pattern of violations, at mines owned by an issuer but operated by an independent contractor are material to the issuer, disclosure could be required under our existing rules pursuant to the applicable items of Regulation S–K.

The final rules will include an instruction noting that ''subsidiary'' is as defined in Exchange Act Rule 12b–2. This definition is identical to the definition of ''subsidiary'' found in Securities Act Rule 405 and Regulation S–X Item 1–02(x), which apply to other elements of issuers' periodic disclosure. As stated in Rule 12b–2, a subsidiary of a specified person is ''an affiliate controlled by such person directly, or indirectly through one or more intermediaries.'' Issuers are accustomed to applying this definition in connection with their periodic reporting and we do not see a benefit to adding to issuers' compliance burden by specifying a different definition of ''subsidiary'' in the context of mine safety disclosure. We considered the suggestion raised by a commentator that ''subsidiary'' should be defined to specifically encompass unconsolidated equity investees and joint ventures. However, we believe that such an approach is inconsistent with the plain meaning of the term ''subsidiary.''

The final rules do not provide special treatment to smaller reporting companies or foreign private issuers. We continue to believe their inclusion is consistent with the plain language of Section 1503(a), which applies broadly to issuers that are required to file reports under Section 13(a) or 15(d) of the Exchange Act. In addition, we note that these issuers have been complying with the Section 1503 disclosure requirements since the effective date of that provision.

The final rules do not extend the special provisions of Form 10–K and Form 10–Q that permit the omission of certain information by wholly-owned subsidiaries and asset-backed issuers. Many commentators stated, and we agree, that such treatment is not necessary for the mine safety disclosure requirement. Section 1503 of the Act applies broadly to ''each issuer that is required to file reports pursuant to'' the Exchange Act, and does not appear to contemplate special treatment for particular types of issuers. We are making technical amendments to General Instructions I and J to Form 10–K and General Instruction H to Form 10–Q to delete the references to ''Item 4, Submission of Matters to a Vote of Security Holders.''

2. Location of Disclosure

The Act states that companies must include the disclosure in their periodic reports required pursuant to Section 13(a) or 15(d) of the Exchange Act.

a. Proposed Amendments

In order to implement the disclosure requirement set forth in Section 1503(a) of the Act, we proposed to add new Item 4 to Part II of Form 10–Q and new Item 4(b) to Part I of Form 10–K, which would require the information required by new Items 106 and 601(b)(95) of Regulation S–K; new Item 16J to Form 20–F; and new Paragraph (18) of General Instruction B of Form 40–F. As proposed, these items would be identical in substance and entitled, ''Mine Safety Disclosure.'' The proposed items would require issuers to provide in their periodic reports and in exhibits to their periodic reports the information listed in Section 1503(a) of the Act and certain additional disclosure designed to provide context for such information.

The proposed rules would require issuers that have matters to report in accordance with Section 1503(a) to include brief disclosure in the body of the periodic report noting that they have mine safety violations or other regulatory matters to report in accordance with Section 1503(a), and that the required information is included in an exhibit to the filing. The exhibit would include the detailed disclosure about specific violations and regulatory matters required by Section 1503(a) as implemented in the proposed rules. The Proposing Release noted our view that this approach would facilitate access to the information about detailed mine safety matters without overburdening the traditional Exchange Act reports with extensive new disclosures.

We did not propose any particular presentation requirements for the new disclosure, although the Proposing Release encouraged issuers to use tabular presentations whenever possible, if to do so would facilitate investor understanding.

[55] *See* MSHA Program Policy Manual Volume III. 41–1. For example, for coal mines, preparation plants that receive coal from only one underground or surface mine, and are located on the same property as that mine, share the mine's identification number, but preparation plants that share mine property with a surface or underground mine, but process coal from other mines, are to be given separate identification numbers.

b. Comments on the Proposed Amendments

A broad spectrum of commentators supported the Commission's proposal to require the information to be presented in an exhibit to the periodic report, with brief disclosure in the body of the report noting that the issuer has mine safety matters to report and referring to the required exhibit.[56] We did not receive any comments opposing this approach, although two commentators requested that certain information, such as all fatal accidents or receipt of notice that a mine has a pattern of violations, be required to be included in the body of the periodic report so that investors would be made aware of significant events without looking to the exhibit.[57]

The Proposing Release requested comment on whether it would be preferable, and consistent with Section 1503, to provide for annual reporting only, instead of requiring the disclosure in every periodic report. Although a few commentators stated a belief that annual reporting would be preferable to quarterly reporting,[58] generally the commentators agreed that Section 1503(a) requires the mine safety disclosures to be included in each periodic report filed with the Commission.[59]

We requested comment on whether the information required by Section 1503 should be included in registration statements, in addition to the periodic reporting requirement. Many commentators stated that the disclosure should not be included in registration statements, noting that Section 1503 specifies only that the disclosure is required in periodic reports.[60] However, two commentators stated their view that the disclosure should be required in registration statements.[61] On a related note, although we did not specifically request comment on the topic, we received a small number of comments expressing a view on whether the disclosure required under Section 1503(a) and the new rules should be filed with the Commission or instead deemed to be furnished, not filed.[62] Commentators who argued for the information to be ''furnished'' asserted that, because in their view the Section 1503 disclosure requirements are not aimed at providing investors with information material to investment decisions, Exchange Act Section 18 should not apply, the Section 1503 information should not be incorporated into any Securities Act filing, and the officer certifications required by Exchange Act Rules 13a–14 and 15d–14 should not extend to the Section 1503 disclosures.[63] However, other commentators expressed their view that information about health and safety risks related to mines operated by issuers is material to investors.[64]

Some commentators approved of the flexibility of the proposed rules, which did not specify any particular presentation requirements for the new disclosure and permitted each issuer the flexibility to adopt a presentation it believes is appropriate for its disclosure.[65] An equal number of commentators, however, expressed a preference for requiring a specific tabular presentation.[66] One commentator stated that a specific tabular presentation would more readily allow an investor to compare results from different owners or operators and individual mines.[67] Another commentator requested that we provide an example of an acceptable presentation or format, stating that a specific tabular presentation format would be helpful to ensure the required information is presented in the correct form.[68]

Commentators generally were of the view that the Commission should not require the information to be provided in an interactive data format.[69] Among the reasons cited for this view was that requiring interactive data could make the reporting more complex and add costs to the system.[70] Another commentator noted its view that the purpose of the Commission's existing XBRL rules is to facilitate financial analysis by investors, and therefore asserted that requiring the Section 1503 information, which is non-financial in nature, to be submitted in interactive data format would not be consistent with this purpose.[71] A few commentators, however, expressed a preference that the disclosure be tagged in XBRL.[72]

c. Final Rule

After considering comments received, we are adopting the final rules substantially as proposed, with minor technical changes. We are amending Form 10–Q to add new Item 4 to Part II and Form 10–K to add new Item 4 to Part I, which would require the information required by new Items 104 and 601(b)(95) of Regulation S–K; Form 20–F to add new Item 16H; and Form 40–F to add new Paragraph (16) of General Instruction B. As discussed in more detail below, the disclosure is required to be provided in each periodic report.[73]

As proposed, the amendments will require issuers that have matters to report in accordance with Section 1503(a) to include brief disclosure in Part II of Form 10–Q, Part I of Form 10–K and Forms 20–F and 40–F noting that they have mine safety violations or other regulatory matters to report in accordance with Section 1503(a), and that the required information is included in an exhibit to the filing. The exhibit would include the detailed disclosure about specific violations and regulatory matters required by Section 1503(a) as implemented in our new rules. Many issuers have already implemented this approach in their periodic reports that contain the disclosure required under Section 1503(a). Consistent with the proposal, the final rule does not require disclosure in the body of the periodic report of certain information, such as all fatal accidents or receipt of notice that a mine has a pattern of violations.[74] We do not believe it is necessary to require this additional disclosure in order to implement Section 1503; and we reiterate, as noted in the Proposing Release, that in the event that mine safety matters raise concerns that should be addressed in other parts of a periodic report, such as risk factors, the business description, legal proceedings or management's discussion and analysis, inclusion of this new disclosure would

[56] *See* letters from AFL-CIO, AngloGold, Chevron Corporation (''Chevron''), Cleary, Freeport-McMoRan, Estess, NMA, NYSBA, Rio Tinto and UMWA.

[57] *See* letters from AFL-CIO and UMWA.

[58] *See, e.g.,* letters from Chevron and NSSGA. One commentator suggested that the Form 10–Q reporting requirement could be met by allowing issuers to incorporate by reference the required information from MSHA's data retrieval system and provide specific instructions as to how to access the information. *See* letter from Freeport-McMoRan.

[59] *See, e.g.,* letters from Chevron, Estess and NMA.

[60] *See* letters from AngloGold, Cleary, DGS Law, NMA, NYSBA and Rio Tinto.

[61] *See* letters from EARTHWORKS and Estess.

[62] *See* letters from EARTHWORKS, SIF and Trillium (filed); and Cleary, NYSBA (furnished).

[63] *See, e.g.,* letter from NYSBA.

[64] *See* letters from SIF and Trillium.

[65] *See* letters from AngloGold, Cleary, IMA–NA, NMA and WMA.

[66] *See* letters from Estess, NSSGA, Rio Tinto, SIF and Trillium.

[67] *See* letter from Rio Tinto.

[68] *See* letter from Chevron.

[69] *See* letters from AngloGold, Chevron, Cleary, DGS Law, Estess, NMA, NSSGA and Rio Tinto.

[70] *See* letter from Estess.

[71] *See* letter from AngloGold.

[72] *See* letters from AFL-CIO, SIF, Trillium and UMWA.

[73] See Section II.A.3 below for a discussion of time periods covered.

[74] We note that under Section 1503(b), receipt of a notice from MSHA that a mine has a pattern of violations is a triggering event that would require disclosure on Form 8–K within four business days of receipt of the notice, as reflected in the new Form 8–K item we are adopting today.

not obviate the need to discuss mine safety matters in accordance with other rules as appropriate.

The amended rules, as proposed, do not specify any particular presentation requirements for the new disclosure, but we continue to encourage issuers to use tabular presentations whenever possible if to do so would facilitate investor understanding. Many issuers are currently providing the disclosure required by Section 1503(a) in tabular format in their periodic reports. We agree with commentators who suggested that the Commission's provision of an example of a possible tabular presentation may encourage uniformity and comparability of disclosures. After considering the comments received and examining current disclosure practices, we are including the below example of a potential tabular presentation. However, we note that issuers are free to present the required information in any presentation they believe is appropriate for the disclosure.

| Mine or Operating Name/MSHA Identification Number | Section 104 S&S Citations (#) | Section 104(b) Orders (#) | Section 104(d) Citations and Orders (#) | Section 110(b)(2) Violations (#) | Section 107(a) Orders (#) | Total Dollar Value of MSHA Assessments Proposed ($) | Total Number of Mining Related Fatalities (#) | Received Notice of Pattern of Violations Under Section 104(e) (yes/no) | Received Notice of Potential to Have Pattern Under Section 104(e) (yes/no) | Legal Actions Pending as of Last Day of Period (#) | Legal Actions Initiated During Period (#) | Legal Actions Resolved During Period (#) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | | |
| | | | | | | | | | | | | |
| | | | | | | | | | | | | |

The use of footnotes, accompanying narrative disclosure or additional tables may also help to clarify information provided, as appropriate. For example, issuers choosing to use a tabular presentation similar to the one above may provide the additional detail described below that our final rules require about types of legal actions [75] in footnotes, accompanying narrative disclosure or an additional table.

We are not adopting a requirement to provide this information in interactive data format. Section 1503 does not require the disclosure to be submitted in interactive format. After considering the comments received, we believe that the added costs of imposing such a requirement would likely not be justified by the potential benefits to investors of having access to the information in interactive format.

The final rules require the disclosure in each periodic report filed with the Commission, and such disclosure will be considered ''filed,'' not ''furnished.'' We believe that this approach is consistent with the statutory language of Section 1503—which provides that an issuer must ''include, [the required disclosure] in each periodic report filed with the Commission.'' Therefore, as is the case with other disclosure filed as part of a periodic report, Section 18 of the Exchange Act will apply and the disclosure is encompassed by the Exchange Act Rule 13a–14 and 15d–14 certifications. In addition, if the issuer files a Securities Act registration statement (such as Form S–3) that incorporates by reference its periodic reports, the disclosure included in Exchange Act reports in accordance with the new rules will be incorporated by reference.

3. Time Periods Covered

Section 1503(a) of the Act states that each periodic report must include disclosure ''for the time period covered by such report.''

a. Proposed Amendments

We proposed that each Form 10–Q would be required to include the required disclosure for any orders or citations received, penalties assessed, legal actions initiated or mining-related fatalities that occurred during the quarter covered by the report.[76] We also proposed that each Form 10–K would be required to include disclosure covering both the fourth quarter of the issuer's fiscal year and cumulative information for the entire fiscal year. For each of Forms 20–F and 40–F, the disclosure would be required for the issuer's fiscal year.

In addition, the Proposing Release noted that, based on the language of Section 1503(a) of the Act, the proposed rule would not allow issuers to exclude information about orders or citations that were received during the time period covered by the report but subsequently were dismissed or reduced. The proposed rules did not prohibit the inclusion of additional information, such as an explanation that certain orders or citations were dismissed or reduced.

b. Comments on the Proposed Amendments

There was support from commentators for the proposal to require an annual report on Form 10–K to include disclosures for orders, citations, assessments, legal actions and fatalities for the fourth quarter and also on an aggregate basis for the whole year.[77] Some of these commentators stated that it is important for investors to learn of trends in order to understand material changes in a mine's health and safety record, and that requiring the information for both the fourth quarter and the whole year would help reveal such trends.[78] However, other commentators expressed concerns about this aspect of the proposed rule.[79] These commentators argued that requiring issuers to include both fourth quarter and annual information would be unnecessary because to do so would not provide investors with additional significant information.[80] Some of these commentators asserted that the disclosure in the Form 10–K should cover only the fiscal year.[81] Others preferred that the disclosure cover only the fourth quarter, which would provide the information disclosed on Form 10–K in a comparable period to the quarterly report on Form 10–Q.[82]

With respect to the disclosure of orders or citations that are dismissed or

[75] *See* new Item 104(a)(3) of Regulation S–K; Item 16H(c) of Form 20–F; Paragraph 16(c) of General Instruction B of Form 40–F; and the discussion in Section II.A.4.d(3) below.

[76] As noted in Sections II.A.4.b(1) and II.A.4.d(1) below, we also proposed to require disclosure of the total amounts of assessments of penalties outstanding as of the last day of the quarter and of any developments material to previously reported legal actions that occur during the quarter.

[77] *See* letters from AFL-CIO, EARTHWORKS, Estess, SIF, Trillium and UMWA.

[78] *See* letters from AFL-CIO and UMWA.

[79] *See* letters from Chevron, Cleary, DGS Law, Freeport-McMoRan, and NMA. NYSBA and Rio Tinto.

[80] *See, e.g.,* letter from Freeport-McMoRan.

[81] *See* letters from Chevron, Freeport-McMoRan and Rio Tinto.

[82] *See* letters from Cleary, DGS Law, NMA and NYSBA.

reduced in severity below the level that triggers disclosure under Section 1503(a), the comments were mixed. Many of the commentators supported the Commission's proposal that issuers should not be allowed to exclude such orders or citations from the disclosure.[83] One commentator stated that it would be simpler for the issuer to report all orders and citations received, rather than taking on the burden of reviewing the information at a later date to remove those that were reduced or dismissed. This commentator also noted that MSHA's summary data does not account for dismissals, and raised a concern that allowing issuers to omit dismissed orders and citations could result in confusion for those who refer to MSHA's site to compare the information.[84]

On the other hand, other commentators requested that the final rules allow issuers to exclude from disclosure orders or citations that have been subsequently dismissed or reduced below a reportable level prior to filing the periodic report.[85] One commentator asserted that such an approach would be consistent with the purposes of Section 1503, which the commentator characterized as providing accurate disclosure of violations that continue to be asserted or have been adjudicated, rather than requiring disclosure of matters that the FMSHRC has dismissed or reduced below a reportable level.[86] Another commentator noted that vacated citations are removed entirely from MSHA's data retrieval system.[87]

Although comments were mixed on the disclosure of dismissed or reduced orders or citations, most of the commentators supported the Commission's approach of permitting issuers to include additional information and disclosures, such as disclosure of orders or citations that the issuer is contesting or annotated disclosure providing information about the status of such orders or citations.[88]

c. Final Rule

We are adopting the final rule with some modifications from the proposal. Consistent with the proposal, the final rule requires each Form 10–Q to include the required disclosure for the quarter covered by the report. For each of Forms 20–F and 40–F, the disclosure is required for the issuer's fiscal year. Similarly, in a change from the proposal, the final rule requires each Form 10–K to include disclosure of the information for the fiscal year only, not also for the fourth quarter.

We are persuaded by commentators that requiring information about both the fourth quarter and the entire year in the Form 10–K would add incrementally to the burden of the rule, is not required by the Act, and may not add significant useful information to the report. We believe the approach we are adopting is consistent with the Act, which requires disclosure in each periodic report ''for the time period covered by the report,'' because the Form 10–K covers the fiscal year. While requiring both full year and fourth quarter data might provide some incremental additional useful information, we do not believe it is necessary to implement Section 1503 or that the benefits of the additional disclosure would clearly justify the burden of preparing it. Among issuers that have provided disclosure under the Act in their most recent annual report on Form 10–K, practices were mixed, with some providing the information for both the fourth quarter and the complete fiscal year, some providing the information for the complete fiscal year, and a minority providing the information for only the fourth quarter. Although we acknowledge that certain limited information is currently reported for the fourth quarter only in Form 10–K, we believe that the requirement to provide full-year information in the Form 10–K is more appropriate because it is consistent with the general Form 10–K requirement to report results as of the issuer's fiscal year-end.[89] We note that although the final rule requires disclosure covering the fiscal year, issuers are permitted, but not required, to also separately present the information for the fourth quarter.

The final rule does not allow issuers to exclude information about orders or citations that were received during the time period covered by the report but subsequently dismissed, reduced or vacated.[90] Although we understand that, because mine operators have the right to contest orders or citations they receive through the administrative process,[91] there is a possibility an operator's challenge would result in dismissal of the order or citation or in a reduction in the severity of the order or citation below the level that triggers disclosure under Section 1503(a), we believe the language of Section 1503(a) of the Act dictates that all orders or citations received from MSHA be disclosed. However, as supported by most commentators, the rule does not prohibit the inclusion of additional disclosure with regard to the status of orders or citations received. As noted in the Proposing Release, we would expect that issuers will include disclosure that complies with our existing disclosure requirements when providing any such information.

4. Required Disclosure Items

Section 1503(a) of the Act includes a list of items required to be disclosed in periodic reports. We proposed that those items be reiterated in proposed Item 106 of Regulation S–K.[92] As discussed in more detail below, we also proposed instructions to certain of the disclosure items specified in Section 1503(a) to clarify the scope of the disclosure we would expect issuers to provide in order to comply with the statute's requirements and proposed one additional disclosure item not required by the Act. We discuss each proposed disclosure item below. Those disclosure items on which we received little or no comment are discussed at the end of this section.

a. *The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under Section 104 of the Mine Act for which the operator received a citation from MSHA.*

(1) Proposed Amendments

Section 1503(a)(1)(A) of the Act references violations that could ''significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104'' of the Mine Act. Section 104 of the Mine Act requires MSHA inspectors to issue various citations and orders for violations of health and safety

[83] *See* letters from AFL-CIO, AngloGold, CalPERS, CalSTRS, Chevron, EARTHWORKS, J. Estess, SIF, Trillium and UMWA.

[84] *See* letter from Chevron.

[85] *See* letters from Barrick Gold, DGS Law, Freeport-McMoRan, NMA, NSSGA and Rio Tinto.

[86] *See* letter from Freeport-McMoRan.

[87] *See* letter from DGS Law.

[88] *See* letters from AngloGold, Barrick Gold, CalPERS, CalSTRS, Chris Barnard (''Barnard''), Estess, NYSBA, Portland Cement Association (''PCA''), SIF, Trillium and UMWA.

[89] *See* Articles 3 and 8 of Regulation S–X (17 CFR 210.3 and 210.8).

[90] The final rule also does not allow issuers to exclude information about orders or citations that it is contesting. See the detailed discussion of this topic under Section II.A.4.b below.

[91] *See* 30 U.S.C. 815(d).

[92] In this release, we reference proposed Item 106 of Regulation S–K when discussing the proposed disclosure requirements, but note that the same analyses apply to the corresponding provisions in proposed Item 16J of Form 20–F and proposed Paragraph (18) of General Instruction B of Form 40–F, which are identical in all respects. The same approach applies to the references in this release to the final rules we are adopting as Item 104 of Regulation S–K, Item 16H of Form 20–F and Paragraph (16) of General Instruction B of Form 40–F.

standards.[93] A violation of a mandatory safety standard that is reasonably likely to result in a reasonably serious injury or illness under the unique circumstance contributed to by the violation is referred to by MSHA as a ''significant and substantial'' violation (commonly called an ''S&S'' violation).[94] In writing each citation or order, the MSHA inspector determines whether the violation is ''S&S'' or not.[95] The MSHA data retrieval system currently provides information about all citations and orders issued, and notes which of those citations or orders are ''S&S.'' [96]

The proposed rules would require disclosure under this item of all citations received under Section 104 of the Mine Act that note an S&S violation. We requested comment on whether the final rules should instead require disclosure of all citations received under Section 104.

(2) Comments on the Proposed Amendments

Most commentators supported the proposal to limit the required disclosure to S&S violations.[97] Commentators stated that such an approach is consistent with the explicit language of the Act, and asserted that expanding the requirement to all violations under Section 104 of the Mine Act would not be useful to investors and could detract from the information required by the Act.[98] However, a few commentators expressed the view that all Section 104 violations should be disclosed in order to provide full disclosure to investors.[99]

(3) Final Rule

We are adopting the provision as proposed. We continue to believe that the language of Section 1503(a)(1)(A) referencing violations that could ''significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104'' was intended to elicit disclosure only of citations received under Section 104 of the Mine Act that note an S&S violation. We agree with commentators that expanding the disclosure requirement to include non-S&S violations under Section 104 of the Mine Act would expand the scope of the disclosure beyond that called for by Section 1503 of the Act and likely would not result in additional useful information being provided to investors that would justify the increased burdens on issuers.

b. *The total dollar value of proposed assessments from MSHA under the Mine Act.*

(1) Proposed Amendments

Section 1503(a)(1)(F) requires issuers to disclose, for each mine, the ''total dollar value of proposed assessments from [MSHA] under the [Mine] Act.'' The issuance of a citation or order by MSHA typically results in the assessment of a civil penalty against the mine operator. Penalties are assessed according to a formula that considers several factors, including a history of previous violations, size of operator's business, negligence by the operator, gravity of the violation, operator's good faith in trying to correct the violation promptly and the effect of the penalty on the operator's ability to stay in business.[100] When any civil penalty is proposed to be assessed by MSHA, the mine operator has 30 days following receipt of the notice of proposed penalty to pay the penalty or file a contest and request a hearing before an FMSHRC administrative law judge.[101]

The proposed rules would require that issuers disclose the total dollar amount of assessments of penalties proposed by MSHA during the time period covered by the report. Under the proposals, the disclosure would also include the cumulative total of all proposed assessments of penalties outstanding as of the last day of the period covered by the report. As proposed, this disclosure would include any dollar amounts of penalty assessments proposed during the time period that the issuer is contesting with the FMSHRC, although issuers would not be prohibited from including additional information noting that certain proposed assessments of penalties are being contested.

(2) Comments on the Proposed Amendments

Some commentators approved of the proposal to require the total dollar amount of proposed penalties assessed by MSHA during the time period covered by the report as well as the cumulative total of all proposed assessments of penalties outstanding as of the date of the report.[102] However, several other commentators expressed concerns about the proposal, in particular about the proposed requirement to disclose cumulative amounts of penalties outstanding as of the date of the report.[103] Commentators noted that such disclosure is not required by Section 1503 and asserted that such a requirement would go beyond the scope of the Act.[104] Some commentators expressed concern that the requirement could lead to inquiries to reconcile period-to-period changes,[105] and asserted that the disclosure would not necessarily be indicative of an issuer's safety record during the reporting period, but rather the issuer's decisions to pay or contest assessments.[106]

Several commentators agreed with the proposal that issuers should be required to include in the total dollar amount reported any proposed assessments of penalties that are being contested.[107] Some commentators expressed a concern that allowing issuers to omit contested matters until they are deemed final could provide an incentive for operators to contest MSHA enforcement actions, which they believe would be contrary to public policy and could increase MSHA's backlog of pending cases.[108] Other commentators expressed concerns about this proposed requirement, and requested that the final rules permit issuers to exclude proposed assessments of penalties that

[93] 30 U.S.C. 814.

[94] Secretary of Labor v. Mathies Coal Company, 6 FMSHRC 1 (January 1984). *See also* MSHA Program Policy Manual February 2003 (Release I–13) Vol. 1, p.21, located at *http://www.msha.gov/regs/complian/ppm/PDFVersion/PPM%20Vol%20I.pdf* (''MSHA Program Policy Manual Vol. 1'') which provides guidelines for interpreting Section 104(d)(1) and (e)(1) of the Mine Act [30 U.S.C. 814(d)(1) and (e)(1)]. In determining whether conditions created by a violation could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, inspectors must determine whether there is an underlying violation of a mandatory health or safety standard, whether there is a discrete safety or health hazard contributed to by the violation, whether there is a reasonable likelihood that the hazard contributed to will result in an injury or illness, and whether there is a reasonable likelihood that the injury or illness in question will be of a reasonably serious nature. *Id.*

[95] MSHA Program Policy Manual Vol. 1, p. 23.

[96] The MSHA data retrieval system can be accessed at *http://www.msha.gov/drs/drshome.HTM.* Vacated citations and orders are removed from the data retrieval system.

[97] *See* letters from AFL-CIO, AngloGold, Chevron, Cleary, NMA, NYSBA, PCA, Rio Tinto and UMWA.

[98] *See* letters from NMA and Rio Tinto.

[99] *See* letters from Estess, SIF and Trillium.

[100] 30 U.S.C. 815(b)(1)(B).

[101] *See* 30 CFR 100.7. If the proposed penalty is not paid or contested within 30 days of receipt, the proposed penalty becomes a final order of the FMSHRC and is not subject to review by any court or agency.

[102] *See* letters from AFL-CIO, EARTHWORKS, SIF, Trillium and UMWA.

[103] *See* letters from Chevron, Cleary, DGS Law, Freeport-McMoRan, NMA and NYSBA.

[104] *See, e.g.,* letters from Cleary, Freeport-McMoRan, NMA and Rio Tinto.

[105] *See* letters from Chevron and DGS Law.

[106] *See* letters from Chevron and Cleary.

[107] *See* letters from AFL-CIO, AngloGold, CalPERS, CalSTRS, Chevron, EARTHWORKS, Estess, SIF, Trillium and UMWA.

[108] *See* letters from AFL-CIO and UMWA.

are being contested.[109] Among the reasons asserted in support of such an approach is the commentators' view that requiring issuers to include proposed assessments of penalties that are being contested in the total dollar amount reported could, in essence, amount to denial of due process for the issuer because reporting such information has the potential to cause reputational harm for the issuer before resolution of the matter has been reached.[110]

Commentators generally agreed that if contested amounts are required to be reported, issuers should be permitted to note the contested amounts.[111] Some of these commentators asserted that contested amounts should be permitted to be reported separately.[112] Others agreed with the Commission's proposal to require disclosure of one total dollar amount that encompasses both contested and uncontested amounts, but were of the view that issuers should be permitted to provide additional disclosure to explain contested amounts if they choose.[113]

We received two comment letters suggesting that the disclosure required by this item should be limited to those penalties proposed for the type of violations required to be disclosed under Section 1503(a), rather than for all penalties proposed during the time period.[114] These commentators stated their view that requiring disclosure of all penalties—not only those that relate to actions that have to be reported under Section 1503—would go beyond the requirements of the Act and increase the burdens on issuers in preparing this disclosure.

(3) Final Rule

We are adopting a final rule that provides that disclosure is required in each periodic report of the total dollar amount of assessments proposed by MSHA during the period covered by the report. Therefore, each Form 10–Q is required to include the dollar amount of assessments proposed by MSHA during the quarter, while the Form 10–K, Form 20–F and Form 40–F must include the dollar amount of assessments proposed by MSHA during the fiscal year.

We are not adopting the proposed requirement to also disclose the cumulative total of all assessments outstanding as of the last day of the reporting period. After considering the comments received, we are persuaded that expanding the disclosure requirement in this manner beyond the scope of the Act is not necessary and likely would not result in additional useful information being provided to investors that would justify the increased burden on issuers. We note that the cumulative total of all outstanding assessments as of the last day of the reporting period is not mandated by Section 1503 of the Act, which requires, ''for the time period covered by the report * * * the total dollar value of proposed assessments from the Mine Safety and Health Administration under [the Mine Act].'' In addition, we believe the final rule is consistent with the information many issuers are currently providing in their periodic reports to comply with the Act.

The final rule requires disclosure of the amount of all assessments of penalties proposed by MSHA during the reporting period relating to any type of violation, and regardless of whether such proposed assessments are being contested or were dismissed or reduced prior to the date of filing of the periodic report. We acknowledge commentators' concerns about the potential for reputational harm from disclosing proposed assessments before they are final, but we believe that the language of Section 1503 requires disclosure of all such proposed assessments. In addition, we note that information about proposed assessments that are being contested is already available on MSHA's Web site. We note that issuers may include additional disclosure explaining the status of these orders, citations and assessments. The final rule adds an instruction clarifying that contested amounts may neither be omitted from the disclosure nor reported separately, but that issuers are permitted to note the contested amounts and provide additional disclosure.

c. *The total number of mining-related fatalities.*

(1) Proposed Amendments

Section 1503(a)(1)(G) of the Act requires issuers to disclose, for each mine, ''the total number of mining-related fatalities.'' Under the proposed rules, the requirement to disclose mining-related fatalities would apply to fatalities at mines that are subject to the Mine Act and not to mining-related fatalities in other jurisdictions. As proposed, issuers would report all such fatalities that are required to be disclosed under MSHA regulations, unless the fatality is determined to be ''non-chargeable'' to the mining industry.[115]

Comments on the Proposed Amendments

Several commentators supported the proposal to require disclosure of mining-related fatalities only at mines that are subject to the Mine Act.[116] Many of these commentators noted that this interpretation is consistent with the scope of Section 1503(a), which by its terms applies to mines that are subject to the Mine Act.[117] Commentators also raised concerns that if the disclosure requirement were to be expanded to cover mining-related fatalities outside of the United States, it would be difficult to apply a standard for what constitutes a ''mining-related'' fatality in non-U.S. jurisdictions.[118]

Other commentators stated that reporting on mining-related fatalities should apply to all mines operated by an issuer (or a subsidiary of the issuer) that files periodic reports with the Commission, regardless of the location of the issuer's mines worldwide.[119] Two of these commentators asserted that such information is material to investors and to the issuer.[120] The majority of the commentators who recommended applying the disclosure requirement to all mining-related fatalities regardless of the location of the mine also recommended that the MSHA framework should be applied to non-U.S. mining-related fatalities for reporting purposes.[121]

Several commentators concurred with the Commission's proposal to require disclosure of all fatalities required to be reported pursuant to MSHA regulations, unless the fatality has been determined to be ''non-chargeable'' to the mining industry.[122] Two commentators stated that an instruction should be added to the rule specifying this interpretation of the disclosure requirement.[123] Two commentators also recommended that we add an instruction to the rule clarifying that fatalities are not required

[109] *See* letters from Barrick Gold, NMA and Rio Tinto.

[110] *See* letters from Barrick Gold and NMA.

[111] *See* letters from AFL-CIO, AngloGold, Chevron, NMA, Rio Tinto and UMWA.

[112] *See* letters from AngloGold and NMA.

[113] *See* letters from AFL-CIO, Chevron, Rio Tinto and UMWA.

[114] *See* letters from Oxford Resources Partners LP and Rio Tinto.

[115] See Section II.A.4.f of the Proposing Release [75 FR 80374 at 80379] for a discussion of MSHA's process for determining whether a fatality is ''non-chargeable'' to the mining industry.

[116] *See* letters from AngloGold, Barrick Gold, Cleary, Estess, NMA, NYSBA and Rio Tinto.

[117] *See* letters from AngloGold, Cleary, NMA, NYSBA and Rio Tinto.

[118] *See* letters from AngloGold, Estess, NMA and Rio Tinto.

[119] *See* letters from AFL-CIO, EARTHWORKS, SIF, Trillium and UMWA.

[120] *See* letters from SIF and Trillium.

[121] *See* letters from AFL-CIO, Estess, SIF, Trillium and UMWA.

[122] *See* letters from AFL-CIO, Barrick Gold, Cleary, DGS Law, Estess, NYSBA, PCA, Rio Tinto and UMWA.

[123] *See* letters from Cleary and Estess.

to be disclosed while under review by MSHA's Fatality Review Committee if the issuer has a good faith belief that the fatality is non-chargeable, and that if the fatality is ultimately determined to be chargeable, the issuer would include it in its next periodic report.[124] Similarly, other commentators asserted that it would be appropriate to require disclosure only of fatalities that, as of the last day of the reporting period, have been determined to be ''chargeable'' by MSHA's Fatality Review Committee.[125]

Other commentators stated that all fatalities should be required to be disclosed, whether chargeable or non-chargeable,[126] but noted that issuers should be permitted to explain non-chargeable incidents in their reports.[127]

(3) Final Rule

After consideration of the comments received, we are adopting the final rule as proposed, with an added instruction specifying that fatalities determined by MSHA not to be mining-related may be excluded.

The final rule requires disclosure of mining-related fatalities at mines that are subject to the Mine Act. Although we considered the views of those commentators who believe the disclosure requirement should encompass mines in all jurisdictions, we continue to believe that this disclosure requirement encompasses mining-related fatalities only at mines that are subject to the Mine Act. As we noted in the Proposing Release, Section 1503(a)(1)(G) is the only provision of the Act that does not specifically reference the Mine Act, a specific notice, order or citation from MSHA, or the FMSHRC, but we are of the view that interpreting Section 1503 as limited to mines that are subject to the provisions of the Mine Act is appropriate because it will result in consistency among reporting obligations.

MSHA regulations require mine operators to report to MSHA all fatalities that occur at a mine.[128] MSHA has also established policies and procedures for determining whether a fatality is unrelated to mining activity (commonly referred to as ''non-chargeable'' to the mining industry).[129] Since the MSHA regulations provide a comprehensive scheme of regulation, reporting and assessment for mining-related fatalities, we believe the disclosure required by this section is intended to include all fatalities that are required to be disclosed under MSHA regulations, unless the fatality is determined to be ''non-chargeable'' to the mining industry. The final rules specify that disclosure is required of all fatalities, unless the fatality is determined to be ''non-chargeable.'' We appreciate the objection raised by some commentators about requiring reporting of fatalities that are under review by MSHA's Fatality Review Committee if the issuer has a good faith belief that the fatality is non-chargeable, but we believe it would be more consistent with Section 1503, our treatment of other disclosure items under Section 1503 (such as the reporting of contested matters under the final rules discussed above) and MSHA's reporting of fatalities [130] to require reporting of all fatalities, other than those that have been determined by MSHA to be non-chargeable. Issuers that wish to provide additional information about fatalities, such as whether a fatality is under review by MSHA, are not prohibited from doing so under the final rules.

d. *Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.*

(1) Proposed Amendments

Section 1503(a)(3) requires disclosure of ''[a]ny pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.'' Under the proposed rules, any legal actions before the FMSHRC involving a coal or other mine for which the issuer or a subsidiary of the issuer is the operator would be disclosed in the periodic report covering the time period during which the legal action was initiated. As proposed, the rules would require the information about pending legal actions to be updated in subsequent periodic reports if there are developments material to the legal action that occur during the time period covered by such report. As proposed, the disclosure required by this item would include the date the pending legal action was instituted and by whom (*e.g.,* MSHA or the mine operator), the name and location of the mine involved, and a brief description of the category of order or citation underlying the proceeding.

(2) Comments on the Proposed Amendments

We received comment letters supporting the proposal to require disclosure about pending legal actions in the periodic report covering the period in which the action was initiated, with updates in subsequent reports for developments material to the pending action.[131] Certain commentators also stated that it was appropriate to require contextual information for each pending legal action.[132]

However, other commentators raised concerns about the proposed approach to this disclosure item.[133] Commentators found both the proposed updating requirement and the proposed requirement to include contextual information about each pending legal action to be problematic, noting that the language of Section 1503 does not require such information.[134] With respect to this disclosure, some commentators supported a requirement to report the number of pending legal actions,[135] while others supported an alternative approach that would require issuers to report the number of pending legal actions initiated during the time period covered by the periodic report.[136] One commentator expressed the view that it would be appropriate to allow issuers to disclose the number of matters pending before the FMSHRC, along with the number instituted and resolved in the reporting period, with a general description of the types of matters.[137]

Some commentators expressed concerns that a requirement to provide updating information would result in voluminous disclosure, be overly burdensome for issuers and potentially be complicated for users of the information, because legal actions would likely overlap multiple periods prior to resolution.[138] Many

[124] *See* letters from Cleary and DGS Law.

[125] *See* letters from AngloGold, Chevron, MNA, NSSGA and Rio Tinto.

[126] *See* letters from EARTHWORKS, SIF and Trillium.

[127] *See* letters from SIF and Trillium.

[128] *See* 30 CFR 50.10 and 50.20.

[129] *See* MSHA Accident/Illness Investigation Procedures Handbook, Chapter 2 Release 1 (June 2011) p. 21 located at *http://www.msha.gov/READROOM/HANDBOOK/PH11–I–1.pdf* (''MSHA Accident/Illness Handbook'').

[130] We note that MSHA makes publicly available its reports of non-chargeable mining deaths, which include the date of the incident, the mine name and the name of the operating company on its Web site. *See http://www.msha.gov/Fatals/NonChargeables/NonChargeableFatalshome.asp.*

[131] *See, e.g.,* letters from AFL-CIO, CalPERS, CalSTRS, EARTHWORKS, Estess, SIF, Trillium and UMWA.

[132] *See* letters from AFL-CIO, Estess, and UMWA.

[133] *See* letters from Chevron, Cleary, DGS Law, Freeport-McMoRan, NMA, NSSGA and NYSBA.

[134] *See* letters from Cleary, DGS Law, NMA and NYSBA.

[135] *See* letters from Cleary and NMA.

[136] *See* letters from Chevron and NSSGA.

[137] *See* letter from Freeport-McMoRan.

[138] *See, e.g.,* letters from Chevron (noting its preference that disclosure be limited to pending legal actions initiated during the reporting period, but suggesting that if updates are required, they should be limited to aggregate information on final resolutions reached during the reporting period), Cleary, DGS Law and NMA.

commentators also stated that the proposed requirement for disclosure of contextual information for each pending legal action would be voluminous and unhelpful, unnecessarily burdening both the issuer and the user of the information.[139] Commentators also noted that, due to the strict statutory language, no materiality standard can be applied to limit the number of legal actions that must be reported, and therefore determining what constitutes a ''material'' development in a case that may not be material to investors under our traditional materiality analysis may be problematic for issuers.[140]

(3) Final Rule

After considering the comments received on the proposed disclosure requirement, we are adopting a final rule that requires issuers to disclose, for each coal or other mine subject to the Mine Act, the identity of the mine and the number of legal actions involving such mine that were pending before the FMSHRC[141] as of the last day of the period covered by the periodic report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. Instead of the proposal to require a brief description of the category of order or citation underlying each proceeding, the final rule requires that the total number of legal actions pending before the FMSHRC as of the last day of the time period covered by the report be categorized according to the type of proceeding, in accordance with the categories established in the Procedural Rules of the FMSHRC.[142] These categories are:

- Contests of citations and orders, which typically are filed prior to an operator's receipt of a proposed penalty assessment from MSHA or relate to orders for which penalties are not assessed (such as imminent danger orders under Section 107 of the Mine Act). This category includes:
  - Contests of citations or orders issued under section 104 of the Mine Act,
  - contests of imminent danger withdrawal orders under section 107 of the Mine Act, and
  - emergency response plan dispute proceedings (as required under the Mine Improvement and New Emergency Response Act of 2006, Pub. L. 109–236, 120 Stat. 493);[143]
- contests of proposed penalties, which are administrative proceedings before the FMSHRC challenging a civil penalty that MSHA has proposed for the violation contained in a citation or order;[144]
- complaints for compensation, which are cases under section 111 of the Mine Act that may be filed with the FMSHRC by miners idled by a closure order issued by MSHA who are entitled to compensation;[145]
- Complaints of discharge, discrimination or interference under section 105 of the Mine Act, which cover:
  - Discrimination proceedings involving a miner's allegation that he or she has suffered adverse employment action because he or she engaged in activity protected under the Mine Act, such as making a safety complaint, and
  - Temporary reinstatement proceedings involving cases in which a miner has filed a complaint with MSHA stating that he or she has suffered such discrimination and has lost his or her position;[146]
- Applications for temporary relief, which are applications under section 105(b)(2) of the Mine Act for temporary relief from any modification or termination of any order or from any order issued under section 104 of the Mine Act (other than citations issued under section 104(a) or (f) of the Mine Act):[147] and
- Appeals of judges' decisions or orders to the FMSHRC, including petitions for discretionary review and review by the FMSHRC on its own motion.[148]

We are not adopting the proposal to require certain additional information about the legal actions, such as the date the action was instituted and by whom, the location of the mine, or the proposal that would have required the information about legal actions to be updated for material developments in subsequent periodic reports. We recognize that this is a departure from the proposed requirement, but we agree with commentators who pointed out that the rule as proposed required information not necessary to implement Section 1503 and could result in voluminous disclosure of limited informational value. We note that Section 1503 calls for disclosure of ''[a]ny pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine'' but does not specify what information is required to be disclosed in accordance with this disclosure item.

We believe the final rule satisfies the statutory language and will provide users of this information with a clear picture of the extent and nature of mine operators' involvement in legal actions. Further, we believe that the requirement to provide the number of legal actions in specified categories will provide consistency in the disclosure, and provide users of this information with a general sense of the types of legal actions involving mine operators. Because all documents filed with the FMSHRC in these legal actions are served on all the involved parties, we believe that this information about legal actions is readily available to issuers. We do not believe that these requirements impose significant additional burdens on issuers.

Issuers who wish to provide additional information about pending legal actions are not prohibited from doing so under the final rules. In addition, we note that Item 103 of Regulation S–K (Legal Proceedings) continues to apply, so that to the extent a legal proceeding is required to be disclosed under that item, disclosure and updates for material developments would be required.

e. *A brief description of each category of violations, orders and citations reported.*

(1) Proposed Amendments

Although not required by Section 1503 of the Act, the proposed rules would require issuers to provide a brief description of each category of violations, orders and citations reported so that investors can understand the basis for the violations, orders or citations referenced.

(2) Comments on the Proposed Amendments

Some commentators expressed the view that the information otherwise provided as required by the Act would be sufficient without requiring the brief

[139] *See* letters from Chevron, Cleary, Freeport-McMoRan, NMA and NSSGA.

[140] *See* letters from DGS Law, Freeport-McMoRan and NMA.

[141] Other types of enforcement-related legal actions under the Mine Act may occur in federal district court or courts of appeal that do not involve FMSHRC at any stage. Although these legal actions are not within the scope of the disclosure requirement, we remind issuers of their obligation to report material legal proceedings under other provisions of our rules.

[142] *See* the Federal Mine Safety and Health Review Commission's Procedural Rules, 29 CFR Part 2700 (''FMSHRC Procedural Rules'').

[143] *See* Subpart B of the FMSHRC Procedural Rules.

[144] *See* Subpart C of the FMSHRC Procedural Rules.

[145] *See* Subpart D of the FMSHRC Procedural Rules.

[146] *See* Subpart E of the FMSHRC Procedural Rules. *See also* ''Guide to Commission Proceedings,'' available at *http://www.fmshrc.gov/guides/englishguide.htm,* Sections II.C and II.D.

[147] *See* Subpart F of the FMSHRC Procedural Rules.

[148] *See* Subpart H of the FMSHRC Procedural Rules.

description of each category of violations, orders and citations reported.[149] Commentators particularly noted concerns about the expansion of the disclosure requirement beyond what is set forth in Section 1503.[150] One commentator raised a concern that the requirement would result in boilerplate language.[151] Others noted that investors who are interested in finding more detail and descriptions of the information reported can find the information on MSHA's Web site [152] or in the Mine Act.[153]

Several other commentators supported the proposal to require the additional disclosure.[154] Some commentators expressed the view that this information would be useful to investors beyond the statistics provided under Section 1503 because it would provide context that would allow investors to weigh the significance of the reported information.[155] Three commentators suggested that clarification of the requirement was needed, such as a generic description or glossary developed by the Commission that could be used in each periodic report.[156] One commentator suggested that the basic descriptions should be provided once a year with the Form 10–K, and not be required to be included in every periodic report.[157]

(3) Final Rule

The final rules do not require a brief description of each category of violations, orders and citations reported. After considering the comments received, we believe that the disclosure that would be elicited by the proposed requirement would not be useful enough to investors to justify the expansion of the disclosure requirement beyond the scope of Section 1503. We note that the information is not required by Section 1503, and issuers, who have been providing the required disclosure since the effective date of Section 1503, have generally not been providing this information. However, issuers may provide additional information in their periodic reports to the extent they believe it would be useful to investors. In addition, we note that if particular mine safety issues are material and required to be disclosed under our other rules, then information about the nature of the violation likely would be necessary to satisfy our other disclosure requirements.

f. *Other disclosure items specified in Section 1503(a).*

In addition to the disclosure items discussed above, proposed Item 106 of Regulation S–K reiterated the language of Section 1503(a) with respect to several other items required to be disclosed under the Act. The Proposing Release did not request comment specifically on these items. We did, however, receive two supporting comments on some of these items, as discussed below. We are adopting these items as proposed.

(1) Proposed Amendments

i. *The total number of orders issued under Section 104(b) of the Mine Act.*

Section 1503(a)(1)(B) of the Act requires disclosure of ''the total number of orders issued under section 104(b) of [the Mine Act].'' Under our proposal, each issuer that is required under Section 1503(a) to provide mine safety disclosure would be required to provide the total number of orders issued under Section 104(b) of the Mine Act for each coal or other mine for the time period covered by the report. Section 104(b) of the Mine Act covers violations that had previously been cited under Section 104(a) that, upon follow-up inspection by MSHA, are found not to have been totally abated within the prescribed time period, which results in the issuance of an order requiring the mine operator to immediately withdraw all persons (except certain authorized persons) from the mine.

ii. *The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health and safety standards under Section 104(d) of the Mine Act.*

Under Section 104(d) of the Mine Act, an inspector issues a citation if the inspector finds a violation of a mandatory health or safety standard, and also finds that, while the conditions do not cause imminent danger, the violation could significantly and substantially contribute to the cause and effect of a safety or health hazard, and that the violation is caused by an unwarrantable failure of the operator to comply with the health and safety standards. If, in the same inspection or an inspection within 90 days, an inspector finds another violation of a mandatory health or safety standard and finds such violation to also be caused by an unwarrantable failure of the operator to comply with the health and safety standards, the inspector issues an order requiring the mine operator to immediately withdraw all persons (except certain authorized persons) from the mine. The proposed rule would implement the Act's requirement to disclose these citations and orders issued during the reporting period.

iii. *The total number of flagrant violations under Section 110(b)(2) of the Mine Act.*

Section 110(b)(2) of the Mine Act is a penalty provision that provides that violations that are deemed to be ''flagrant'' may be assessed a maximum civil penalty. The term ''flagrant'' with respect to a violation means ''a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.'' [158] The proposed rule would implement the Act's requirement to disclose the total number of flagrant violations under Section 110(b)(2) of the Mine Act for the reporting period.

iv. *The total number of imminent danger orders issued under Section 107(a) of the Mine Act.*

An imminent danger order is issued under Section 107(a) of the Mine Act if the MSHA inspector determines there is an imminent danger in the mine. The order requires the operator of the mine to cause all persons (except certain authorized persons) to be withdrawn from the mine until the imminent danger and the conditions that caused such imminent danger cease to exist. This type of order does not preclude the issuance of a citation under Section 104 or a penalty under Section 110. The proposed rule would implement the Act's requirement to disclose the total number of imminent danger orders issued under Section 107(a) of the Mine Act during the reporting period.

v. *A list of mines for which the issuer or a subsidiary received written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act.*

If MSHA determines that a mine has a ''pattern'' of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, under Section

[149] *See* letters from NMA, Chevron, Cleary, IMA–NA and WMA.

[150] *See* letters from Cleary, IMA–NA and WMA.

[151] *See* letter from Cleary.

[152] *See* letter from Chevron.

[153] *See* letter from Cleary.

[154] *See* letters from AFL-CIO, DGS Law, EARTHWORKS, Estess, NYSBA, SIF, Trillium and UMWA.

[155] *See* letters from SIF and Trillium.

[156] *See* letters from NMA and PCA. *See also* letter from Chevron (stating its opposition to inclusion of the requirement, but suggesting this approach as a potential alternative).

[157] See letter from DGS Law.

[158] 30 U.S.C. 820(b)(2).

104(e) of the Mine Act and MSHA regulations the agency is required to notify the operator of the existence of such pattern. The proposed rule would implement the Act's requirement to disclose the receipt of such notices during the reporting period.

vi. *A list of mines for which the issuer or a subsidiary received written notice from MSHA of the potential to have such a pattern.*

MSHA regulations state that MSHA will give the operator written notice of the potential to have a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act.[159] The proposed rule would implement the Act's requirement to disclose the receipt of such notices during the reporting period.

(1) Comments on the Proposed Amendments

We received two comments supporting the proposed requirements that the total number of 104(b) orders, citations and orders for unwarrantable failures, flagrant violations and imminent danger orders be reported.[160] We did not receive any comments on the proposed requirements to disclose a list of mines that receive notice of a pattern or potential pattern of violations.

(2) Final Rule

Consistent with the proposal, we are adopting final rules requiring each issuer that is required under Section 1503(a) to provide mine safety disclosure to provide, for each coal or other mine for the time period covered by the report:

- The total number of orders issued under Section 104(b) of the Mine Act;
- The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health and safety standards under Section 104(d) of the Mine Act;
- The total number of flagrant violations under Section 110(b)(2) of the Mine Act;
- The total number of imminent danger orders issued under Section 107(a) of the Mine Act;
- A list of mines for which the issuer or a subsidiary received written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act; and
- A list of mines for which the issuer or a subsidiary received written notice from MSHA of a potential to have such a pattern of violations of mandatory health or safety standards.

*B. Form 8–K Filing Requirement*

Section 1503(b) of the Act requires each issuer that is an operator, or has a subsidiary that is an operator, of a coal or other mine to report on Form 8–K the receipt of certain notices from MSHA.[161] We are adopting revisions to Form 8–K to add new Item 1.04 to implement this requirement.

2. Disclosure Requirements and Deadline

a. Proposed Amendments

We proposed to amend Form 8–K to add new Item 1.04, which would require filing of Form 8–K within four business days of the receipt by an issuer (or a subsidiary of the issuer) of:

- An imminent danger order under Section 107(a) of the Mine Act;[162]
- Written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act;[163] or
- Written notice from MSHA of the potential to have a pattern of such violations.[164]

For each such triggering event, we proposed that new Item 1.04 of Form 8–K require disclosure of the date of receipt of the order or notice, the category of order or notice, and the name and location of the mine involved.

b. Comments on the Proposed Amendments

The Proposing Release noted that the events that would trigger filing under proposed Item 1.04 are also events that are required to be disclosed in periodic reports under Section 1503(a) of the Act and our proposed Item 106 of Regulation S–K. We received comment letters supporting adoption of the rule as proposed, under which the orders and notices that trigger the Form 8–K filing requirement would also be disclosed in issuers' periodic reports.[165] Commentators noted that the events that would trigger the Form 8–K filing are significant, and expressed their view that because the events are already monitored by the issuer, there would not be an extra burden in reporting them twice.[166] However, other commentators indicated that the proposed rule should be revised to minimize duplicative disclosure.[167] One commentator stated that, because these orders and notices are required to be reported in the issuer's periodic reports, the proposed Form 8–K requirement is needlessly duplicative and burdensome.[168] Another commentator suggested eliminating duplicative reporting by removing the Form 8–K filing requirement and allowing the information to be reported only in the issuer's periodic reports.[169]

Commentators that expressed a view were generally supportive of the information proposed to be required in Item 1.04 of Form 8–K.[170] Commentators also indicated that no additional information beyond what was proposed should be required to be disclosed.[171]

Some commentators supported the proposed four business day filing period for a Form 8–K under proposed Item 1.04.[172] Others suggested different filing deadlines for the Form 8–K. Three commentators supported longer filing deadlines, such as seven or ten business days, in order to allow issuers to conduct analysis and provide more detail or complete information about the event.[173] One commentator, drawing a distinction between the type of information required to be disclosed under Section 1503 and other material items covered by Form 8–K, recommended that the Form 8–K be required once a year, allowing issuers to provide aggregate information about any such orders or notices received during the year.[174] In addition, one commentator requested clarification of

[159] *See* 30 CFR 104.4.

[160] *See* letters from AFL-CIO and UMWA.

[161] Section 1503(b) of the Act.

[162] *See* Section II.A.4.f.(1)iv. above for a description of an imminent danger order issued under Section 107(a) of the Mine Act [30 U.S.C. 817(a)].

[163] *See* Section II.A.4.f.(1)v. above for a description of the written notice from MSHA regarding a pattern of violations under Section 104(e) of the Mine Act [30 U.S.C. 814(e)].

[164] *See* Section II.A.4.f(1)vi. above for a description of the written notice from MSHA of the potential to have a pattern of violations under Section 104(e) of the Mine Act [30 U.S.C. 814(e)].

[165] *See* letters from AFL-CIO, SIF, Trillium and UMWA.

[166] *See* letters from SIF and Trillium.

[167] *See* letters from Chevron, Estess, NMA and NSSGA.

[168] *See* letter from NSSGA.

[169] *See* letter from Chevron.

[170] *See* letters from Estess, SIF and Trillium.

[171] *See* letters from Chevron, Cleary and Estess.

[172] *See* letters from Estess, SIF and Trillium.

[173] *See* letters from NMA (suggesting seven business day deadline), Chevron (suggesting ten business day deadline) and PCA (suggesting ten calendar day deadline).

[174] *See* letter from NSSGA.

the filing requirement for an order or notice vacated by MSHA prior to the filing deadline for the Form 8–K,[175] and another commentator recommended that the final rule provide that if the order triggering the Form 8–K filing is vacated, dismissed or reduced below a reportable level during the reporting period, the Form 8–K filing is not required.[176]

c. Final Rule

After considering the comments, we are adopting new Item 1.04 to Form 8–K as proposed. Under the final rule, issuers are required to file a Form 8–K under new Item 1.04 no later than four business days after the receipt by the issuer (or a subsidiary of the issuer) of an imminent danger order under Section 107(a) of the Mine Act, written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act or written notice from MSHA of the potential to have a pattern of such violations. Item 1.04 of Form 8–K requires disclosure of the date of receipt of the order or notice, the category of order or notice, and the name and location of the mine involved.

As discussed above, these orders and notices are also required to be disclosed under Section 1503(a) of the Act in issuers' periodic reports. Although we have considered the views of commentators that the disclosure is duplicative, we believe the plain language of Section 1503 of the Act requires such orders and notices to be reported in both issuers' Forms 8–K and their periodic reports, and note that issuers generally seem to have been complying with these requirements since Section 1503(b) became effective. We have also considered commentators' views with respect to the filing deadline for the required Form 8–K. Although Section 1503(b) of the Act does not specify a filing deadline, we continue to believe that, because the triggering events are clear and do not require management to make rapid materiality judgments, the customary Form 8–K four business day deadline provides adequate time for issuers to prepare accurate and complete information.

We understand there is a possibility that an order or notice could be issued and subsequently vacated by MSHA within the four business day time period for filing the Form 8–K. However, as discussed above with respect to reporting of dismissed, reduced or contested matters,[177] we believe the language of Section 1503(b) of the Act dictates that the ''receipt'' of the specified orders or notices must be disclosed. We note that issuers may include additional disclosure explaining the status of these orders and notices if they choose to do so.[178]

3. Treatment of Foreign Private Issuers

a. Proposed Amendments

Our proposed rule would not extend the requirement to file current reports on Form 8–K to foreign private issuers. The Proposing Release noted that foreign private issuers are not required to file current reports on Form 8–K.[179] Instead, a foreign private issuer is required to furnish under the cover of Form 6–K [180] copies of all information that it makes, or is required to make, public under the laws of its jurisdiction of incorporation, files, or is required to file, under the rules of any stock exchange, or otherwise distributes to its security holders.[181]

b. Comments on the Proposed Amendments

Several commentators agreed with our proposed approach not to apply the current reporting requirements of Section 1503(b) of the Act to foreign private issuers. These commentators noted that this approach is consistent with the statutory text of Section 1503(b), which refers only to Form 8–K, and with the Commission's current framework of reporting for foreign private issuers.[182] Other commentators indicated that foreign private issuers should be required to file a Form 8–K to disclose information about the receipt of the specified orders and notices.[183] One of these commentators expressed the view that the reporting requirements should be as equal as possible for all issuers so that U.S. issuers are not placed at a disadvantage.[184]

c. Final Rule

After considering the comments, we have determined not to apply the new Form 8–K reporting requirement to foreign private issuers and are adopting the requirement as proposed. Although we are mindful of concerns that the disclosure requirement should be as equal as possible in order to avoid disadvantaging U.S. issuers in comparison to foreign private issuers, we continue to believe that this approach is consistent with Section 1503(b) of the Act, which references Form 8–K, a form applicable only to domestic issuers, not to foreign private issuers, and the Commission's current framework of reporting for foreign private issuers.[185]

Although they will not be subject to the Form 8–K requirement, foreign private issuers will not be able to avoid disclosure of the orders and notices specified in Item 1.04 of Form 8–K. As described above, we are adopting amendments to Forms 20–F and 40–F that require a foreign private issuer to disclose in each annual report the items described in Section 1503(a) of the Act. This is the same information that is required of domestic issuers, including disclosure of the receipt during the foreign private issuer's past fiscal year of any imminent danger order issued under Section 107(a) of the Mine Act, written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such a nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act, and written notice from MSHA of the potential to have a pattern of such violations.

*C. Amendment to General Instruction I.A.3.(b) of Form S–3*

a. Proposed Amendments

Under our existing rules, the untimely filing on Form 8–K of certain items does not result in loss of Form S–3 eligibility, so long as Form 8–K reporting is current at the time the Form S–3 is filed. Our existing rules also provide a limited safe harbor from liability under Section 10(b) or Rule 10b–5 under the Exchange Act for certain Form 8–K items.[186] We

[175] *See* letter from DGS Law (noting that vacated citations are removed entirely from the MSHA data retrieval system).

[176] *See* letter from NMA.

[177] *See* Sections II.A.3 and II.A.4.b above.

[178] We note that between the effective date of Section 1503(b) and November 30, 2011, there have been 116 Form 8–Ks filed to comply with this provision, and only five of them report that the order was vacated within four business days of issuance of the order.

[179] *See* Exchange Act Rules 13a–11 and 15d–11 [17 CFR 240.13a–11 and 15d–11].

[180] Referenced in 17 CFR 249.306.

[181] *See* Exchange Act Rule 13a–6 [17 CFR 240.13a–16].

[182] *See* letters from AngloGold, Cleary, NMA, NYSBA, and Rio Tinto. *See also* advance comment letter from Rio Tinto.

[183] *See* letters from Estess, SIF and Trillium.

[184] *See* letter from Estess.

[185] This approach is consistent with the manner in which the Commission implemented Sections 306 and 406 of the Sarbanes-Oxley Act of 2002. *See Insider Trades During Pension Fund Blackout Periods,* SEC Release No. 34–47225 (Jan. 22, 2003) [68 FR 4338], and *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002,* SEC Release No. 33–8177 (Jan. 23, 2003) [68 FR 5110].

[186] Rules 13a–11(c) and 15d–11(c) each provides that ''[n]o failure to file a report on Form 8–K that

Continued

proposed to amend General Instruction I.A.3.(b) of Form S–3 to provide that an untimely filing on Form 8–K regarding new Item 1.04 would not result in loss of Form S–3 eligibility. We did not propose to include new Item 1.04 in the list in Rules 13a–11(c) and 15d–11(c) under the Exchange Act of Form 8–K items eligible for the limited safe harbor from liability.

b. Comments on the Proposed Amendments

Commentators generally supported our proposal to amend General Instruction I.A.3(b) of Form S–3 to add proposed Item 1.04 to the list of items on Form 8–K with respect to which an issuer's failure timely to file the Form 8–K will not result in the loss of Form S–3 eligibility.[187] One commentator indicated that proposed Item 1.04 is similar to the existing exceptions provided in Form S–3, and expressed its view that, but for the statutory requirement to file current reports, for a diversified company engaging in mining operations, an individual shutdown or notice would not be material to the company and shareholders.[188] Similarly, another commentator noted that when compared to other items that have been specified as not affecting Form S–3 eligibility, Item 1.04 would be no more significant than the other items, particularly in light of the absence of a materiality threshold for the reporting obligation under the proposed item and the range of issues, particularly under 107(a) of the Mine Act, that can trigger the disclosure requirement.[189] One noted that a delay in reporting information that is typically not material to the issuer should not affect the issuer's Form S–3 eligibility.[190]

We received some support for our proposal not to include Item 1.04 in the list of items in Rules 13a–11(c) and 15d–11(c) with respect to which the failure to file a report on Form 8–K will not be deemed to be a violation of Section 10(b) or Rule 10b–5.[191] However, other commentators indicated that the Commission should add Item 1.04 to the safe harbors.[192] One commentator noted that such information will be made public by the MSHA data retrieval system.[193] Others noted that disclosures regarding mine safety are typically immaterial events and the failure to timely report them on Form 8–K should not be considered a violation of Section 10(b) or Rule 10b–5.[194]

c. Final Rule

The final rule adds Item 1.04 to the list of Form 8–K items in General Instruction I.A.3.(b) of Form S–3 to provide that untimely filing of the new item will not result in the loss of Form S–3 eligibility. Commentators were supportive of this approach, which we continue to believe is appropriate. Section 1503(b) of the Act does not address the Securities Act implications of a failure to timely file a Form 8–K. In addition, as noted in the Proposing Release, in the past when we have adopted new disclosure requirements that differed from the traditional periodic reporting obligations of companies, we have acknowledged concerns about the potentially harsh consequences of the loss of Form S–3 eligibility, and addressed such concerns by specifying that untimely filing of Forms 8–K relating to certain topics would not result in the loss of Form S–3 eligibility.[195]

Although we are mindful of commentators' concerns, we are not including Item 1.04 in the list of items in Rules 13a–11(c) and 15d–11(c) with respect to which the failure to file a report on Form 8–K will not be deemed to be a violation of Section 10(b) or Rule 10b–5. We continue to believe, as we expressed when we adopted the limited safe harbor from liability under Section 10(b) or Rule 10b–5 under the Exchange Act for certain Form 8–K items, that the safe harbor is appropriate if the triggering event for the Form 8–K requires management to make a rapid materiality determination.[196] The filing of an Item 1.04 Form 8–K is triggered by an event that does not require management to make a rapid materiality determination, and we continue to believe that it is not necessary to extend the safe harbor to this new item.

## III. Paperwork Reduction Act

### *A. Background*

Certain provisions of the final amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[197] We published a notice requesting comment on the collection of information requirements in the Proposing Release for the rule amendments and we submitted these requirements to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[198] The titles for the collection of information are:

(A) ''Regulation S–K'' (OMB Control No. 3235–0071);

(B) ''Form 10–K'' (OMB Control No. 3235–0063);

(C) ''Form 10–Q'' (OMB Control No. 3235–0070);

(D) ''Form 8–K'' (OMB Control No. 3235–0060);

(E) ''Form 20–F'' (OMB Control No. 3235–0288); and

(F) ''Form 40–F'' (OMB Control No. 3235–0381).

These regulations and forms were adopted under the Securities Act and the Exchange Act. They set forth the disclosure requirements for periodic and current reports filed by companies to inform investors.[199] The hours and costs associated with preparing disclosure, filing forms and retaining records constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

### *B. Summary of the Final Rules*

As discussed in more detail above, we are adopting new rule and form amendments to implement Section 1503 of the Act. Section 1503(a) requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act

is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 5.02(e) or 6.03 of Form 8–K shall be deemed a violation of'' Section 10(b) of the Exchange Act or Rule 10b–5 thereunder.

[187] *See, e.g.,* letters from Chevron, Cleary, DGS Law, NMA, NYSBA, SIF and Trillium. One commentator noted with approval that, as a consequence, failure to file a Form 8–K with Section 1503(b) disclosure would not result in status as an ''ineligible issuer'' pursuant to Rule 405 under the Securities Act. *See* letter from Cleary.

[188] *See* letter from Chevron.

[189] *See* letter from DGS Law.

[190] *See* letter from NMA.

[191] *See, e.g.* letters from SIF and Trillium.

[192] *See* letters from AngloGold, Chevron, Cleary, NMA and NYSBA.

[193] *See* letter from AngloGold.

[194] *See* letters from Chevron and NMA.

[195] *See Selective Disclosure and Insider Trading,* SEC Release No. 33–7881 (Aug. 15, 2000) [65 FR 51715]; *Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date,* SEC Release No. 33–8400 (March 16, 2004) [69 FR 15594] (the ''Additional Form 8–K Disclosure Release'').

[196] *See* Additional Form 8–K Disclosure Release at 69 FR 15607.

[197] 44 U.S.C. 3501 *et seq.*

[198] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[199] Forms 20–F and 40–F may also be used by foreign private issuers to register a class of securities under the Exchange Act. In addition, Form 20–F sets forth many of the disclosure requirements for registration statements filed by foreign private issuers under the Securities Act.

mandates the filing of a Form 8–K disclosing the receipt of certain orders and notices from MSHA.

We are adopting new Items 104 and 601(b)(95) of Regulation S–K and amending Forms 10–Q, 10–K, 20–F and 40–F under the Exchange Act to implement the disclosure requirement set forth in Section 1503(a) of the Act. We are adopting new Item 1.04 of Form 8–K to implement the requirement of Section 1503(b) of the Act. In addition, we are amending General Instruction I.A.3(b) of Securities Act Form S–3.

Issuers are currently required to comply with the provisions of Section 1503 of the Act; therefore, the Act has already increased the burdens and costs for issuers by requiring the disclosure set forth in Sections 1503(a) and (b) of the Act. We note that Section 1503 of the Act imposed the disclosure requirements set forth in Sections 1503(a) and (b) of the Act, regardless of whether the Commission adopts rules to implement those provisions. Our amendments incorporate the Act's requirements into Regulation S–K and related forms.

The disclosure requirement of Section 1503(a)(1)(G) of the Act, which requires disclosure of mining-related fatalities, overlaps to some extent with a disclosure requirement under MSHA rules. MSHA requires mine operators to report immediately any death of an individual at a mine,[200] which MSHA then makes available to the public through its data retrieval system on its Web site, *http://www.msha.gov.* MSHA's disclosure requirement applies to all mine operators under MSHA's jurisdiction, while the disclosure requirement of Section 1503(a)(1)(G) of the Act requires reporting by a subset of that group, specifically, issuers that are required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and that are operators (or have a subsidiary that is an operator) of a coal or other mine. We note that, while there is some overlap, the disclosure requirement of Section 1503(a)(1)(G) of the Act is currently in effect by operation of the statute, and the amendments we are adopting simply incorporate the Act's requirements into our rules and forms. We believe our rules must incorporate this provision of the Act in order to be consistent with the Act.

Most of the information called for by the new disclosure requirements is publicly disclosed by MSHA and readily available to issuers, who receive notices, orders and citations directly from MSHA and can also access the information via MSHA's data retrieval system. Information regarding pending legal actions is known to issuers, and certain information about orders and citations that are in contest before the FMSHRC is also available via MSHA's data retrieval system. Further, as noted above, the disclosure item for periodic reports requiring disclosure of mining-related fatalities is already subject to a collection of information under MSHA regulations,[201] and fatality information also is made public via MSHA's data retrieval system. Our amendments incorporate the Act's requirements into Regulation S–K and related forms.

We anticipate that new Items 104 and 601(b)(95) of Regulation S–K will increase the disclosure burdens for annual reports on Form 10–K and quarterly reports on Form 10–Q that existed prior to enactment of the Act. Because Regulation S–K does not apply directly to Forms 20–F and 40–F,[202] we are amending those forms to include the same disclosure requirements as those applicable to issuers that are not foreign private issuers, and therefore we anticipate that the disclosure burdens that existed prior to the enactment of the Act for annual reports on Forms 20–F and 40–F will increase.[203] We anticipate that new Item 1.04 of Form 8–K will increase the disclosure burden that existed prior to enactment of the Act for current reports on Form 8–K by requiring issuers to file a Form 8–K upon receipt of three types of notices or orders from MSHA relating to mine health and safety concerns and specifying the information required about the orders or notices required to be disclosed.

Compliance with the amendments by affected issuers will be mandatory. Responses to the information collections will not be kept confidential, and there will be no mandatory retention period for the information disclosed.

### *C. Summary of Comment Letters and Revisions to Proposals*

In the Proposing Release, we requested comment on the PRA analysis. We received one comment letter that addressed our overall burden estimates for the proposed amendments.[204] The commentator stated its belief that the estimates included in the Proposing Release were on the low end of the scale. The commentator noted its view that, due to the number and variety of operations that must be included in the reports and the corporate structure and segregation of responsibilities that are required in a multinational organization with a number of individual operating subsidiaries, the estimate of burden hours to manage, assemble, track, verify and prepare the reports should be higher. In the commentator's experience, the necessary internal procedures and controls to accurately assemble, track and report the Section 1503 mine safety information and the actual hourly burden alone would be 10 to 15 times the estimate made by the Commission, and the outside professional burden would likewise be several orders of magnitude greater than the estimate.

After consideration of the comment received, we have increased the hours and costs from the proposal, although we have not increased such estimates by the magnitude suggested by the commentator, taking into account several substantive modifications we have made to the proposed amendments. We are adopting final rules that in some respects are less burdensome than the proposals. We have simplified the reporting of information with respect to proposed assessments of penalties and pending legal actions, and we are not adopting the proposed additional disclosure item. We also have changed the time period requirement for periodic reporting in a manner that will lessen the burden for issuers by requiring disclosure only for the period covered by the report. Therefore, we have adjusted our estimates to reflect a decrease in hours and costs from the proposal, but also reflecting an increase in hours and costs based on the comment received.

### *D. Revisions to PRA Reporting and Cost Burden Estimates*

We anticipate that the rule and form amendments will increase the burdens and costs for issuers subject to the amendments. For purposes of the PRA, in the Proposing Release we estimated the total annual increase in paperwork burden for all affected companies to comply with the proposed collection of information requirements to be approximately 1,677 hours of company personnel time and approximately $263,500 for the services of outside professionals. These estimates included the time and the cost of implementing disclosure controls and procedures, preparing and reviewing disclosure, filing documents and retaining records.

[200] *See* 30 CFR 50.10.

[201] 30 CFR 50.10 and 50.20.

[202] While Form 20–F may be used by any foreign private issuer, Form 40–F is only available to a Canadian issuer that is eligible to participate in the U.S.-Canadian Multijurisdictional Disclosure System.

[203] *See* new Item 16H under Part II of Form 20–F and paragraph (16) to General Instruction B of Form 40–F.

[204] *See* letter from Rio Tinto.

As discussed above, as a result of the changes we have made from the proposals, and taking into consideration the comment received, we are increasing the total PRA burden and cost estimates that we originally submitted to OMB in connection with the proposed amendments. We estimate the annual incremental paperwork burden for all companies to prepare the disclosure required under our rule amendments to be approximately 5,775 hours of company personnel time and approximately $1,090,000 for the services of outside professionals.

In deriving our new estimates, we assume that:

- For Forms 10–K, 10–Q and 8–K, an issuer incurs 75% of the annual burden required to produce each form, and outside firms, including legal counsel, accountants and other advisors retained by the issuer, incur 25% of the annual burden required to produce the form at an average cost of $400 per hour; and
- For Forms 20–F and 40–F, a foreign private issuer incurs 25% of the annual burden required to produce each form, and outside firms retained by the issuer incur 75% of the burden require to produce each form at an average cost of $400 per hour.

The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

We have based our new burden hour and cost estimates of the effect that the adopted rule and form amendments would have on those collections of information primarily on our understanding that the information required to be disclosed is readily available to issuers, and that therefore the burden imposed by the disclosure requirements is mainly in formatting the information in order to comply with our disclosure requirements and ensuring that appropriate disclosure controls and procedures are in place to facilitate reporting of the information. In this regard, we note that mine operators receive the relevant notices, citations and similar information directly from MSHA, and that issuers could also access such information via MSHA's publicly available data retrieval system. Information regarding pending legal actions is known to issuers, and certain information about orders and citations that are in contest before the FMSHRC is also available via MSHA's data retrieval system. Further, mine operators are required by MSHA regulations to report all fatalities to MSHA immediately, and information about mining-related fatalities also is made public via MSHA's data retrieval system. In preparing the burden hour and cost estimates, we took into consideration the number of issuers that filed reports with the Commission including information required under Section 1503 since its effective date.

1. Regulation S–K

While the rule and form amendments make revisions to Regulation S–K, the collection of information requirements for that regulation are reflected in the burden hours estimated for Forms 10–K and 10–Q. The rules in Regulation S–K do not impose any separate burden. Consistent with historical practice, we are retaining an estimate of one burden hour to Regulation S–K for administrative convenience.

2. Form 10–K

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we estimate that, of the 13,545 Form 10–Ks filed annually, approximately 100 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore will be affected by the rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in its Form 10–K, and that preparation of the Form 10–K disclosure would involve gathering the information for the fourth quarter of the fiscal year, consolidating it with information reported in the prior quarters of the fiscal year, and formatting the information for inclusion in the annual report. We estimate that the rule and form amendments would add 20 burden hours to the total burden hours required to produce each Form 10–K.

3. Form 20–F

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we currently estimate that of the 942 Form 20–F annual reports filed annually by foreign private issuers, approximately 15 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in its Form 20–F. We estimate that the rule and form amendments would add 40 burden hours to the total burden hours required to produce each Form 20–F.

4. Form 40–F

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we currently estimate that of the 205 Form 40–F annual reports filed annually by foreign private issuers, approximately 15 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in its Form 40–F. As with Form 20–F, we estimate that the rule and form amendments would add 40 burden hours to the total burden hours required to produce each Form 40–F annual report.

5. Form 10–Q

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we estimate that, of the 32,462 Form 10–Qs filed annually, approximately 300 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments.[205] For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in each Form 10–Q. We further estimate that the rule and form amendments would add 15 burden hours to the total burden hours required to produce each Form 10–Q.

6. Form 8–K

We estimate that companies annually file 116,860 Form 8–Ks. Only companies that are not foreign private issuers and are operators, or have subsidiaries that are operators, of mines subject to the Mine Act are required to comply with the new Form 8–K

[205] We estimate that approximately 100 companies with a Form 10–Q filing obligation would be affected by the proposed rule and form amendments. Each such company would file three quarterly reports on Form 10–Q per year. 100 companies x 3 Forms 10–Q per year=300 Forms 10–Q.

requirement. For purposes of the PRA, we estimate that there will be approximately 100 Form 8–K filers under new Item 1.04, which is based on our estimate of the number of Form 10–K filers that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments. In addition, we understand that the triggering events for Form 8–K filing set forth in Section 1503(b)(2)—the receipt of written notice from MSHA that the coal or other mine has a pattern of violations or the potential to have such a pattern—are relatively rare, while the triggering event set forth in Section 1503(b)(1)—the receipt of an imminent danger order—is more common.[206] For purposes of this calculation, we assume that each potential filer under Item 1.04 of Form 8–K would file four Forms 8–K per year under new Item 1.04 and we estimate that the amendments to Form 8–K would add 2 burden hours to the total burden hours required to produce each Form 8–K.

*E. Summary of Changes to Annual Compliance Burden in Collection of Information*

The table below illustrates the total incremental annual compliance burden of the collection of information in hours and in cost under the amendments for annual reports, quarterly reports and current reports on Form 8–K under the Exchange Act (Table 1). There is no change to the estimated burden of the collection of information under Regulation S–K because the burdens that Regulation S–K imposes are reflected in our revised estimates for the forms. The burden estimates were calculated by multiplying the estimated number of annual responses by the estimated average number of hours it would take a company to prepare and review the new disclosure requirements.

| Form | Current annual response | Current burden hours | Increase in burden hours | Proposed burden hours | Current professional costs ($) | Increase in professional costs ($) | Proposed professional costs ($) |
|---|---|---|---|---|---|---|---|
| 10–K | 13,545 | 21,361,898 | 1,500 | 21,363,398 | 2,848,253,000 | 200,000 | 2,848,453,000 |
| 20–F | 942 | 622,871 | 150 | 623,021 | 743,047,230 | 180,000 | 743,227,230 |
| 40–F | 205 | 21,884 | 150 | 22,034 | 26,260,500 | 180,000 | 26,440,500 |
| 10–Q | 32,462 | 4,559,793 | 3,375 | 4,563,168 | 607,972,400 | 450,000 | 608,422,400 |
| 8–K | 116,860 | 502,839 | 600 | 503,439 | 67,045,200 | 80,000 | 67,125,200 |

## IV. Cost-Benefit Analysis

*A. Introduction*

We are adopting the rule and form amendments discussed in this release to implement the disclosure requirements set forth in Section 1503 of the Act. Section 1503(a) of the Act requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8–K disclosing the receipt of certain orders and notices from the Mine Safety and Health Administration.

As discussed in detail above, the disclosure requirements set forth in Section 1503 of the Act refer to and are based on the safety and health requirements applicable to mines under the Mine Act and administered by MSHA. MSHA inspectors issue citations, orders and decisions directly to mine operators during the course of inspections and MSHA assesses and collects civil monetary penalties for violations. Mine operators receive the relevant notices, citations and similar information directly from MSHA, and this information is publicly available on MSHA's data retrieval system on its Web site on a mine-by-mine basis.[207] Information regarding pending legal actions is known to issuers, and certain information about orders and citations that are in contest before the FMSHRC is also available via MSHA's data retrieval system. Further, mine operators are required by MSHA regulations to report all fatalities to MSHA immediately, and information about mining-related fatalities also is made public via MSHA's data retrieval system. Therefore, we believe most of the information required to be disclosed under Section 1503 of the Act and our final rules is readily available to issuers. Further, because the disclosure requirements set forth in Section 1503 are currently in effect, we assume that issuers have already developed the necessary controls and procedures to review and prepare the information required by Section 1503 of the Act for filing with the Commission.

We are adopting amendments to Form 10–K, Form 10–Q, Form 20–F and Form 40–F to provide for the disclosure required by Section 1503(a) of the Act. New Item 104 of Regulation S–K, new Item 16H of Form 20–F and new Paragraph (16) of General Instruction B of Form 40–F detail the information to be disclosed in accordance with Section 1503(a) of the Act, and the amendment to Item 601 of Regulation S–K sets forth the exhibit requirement for Form 10–K and Form 10–Q for the information required to be disclosed under Item 104 of Regulation S–K. We are also adopting amendments to Form 8–K to add new Item 1.04 to implement the requirement imposed by Section 1503(b) of the Act. Finally, we are amending General Instruction I.A.3.(b) of Form S–3 to add new Form 8–K Item 1.04 to the list of Form 8–K items the untimely filing of which will not result in loss of Form S–3 eligibility.

We did not receive any comment letters addressing the cost-benefit analysis included in the Proposing Release. The Commission is sensitive to the costs and benefits that will be imposed by the rule and form amendments. The discussion below focuses on the costs and benefits of the decisions made by the Commission to fulfill the mandates of the Act, rather than the costs and benefits of the mandates of the Act itself. However, to the extent that the Commission helps achieve the benefits intended by the

[206] *See* U.S. Department of Labor, Office of Inspector General, *In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority,* Report Number 05–10–005–06–001 (Sept. 29, 2010). According to data available on MSHA's Web site, 549, 630 and 562 imminent danger orders under Section 107(a) were issued during fiscal 2011, 2010 and 2009, respectively. *See* Violations Data Set (as of December 9, 2011), available at *http://www.msha.gov/OpenGovernmentData/OGIMSHA.asp* (on file with the Division of Corporation Finance). Note that this number includes all imminent danger orders issued to all companies subject to MSHA's jurisdiction, not only to reporting companies that are subject to the disclosure requirements of Section 1503 of the Act.

[207] *See http://www.msha.gov/DRS/DRSHOME.HTM.*

Act, the two types of benefits are not entirely separable.

The final rule adheres closely to the statutory mandate, which is already in effect. We have determined not to adopt the proposed requirements to provide additional disclosure in periodic reports addressing the categories of violations, orders or citations disclosed in response to the Section 1503(a) disclosure requirement, or total dollar values of proposed penalty assessments from MSHA outstanding as of the end of a reporting period. We are adopting a requirement to disclose the total number of legal actions involving each mine that were pending before the FMSHRC as of the last day of the reporting period, the aggregate number of legal actions instituted and the number resolved during the reporting period, and the numbers of such legal actions in specified categories, rather than the more burdensome proposed requirement to provide more detailed descriptions of legal actions pending before the FMSHRC and developments material to previously reported pending legal actions. As a consequence, we believe that the vast majority of the costs and benefits of our final rules are attributable to the provisions of Section 1503.

*B. Benefits*

The amended rules we are adopting today are intended to implement the requirements of Section 1503 of the Act. Our Regulation S–K and form amendments implement the requirements of the Act by reiterating the disclosure items listed in Section 1503, which are currently in effect. Our rule and form amendments specify for issuers how, in what form, and when to report the mine safety information required by the Act. These rules are designed to facilitate compliance with the new statutory requirements. We believe this should simplify the disclosure obligation, promote comparability and consistency of disclosure across issuers and time periods, and make the information more accessible for users, which will benefit investors in their consideration of information about issuers' mine health and safety matters.

We believe that the requirement to disclose the total number of legal actions involving each mine that were pending before the FMSHRC as of the last day of the reporting period, the aggregate number of legal actions instituted, the number resolved during the reporting period and the numbers of legal actions in specified categories will provide useful information to users about overall developments in legal actions and the extent of the mine operators' involvement in legal actions.

Our amendment to Form 8–K requires additional disclosure beyond that specifically designated by Section 1503(b) of the Act by specifying the information required about the orders or notices required to be disclosed, and specifying a four business day filing deadline for Forms 8–K filed under new Item 1.04. Our amendment to Form 8–K specifying that the form is to be filed within four business days of receipt of the order or notice designated under Section 1503(b) of the Act will provide issuers and investors with certainty about the timing of that disclosure requirement.

*C. Costs*

The vast majority of the costs resulting from the disclosures required by Section 1503 of the Act arise whether or not we adopt rules to implement the Section. Moreover, the information required to be disclosed under Section 1503 is already subject to an extensive recordkeeping regime under MSHA and, for the most part, is readily available to issuers via MSHA's data retrieval system. Certain information, such as information regarding pending legal actions and mining-related fatalities, is known to issuers, although they may have had to adopt new procedures to capture and report the information in order to comply with Section 1503. The primary costs to result from this rulemaking are costs associated with the formatting and filing of the information. We believe that there are no significant incremental costs imposed as a result of our codification of the Section 1503 requirements.[208]

## V. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[209] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Section 2(b)[210] of the Securities Act and Section 3(f)[211] of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We did not receive any comment letters addressing the discussion of these issues included in the Proposing Release. The amendments we are adopting will implement the requirements of Section 1503 of the Act, which imposed the substance of the disclosure requirements set forth in our new rules. We are not imposing any additional requirements in our rulemaking that will impose a burden on competition or have a significant impact on capital formation.

We believe that the rule and form amendments we are adopting will provide direction and consistency as to how, in what form, and when to report the relevant information. We believe that the specifications in the rulemaking will improve the efficiency of the reporting process for issuers and provide for a more efficient and effective review of the information by investors.

The loss of eligibility by an issuer to use Form S–3 could restrict the ability of the company to raise capital or increase an issuer's costs relating to capital raising, and may be a disproportionately large negative consequence of an untimely filing of a Form 8–K. To address this potential burden, we are revising the eligibility rules under Form S–3 so that an untimely filing of a report under new Item 1.04 of Form 8–K would not result in a loss of eligibility to use that form.

## VI. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.[212] It relates to revisions to Regulation S–K and forms under the Securities Act and the Exchange Act regarding disclosure about mine safety.

*A. Reasons for, and Objectives of, the Proposed Action*

We are adopting rule amendments to implement the disclosure requirements set forth in Section 1503 of the Act.

[208] For purposes of the PRA, we estimate the total cost of the disclosure to be approximately 5,775 hours of company personnel time and approximately $1,090,000 for the services of outside professionals. However, this amount reflects the costs associated with the disclosure requirement set forth in Section 1503 of the Act. We do not believe our rules, which implement Section 1503, impose any additional costs beyond those imposed by the statute.

[209] 15 U.S.C. 78w(a).

[210] 15 U.S.C. 77b(b).

[211] 15 U.S.C. 78c(f).

[212] 5 U.S.C. 601.

Section 1503(a) of the Act requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8–K disclosing the receipt of certain orders and notices from MSHA.

*B. Significant Issues Raised by Public Comments*

In the Proposing Release, we requested comment on any aspect of the Initial Regulatory Flexibility Analysis (''IRFA''), including how the proposed amendments could achieve their objective while lowering the burden on small entities, the number of small entities that would be affected by the proposed amendments, the nature of the potential impact of the proposed amendments on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA. However, several commentators addressed aspects of the proposed rule amendments that could potentially affect small entities. In particular, several commentators stated their belief that smaller companies should not be exempted from all or part of the amendments,[213] while only one commentator urged that we adopt a modified reporting system for smaller companies.[214]

*C. Small Entities Subject to the Final Amendments*

The amendments will affect some companies that are small entities. The Regulatory Flexibility Act defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [215] The Commission's rules define ''small business'' and ''small organization'' for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157 [216] and Exchange Act Rule 0–10(a) [217] define a company, other than an investment company, to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. The new rules will affect small entities that (i) are required to file reports under Section 13(a) or 15(d) of the Exchange Act and (ii) operate, or have a subsidiary that operates, a coal or other mine that is subject to the Mine Act, and therefore are required to provide mine safety disclosure under Section 1503 of the Act. We estimate that there are approximately 25 companies that would currently be required to provide the Section 1503 disclosure and that may be considered small entities. We note that there are a significant number of small entities that are exploration stage mining companies that would be required to provide the Section 1503 disclosure if such companies were to become operators, or have subsidiaries that become operators, of coal or other mines subject to the Mine Act.

*D. Reporting, Recordkeeping, and Other Compliance Requirements*

The disclosure requirements are intended to implement the disclosure requirements set forth in Section 1503 of the Act. These amendments require small entities that are required to file reports under Section 13(a) or 15(d) of the Exchange Act and operate, or have a subsidiary that operates, a coal or other mine to provide mine safety disclosure under applicable rules and forms.

Small entities will be required to include the disclosure in their annual report on Form 10–K, Form 20–F or Form 40–F and, if applicable, quarterly report on Form 10–Q and current report on Form 8–K. We are amending Form 10–K, Form 10–Q, Form 20–F and Form 40–F to require the disclosure required by Section 1503(a) of the Act. New Item 104 of Regulation S–K, new Item 16H of Form 20–F and new Paragraph (16) of General Instruction B of Form 40–F detail the information to be disclosed in accordance with Section 1503(a) of the Act, and the amendment to Item 601 of Regulation S–K sets forth the exhibit requirement for Form 10–K and Form 10–Q for the information required to be disclosed under new Item 104 of Regulation S–K. We are also adopting amendments to Form 8–K to add new Item 1.04 to implement the requirement imposed by Section 1503(b) of the Act. Finally, we are amending General Instruction I.A.3.(b) of Form S–3 to add new Form 8–K Item 1.04 to the list of Form 8–K items the untimely filing of which will not result in loss of Form S–3 eligibility.

*E. Agency Action To Minimize Effect on Small Entities*

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the disclosure amendments, we considered the following alternatives:

(1) Establishing differing compliance or reporting requirements or timetables which take into account the resources available to smaller entities;

(2) Exempting smaller entities from coverage of the disclosure requirements, or any part thereof;

(3) The clarification, consolidation, or simplification of disclosure for small entities; and

(4) Use of performance standards rather than design standards.

Section 1503 of the Act requires all entities, including small entities, that are required to file reports under Section 13(a) or 15(d) of the Exchange Act and operate, or have a subsidiary that operates, a coal or other mine to provide mine safety disclosure under applicable rules and forms. These requirements apply without regard to whether we adopt rules to implement them. The amendments implement the disclosure requirements set forth in Section 1503 of the Act. Given the statutory disclosure requirements in Section 1503 of the Act, the Act does not appear to contemplate separate compliance or reporting requirements for smaller entities.

Our amendments would require clear and straightforward disclosure of the information required by Section 1503 of the Act. We generally have used design rather than performance standards in connection with the amendments. By specifying in the Act the disclosure required, Congress appears to have contemplated that consistent, comparable disclosure would be provided. We believe that the specific disclosure requirements in the amendments will promote consistent and comparable disclosure among all companies that operate, or have a subsidiary that operates, a coal or other mine. Further, based on our past experience, we believe that specific disclosure requirements for this information would be more useful to investors than would a performance standard. However, we note that, although we encourage tabular presentation, we are not adopting a particular presentation requirement for the disclosure, so that each issuer has flexibility to adopt a presentation it believes is appropriate for its disclosure. We proposed additional disclosure requirements that would have given greater context to the information required to be disclosed by Section 1503. After further consideration, we are not requiring such additional

[213] *See* letters from AFL-CIO, CalPERS, CalSTRS, EARTHWORKS, NMA, Rio Tinto, SIF, Trillium and UMWA.

[214] *See* letter from Estess.

[215] 5 U.S.C. 601(6).

[216] 17 CFR 230.157.

[217] 17 CFR 240.0–10(a).

disclosure, but issuers are permitted to include additional disclosure if they choose to do so.

Currently, small entities are subject to some different compliance or reporting requirements under Regulation S–K and the amendments would not affect these requirements. The disclosure requirements will apply to small entities to the same extent as larger issuers. We do not believe these disclosures will create a significant new burden, and we believe this approach is consistent with the requirements of the Act.

**VII. Statutory Authority and Text of The Amendments**

The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act; Sections 12, 13, 15 and 23 of the Exchange Act and Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

**List of Subjects in 17 CFR Parts 229, 239 and 249**

Reporting and recordkeeping requirements, Securities.

**Text of The Amendments**

For the reasons set out in the preamble, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

## PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 1. The authority citation for part 229 continues to read in part as follows:

**Authority:** 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l,* 78m, 78n, 78o, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Section 229.104 is added to read as follows:

### § 229.104 (Item 104) Mine safety disclosure.

(a) A registrant that is the operator, or that has a subsidiary that is an operator, of a coal or other mine shall provide the information specified below for the time period covered by the report:

(1) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)).

(iii) The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under section 104(d) of such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2)).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 *et seq.*).

*Instruction to Item 104(a)(1)(vi):* Registrants must provide the total dollar value of assessments proposed by MSHA relating to any type of violation during the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

*Instruction to Item 104(a)(1)(vii):* Registrants must report all fatalities occurring at a coal or other mine during the period covered by the report unless the fatality has been determined by MSHA to be unrelated to mining activity.

(2) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) A pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(ii) The potential to have such a pattern.

(3) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

*Instruction to Item 104(a)(3):* The registrant must report the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. With respect to the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, the registrant must also report the number of such legal actions that are:

1. Contests of citations and orders referenced in Subpart B of 29 CFR part 2700;

2. Contests of proposed penalties referenced in Subpart C of 29 CFR part 2700;

3. Complaints for compensation referenced in Subpart D of 29 CFR part 2700;

4. Complaints of discharge, discrimination or interference referenced in Subpart E of 29 CFR part 2700;

5. Applications for temporary relief referenced in Subpart F of 29 CFR part 2700; and

6. Appeals of judges' decisions or orders to the Federal Mine Safety and Health Review Commission referenced in Subpart H of 29 CFR part 2700.

(b) *Definitions.* For purposes of this Item:

(1) The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 *et seq.*).

(2) The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

(3) The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b–2 (17 CFR 240.12b–2).

Instructions to Item 104:

1. The registrant must provide the information required by this Item as specified by § 229.601(b)(95) of this chapter. In addition, the registrant must provide a statement, in an appropriately captioned section of the periodic report, that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in exhibit 95 to the periodic report.

■ 2. When the disclosure required by this item is included in an exhibit to an annual report on Form 10–K, the information is to be provided for the registrant's fiscal year.

■ 3. Amend § 229.601 by revising paragraphs (a)(36) through (a)(98) in the exhibit table in paragraph (a), and adding paragraph (b)(95), to read as follows:

**§ 229.601 (Item 601) Exhibits.**

(a) * * *

EXHIBIT TABLE

| | Securities Act Forms | | | | | | | | *Exchange Act Forms* | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | *S–1* | *S–3* | *S–4*[1] | *S–8* | *S–11* | *F–1* | *F–3* | *F–4*[1] | *10* | *8–K*[2] | *10–D* | *10–Q* | *10–K* |
| * * | | | * | | * | | * | | | * | | * | |
| (36) through (94) [Reserved] | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
| (95) Mine Safety Disclosure Exhibit | | | | | | | | | | | | X | X |
| (96) through (98) [Reserved] | | | | | | | | | | | | | |

[1] An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Form S–4 or F–4 to provide information about such company at a level prescribed by Form S–3 or F–3; and (2) the form, the level of which has been elected under Form S–4 or F–4, would not require such company to provide such exhibit if it were registering a primary offering.

[2] A Form 8–K exhibit is required only if relevant to the subject matter reported on the Form 8–K report. For example, if the Form 8–K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

* * * * *

(b) * * *

(95) *Mine Safety Disclosure Exhibit.* A registrant that is an operator, or that has a subsidiary that is an operator, of a coal or other mine must provide the information required by Item 104 of Regulation S–K (§ 229.104 of this chapter) in an exhibit to its Exchange Act annual or quarterly report. For purposes of this Item:

(1) The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 *et seq*).

(2) The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

(3) The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b–2 (17 CFR 240.12b–2).

* * * * *

## PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 4. The authority citation for part 239 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u–5, 78w(a), 78ll(d), 77mm, 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 404 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 5. Amend Form S–3 (referenced in § 239.13) by revising General Instruction I.A.3.(b) to read as follows:

**Note:** The text of Form S–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

## FORM S–3—REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

## GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form S–3 * * *

A. *Registrant Requirements.* * * *

3. * * *

(b) has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement, other than a report that is required solely pursuant to Item 1.01, 1.02, 1.04, 2.03, 2.04, 2.05, 2.06, 4.02(a), or 5.02(e) of Form 8–K (§ 249.308 of this chapter). If the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b–25(b) (§ 240.12b–25(b) of this chapter) under the Exchange Act with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule.

* * * * *

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 6. The authority citation for part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 7. Amend Form 20–F (referenced in § 249.220f) by adding Item 16H, and adding Instruction 16 to the Instructions as to Exhibits, of Form 20–F, to read as follows:

**Note:** The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

## FORM 20–F

* * * * *

### Item 16H. Mine Safety Disclosure

If the registrant is the operator, or has a subsidiary that is an operator, of a coal or other mine, include the information set forth below for the time period covered by the annual report. In an appropriately captioned section of the annual report, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in a specified exhibit to the annual report. Include the following information in an exhibit to the annual report.

(a) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)).

(iii) The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under section 104(d) of such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2)).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 et seq.).

*Instruction to Item 16H(a)(vi):* Registrants must provide the total dollar value of assessments proposed by MSHA relating to any type of violation during the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

*Instruction to Item 16H(a)(vii):* Registrants must report all fatalities occurring at a coal or other mine during the period covered by the report unless the fatality has been determined by MSHA to be unrelated to mining activity.

(b) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) A pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(ii) the potential to have such a pattern.

(c) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

*Instructions to Item 16H(c):* The registrant must report the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. With respect to the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, the registrant must also report the number of such legal actions that are (a) contests of citations and orders referenced in Subpart B of 29 CFR Part 2700; (b) contests of proposed penalties referenced in Subpart C of 29 CFR Part 2700; (c) complaints for compensation referenced in Subpart D of 29 CFR Part 2700; (d) complaints of discharge, discrimination or interference referenced in Subpart E of 29 CFR Part 2700; (e) applications for temporary relief referenced in Subpart F of 29 CFR Part 2700; and (f) appeals of judges' decisions or orders to the Federal Mine Safety and Health Review Commission referenced in Subpart H of 29 CFR Part 2700.

* * * * *

**Instructions to Item 16H**

1. Item 16H only applies to annual reports, and not to registration statements on Form 20–F.

2. The exhibit described in this Item must meet the requirements under Instruction 19 as to Exhibits of this Form.

3. For purposes of this Item:

a. The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 *et seq.*).

b. The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

c. The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b–2 (17 CFR 240.12b–2).

* * * * *

**INSTRUCTIONS AS TO EXHIBITS**

* * * * *

16. The mine safety disclosure required by Item 16H.

A registrant that is the operator, or that has a subsidiary that is an operator, of a coal or other mine must provide the information specified in Item 16H in an exhibit to its annual report on Form 20–F.

17 through 99 [Reserved]

* * * * *

■ 8. Amend Form 40–F (referenced in § 249.240f) by adding Paragraph (16) to General Instruction B to read as follows:

* * * * *

(16) Mine safety disclosure. If the registrant is the operator, or has a subsidiary that is an operator, of a coal or other mine, include the information set forth below for the time period covered by the annual report. In an appropriately captioned section of the annual report, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in a specified exhibit to the annual report. Include the following information in an exhibit to the annual report.

(a) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)).

(iii) The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under section 104(d) of such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2)).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 *et seq.*).

*Instruction to paragraph (16)(a)(vi):* Registrants must provide the total dollar value of assessments proposed by MSHA relating to any type of violation during the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

*Instruction to paragraph (16)(a)(vii):* Registrants must report all fatalities occurring at a coal or other mine during the period covered by the report unless the fatality has been determined by MSHA to be unrelated to mining activity.

(b) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) A pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety

hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(ii) the potential to have such a pattern.

(c) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

*Instruction to paragraph (16)(c):* The registrant must report the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. With respect to the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, the registrant must also report the number of such legal actions that are (a) contests of citations and orders referenced in Subpart B of 29 CFR part 2700; (b) contests of proposed penalties referenced in Subpart C of 29 CFR part 2700; (c) complaints for compensation referenced in Subpart D of 29 CFR part 2700; (d) complaints of discharge, discrimination or interference referenced in Subpart E of 29 CFR part 2700; (e) applications for temporary relief referenced in Subpart F of 29 CFR part 2700; and (f) appeals of judges' decisions or orders to the Federal Mine Safety and Health Review Commission referenced in Subpart H of 29 CFR part 2700.

* * * * *

**Notes to Paragraph (16) of General Instruction B:**

For purposes of this Item:

1. The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 *et seq.*).

2. The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

3. The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b–2 (17 CFR 240.12b–2).

4. Instruction B(16) only applies to annual reports, and not to registration statements on Form 40–F.

* * * * *

■ 9. Amend Form 8–K (referenced in § 249.308) by adding Item 1.04 under the caption ''Information to Be Included in the Report'' after the General Instructions to read as follows:

**Note:** The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form 8–K**

* * * * *

**General Instructions**

* * * * *

**Information To Be Included in the Report**

* * * * *

**Item 1.04 Mine Safety—Reporting of Shutdowns and Patterns of Violations.**

(a) If the registrant or a subsidiary of the registrant has received, with respect to a coal or other mine of which the registrant or a subsidiary of the registrant is an operator

- an imminent danger order issued under section 107(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 817(a));
- a written notice from the Mine Safety and Health Administration that the coal or other mine has a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or
- a written notice from the Mine Safety and Health Administration that the coal or other mine has the potential to have such a pattern,

disclose the following information:

(1) The date of receipt by the issuer or a subsidiary of such order or notice.

(2) The category of the order or notice.

(3) The name and location of the mine involved.

*Instructions to Item 1.04.*

1. The term ''*coal or other mine*'' means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 *et seq.*).

2. The term ''*operator*'' has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

* * * * *

■ 10. Amend Form 10–Q (referenced in § 249.308a) by revising General Instruction H.2.b to delete the reference to Item 4, Submission of Matters to a Vote of Security Holders, and adding Item 4 in Part II to read as follows:

**Note:** The text of Form 10–Q does not, and this amendment will not, appear in the Code of Federal Regulations.

**FORM 10–Q**

* * * * *

**PART II**

* * * * *

**Item 4. Mine Safety Disclosures * * ***

If applicable, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and Item 104 of Regulation S–K (17 CFR 229.104) is included in exhibit 95 to the quarterly report.

* * * * *

■ 11. Amend Form 10–K (referenced in § 249.310) by revising General Instructions I(2)(c) and J(1)(e) to delete the references to Item 4, Submission of Matters to a Vote of Security Holders, and adding Item 4 in Part I to read as follows:

**Note:** The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

**FORM 10–K**

* * * * *

**PART I**

* * * * *

**Item 4. Mine Safety Disclosures * * ***

If applicable, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and Item 104 of Regulation S–K (17 CFR 229.104) is included in exhibit 95 to the annual report.

* * * * *

By the Commission.

Dated: December 21, 2011.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2011–33148 Filed 12–27–11; 8:45 am]

BILLING CODE 8011–01–P

# Reader Aids

**Federal Register**

Vol. 76, No. 249

Wednesday, December 28, 2011

## CUSTOMER SERVICE AND INFORMATION

| | |
|---|---|
| **Federal Register/Code of Federal Regulations** | |
| General Information, indexes and other finding aids | **202–741–6000** |
| **Laws** | **741–6000** |
| **Presidential Documents** | |
| Executive orders and proclamations | **741–6000** |
| **The United States Government Manual** | **741–6000** |
| **Other Services** | |
| Electronic and on-line services (voice) | **741–6020** |
| Privacy Act Compilation | **741–6064** |
| Public Laws Update Service (numbers, dates, etc.) | **741–6043** |
| TTY for the deaf-and-hard-of-hearing | **741–6086** |

## ELECTRONIC RESEARCH

### World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.fdsys.gov.**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **www.ofr.gov.**

### E-mail

**FEDREGTOC-L** (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

**PENS** (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

**FEDREGTOC-L** and **PENS** are mailing lists only. We cannot respond to specific inquiries.

**Reference questions.** Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

**Reminders.** Effective January 1, 2009, the Reminders, including Rules Going Into Effect and Comments Due Next Week, no longer appear in the Reader Aids section of the Federal Register. This information can be found online at **http://www.regulations.gov.**

**CFR Checklist.** Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

## FEDERAL REGISTER PAGES AND DATE, DECEMBER

74625–75426 ..... 1
75427–75770 ..... 2
75771–76020 ..... 5
76021–76292 ..... 6
76293–76600 ..... 7
76601–76872 ..... 8
76873–77106 ..... 9
77107–77362 ..... 12
77363–77668 ..... 13
77669–77894 ..... 14
77895–78092 ..... 15
78093–78464 ..... 16
78465–78804 ..... 19
78805–79024 ..... 20
79025–79528 ..... 21
79529–80190 ..... 22
80191–80724 ..... 23
80725–81358 ..... 27
81359–81786 ..... 28

## CFR PARTS AFFECTED DURING DECEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

**2 CFR**

421 ..... 76609

**3 CFR**

**Proclamations:**
8760 ..... 76021
8761 ..... 76023
8762 ..... 76025
8763 ..... 76601
8764 ..... 76871
8765 ..... 77363
8766 ..... 77365
8767 ..... 79021

**Executive Orders:**
12131 (amended by 13596) ..... 80725
13539 (amended by 13596) ..... 80725
13592 ..... 76603
13593 ..... 78451
13594 ..... 80191
13595 ..... 80205
13596 ..... 80725

**Administrative Orders:**
Memorandums:
Memorandum of July 19, 2011 ..... 76869
Memorandum of November 28, 2011 ..... 75423
Memorandum of December 15, 2011 ..... 79023
Memorandum of December 21, 2011 ..... 80727

**4 CFR**

28 ..... 76873

**5 CFR**

1605 ..... 78093
1653 ..... 78093
Ch. XCIX ..... 81359

**Proposed Rules:**
534 ..... 80268
Ch. XXIII ..... 75798

**7 CFR**

210 ..... 78095
215 ..... 78095
220 ..... 78095
235 ..... 78095
245 ..... 78095
301 ..... 81359
761 ..... 75427
763 ..... 75427
764 ..... 75427
920 ..... 80209
948 ..... 80211
1150 ..... 80214
1778 ..... 80729
1940 ..... 80217
1942 ..... 80729
1944 ..... 80729
1948 ..... 80729
1951 ..... 80729
1980 ..... 80729
3021 ..... 76609
3560 ..... 80729
3565 ..... 80729
3570 ..... 80729
4274 ..... 80729
4290 ..... 80217

**Proposed Rules:**
27 ..... 80278
28 ..... 80278
58 ..... 80280
319 ..... 78168, 81401
331 ..... 77914
400 ..... 75799
457 ..... 75805
1700 ..... 76905

**8 CFR**

280 ..... 74625
1280 ..... 74625

**9 CFR**

201 ..... 76874
317 ..... 76890
332 ..... 81360
381 ..... 76890, 81360

**Proposed Rules:**
92 ..... 81404
121 ..... 77914
316 ..... 75809
317 ..... 75809
320 ..... 75809
331 ..... 75809
354 ..... 75809
355 ..... 75809
381 ..... 75809
412 ..... 75809
424 ..... 75809

**10 CFR**

40 ..... 78805
50 ..... 74630, 75771
52 ..... 74630, 75771, 78096

**Proposed Rules:**
20 ..... 77431
30 ..... 77431
32 ..... 76625
40 ..... 77431
50 ..... 76322, 77431, 78173
70 ..... 77431
72 ..... 77431
73 ..... 76327
Ch. II ..... 75798
429 ..... 76328, 77914
430 ..... 76328, 78174, 79135
431 ..... 77914
719 ..... 81408
Ch. III ..... 75798

900 ....77432
Ch. X ....75798

**11 CFR**

**Proposed Rules:**
114 ....80803

**12 CFR**

25 ....79529
195 ....79529
225 ....74631
228 ....79529
345 ....79529
701 ....80226
704 ....79531
912 ....74648
997 ....74648
1002 ....79442
1003 ....78465
1005 ....81020
1006 ....78121
1007 ....78483
1008 ....78483
1009 ....78126
1010 ....79486
1011 ....79486
1012 ....79486
1013 ....78500
1014 ....78130
1015 ....78130
1016 ....79025
1022 ....79308
1024 ....78978
1026 ....79770
1030 ....79276
1281 ....79050
1780 ....74648
1781 ....74648
1782 ....74648
1783 ....74648
1784 ....74648
1785 ....74648
1786 ....74648
1787 ....74648
1788 ....74648
1789 ....74648
1790 ....74648
1791 ....74648
1792 ....74648
1793 ....74648
1794 ....74648
1795 ....74648
1796 ....74648
1797 ....74648
1798 ....74648
1799 ....74648

**Proposed Rules:**
3 ....79380
5 ....76905
208 ....79380
225 ....79380
325 ....79380
362 ....78086, 78090
380 ....77442
615 ....80817
701 ....79548, 81421
703 ....81421
723 ....81421
741 ....79548, 79553
742 ....81421
Ch. X ....75825, 76628

**13 CFR**

**Proposed Rules:**
107 ....76907, 81430
121 ....74749
125 ....74749
300 ....76492
301 ....76492
302 ....76492
303 ....76492
304 ....76492
305 ....76492
306 ....76492
307 ....76492
308 ....76492
310 ....76492
311 ....76492
314 ....76492

**14 CFR**

23 ....75736
25 ....74649, 81360
27 ....74655
29 ....74655, 75435
39 ....74665, 74667, 75442, 75772, 76027, 76293, 77107, 77108, 77367, 77369, 77371, 77375, 77376, 77378, 77380, 77382, 78138, 78520, 78522, 78524, 78526, 78805, 78808, 79051, 80228
61 ....78141
71 ....75445, 75446, 75447, 75448, 75449, 76891, 77383, 77669, 77899, 78144, 78529, 80230, 80231, 80232, 80732
73 ....77386
91 ....76611
97 ....77111, 77113, 78810, 78812
399 ....78145

**Proposed Rules:**
23 ....80829
35 ....74749
39 ....76066, 76068, 76330, 77157, 77159, 77446, 77934, 77937, 78574, 78863, 79558, 79560, 81430
71 ....76070, 77448, 77449, 77450, 77451, 77727, 78180, 78576, 78864, 79137, 79140, 79563, 79564
77 ....76333
91 ....77939
121 ....77452, 77939
125 ....77939
129 ....77939
135 ....77452, 77939, 80831
142 ....77452
183 ....77453

**15 CFR**

285 ....78814
730 ....76892
732 ....77115
734 ....76892
736 ....76892, 77115
738 ....77115
740 ....77115
742 ....76892, 77115
744 ....76892, 78146
745 ....76892
746 ....77115
774 ....77115, 79054
801 ....76029
806 ....79054
902 ....74670
922 ....77670

**Proposed Rules:**
740 ....76072
742 ....76072, 76085, 80282, 80291
770 ....76085
774 ....76072, 76085, 80282, 80291

**16 CFR**

305 ....79057, 79063
437 ....76816

**Proposed Rules:**
Ch. II ....75504, 80832

**17 CFR**

Ch. I ....80233
1 ....77670, 78776
30 ....78776
48 ....80674
229 ....81762
239 ....81762
240 ....80733
249 ....81762

**Proposed Rules:**
37 ....77728
38 ....77728
Ch. II ....79141
230 ....78181

**18 CFR**

**Proposed Rules:**
4 ....80838
5 ....80838
16 ....80838
33 ....80838
35 ....80838
157 ....80838
348 ....80838
375 ....80838
380 ....80838
385 ....80838
388 ....80838

**19 CFR**

12 ....74690, 74691

**20 CFR**

404 ....80241
416 ....80241
901 ....81362

**21 CFR**

113 ....81363
314 ....78530
510 ....79064
520 ....78149, 78815
522 ....79064
524 ....78150
558 ....76894, 79064
1308 ....77330, 77895
1314 ....74696

**Proposed Rules:**
172 ....78866
1140 ....76096

**22 CFR**

22 ....76032
126 ....76035

**Proposed Rules:**
120 ....78578
121 ....76097, 76100, 80302, 80305
122 ....78578
123 ....80305
124 ....80305
125 ....80305
126 ....78578
127 ....78578
129 ....78578
171 ....76103

**24 CFR**

91 ....75954, 75994
203 ....81363
576 ....75954
582 ....75994
583 ....75994

**Proposed Rules:**
50 ....77162, 79145
55 ....77162, 79145
58 ....77162, 79145
91 ....76917, 78344
92 ....78344
576 ....76917
580 ....76917
583 ....76917

**25 CFR**

**Proposed Rules:**
502 ....80846
537 ....79565
556 ....79567
558 ....79567
573 ....80847

**26 CFR**

1 ....75774, 75781, 76895, 78540, 78545, 78553, 78816, 80084, 80249, 81060
31 ....77672
301 ....76037, 80084
602 ....80084

**Proposed Rules:**
1 ....75829, 76633, 77454, 78182, 78183, 78591, 78594, 80309, 81128

**27 CFR**

9 ....77677, 77684, 77696

**Proposed Rules:**
9 ....75830
19 ....75836

**28 CFR**

50 ....76037

**Proposed Rules:**
2 ....78183

**29 CFR**

101 ....80140
102 ....77699, 80140
1602 ....79065
1910 ....75782, 80735
1915 ....80735
1926 ....80735
1980 ....78150
4022 ....77900
4044 ....74699, 77900

**Proposed Rules:**
552 ....81190
1910 ....75840
2520 ....76222
2560 ....76235
2571 ....76235

**30 CFR**

1206 ....76612
1210 ....76612
1218 ....76612
1220 ....76612
1227 ....76612
1228 ....76612
1243 ....76612

**Proposed Rules:**
904 ..... 76104
906 ..... 76109
926 ..... 76111
950 ..... 80310
Ch. XII ..... 76634

**31 CFR**

538 ..... 76617

**32 CFR**

199 ..... 80741, 81366, 81368
222 ..... 80744

**33 CFR**

100 ..... 77119, 78151
110 ..... 76295
117 ..... 76297, 76298, 76299, 78153, 79065, 79066, 79067, 79534, 79536
155 ..... 76299
165 ..... 75450, 76044, 77121, 77125, 77901, 78154, 78157, 78159, 78161, 78820, 79536, 80251, 81371
334 ..... 75453
**Proposed Rules:**
100 ..... 79571, 80850
110 ..... 78185
117 ..... 75505, 76634, 76637, 79145
127 ..... 78188
165 ..... 76640, 77175, 80850
167 ..... 76927
334 ..... 75508

**34 CFR**

99 ..... 75604

**36 CFR**

7 ..... 77131
**Proposed Rules:**
1190 ..... 75844
1193 ..... 76640, 77738
1194 ..... 76640, 77738

**37 CFR**

1 ..... 74700, 78566
381 ..... 74703
386 ..... 74703
**Proposed Rules:**
1 ..... 81432
201 ..... 78866

**38 CFR**

4 ..... 78823
9 ..... 75458
17 ..... 78569, 78824, 79067
36 ..... 78827
**Proposed Rules:**
9 ..... 77455
17 ..... 75509

**39 CFR**

20 ..... 75786, 76619
111 ..... 74704, 75461, 77133, 79072
501 ..... 77149
**Proposed Rules:**
121 ..... 77942
501 ..... 74753
3050 ..... 80312

**40 CFR**

9 ..... 75794, 76300
52 ..... 75464, 75467, 75795, 76046, 76048, 76302, 76620, 77150, 77701, 77903, 78162, 78571, 78829, 79537, 79539, 79541, 80253, 80747, 80754, 80760, 81371
62 ..... 80777
63 ..... 74708, 80281
70 ..... 77701
81 ..... 76048, 76302, 77903, 80253
82 ..... 77909, 78832
93 ..... 75797
97 ..... 80760
98 ..... 80554
180 ..... 76304, 76309, 77703, 77709, 81393
261 ..... 74709
300 ..... 76048, 76314, 77388
721 ..... 75794, 76300
**Proposed Rules:**
9 ..... 78599
52 ..... 75845, 75849, 75857, 76112, 76115, 76646, 76673, 76929, 77178, 77182, 77739, 77742, 77950, 77952, 78193, 78194, 78869, 78871, 79574, 79579, 79593
60 ..... 80452
62 ..... 80865
63 ..... 76260, 78872, 80314, 80532, 80598, 81328
70 ..... 74755, 77742
81 ..... 78872, 79579, 79593
85 ..... 74854, 76932
86 ..... 74854, 76932
122 ..... 78599
131 ..... 79605
136 ..... 77742
152 ..... 76335
180 ..... 76674, 79146
241 ..... 80452
261 ..... 76677
281 ..... 76684
300 ..... 76118, 76336, 77457
600 ..... 74854, 76932
721 ..... 81437, 81441, 81447

**41 CFR**

102-34 ..... 76622
**Proposed Rules:**
60-741 ..... 77056

**42 CFR**

401 ..... 76542
**Proposed Rules:**
73 ..... 78215
121 ..... 78216
402 ..... 78742
403 ..... 78742

**44 CFR**

64 ..... 74717, 78164
65 ..... 76052, 77155, 79090, 79093
67 ..... 76055, 76060, 79098

**45 CFR**

156 ..... 77392
158 ..... 76574, 76596

**46 CFR**

2 ..... 77712
8 ..... 76896
10 ..... 79544
11 ..... 79544
12 ..... 79544
15 ..... 79544
24 ..... 77712
30 ..... 77712
70 ..... 77712
90 ..... 77712
91 ..... 77712
126 ..... 77128
188 ..... 77712
506 ..... 74720
**Proposed Rules:**
532 ..... 80866

**47 CFR**

0 ..... 74721, 81562
1 ..... 81562
8 ..... 74721
11 ..... 80780
20 ..... 74721, 77415, 81562
25 ..... 79110
36 ..... 81562
51 ..... 81562
54 ..... 81562
61 ..... 76623, 81562
64 ..... 81562
69 ..... 76623, 81562
73 ..... 79112, 79113
74 ..... 79113
101 ..... 74722
**Proposed Rules:**
Ch. I ..... 81462
20 ..... 77747
52 ..... 79609
54 ..... 78384
73 ..... 76337

**48 CFR**

52 ..... 76899
202 ..... 76318
204 ..... 76318
205 ..... 76318
206 ..... 76318
207 ..... 76318
209 ..... 76318
211 ..... 76318
212 ..... 76318, 78858
213 ..... 76318
214 ..... 76318
215 ..... 76318
216 ..... 76318
217 ..... 76318
219 ..... 76318
225 ..... 76318, 78858
227 ..... 76318
234 ..... 76318
237 ..... 76318
243 ..... 76318
252 ..... 76318, 78858
Ch. II ..... 76318
422 ..... 74722
9901 ..... 79545
9903 ..... 79545
9904 ..... 81296
**Proposed Rules:**
53 ..... 79610
App. I to Ch. 2 ..... 78874
201 ..... 78874
203 ..... 78874
204 ..... 78874
212 ..... 78874
213 ..... 78874
215 ..... 75512
217 ..... 78874
219 ..... 78874
222 ..... 78874
225 ..... 78874
233 ..... 78874
243 ..... 78874
252 ..... 75512, 78874
422 ..... 74755
931 ..... 81408
952 ..... 81408
970 ..... 81408

**49 CFR**

10 ..... 79114
172 ..... 81396
173 ..... 81396
177 ..... 75470
219 ..... 80781
269 ..... 77716
383 ..... 75470
384 ..... 75470
385 ..... 81134
386 ..... 81134
390 ..... 75470, 81134
391 ..... 75470
392 ..... 75470
395 ..... 81134
575 ..... 74723, 79114
**Proposed Rules:**
385 ..... 81463
386 ..... 77458, 81463
390 ..... 81463
395 ..... 81463
523 ..... 74854, 76932
531 ..... 74854, 76932
533 ..... 74854, 76932
536 ..... 74854, 76932
537 ..... 74854, 76932
571 ..... 77183
830 ..... 76686

**50 CFR**

17 ..... 81666
622 ..... 75488
635 ..... 75492, 76900
640 ..... 75488
648 ..... 74724
660 ..... 74725, 77415, 79122
665 ..... 74747
679 ..... 74670, 76902, 76903, 80266, 80782, 81248
680 ..... 74670
**Proposed Rules:**
17 ..... 75858, 76337, 78601
223 ..... 77465, 77466, 77467
224 ..... 77467
622 ..... 74757, 78879
648 ..... 77200, 79611, 79613, 80318
679 ..... 77757, 79621

## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO's Federal Digital System (FDsys) at *http://www.gpo.gov/fdsys*. Some laws may not yet be available.

**H.R. 470/P.L. 112–72**
Hoover Power Allocation Act of 2011 (Dec. 20, 2011; 125 Stat. 777)

**H.R. 2061/P.L. 112–73**
Civilian Service Recognition Act of 2011 (Dec. 20, 2011; 125 Stat. 784)

**Last List December 21, 2011**

## Public Laws Electronic Notification Service (PENS)

**PENS** is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

**Note:** This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.